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THE
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CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME COURTS OF MISSOURI, ARKANSAS, AND TENNESSEE, COURT
OF APPEALS OF KENTUCKY, SUPREME COURT, COURT OF CRIM-
INAL APPEALS, AND COURTS OF CIVIL APPEALS
OF TEXAS, AND COURT OF APPEALS
OF INDIAN TERRITORY.

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WITH TABLE OF SOUTHWESTERN CASES IN WHICH REHEARINGS HAVE BEEN DENIED.

ALSO, TABLE OF WRITS OF ERROR DENIED BY THE SUPREME COURT OF TEXAS IN CASES IN THE
COURT OF CIVIL APPEALS.

ALSO, TABLES OF SOUTHWESTERN CASES PUBLISHED IN VOLS. 163, MISSOURI REPORTS; 24, TEXAS CIVIL
APPEALS REPORTS.

ALSO, ADDITIONAL TABLES FOR VOLS. 163, MISSOURI REPORTS; 24, TEXAS CIVIL APPEALS REPORTS.

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⁵ Became Chief Justice January 6, 1902.

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RULE IV. AS AMENDED—ORAL ARGUMENTS.

Where counsel on either side desire to make an oral argument in any cause, they shall notify the court of such intention on or before the day set for its submission, on which day the cause shall be submitted if ready, but the argument shall not be heard until the court shall be ready to consider the cause and shall have given notice to counsel on both sides of the day on which it will hear the argument. Only two counsel will be heard for each party, and not more

than one hour will be allowed to each side for argument, without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: provided, always, that a fair opening of the case shall be made by the party having the opening and closing argument. The plaintiff in error, or appellant, shall be entitled to open and conclude the argument. But where there are cross appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

SUPREME COURT OF TEXAS.¹

March 20, 1902.

Ordered, that rule 4 of rules for the supreme court be so amended as hereafter to read as follows:

4. Upon refusal by this court of an application for a writ of error, the clerk shall retain the application, together with the transcript and accompanying papers, for fifteen days from the day of the rendition of the judgment refusing the writ, at the end of which time, if no motion for a rehearing has been filed, or upon the overruling or the dismissal of such motion in case one has been filed, he shall transmit to the clerk of the court of civil appeals to which the writ of error was sought to be sued out a certified copy of the orders of this court denying such

application, and overruling the motion for rehearing, in case such motion has been filed, and shall return the file papers of that court to the clerk thereof, but shall not return the petition for the writ of error. A motion for a rehearing of an application is not a matter of right. But in case one, in which some new argument is urged upon one or more points in the application, or some new authority is cited, is filed during the term in which the judgment refusing the application is rendered, it may be considered, provided it be confined to the new matter presented. Motions for rehearing of applications filed after the adjournment for the term cannot be considered. The presentation of any point previously presented in the application, without urging some new argument or citing some new authority, will be deemed a sufficient ground for dismissing the motion.

¹ For rule as originally adopted, and amendment thereto, see 20 S. W. v., and 31 S. W. vi.

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WERE DENIED BY THE

SUPREME COURT OF TEXAS

IN THE FOLLOWING CASES IN THE

COURT OF CIVIL APPEALS

PRIOR TO APRIL 14, 1902.

[Cases in which writs of error have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

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SHEWMAKER v. YANKEY.¹

(Court of Appeals of Kentucky. Jan. 16,
1902.)

MARSHALING SECURITIES—ASSIGNMENTS FOR CREDITORS—COSTS OF SETTLEMENT—APPEAL—CORRECT RESULT REACHED BY ERRONEOUS METHOD.

1. In distributing an assigned estate the court will not marshal securities where it will prejudice general creditors to do so, and therefore where a creditor of a debtor who had made an assignment for benefit of creditors held the third of four mortgages on one tract of land and the only mortgage on another tract, it was error to require him to exhaust the proceeds of the second tract before sharing in the balance of the proceeds of the first tract after satisfying the first two mortgages, as his debt should instead have been placed pro rata upon such balance and upon the proceeds of the second tract, the balance of the proceeds of the first tract going to the fourth mortgagee, and the balance of the proceeds of the second tract going to the assignee for creditors generally.

2. The costs of the suit for a settlement of the trust must be paid out of the general fund, if sufficient for that purpose, but, if not, then to the extent it is insufficient such expenses as were necessary to the settlement of the right of the creditors, including the mortgagees, may be paid out of the fund adjudged the fourth mortgagee.

3. Though the chancellor, in distributing an assigned estate, has applied erroneous principles, yet, where he has reached practically the same result he would have reached if correct principles had been applied, his judgment will not be disturbed.

Appeal from circuit court, Washington county.

"Not to be officially reported."

Action by John S. Yankey, assignee of John Shewmaker, against Uriah Shewmaker and others, for a settlement of the assigned estate. From the judgment distributing the estate, Uriah Shewmaker appeals, and the assignee prosecutes cross appeal. Affirmed.

G. C. McChord, for appellant. W. C. McChord, for appellee.

HOBSON, J. John Shewmaker made a deed of assignment of all his property to John S. Yankey, in trust for the benefit of his creditors. Yankey, as assignee, filed this suit in the Washington circuit court for the

settlement of the trust. In the progress of the case the following facts were developed: The assigned estate consisted of three tracts of land,—one containing 200 acres, another 25 acres, and the third 6 acres. On the first tract, from which was realized \$1,704.38, there was a mortgage lien to Arena Peter for \$657.54; also a second mortgage to James W. Shewmaker for \$317.87; and, subject to these, a third mortgage to James W. Shewmaker, Cal Shewmaker, and Frank Shewmaker for \$735. This third mortgage also included the second tract of 25 acres, from which was realized \$558.66. There was also a fourth mortgage to appellant, Uriah Shewmaker, for \$679.28, on the first tract, which was subordinate to the other three mortgages. The third tract, which sold for \$288.12, was unincumbered. The sheriff of the county filed in the action a claim for taxes, which was controverted, but was allowed by the court on October 31, 1898, and adjudged to be a preferred claim against the estate, but subordinate to the mortgage debts. The cost of the assignee, including his attorney's fee of \$150, amounted to \$275. There not being money enough to pay all the claims, the court ordered the money to be paid out as follows: First, the mortgage debt of Arena Peters, \$657.54; second, the cost of the suit, \$275; third, the taxes, \$151.45; fourth, the mortgage debt of James W. Shewmaker, \$317.87; fifth, the mortgage debt of James W., Cal, and Frank Shewmaker, \$735; sixth, the mortgage debt of Uriah Shewmaker, to the extent of the balance of the fund. This left a deficit in the payment of that debt of about \$300 or \$400. From this judgment Uriah Shewmaker has appealed, and the assignee prosecutes a cross appeal.

It will be seen that on the first tract of land, which brought \$1,704.38, there were the following liens: Arena Peter, \$657.54; James W. Shewmaker, \$317.87; James W., Cal, and Frank Shewmaker, \$735; Uriah Shewmaker, \$678.28,—total, \$2,889.69. The court required James W., Cal, and Frank Shewmaker to exhaust their mortgage on the second tract before resorting to the first tract, and thus reduced the amount of lien against the first tract to the difference between \$2,-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

\$390.69 and \$558.66, or \$1,831.03. By this method nothing was left for the payment of the unsecured creditors, after the payment of the costs. In fact, there were not enough assets to pay the costs and the taxes, and a considerable loss was thrown upon Uriah Shewmaker, of which he complains, insisting that he should not be made to bear the entire loss. The first question to be determined in the case is the right of James W., Cal, and Frank Shewmaker to exhaust the second tract before collecting any of their debt out of the first tract. The second tract was incumbered in no way, except by their mortgage. The remainder of its proceeds, after the payment of this debt, as well as the proceeds of the third tract, were assets for the payment of the general creditors, and passed to the assignee under the deed of assignment. In 3 Pom. Eq. Jur. § 1414, the rule is thus stated: "The general rule is that, if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only,—as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another,—the former must seek satisfaction out of that fund which the latter cannot touch. If, therefore, the prior creditor resorts to the doubly charged fund, the subsequent creditor will be substituted, as far as possible, to his rights. These rules must be taken with the modifications and exceptions that in their application the paramount incumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security; that the rights of third parties shall not be prejudiced; and that the parties themselves are creditors of the same debtor." So, in *Logan v. Anderson*, 18 B. Mon. 119, after stating the general rule, this court said: "But equity refuses to marshal securities where, in aiding one incumbrancer, it would injure another, or trench upon the rights or operate to the prejudice of the party entitled to the double fund." "As a general rule, the debts of a mortgagee who has more than one security will be thrown upon all his securities ratably *pari passu*, according to the value, and thus leave the residue of each to satisfy the other incumbrancers to whom it is specially mortgaged." Under these principles the whole of the mortgage debt of James W., Cal, and Frank Shewmaker should not have been charged to the second tract. After paying the two prior mortgages on the first tract, there was a balance of its proceeds of something over \$700, and the mortgage debt of James W., Cal, and Frank Shewmaker should have been placed *pro rata* upon this fund and the proceeds of the second tract. The balance of the proceeds of the first tract should have been adjudged to Uriah Shewmaker, and the balance of the proceeds of the second tract should have gone to the assignee. The assignee, un-

der his deed of assignment, took all the title to the land then in his assignor in trust for the general creditors. They thereby acquired a lien on this estate for the payment of their debts, and the assignee had a lien on it for his necessary costs of the administration. After this deed was made, the general creditors could not protect themselves by taking out an execution or attachment and levying it on the second tract, subject to the mortgage then on it. It is very clear that, if they had made such a levy before the deed of assignment was executed, the securities could not be marshaled so as to defeat their lien by throwing the entire burden of the mortgage held by James W., Cal, and Frank Shewmaker on that tract. The same effect must be given to the deed of assignment that would be given to an execution levied by a creditor or to a mortgage made to him by the debtor at the time the assignment was executed; otherwise the assignment would only tie his hands, preventing him from protecting himself without securing his interest in any way.

It is unnecessary for us to determine the questions made in regard to the payment of the taxes, as appellant is not affected thereby; for of the proceeds of the second tract the balance unincumbered is sufficient for the payment of this claim.

The costs must be paid out of the general fund, if sufficient for that purpose. If it is insufficient, such expenses as were necessary to the settlement of the rights of the creditors, including the mortgagees, may be paid out of the fund adjudged Uriah Shewmaker to the extent that the general estate is insufficient to pay this cost. *Loth v. Carty*, 85 Ky. 501, 4 S. W. 814.

Although the circuit court proceeded on different principles, he seems, in the end, to have reached practically the same result as a settlement made on the principles we have indicated. The judgment is therefore affirmed on the original and cross appeal.

WINTERSMITH v. PRICE et al.¹

(Court of Appeals of Kentucky. Jan. 15, 1902.)

OCCUPYING CLAIMANTS—COMPENSATION FOR IMPROVEMENTS.

Ky. St. § 3723, giving a lien for improvements to an unsuccessful occupying claimant the foundation of whose claim is "a public record," applies only to one who claims to derive title from the commonwealth.

Appeal from circuit court, Hardin county. "Not to be officially reported."

Action by Maggie Wintersmith against Robert Price and another to recover land. Judgment for defendants, and plaintiff appeals. Reversed.

J. P. O'Meara, for appellant. R. L. Stith, for appellees.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

WHITE, J. The appellant is the owner of a lot in Elizabethtown, and while she resided in Louisville, Ky., this lot was sold and conveyed to appellee Price by one Brown, and under this deed the appellee Price took possession of the lot, and built a house thereon. Appellant, upon learning of this sale and conveyance, instituted this action of ejectment against Price. For defense Price pleaded the occupying claimant's statute for the value of his improvement, not in any way claiming title in himself, or that Brown had title of any sort. The court rendered judgment for the land, but before awarding to appellant possession thereof adjudged that appellee Price should recover the value of his improvements, fixed by the judgment at \$100, which the court adjudged to be a lien on the land. It further appears that the lot was sold to satisfy this judgment, and brought less than the claim against it, the appellee Price being the purchaser. The record contains no bill of exceptions as to the proof of the value of the improvement. Appellant seeks a reversal of the judgment allowing appellee Price pay for his improvement as an occupying claimant. Section 3728, Ky. St.,—being the section as to occupying claimants,—reads: "If any person believing himself to be the owner, by reason of a claim in law or equity, the foundation of which being a public record, hath or shall hereafter peaceably seat and improve any land, but which land shall, upon judicial investigation, be decided to belong to another, the value of the improvements shall be paid by the successful party to the occupant, or the person under whom and for whom he entered and holds, before the court rendering judgment or decree of eviction shall cause the possession to be delivered to the successful party." It is under this statute that appellee claims compensation for the enhanced value of the land by reason of the improvements. This statute has been in existence for many years, and in the case of *Fairbairn v. Means*, 4 Metc. 323, after a review of all previous cases under the statute, this court said: "The appellees having failed to arrive at the foundation contemplated by the statute, having failed to deduce a title from the commonwealth, and having held the land, not under Bryant's patent, but under Young's deed, and adversely to Bryant's title, their case is not within the statute." In the case at bar there is no pretense that appellee's title was deducible from the commonwealth; indeed, his only claim of title was his deed from Brown, who had no title of record. Appellee's answer and plea fails to show him to be within the statute, and it is therefore insufficient to support the judgment for improvements. Upon the pleadings, and in the absence of a bill of exceptions, the judgment for the value of the improvements appears to be erroneous.

For the reasons stated, the judgment awarding to appellee compensation for his

improvements is reversed, and cause remanded, with directions to award appellant a writ of possession for the land, and for proceedings consistent herewith.

COMMONWEALTH v. HOVIOUS.¹

(Court of Appeals of Kentucky. Jan. 14, 1902.)

DRUGGISTS—SALE OF DRUGS BY UNREGISTERED PHARMACIST—RIGHT OF PHYSICIAN TO SELL DRUGS.

Under Ky. St. § 2620, prohibiting the selling or compounding of drugs, except by a registered pharmacist, and section 2632 (part of same act), providing that "nothing in this act shall apply to, or in any manner interfere with the business of any licensed practicing physician, or prevent him from supplying to his patients such articles as may seem to him proper, or with his compounding his own prescriptions," while a regular physician may sell drugs to his own patients, he is subject to the penalty prescribed if, not being a registered pharmacist, he fills prescriptions sent to him by others.

Appeal from circuit court, Russell county. "To be officially reported."

An indictment against R. D. Hovious was dismissed, and the commonwealth appeals. Reversed.

R. J. Breckinridge and N. H. W. Aaron, for the Commonwealth.

GUFFY, C. J. The appellee was indicted by the grand jury of Russell county, charged with a violation of section 2620, Ky. St., which reads as follows: "Drugs not to be Sold or Compounded, Except by Registered Pharmacist—Penalty: Any owner of a pharmacy, or retail drug store, who, not being a registered pharmacist, shall fail or neglect to place in charge of such pharmacy or drug store a registered pharmacist, or any such proprietor who shall by himself, or any other person, permit the compounding or dispensing of prescriptions, or the vending at retail of drugs, medicine, poisons, or pharmaceutical preparations in his store or place of business, except by or in the presence and under the immediate supervision of a registered pharmacist, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be liable to a fine of not less than twenty-five nor more than one hundred dollars and each week that he shall cause or permit such pharmacy or retail drug store to be so conducted or managed shall constitute a separate and distinct offense and render him liable to separate prosecution and punishment therefor." The law and facts were submitted to the court, a jury trial being waived. The court found as a fact that the defendant carried on the business of a retail druggist in person and by his agent, Kimble; but the court was of opinion that as the defendant was a regular, licensed physician, he had the right to carry on the business of a retail druggist and pharmacist

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

without obtaining the certificate required by law of pharmacists. The court was of the opinion that the law authorized a pharmacist to have a clerk not a pharmacist to carry on his business, and was of the opinion that a licensed practicing physician might also have a clerk to sell drugs by retail in his absence, and thereupon dismissed the indictment; and the motion for a new trial by the commonwealth having been overruled, it prosecutes this appeal.

Section 2632, c. 85, Ky. St., reads as follows: "Persons and Articles Exempt from Operation of This Act: Nothing in this act shall be construed so as to apply to, or in any manner interfere with, the sale of the usual non-poisonous domestic remedies and medicines, and patent or proprietary medicine, by country stores in small places or rural districts. Nothing in this act shall apply to, or in any manner interfere with the business of any licensed practicing physician, or prevent him from supplying to his patients such articles as may seem to him proper, or with his compounding his own prescriptions." It seems from the opinion of the circuit court that the court was of the opinion, and so adjudged, that the provisions of the last-named section of the statute entitled a licensed, practicing physician to keep, sell, and compound drugs as a retail druggist, without any other license. The contention of appellant is that the section in question only permits such physician to sell or furnish to or compound drugs for his own patients. It will be seen from the section supra that it does not, simply in general terms, exempt physicians from the provisions of section 2620. We are of the opinion that the true meaning and intent of section 2632 is to allow a physician to compound or sell any kind of drugs to his own patients, but not to fill prescriptions sent to him by others. In other words, if a party applies to a physician for examination and treatment, the physician may furnish him any kind of drugs that in his judgment is proper, or compound for him any kind of drugs or medicine; but he cannot sell drugs indiscriminately to persons calling for the same, nor compound drugs and sell them indiscriminately to all who may call for them.

It results from the foregoing that the circuit court erred in adjudging the defendant not guilty. The judgment is therefore reversed, and the cause remanded for proceedings consistent herewith.

VAN VACTOR'S ADM'X v. LOUISVILLE & N. R. CO.¹

(Court of Appeals of Kentucky. Jan. 8, 1902.)
DEATH—ACTION FOR CAUSING—LIMITATION—
INFANCY OF WIDOW AND CHILD.

As the right of action to recover for the death of a person from an injury inflicted by

negligence is by Ky. St. § 6, vested in his personal representative, and the period within which such an action may be brought is limited to one year from the death, the fact that the widow, who subsequently qualified as personal representative, and the only child of the intestate, were both infants at the time of his death, did not extend the period of limitation beyond one year from the death.

Appeal from circuit court, Bullitt county.
"To be officially reported."

Action by the administratrix of William A. Van Vactor against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

S. M. Payton, for appellant. B. D. Warfield, Fairleigh, Straus & Eagles, and Edward W. Hines, for appellee.

HOBSON, J. William A. Van Vactor was injured in appellee's service on February 28, 1899. He died of these injuries on August 28, 1899, leaving surviving him his widow, who was an infant, and an infant child two years old. The widow became of age on August 20, 1900. On October 22, 1900, she qualified as administratrix of her husband's estate, and on November 30, 1900, she filed this suit to recover of appellee damages for the loss of his life, charging that his injury was by reason of the negligence of appellee and its servants. The circuit court dismissed the petition on the ground that the cause of action was barred by limitation, the suit not having been filed within one year from the death of the intestate.

The ruling of the court below is in accord with the case of *Carden v. Railroad Co.*, 101 Ky. 115, 39 S. W. 1027. That case was followed in *Railroad Co. v. Kelley's Adm'r* (Ky.) 48 S. W. 993, and was approved in *Railroad Co. v. Brantley's Adm'r* (Ky.) 51 S. W. 585. It is insisted, however, for appellant that these cases do not apply, because the widow of the intestate and his child were both infants at the time the cause of action accrued, and the disability of the widow was not removed until a few months before the suit was filed. Section 2525, Ky. St., is relied on, which provides that, "if a person entitled to bring" any of the actions mentioned in the third article of the chapter was at the time the cause of action accrued an infant, the action may be brought within the like number of years after the removal of such disability. But this section has no application, for neither the widow nor the infant child was "entitled to bring" the action. The cause of action to recover for the death of a person from an injury inflicted by negligence is, by section 6, *Id.*, vested in his personal representative. The infancy of persons who were not entitled to bring the action can have no effect upon the running of the statute. The cases above referred to rest upon the construction of the statute that the suit must be commenced within one

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year from the time of the death of the person injured.

Judgment affirmed.

BLACKBURN v. THOMPSON et al.¹

(Court of Appeals of Kentucky. Jan. 14, 1902.)

HUSBAND AND WIFE—CONDUCT OF BUSINESS BY HUSBAND AS WIFE'S AGENT—PROPERTY PURCHASED WITH PROFITS SUBJECT TO HUSBAND'S DEBTS.

Where the wife's success in business was due to the skill and industry of her husband, who conducted the business as her agent, real estate purchased with the profits of the business was subject to the husband's debts.

Appeal from circuit court, Ballard county.

"Not to be officially reported."

Action by Thompson, Wilson & Company against Mollie J. Blackburn to enforce a judgment. Judgment for plaintiffs, and defendant appeals. Affirmed.

Bugg & Wickliffe, for appellant. Wm. Dance, for appellees.

BURNAM, J. The appellees, Thompson, Wilson & Co., recovered judgment against Henry Blackburn, the husband of the appellant, Mollie J. Blackburn, upon which execution issued, which was returned "No property found." They then instituted this action under section 439 of the Civil Code, to subject to the payment of their debt a house and lot to which the appellant, Mollie J. Blackburn, held the legal title, and which appellee alleges was purchased and paid for by the husband, and the title taken to the wife, for the fraudulent purpose of cheating his creditors. The appellant, Mollie J. Blackburn, filed her separate answer, in which she denied that her husband had any interest in the property sought to be subjected, and says that all the money used in its purchase belonged to her, and denied that the title was taken in her name for the purpose of defrauding her husband's creditors. Upon final submission the circuit judge held the property liable for appellees' debt, and from that judgment the defendant appeals.

The evidence discloses that Henry Blackburn was engaged in the saloon business for three or four months in the city of Cairo, Ill., about a year before his wife opened a saloon in Wickliffe, Ky., and that while so engaged he contracted the debt which is the basis of appellees' judgment, and that he failed to pay any part thereof, and that they sued for and recovered their judgment after his removal to Kentucky. It is also shown that he is a professional saloon keeper, and a most admirable business man; that after his wife began business in Wickliffe he had entire charge of the business; his wife did not pretend to run the saloon; she was never in the house but twice after the saloon was

opened, and then on Sunday, when it was closed. Her husband paid the license fee of \$1,000 both years. He negotiated and paid for the lot, and contracted with the builders to erect thereon a comfortable brick house, which cost in the neighborhood of \$2,500. Both of them testify that the wife was without means when she began business in Wickliffe, but that she borrowed \$1,200 from a cousin of her husband, who resided in Tennessee, with which to pay the license for the first year, and that the business yielded in profits the first year between \$3,000 and \$4,000; and that the property sought to be subjected was paid for out of these profits. There can be no doubt that her business success was largely, if not wholly, due to the intelligent supervision and industry of her husband. It was held in *Gross v. Eddinger*, 85 Ky. 168, 3 S. W. 1, where the facts were very similar to those in the case at bar, that the husband's creditors were entitled to subject to the payment of their debt a lot purchased with the profits of a business conducted by the husband as agent for the wife, the title to which was in the wife. And in *Brooks-Waterfield Co. v. Frisbie*, 99 Ky. 131, 35 S. W. 106, 59 Am. St. Rep. 452, it was held that the creditors of an insolvent husband were entitled to subject to the payment of their debt the increase in the value of the wife's property, which was chiefly due to the skill, energy, and labor of the husband. In *Moran v. Moran*, 12 Bush, 303, it was held that the creditors of an insolvent husband were entitled to subject all that he might be able to earn in excess of what was necessary for the reasonable support of himself and family to the payment of their debts, notwithstanding the fact that it had been invested in property in the wife's name. And the same ruling was followed in *Edelmuth v. Wybrant* (Ky.) 53 S. W. 528.

The evidence in this case does not warrant a reversal of the judgment appealed from. Judgment affirmed.

LOUISVILLE & N. R. CO. v. MILLER.¹

(Court of Appeals of Kentucky. Jan. 10, 1902.)

COURT OF APPEALS—POWER TO ISSUE WRIT OF PROHIBITION—CONTEMPT IN VIOLATING INJUNCTION—CONSTRUCTION OF ORDER OF INJUNCTION.

1. The court of appeals has jurisdiction to issue a writ of prohibition to restrain a trial court from proceeding to enforce an order adjudging a defendant to be in contempt, and imposing a fine for an alleged violation of an order of injunction, where the act complained of is not within the order, fairly construed.

2. Where a railroad company was required by mandatory injunction to receive at any of its stations in Kentucky, and to "bill," transport, transfer, switch, and deliver in the customary way at a certain point of physical connection between the tracks of said company and another

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er railroad company at Louisville, Ky., any live stock and other freight consigned to the latter company for a certain stock yards company, and to so "transfer, switch, and deliver" to the latter company and at said point of physical connection any and all live stock and other freight "coming over its lines in Kentucky" consigned to said stock yards company at its stock yards, the order does not embrace live stock shipped from another state, which was originally billed and consigned merely to Louisville, Ky., and not to the stock yards, but the destination of which, by agreement between the consignor and consignee, was changed to that point after it was shipped.

3. The language of an order of injunction should not be stretched to cover acts not fairly and reasonably within its meaning.

Paynter, Hobson, and White, JJ., dissenting.

"To be officially reported."

Motion by the Louisville & Nashville Railroad Company against Shackelford Miller for a writ of prohibition. Granted.

Helm, Bruce & Helm, for petitioner. Dodd & Dodd, Hazelrigg & Chenault, and W. M. Smith, for defendant.

DU RELLE, J. The Central Stock Yards Company brought suit in the Jefferson circuit court against the Louisville & Nashville Railroad Company seeking to have certain live stock delivered to the Central Stock Yards Company at the Central Stock Yards station. The suit was duly allotted to the chancery division. Application having been made and affidavits filed, the court delivered a written opinion, and entered an order as follows: "And in pursuance of said opinion it is ordered and adjudged that the defendant Louisville & Nashville Railroad Company be enjoined and restrained from neglecting, failing, or refusing to receive, and said Louisville & Nashville Railroad Company is hereby required and compelled until further order of the court herein to receive at any and all of its stations in Kentucky, and to bill, transport, transfer, switch, and deliver in the customary way at its most convenient and practical point of physical connection between its tracks in Louisville, Kentucky, and the tracks of the Southern Railway Company in Kentucky at Louisville, Kentucky, and at their Seventh and Magnolia connection, any and all live stock and other freight consigned to the Southern Railway Company in Kentucky at Louisville, Kentucky, for the Central Stock Yards Company, for transportation and delivery by said Southern Railway Company in Kentucky to plaintiff at Central Stock Yards, Kentucky, or any other person or persons at said station, or in care of said Central Stock Yards Company at said station, and to so transfer, switch, and deliver to said Southern Railway Company in Kentucky at Louisville, Kentucky, and at said point of physical connection, any and all live stock and other freight coming over its lines in Kentucky consigned to the Central Stock Yards Company at Central Stock Yards, Kentucky, or any other person or persons at said station, or in care of said Cen-

tral Stock Yards Company at said station, for transportation and delivery by said Southern Railway Company in Kentucky at Louisville, Kentucky, and so billed and consigned." After the entry of the order, live stock was offered to the railroad company at Columbia, Tenn., and the company requested to bill and consign the stock to the Central Stock Yards via the Southern Railway in Kentucky. The Nashville Railroad Company refused to so bill and consign the live stock, but it was received and billed and consigned to Louisville, Ky. The Louisville & Nashville Railway Company's live stock station in Louisville is the Bourbon Stock Yards. When the consignment reached South Louisville, the consignee, by authority of the consignor, demanded that the cars containing the shipment be stopped at that point, and delivered to the Southern Railway Company in Kentucky, to be carried on the track of the latter company to the Central Stock Yards station,—which is not in Louisville,—and there delivered to the Central Stock Yards Company. The Louisville & Nashville Railroad Company refused to comply with this demand, but carried the shipment to the Bourbon Stock Yards, its live stock station in Louisville. A rule issued from the circuit court against the Louisville & Nashville Railroad Company to show cause why it should not be punished for contempt for disobeying the order of court before mentioned. The facts herein stated having been made to appear, the railroad company was adjudged guilty of contempt in disobeying the order, and fined. The railroad company has applied to this court for a writ of prohibition prohibiting the judge of the chancery division of the Jefferson circuit court from proceeding to carry into effect or execution the order adjudging the railroad company guilty of contempt and fining it.

The first question is as to the power of this court in the premises. The cases of *Hindman v. Toney*, 97 Ky. 413, 30 S. W. 1006, and *Weaver v. Toney* (Ky.) 54 S. W. 732, 50 L. R. A. 105, seem conclusive that this court has power to grant the writ if a case has been presented for the exercise of the power. It is manifest that no question is here presented which in any way involves the merits of the litigation in which the order was made. It is immaterial in this proceeding to inquire whether the trial court did right in making the order of injunction, or whether it might properly have enjoined the Louisville & Nashville Railroad Company from doing the acts admitted to have been done. The sole question here is whether those acts are a violation of the order of injunction, fairly construed. No other question is considered or decided upon this application. An examination of the order of injunction shows it to be divided into two clauses, and that each clause relates, and was intended to relate, to a different class of railroad traffic. The first

clause requires the railroad company to receive live stock at any and all of its stations in Kentucky, and to bill and transport and deliver such live stock to the Southern Railway Company at Louisville for transportation to the Central Stock Yards Company at Central Stock Yards station, when so required by the consignor. This clause refers to and provides for the transportation of live stock consigned to the Central Stock Yards Company or the Southern Railway Company from points within the state. The second clause applies to shipments from beyond the boundary of the state, and requires the Louisville & Nashville Company to transport and deliver live stock shipped from points outside the state in the same manner if such live stock is so billed and consigned. The live stock here in question was billed and consigned from a point outside of the state to Louisville, and not to Central Stock Yards station. Whether the railroad company's refusal to accept the consignment to the Central Stock Yards via the Southern Railway was legal or illegal, it was certainly not a violation of the order, and therefore not a contempt.

Was the railroad company's refusal to change the destination of the shipment at South Louisville a disobedience of the order? In his opinion upon the rule for contempt the learned chancellor has argued at some length, and with his accustomed ability and clearness, that the consignor and consignee had the legal right to change the destination of the shipment, and that it was the legal duty of the railroad company to comply with their demand. In the view we have taken of the matter, this is not material. It is not a question of what the chancellor had the right to order, but of what he did order. Fairly construed, the order of injunction does not, in either clause, in our opinion, cover an attempt to change the destination of a shipment made in another state. Upon an application to a judge of this court to dissolve or modify the order, we do not think this question would be considered as involved. The petitioner, therefore, if the order be now construed to cover a change of destination, is deprived of his right of application to a judge of this court upon the question of the chancellor's right to make an order covering such change of destination.

The procedure by rule for contempt should not be exercised unless a case is presented of actual disobedience. We do not think such a case is presented here. The entry of an order of injunction is, in some respects, analogous to the publication of a penal statute. It is a notice to the parties that certain things must be done or not done, under a penalty to be fixed by the court. The language of such notice should not be stretched to cover acts not fairly and reasonably within its meaning. In the case at bar the differences of opinion which have appeared as to the proper construction of this order indi-

cate that it is at least doubtful whether it covers the acts complained of, and we are of opinion that it ought not to be so construed or understood.

The writ of prohibition may go.

PAYNTER, HOBSON, and WHITE, JJ., dissenting.

M. RUMLEY CO. v. WILCHER et al.¹

SAME v. RUSSELL et al.

(Court of Appeals of Kentucky. Jan. 8, 1902.)

BILLS AND NOTES—ALTERATION BY ADDITION OF OBLIGOR—CONSIDERATION FOR NEW SIGNATURE—RIGHT OF SURETY TO MORTGAGE SECURITY.

1. The alteration of a note by the addition of an obligor at the instance of the obligee, after the issue of the paper, releases the previous obligors, unless they have consented thereto.

2. One who signs an existing note in consideration of the extension of the time of payment is bound as upon a new contract, though the previous obligors are thereby released.

3. Where personal property mortgaged by the buyer to the seller to secure notes for the price was resold by the buyer to the seller, the sureties in the notes were entitled to have the value of the mortgaged property at the time of resale credited upon the notes in proportion to their amounts.

Appeal from circuit court, Marion county.

"Not to be officially reported."

Actions by the M. Rumley Company against Bryant Wilcher and others on certain promissory notes. Judgment for defendants, and plaintiff appeals. Reversed.

H. P. Cooper, for appellant. S. A. Russell, for appellees.

BURNAM, J. In May, 1894, the appellant, the M. Rumley Company, sold to Bryan and Charles Wilcher a "threshing outfit," consisting of an engine, separator, etc., at the price of \$1,615.02, taking in payment therefor their six promissory notes, for \$269.17, bearing interest from the date of execution, and payable in semiannual installments on November 1, 1894, April 1, 1895, November 1, 1895, April 1, 1896, November 1, 1896, and April 1, 1897. These notes were all signed by W. G. Taylor, John Russell, and J. P. Russell as sureties, and the company also took a mortgage on the outfit as additional security. Some time after their purchase, Charles Wilcher sold his interest in the outfit to Bryan Wilcher. The purchaser failed to pay the first two installments of the purchase price, which fell due in November, 1894, and April, 1895; and in May, 1895, the defendant Sarah A. Russell signed each of these notes in consideration of the extension of the time for their payment for one year. In May, 1896, Bryan Wilcher sold the outfit back to the company for \$600, which was paid by the surrender of the notes which became due in April and November, 1896, leaving four of the six original notes unpaid, the first two of which were

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signed by Mrs. Sarah A. Russell. On the 20th day of August, 1898, the company instituted in the Marion circuit court separate suits,—one on the notes which were signed by Mrs. Russell, and the other on the notes which she had not signed. Judgment was rendered by default against Bryan and Charles Wilcher. The defendants John Russell, J. P. Russell, and W. G. Taylor pleaded that they were accommodation securities on all of the notes, and that appellant, without their knowledge or consent, had procured Mrs. Russell to sign the first two notes after they were delivered, and in consideration thereof the time for the payment of all the notes was extended one year; and in the second paragraph of the answer they pleaded that they had, by virtue of the mortgage to appellant upon the threshing outfit, a lien thereon to protect them to the extent of its value, and that it was worth at the time it was taken possession of \$1,400, and that it was done without their knowledge or consent, and asked that as to them the petition be dismissed. The defendant Sarah A. Russell, for separate answer to the petition filed against her, pleaded first that her signature to the notes had been procured by appellant by representations made to her that she would lose nothing, as the mortgage upon the threshing outfit was ample to discharge plaintiff's entire debt; and in the second paragraph, for answer, she pleads that appellant had converted the outfit to its own use without her knowledge or consent, and, in violation of her rights, had undertaken to pay therefor by the surrender of two of the purchase-money notes on which she was not bound, and that by reason thereof she was discharged from all liability.

Appellant only consented to extend the time for the payment of the notes which were signed by Mrs. Russell. This is not only shown by the testimony of the parties, but by the fact that the indorsement of the extension of the time of payment was made upon the back of each of these notes at the dates of her signature, and no such indorsement was made upon the other notes. The first question of law to be determined is the effect of the addition of Mrs. Russell's name to the notes signed by her without the knowledge or consent of the original securities thereon. The rule is a very general one that the alteration of a note by the addition at the instance of the obligee of another security after the issue of the paper, and without the consent of the previous signers, vitiates it. This doctrine is fully sustained by the following authorities: *Bank v. Penick*, 5 T. B. Mon. 25; *Shipp's Adm'r v. Suggett's Adm'r*, 9 B. Mon. 8; *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. 652; *Brandt*, Sur. § 331; 2 Pars. Notes & B. p. 559. And the appellees John Russell, J. P. Russell, and W. G. Taylor were released from all liability upon the two notes signed by Mrs. Russell. But as the agreement providing for the extension

only applied to the notes signed by her, their liability was unaffected upon the remaining obligations signed by them; and as the Wilchers procured an extension of time for the payment of these two notes by reason of the signature of Mrs. Russell, so far as she is concerned she was bound by her signature as upon a new contract. See *Crandall v. Bank*, 61 Ind. 349; *Favorite v. Stidham*, 84 Ind. 423; *Dickerman v. Miner*, 43 Iowa, 508; *Partridge v. Colby*, 19 Barb. 248; *McVean v. Scott*, 46 Barb. 379.

It is insisted for appellees that appellant arbitrarily and forcibly took possession of the threshing outfit. The testimony does not support this contention. The witness Blodgett, who represented the company, testified to a distinct contract made with Bryan Wilcher by which he surrendered the outfit in consideration of the surrender of the two notes for the purchase money, which were delivered to him at the time. This statement of Blodgett is not substantially contradicted by Wilcher. He testifies, in substance, that he thought the price offered for the outfit by the company inadequate, but that he gave possession under the impression that, as they could sell by a foreclosure of their mortgage, it was the best thing he could do. Undoubtedly the securities had a right to look to the mortgage as at least a partial indemnity against loss, and appellant could not, by purchase from Wilcher at an inadequate price, divest them of their rights in the premises; but all that they have a right to require is that the appellant shall account for the outfit so purchased from Wilcher at its full value. There is some conflict in the testimony as to what was its real value at the time it was surrendered to appellant, and upon the whole testimony we have concluded that \$900 was its fair valuation. As Mrs. Russell is bound for one-third of the amount of the notes which the mortgage was executed to secure, she is entitled to a credit for one-third of the value of the mortgaged property at the date of its resale to appellant upon the two notes signed by her. And John Russell, J. P. Russell, and W. G. Taylor should be credited with \$600 upon the remaining four notes. As two of the notes, aggregating \$600, have been surrendered by appellant, it is entitled to a judgment against John and J. P. Russell and W. G. Taylor for the amount of the obligations sued on.

For the reasons indicated, the judgment in the consolidated cases is reversed, and the causes remanded for proceedings consistent with this opinion.

CITY OF COVINGTON v. WILSON et al.
(Court of Appeals of Kentucky. Jan. 10, 1902.)
BILLS OF EXCEPTIONS—TIME FOR FILING IN COURTS OF CONTINUOUS SESSION.

Under Ky. St. § 1016, providing, as to courts of continuous session, that "within sixty

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days after the judgment becomes final the party excepting shall unless further time be given him, prepare his bill of exceptions," where a motion for new trial was overruled December 10th, a bill of exceptions tendered February 13th was too late; there having been no extension of time.

Appeal from circuit court, Kenton county.
"Not to be officially reported."

Action by A. L. and W. A. Willson against the city of Covington to recover damages for personal injuries. Judgment for plaintiffs, and defendant appeals. Affirmed.

F. J. Hanlon, for appellant. O. P. Schmidt, for appellees.

HOBSON, J. Appellee sued appellant for personal injuries alleged to have been received by her by reason of appellant's negligence, and recovered \$500. The verdict and judgment were rendered on November 21, 1900. On November 23d appellant filed grounds and entered a motion for new trial. This motion was overruled on December 10th, and an appeal was then granted to this court. No steps were taken in the case after this until February 13, 1901, when appellant tendered a bill of exceptions. This the court refused to allow to be filed on the ground that the time had expired for filing it. The proceedings were had in the Kenton circuit court, which is of continuous session, and more than 60 days had elapsed after the overruling of the motion for new trial and the granting of the appeal to this court before the bill of exceptions was tendered. Section 1016, Ky. St., which controls the matter, is as follows: "Bills of exception must be prepared and presented to the judge within sixty days after the making of the order excepted to; but exceptions taken during the trial need not be noted of record nor reduced to writing, unless by order of the court until after the trial; within sixty days after the judgment becomes final the party excepting shall unless further time be given him, prepare his bill of exceptions, but further time may be given to prepare a bill, but not beyond one hundred and twenty days after the judgment becomes final." In courts of continuous session 60 days is a term, and the court has no control of its judgments after that time. *Worsham v. Lancaster* (Ky.) 47 S. W. 448. The statute quoted requires the party excepting to prepare his bill of exceptions within 60 days after the judgment becomes final. Further time may be given to prepare a bill, but not beyond 120 days. In this case the judgment became final on December 10th, when the motion for new trial was overruled. The bill of exceptions was not tendered within 60 days after this, nor was further time given to prepare it. The time for filing the bill had therefore expired on February 18th, when it was tendered, and the court properly refused to allow it to be filed. The pleadings support the judgment, and we see no error in the record.

Judgment affirmed.

ILLINOIS CENT. R. CO. v. BARRET.¹

(Court of Appeals of Kentucky. Jan. 10, 1902.)

RAILROADS—FIRES FROM ESCAPING SPARKS—PEREMPTORY INSTRUCTION—RECORD OF INSPECTION OF ENGINE AS EVIDENCE—BURDEN OF PROOF.

1. In an action against a railroad company to recover damages for the burning of crops by sparks escaping from an engine, the fact that the fire was caused by escaping sparks being admitted, the burden was upon defendant not only to prove that the engine was provided with a proper spark arrester, but that it was properly adjusted, and in perfect order, at the time the sparks escaped; and as the only person who testified on that point was the engineer in charge of the engine, who admitted that he had not examined the spark arrester for six months, and that he had not used the engine for a long time previous to that day, defendant's request for a peremptory instruction was properly refused.

2. The record of an inspection of the engine by one who was not offered as a witness was not admissible as original evidence, not being a public record.

3. Defendant having admitted that the fire was caused by sparks which escaped from its engine, and pleaded that the engine was furnished with a proper spark arrester, which was properly adjusted, and in perfect condition, its plea was, in effect, a plea of confession and avoidance, and it therefore properly assumed the burden of proof.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by James R. Barret against the Illinois Central Railroad Company to recover damages for loss of property by fire. Judgment for plaintiff, and defendant appeals. Affirmed.

S. R. & R. D. Vance and Pirtle & Trabue, for appellant. Yeaman & Yeaman, for appellee.

BURNAM, J. This action was instituted by appellee, James R. Barret, against the appellant, the Illinois Central Railroad Company, to recover damages for the burning of 40 acres of clover growing on his land and 60 tons of straw stacked thereon, alleged to be due to the negligence and carelessness of appellant in operating its railroad. The answer is in two paragraphs. In the first the amount and value of the property destroyed is put in issue. In the second defendant admits having set fire to and burned the property sued for, and "says that it was caused by sparks that escaped from its engine No. 287; that this engine was provided with the best and most effective appliances known to science for the preventing the escape of sparks from the chimneys of locomotive engines, which were in good condition, and properly adjusted; and that the engine was properly and prudently managed and operated, so that the sparks which escaped therefrom and caused the fire could not have been prevented, and were not caused by the negligence of the defendant." By reply appellee denied that the engine which set fire to the

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property was furnished with the best and most effective appliances in use for preventing the escape of sparks, or that they were in good condition, or properly adjusted, or that the engine was prudently managed, or that the fire could not have been prevented. A trial before a jury resulted in a verdict and judgment for the plaintiff for \$250, and we are asked to reverse that judgment.

The chief ground relied on is that the court erred in failing to give a peremptory instruction, it being insisted that there was no evidence tending to show that the burning was due to its negligence. We cannot concur in this contention. The burden was upon appellant not only to prove that the engine was provided with proper spark arresters, but that it was properly adjusted, and in perfect order, at the time the sparks escaping therefrom set fire to plaintiff's property. The only witness who testified on this point was the engineer in charge of the engine, who admits that he had not examined the spark arrester for six months, and that he had not used the engine for a long time previous to that day. There was no testimony at all to show that the arrester was in good condition at the time.

Appellant also complains that it was not permitted to read as original evidence the record of the inspection of engine No. 287, which was made by a party who was not even offered as a witness. Undoubtedly the man who actually inspected the engine and made the entry, if he had been present, could have referred to the records made by him to refresh his recollections as to his inspection and the condition of the engine. But the book itself could not be used as original evidence, as it was not a public record.

Appellant also complains that the burden of proof under the pleadings was upon the plaintiff upon the trial in the court below. It introduced its evidence first, and concluded the argument without objection, and, we think, properly so, as the plea was, in effect, one of confession and avoidance, and it has no ground to complain of the instructions given to the jury.

Judgment affirmed.

MERCER COUNTY et al. v. CITY OF HARRODSBURG et al.¹

(Court of Appeals of Kentucky. Jan. 8, 1902.)

NUISANCE — HITCHING POSTS ERECTED BY COUNTY AT COUNTY SEAT — RIGHT OF CITY TO INJUNCTION — CONTRACT AUTHORIZING ERECTION NOT AN ESTOPPEL — TRANSFER OF LEGAL ISSUES TO ORDINARY DOCKET.

1. Where a city made an order condemning as a nuisance hitching posts erected by the county, and caused them to be removed, the city was entitled to an injunction restraining the county from replacing them, as the posts, though not a nuisance in themselves, became a nuisance from the hitching of horses to them, by reason of the filth which was dropped.

2. A contract between the county and city au-

thorizing the county to erect the posts does not estop the city from abating the nuisance, as population has increased since the contract was made; and, besides, the contract did not contemplate a nuisance, and, even if it had done so, the city could not legalize a nuisance.

3. As equity has exclusive jurisdiction to enjoin a nuisance, the defendant was not entitled to a transfer to the ordinary docket for a trial of the question of fact whether there was a nuisance; Civ. Code Prac. § 12, which authorizes a transfer to the ordinary docket of any issue as to which either party is entitled to a jury trial, having no application.

Appeal from circuit court, Mercer county.
"Not to be officially reported."

Action by the city of Harrodsburg and others against Mercer county and others for an injunction. Judgment for plaintiffs, and defendants appeal. Affirmed.

Galther & Vanarsdall and W. C. Bell, for appellants. Robert Harding, for appellees.

HOBSON, J. In the year 1820 the trustees of the town of Harrodsburg conveyed to the county of Mercer land for a public square, on which the public buildings were erected. This square was bounded on each side by streets, and was inclosed by a fence. The fence was used to hitch horses to. In the year 1883 the town authorities, in consideration of the county court removing the fence on the north and south side of the square, and building a good, new fence seven feet within the line of that fence, and also a good brick pavement on this seven feet, agreed that the county court might put up good hitching posts where the old fence stood, with a strong chain from post to post, and maintain the posts and chains in good repair. The county court complied with the contract, and this became the hitching place for the town. About the year 1897 the board of health condemned these hitching posts as a nuisance, on the ground that the horses hitched there dropped so much filth as to create a stench and draw flies that were a menace to public health. This order was not at first put on their record book, but in the year 1900 it was recorded "now for then." The city authorities then made an order condemning the hitching posts as a nuisance and ordering the marshal to remove them. This he did at night. The next morning the county authorities proceeded to replace the hitching posts, and the city filed this suit to enjoin them from so doing. The allegations of the petition were denied by the answer, and a large amount of evidence was offered on the trial. The circuit court perpetuated the injunction, and the county has appealed. A number of grounds for reversal are relied on, which will be briefly noticed.

The petition is sufficient on demurrer. While the hitching posts and chains were not a nuisance in themselves, they became a nuisance from the hitching of horses to them. They were placed there for horses to be hitched to them, and the removal of

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the posts and chains was the only way to abate the nuisance.

There was no error in overruling the motion to transfer the case to the ordinary docket for a trial of the question whether there was a nuisance. Equity has always entertained jurisdiction to abate nuisances, and the defendant was not entitled to a jury trial of a question of fact arising in an action of exclusively equitable cognizance. Section 12 of the Civil Code of Practice has no application to such a case. The chancellor could never get through with his docket if either party were entitled to a jury trial on every issue of fact made in the cases.

The city was not estopped by the contract made in the year 1883. As population increases things become nuisances which occasioned little inconvenience when the population was not so dense or the traffic so great. The contract of 1883 did not contemplate the creation of a nuisance; the town trustees could not have legalized a nuisance if they had contemplated it.

On the question of fact, we see no reason for disturbing the chancellor's conclusion.

Judgment affirmed.

O'NEAL v. SPALDING et al.¹

(Court of Appeals of Kentucky. Jan. 14, 1902.)

ATTORNEY AND CLIENT—RIGHT OF CLIENT TO ENJOIN ATTORNEY FROM COLLECTING JUDGMENT.

1. The plaintiff in a judgment was entitled to an injunction restraining her attorney from collecting the judgment, though he had a lien thereon for a reasonable fee, and in an action for that purpose was entitled, under proper pleadings and proof, to have the chancellor fix the extent of the attorney's lien.

2. Plaintiff had a right to discharge her attorney, and the institution of the action to enjoin him from collecting the judgment which he had obtained was notice of his discharge.

Appeal from circuit court, Marion county.

"Not to be officially reported."

Action by Kate O'Neal against Ben Spalding and another for an injunction. Judgment for defendants, and plaintiff appeals. Reversed.

W. J. Lisle, for appellant. Ben Spalding, for appellees.

GUFFY, C. J. It appears from the petition in this action that the appellant recovered judgment against Ben O'Neal for the sum of \$984.32, with interest from February 28, 1899; that the appellant is the daughter-in-law of defendant Ben O'Neal, and does not wish an execution to issue on said judgment, and has so informed defendant Lancaster, clerk of the Marion circuit court; that her attorney in said action, Spalding, has a lien on said judgment for a reasonable attorney's

fee, which plaintiff is willing, ready, and able to pay and has offered to pay said attorney, but he (Spalding) claims a fee of one-half of said judgment, which plaintiff averred to be unreasonable, and said attorney was then ordering said clerk to issue an execution on said judgment, and the defendant O'Neal was insisting upon paying said judgment to said Spalding, which judgment at that time amounted to more than \$1,100; and that the defendant O'Neal had ordered the Marion National Bank to pay said sum to said Spalding. It is further averred that said attorney is insolvent, and that the collection of the sum by him would produce great and irreparable injury to her. Plaintiff also asserted her right to control the collection of said judgment, subject to the attorney's lien for a reasonable fee, which it is averred should be \$100, and no more, which she was then ready, willing, and able to pay, "and here and now offers to pay," but her said attorney would not agree thereto. She asks for an injunction against said Spalding, said bank, and O'Neal, enjoining Spalding from collecting, the clerk from issuing the execution, and O'Neal from paying said judgment. It was averred in an amended petition that she had paid before the institution of her said suit \$50 to her said attorney, and never gave him any power or authority to sue out an execution for and collect said judgment; that all right or authority he had ceased upon the rendition of the final judgment in the action named in her original petition, and said Spalding had no right in said judgment or in its collection, except to the extent of his statutory lien for a reasonable attorney's fee. The court was further asked to fix said defendant's fee in the action against this plaintiff. Demurrer was sustained to the petition as amended. Appellant also offered a second amended petition, which the court refused to permit to be filed, the substance of which was to the effect that, but for the injunction sued out, the clerk of the Marion circuit court would have issued execution on her said judgment, and the amount thereof and the costs would have been paid over to the defendant Spalding. The court finally dismissed plaintiff's petition and dissolved the injunction. From that judgment this appeal is prosecuted, with a supersedeas.

It seems to us that the appellant had a perfect right to control the collection of the judgment against the defendant Ben O'Neal, except that she might not claim so much of the judgment as would be a reasonable fee to her attorney, who had been given a lien thereon for a reasonable fee. She certainly had a right to discharge him from acting as her attorney, and the institution of this suit was evidently notice to that effect. *Root v. McIlvaine* (Ky.) 56 S. W. 498. The appellee Spalding would have a right by appropriate proceedings to enforce his lien upon the judgment herein mentioned in satisfaction of

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a reasonable fee, but he could not legally collect the entire judgment in opposition to the wish of appellant; nor could the defendant in the judgment legally pay the same to Spalding in opposition to the known or expressed wish of the appellant. It therefore follows that the court erred in dismissing the petition. Moreover, the court was asked to fix and determine the extent of Spalding's lien, which it should have done upon proper pleadings and proof.

We deem it unnecessary to pass upon the various motions heretofore filed in this court, but, for the reasons given, the judgment appealed from is reversed, and the cause remanded, with directions to overrule the demurrer, and for proceedings consistent herewith.

ASHER LUMBER CO. et al. v. CLEMMONS.¹

(Court of Appeals of Kentucky. Dec. 18, 1901.)

QUIETING TITLE—ADVERSE POSSESSION.

As against a title derived from the commonwealth, plaintiff was entitled to judgment quieting his title to only so much of the land in dispute as had been inclosed by him for seven years prior to the institution of the action.

Appeal from circuit court, Knott county.

"Not to be officially reported."

Action by Lewis Clemmons against the Asher Lumber Company and others to quiet title to land. Judgment for plaintiff, and defendants appeal. Reversed.

Baker & Baker and J. L. Scott, for appellants. John E. Patrick, for appellee.

GUFFY, J. This action was instituted in the Knott circuit court by the plaintiff, Clemmons, against the Asher Lumber Company. The plaintiff claimed to be the owner of a lot of land, and claimed to have been in the actual possession thereof for more than 15 years last past. It is further alleged that defendant had branded the poplar trees on said land, and is setting up some claim to said trees, and giving it out that it is the owner thereof, and thereby creating a cloud on plaintiff's title to said land and trees; and the trees are now standing and growing on said land. The kind of brand is set out. It is further alleged that defendant's claim is worthless, and is a fraud on plaintiff's title, and that his title is superior to defendant's, and that by the entering upon said land and branding said trees plaintiff has been damaged in the sum of \$100; wherefore he prays judgment quieting his title to said land and trees, and that defendant be required to remove the brand from the timber, and that his title to said timber and land be adjudged superior to defendant's and all others, and for his costs and proper relief. The answer may be treated as a denial of all the averments of the

petition showing a right to any relief. Defendant also set up title to the trees in controversy, showing specifically how it became the owner of the trees, and filed a deed from William Everidge and others thereto. All the material averments of the answer were denied by reply. The Everidges were made parties to the suit, and asserted a title to the land by virtue of a patent granted by the commonwealth to John Walker, bearing date April 6, 1850, upon a plat and survey of a still earlier date. Upon final hearing of the issue between plaintiff and the Asher Lumber Company, the court adjudged that plaintiff is the owner of the land described in the petition, and that the defendants are not the owners of same, and that the plaintiff be and is quieted in the possession of same, and all other questions are reserved for future adjudication, and this cause is continued on other such questions. From this judgment appellants Asher Lumber Company, William Messer, and William Everidge prosecute this appeal.

Without attempting to recite in detail the testimony introduced, it may be observed that the appellants claim under the 500-acre patent to John Walker. The appellee has sought to defeat that claim upon several grounds: First, he says that Walker, and those claiming under him, by petition to the legislature secured an act of the legislature changing the boundary of his patent so as not to cover the land in contest; second, that there was a suit between Everidge, etc., and John Begley, in which the land was adjudged to Begley; third, that plaintiff, and those under whom he claims, have been in the actual adverse possession of the land for more than 15 years before the institution of the suit. All of these contentions were denied by appellants. There is absolutely no proof tending to sustain the first and second contentions. As to the third contention, the proof is insufficient to prevail against a clear, unmistakable title derived from the commonwealth. It is, however, suggested that Everidge, etc., have not shown the complete title from the patentee, John Walker, but they undoubtedly have derived some title, assuming that John Walker had good title; and, if it be true that the Walker title is good, it follows that the judgment is erroneous, without regard to the title of Everidge, etc. We are of opinion that the plaintiff is entitled to hold only so much of the land in dispute as has been inclosed by fencing for seven years prior to the institution of this action, and to that extent, when ascertained, it will be proper to render a judgment quieting his title thereto. But it is manifest that he is not entitled to a judgment quieting his title to the entire tract of timber or land adjudged to him. We do not mean to decide that the appellants have perfect title to the land in question, but only hold that plaintiff is not entitled to a judgment quieting his title and

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adjudging to him the land and timber in controversy.

Judgment is reversed, and cause remanded for proceedings consistent herewith.

WATSON v. CHILDERS et al.¹

(Court of Appeals of Kentucky. Jan. 8, 1902.)

JUDICIAL SALES—VENDOR AND PURCHASER—AGREEMENT TRANSFERRING LIEN FROM ONE TRACT TO ANOTHER—RIGHTS OF MORTGAGEE.

1. A mortgagee has no ground to complain of a sale of the mortgaged land made by a commissioner to satisfy a prior vendor's lien, where he was present at the sale, and made no bid in excess of the amount of the prior lien.

2. An agreement between vendor and purchaser transferring a lien from one tract of land to another was void as to one who held a mortgage on the tract to which the lien was transferred.

Appeal from circuit court, Menefee county.
"Not to be officially reported."

Action by J. W. Childers against W. R. Stacy to enforce a vendor's lien, consolidated with an action by Henry Watson against J. W. Childers and W. R. Stacy to enforce a lien and to vacate an agreement and a judgment. Judgment refusing to set aside agreement and judgment, and Henry Watson appeals. Reversed.

Henry Watson, in pro. per. A. T. Wood and J. H. Williams, for appellees.

BURNAM, J. On the 24th day of October, 1893, the appellee John W. Childers and wife sold and conveyed by general warranty deed to W. R. Stacy two tracts of land on the waters of Long Branch creek, in Menefee county. In the deed the first tract is described as lying on the south side of the state road, and containing 70 acres, more or less. The second tract is described as lying on the north side of the state road. The calls in the deed describing both tracts of land are with fences and natural objects, there being no calls by courses and distances. The consideration expressed in the deed is \$700, paid in cash, and \$700 due 12 months after date, and to secure the payment of which a lien is retained upon the property conveyed. And on the 21st day of June, 1893, Arch Childers and wife sold and conveyed by general warranty deed to W. R. Stacy a tract of land adjoining the land purchased from John W. Childers for \$500, \$250 of which was paid in cash, and the residue of the purchase money was evidenced by a note for \$250, due 12 months after date. The description of this land is also by natural objects, with the exception of one call. In November, 1894, Arch Childers transferred and assigned the \$250 note executed to him by Stacy to J. W. Childers. After his purchase, W. R. Stacy took possession of both tracts of land, and on the 22d day of March, 1895, he gave three notes to appellant, Watson, for \$200 each, and to secure their payment ex-

ecuted a mortgage on each of the tracts of land theretofore purchased by him from John W. and Arch Childers. Watson's mortgage was duly recorded in the county court clerk's office. On the 14th day of November following, J. W. Childers instituted a suit in equity in the Menefee circuit court to enforce his liens on the lands sold by him to Stacy, and also upon the land sold by Arch Childers to Stacy. Watson was not made a party to this proceeding. Stacy, in his answer, alleged that he was entitled to a credit of \$95 upon the \$700 note, and also claimed that Childers at the date of the sale had represented that the two tracts of land covered by his deed contained about 135 acres, when in fact they only contained about 85 acres; and alleged that the credit and the deficit in the land was sufficient to extinguish the balance due upon the \$700 note. He also alleged that he had paid \$21.25 on the \$250 note executed to Arch Childers, which had been subsequently assigned by him to J. W. Childers, and that Arch Childers had represented to him at the time of the sale that the tract of land contained 85 acres, when as a matter of fact it only contained 60 acres, leaving a deficit of at least 25 acres, worth at least \$150, and that the \$250 note should be credited with this sum. All these averments in Stacy's answer were denied by reply, and testimony was taken, and the case submitted for judgment. After its submission, and before judgment was entered, it was agreed between them that Stacy and wife should convey to Childers all the land embraced in the deed from Arch Childers to Stacy, and that the plaintiff J. W. Childers should take judgment against Stacy for \$450, with interest, with lien adjudged against the land conveyed by John W. Childers to him, the judgment not to be enforced for 18 months. In March, 1898, the appellant, Henry Watson, instituted a suit for the enforcement of his mortgage lien, making the defendant Childers a party, in which he sought to vacate the agreement between Childers and Stacy and the judgment rendered pursuant thereto, claiming that the notes of Childers should be credited with the same sums which had been pleaded by Stacy in the suit instituted against him by Childers. This suit was consolidated with the suit of Childers against Stacy, whereupon John W. Childers filed an answer controverting all the affirmative averments of the petition in so far as the credits were claimed on his debt. No additional proof was taken, and by a judgment in the consolidated suits the lands conveyed by J. W. Childers to Stacy were directed to be sold, and to satisfy, first, the judgment of J. W. Childers for \$450, with interest and costs, and, second, the \$600, with interest and costs due the appellant, Watson. At this sale Childers became the purchaser of both tracts of land covered by his deed to Stacy for the amount of his judgment. Watson appeals, and complains that the court erred in refus-

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ing to set aside the agreement and judgment pursuant thereto between John W. Childers and Stacy.

The testimony which was taken between Childers and Stacy fails to support the contention of Stacy either as to the credits claimed by him or the alleged representations as to the amount of land contained in the tracts sold to him by John W. Childers. Besides, appellant had an opportunity to take additional evidence before the sale of these tracts of land if he had so desired, which he failed to do. He was present at the sale made by the commissioner, and made no bid in excess of Childers' debt, and, in so far as this tract of land is concerned, we are of the opinion that he had no ground of complaint. But the tract of land purchased by Stacy from Arch Childers was only incumbered by a lien for \$250 at the time Stacy mortgaged this tract of land to the appellant, Watson, and he was entitled to have this tract of land also sold to satisfy any balance that might be due on the \$250 lien note for purchase money assigned by Arch Childers to J. W. Childers, and have the overplus applied to his debt. J. W. Childers and W. R. Stacy could not, after the execution of the mortgage to appellant by Stacy, transfer the lien held by J. W. Childers against the land sold by him to Stacy to the land sold by Arch Childers to Stacy. The sales were separate, and liens for unpaid purchase money were also distinct.

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

GARRISON et al. v. PENN et al.¹

(Court of Appeals of Kentucky. Jan. 14, 1902.)

HOMESTEAD—RENTED HOUSE—EXEMPT PREMISES—AGGREGATE VALUE.

As it is not the location of property, but the use of it, which determines whether it is a part of the homestead, a house rented out by the debtor is not exempt, though erected on the same lot on which the debtor's residence is located, and though the value of both houses together does not exceed \$1,000.

Appeal from circuit court, Robertson county.

"Not to be officially reported."

Action by Penn Bros. against J. S. Garrison and S. C. Garrison to subject real estate to the payment of a debt. Judgment for plaintiffs, and defendants appeal. Affirmed.

S. Holmes and W. J. Osborne, for appellants. Kennedy & Williamson, for appellees.

HOBSON, J. On January 3, 1893, a deed was made to J. S. Garrison and his wife, S. C. Garrison, for a house and lot in Mt. Olivet, Ky., in consideration of \$625. The lot contained about three-fourths of an acre of ground. The house stood on one side of the

lot. Garrison proceeded at once to build a new house, which cost him about \$800, on the other side of the lot; and as soon as this house was completed he moved into it with his family, and has since resided there. He fenced off the old house so as to include about it a small lot, and has since rented out this house and lot. Appellees, Penn Bros., furnished him material for the building of the new house. He did not pay them, but within 60 days after the completion of the house they went on a note for him for the amount, and the money raised on the note was received by him. He failed to pay the note, and they, having paid it, brought this suit to subject the property to the debt. The court below subjected to the debt the half interest of J. S. Garrison in the house and lot which was fenced off to itself and rented out. The judgment is based on the finding of the court that Garrison and family have since 1893 occupied the other house on the lot, renting out this house and lot to tenants; the lots being separated by a fence, and not used in any way as one property. From this judgment the appeal before us is prosecuted.

If the lot that is rented out was situated a mile from the other lot, it would hardly be supposed that it was exempt from debt as a homestead. But it is not the location of the property, but the use of it, which determines whether it is a part of the homestead. The statute exempts "so much land including the dwelling house and appurtenances * * * as shall not exceed in value one thousand dollars." Ky. St. § 1702. The purpose of the exemption is to secure a home for the family. It does not include land on which the family does not reside, or which is not used in any way in connection with the home. Thus, in *Brown v. Martin*, 4 Bush, 47, this court said: "According to our interpretation of the statute, the right of exemption depends upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family. The right does not exist where the residence of the debtor and his family is permanently located elsewhere." This is the general conclusion of the authorities. "A homestead necessarily includes the idea of a residence. It must be the owner's place of residence,—the place where he lives." *Thomp. Homest. & Ex.* § 100. Thus it has been said that the question whether the property is a homestead does not depend on its situation, external appearance, or internal arrangement, but upon the fact that it is really and truly occupied as a home for the family. *Thomp. Homest. & Ex.* § 100. In section 102, after referring to a number of cases, he adds: "We are thus conducted to use as a test by which to determine whether particular premises are or are not the homestead of the owner. It may be stated broadly that use is one of the concurring conditions of homestead. Unless the premises are used as

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a homestead no right of homestead exists in them. The use made of land may determine its character as a part of a homestead or not, as well as its proximity to or remoteness from the residence or mansion house." In 15 Am. & Eng. Enc. Law (2d Ed.) pp. 584-588, a number of authorities are collected, and from them the following conclusions are deduced: "If a building is used by a debtor as his family residence, it may be his homestead, and exempt as such, notwithstanding a part of it may be leased to others for residence or business purposes. But in some states, though not in all, where there are two or more houses on land owned by a debtor, and he resides in one and leases the others, he can acquire a homestead in that part of the land only on which the house in which he resides is situated." Page 584. "A tract adjoining premises occupied as a homestead, but leased to others, and used only as a source of revenue, is held in most states to form no part of the homestead, and not to be exempt." Page 586. "In those states in which a debtor residing on one tract or lot of land as his home may claim as a part of his homestead a detached lot or tract, it is generally, if not always, required, expressly or impliedly, that he shall use such separate lot or tract in connection with the homestead." "Separate and detached lots or tracts of land, which are not only not used in connection with the home place, but are leased to others, cannot be claimed as parts of the homestead." Page 588. The lot upon which the old house stood, not being used in any way as a part of the residence, was as distinct from it as if it were situated in any other part of the town; and, the residence of the debtor being permanently located on the other property, the court properly subjected his interest in this lot to the payment of the debt, although his interest in both lots was not of value \$1,000.

Judgment affirmed.

NEURENBERGER v. LEHENBAUER et al.¹
(Court of Appeals of Kentucky. Jan. 9, 1902.)
DEEDS—CONSIDERATION—PAROL EVIDENCE—
VOLUNTARY CONVEYANCE—GRANTOR'S
HEIRS—VALIDITY.

1. Parol testimony is admissible not only to disprove the consideration recited in a deed, but to show the true consideration.

2. A conveyance completely executed will be upheld, as against the grantor or his heirs, though not supported by a valuable consideration.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by Julia Lehenbauer against John Neurenberger and others for a sale of land and division of the proceeds. Judgment for plaintiff, and defendant Neurenberger appeals. Reversed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

L. J. Crawford, for appellant. Root & Root, for appellees.

O'REAR, J. In 1892 the ancestor of the parties in interest in this suit conveyed certain described real estate lying in Campbell county to his son-in-law, Henry Dischar, for the recited consideration of \$2,400 paid. The deed purported to convey a fee-simple title. The grantor and his wife died in 1898, intestate. The land was conveyed by Dischar and wife to appellant, a son of the original grantor, in 1896, by quitclaim deed, for the actual consideration of \$500. This suit is by one of the heirs at law of the original grantor against appellant in possession and the other heirs for a sale of the property because of its indivisibility; it being asserted in the petition that the deed first mentioned was "intended to be in trust," and that it was intended by the parties to create a trust for the sole benefit of the grantor, John Neurenberger, Sr. It was alleged that no consideration passed between Neurenberger, Sr., and Dischar. It was shown that the recited consideration was in fact fictitious. What passed between the parties when the deed in controversy was executed is not shown, further than this testimony of Dischar, the grantee: "I did not pay him [the grantor] anything at any time for the land. He made me a present of it. He said the land was paid for when he made me the deed." Q. 6. Did the old man say why he deeded you the land at the time he came to your house and gave you the deed? A. Nothing. He didn't say what for. He only said the land belongs to me, and is paid for. That's what he said when he brought me the deed." From other evidence, of doubtful competency, it may be gathered that the old man was engaged in a litigation with one of his sons, and his purpose in making the conveyance was to prevent the land from falling into the son's hands. From these facts the argument is made by appellees (1) that, as there was an absence of the consideration recited, the deed was nudum pactum, and therefore void, and that consequently the grantee held it in trust for his grantor; and (2) that, as the deed purported to be one of bargain and sale, it could not be supported as a deed of gift by showing that fact allunde. Those are the questions with which we have to deal. We do not agree with the argument.

The true consideration of a deed may always be shown, though it may contradict the writing. Ky. St. § 472. In this way the real transaction between the parties may be arrived at, not for the purpose of satisfying curiosity, but for the practical end of basing on the discovery appropriate legal relief, if relief is due. Here the contention is that as the recited consideration never existed, there was therefore no consideration, and, being no consideration, the conveyance was void, and the grantee, because of these facts, held the

title as trustee. The rule is not confined, though, to disproving the recited consideration, but is extended so as to permit proof of the true one. Therefore proof of a different consideration, if adequate, would support the conveyance. At bar it was shown that the real transaction was a gift of this land by the grantor to his son-in-law. One may give his land by deed. In such conveyance a consideration is not necessary. If it be completely executed, and without reservation of power to revoke, it will be upheld, even as against the grantor or his heirs (Chiles v. Coleman, 2 A. K. Marsh. 290, 12 Am. Dec. 396; Berry v. Kinnaird [Ky.] 20 S. W. 511; Gault v. Trumbo, 17 B. Mon. 684; Toker v. Toker, 31 Beav. 629), but not as against his antecedent creditors, nor purchasers for value without notice (section 1907, Ky. St.; Jones v. Hill, 9 Bush, 692; Yankey v. Sweeney, 85 Ky. 55, 2 S. W. 559). In this case no creditor is complaining. Whatever may have been the motive of the grantor,—however whimsical, or even unjust, as among his children, the act in question may have been,—he was acting within his legal privilege as owner of the land, and, so far as this record discloses, was of sound mind and acting without constraint. The courts should not interfere with what he appears to have done deliberately, solemnly, and legally, with reference to his own, based upon reasons unknown to us.

The judgment below should have been for appellant, and to that end it is reversed, and cause remanded, with direction to dismiss the petition.

GLEASON'S ADM'R et al. v. PETER & BINGHARD STONE CO. et al.¹

(Court of Appeals of Kentucky. Jan. 8, 1902.)
MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—MISTAKE IN APPORTIONMENT—LIMITATION OF ACTION FOR NEW APPORTIONMENT.

An action seeking a new apportionment of the cost of a street improvement is barred after the lapse of five years from the time the first apportionment was made.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by the administrator and assignees of Michael Gleason against the Peter & Binghard Stone Company and others, seeking a new apportionment of the cost of a street improvement. Judgment for defendants, and plaintiffs appeal. Affirmed.

Lane & Harrison, for appellants. I. T. Woodson, for appellees.

HOBSON, J. On February 10, 1892, the city council of Louisville passed an ordinance for the improvement of an alley south of Maple street, and on February 27, 1892, made a contract with Michael Gleason for the

work. He complied with the contract, and the work was accepted on July 9, 1892. On July 17th an apportionment of the cost was made against the property owners. On July 28, 1897, this action was filed by the administrator of Gleason and his assignees. It was alleged in the petition that the apportionment made by the city council was erroneous, in that no part of the property in the southeast or the southwest quarter of the square was subject to assessment, and the owners of the property refused to pay, and could not be compelled to pay, the assessment on their lots. The petition sought a new apportionment, by which the entire cost of the work should be assessed against the other property. These property owners by their answers set up the fact that they had paid the apportionment as made against them by the city council, and pleaded limitation in bar of the action; more than five years having elapsed since the first apportionment was made before the suit was filed. The circuit court sustained the plea of limitation and dismissed the action, and the plaintiffs have appealed.

The ruling of the circuit judge was in accord with the decision of this court in Kirwin v. Nevin, 64 S. W. 647, where it was held that the liability of the property owner being created by statute, and no other time being fixed by the statute, the action must be commenced within five years next after the cause of action accrued. That case is conclusive of this, under the averments of the pleadings.

Judgment affirmed.

BREEDLOVE v. LOUISVILLE & N. R. CO. et al.¹

(Court of Appeals of Kentucky. Jan. 15, 1902.)

APPEAL AND ERROR—HARMLESS ERROR.

Under Civ. Code Prac. § 134, there can be no reversal for any error which did not affect the substantial rights of appellant.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by Robert Breedlove against the Louisville & Nashville Railroad Company and the Louisville Railway Company to recover damages for personal injuries. From the judgment, the plaintiff appeals. Affirmed.

Bennett H. Young and M. W. Ripy, for appellant. Fairleigh, Straus & Eagles and Helm, Bruce & Helm, for appellees.

O'REAR, J. Appellant was injured while a passenger on a car of appellee the Louisville Railway Company, an electric street railway, at a point where it crosses appellee Louisville & Nashville Railroad Company's track, in the suburbs of Louisville. The in-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

jury was caused by the negligence of one or both of the companies. Appellant was awarded a substantial verdict for the injury sustained, and very much in excess of a fair compensation for the time lost and suffering proved. The court is of the opinion that, although errors may have been committed against appellant, they do not affect his substantial rights; and under section 134 of the Civil Code of Practice, a part of which is as follows: "The court must in every stage of an action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect,"—we are constrained to affirm the judgment appealed from.

DAVIS v. WESTERN UNION TEL. CO.¹
(Court of Appeals of Kentucky. Jan. 16, 1902.)

TELEGRAPHS—DELAY IN DELIVERY OF MESSAGE—REASONABLENESS OF RULE NOT TO DELIVER MESSAGES AT NIGHT.

1. A telegraph company has the right to establish reasonable hours during which its office shall be kept open for the transmission and delivery of messages, and a rule not to deliver messages received after 7 p. m. until the next morning was not unreasonable in a town where the business of the company was not large enough to justify the employment of a special messenger to deliver messages received after 7 p. m.

2. Where a telegraph company, under its rules, did not deliver messages received after 7 p. m. until the next morning, it owed no duty, where a message was received exactly at 7 p. m., to deliver it that night, as the rules of the company required that before delivery a letter-press copy of the message should be made, and a record thereof entered in a book kept for that purpose; and this was true though the message may have been received by the day operator, and while the messenger was still in the office, as the messenger's hours of employment had expired.

Appeal from circuit court, Caldwell county.
"Not to be officially reported."

Action by John Davis against the Western Union Telegraph Company to recover damages for defendant's failure to deliver a message promptly. Judgment for defendant, and plaintiff appeals. Affirmed.

S. Hodge, for appellant. Richards & Ronald, for appellee.

BURNAM, J. Mose Davis, the half-brother of appellant, died in Princeton, Ind., at 7:30 p. m. on the 29th day of July, 1895, and at 7 p. m. on the next day J. B. Phar sent the following telegram to appellant at Princeton, Ky.: "Brother Mose died yesterday 7:30 p. m. Funeral to-morrow afternoon. J. B. Phar." This suit was instituted by appellant against appellee, the Western Union Telegraph Company, to recover damages for mental anguish alleged to have been suffered by reason of the negligence of appellee in fail-

ing to deliver this telegram to him in time to allow him to go to Princeton, Ind., to attend the funeral and burial of his brother the next day. The alleged negligence was denied in the answer by appellant, and judgment resisted on several grounds. First, it is alleged that by the established custom and rule of their office at Princeton, Ky., no messages received between the hours of 7 p. m. and 7 a. m. are delivered until after 7 o'clock the next morning; that the message was not started from Princeton, Ind., until 7 p. m., and that it was accepted to be delivered according to the rules of its office at Princeton, Ky.; that the operator in Princeton, Ind., informed the sender that it would probably arrive in Princeton, Ky., too late to be delivered that night, and that the sender, Phar, said to send it anyhow; that it did not make any difference, as he did not expect appellant would come. The testimony is to the effect that appellee's business in the town of Princeton, Ky., is not large enough to justify the employment of a special messenger to deliver telegrams received after 7 p. m. Its agent at that point is also the agent of the Ohio Valley Railroad Company, and his duties to the railroad company require him to remain at his post in order to handle the trains of the railroad company.

The company has the right to establish reasonable hours during which its office shall be kept open for the transmission and delivery of messages. See *Telegraph Co. v. Vancleave* (Ky.) 54 S. W. 827; and *Same v. Crider*, Id. 963. And the undisputed proof shows that the message was received at Princeton, Ky., at exactly 7 p. m.; that the rules of the company require that a letter-press copy of the message should be made, and a record thereof entered in a book kept for that purpose, and that it should then be put in an envelope addressed to the sender, and that it was some moments after 7 p. m. before this work was accomplished. And the undisputed testimony is also to the effect that the company did not deliver messages received after 7 p. m. until the next morning. The appellant claims that, as the message was received by the day operator, it was the duty of appellee, under its rules, to have delivered it on the evening on which it was received, notwithstanding the fact that it was after 7 o'clock; and to support this contention proved by the colored boy who acted as messenger that he went on duty every morning at 7 o'clock, and did not leave the depot until after the day operator left. He admits, however, on cross-examination, that he had no definite recollection of where he was at 7 p. m. on the 30th day of July. The operator, however, testifies that he was not in the office, but it seems to us that his whereabouts are unimportant, as, under all the testimony, the hours of his employment had expired. There must be some definite time fixed when the responsibility of the company begins and ends, and when a

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

message is received after that time it is under no obligations to make delivery, except in accordance with its undertaking to the public, which in this case did not require that it should make the delivery before the next morning. Several other defenses are relied on and ably discussed in the brief of counsel, but this one seems conclusive of the question, and to justify the peremptory instruction for the defendant company given by the circuit judge.

Judgment affirmed.

RUDY v. KATZ.¹

(Court of Appeals of Kentucky. Jan. 8, 1902.)

FRAUDULENT CONVEYANCES—EVIDENCE OF DEBTOR'S ABILITY TO PAY FOR GOODS HELD BY ANOTHER—BURDEN OF PROOF.

1. In an action by the father of a bankrupt to recover possession of goods claimed by defendant as assignee in bankruptcy, in which defendant claimed that the bankrupt furnished the money to buy the goods, and that plaintiff held them in his own name for the purpose of defrauding the bankrupt's creditors, evidence that a firm composed of the bankrupt and his brother had, before its goods were attached by creditors, made a report showing that it had on hand twelve or fifteen thousand dollars cash, which had never been accounted for, and that its assets exceeded its liabilities in a large sum, and that the firm subsequently, before attachments were issued, made rush sales of a large part of its stock at prices much less than cost, was admissible to show that the bankrupt was probably in a position to furnish the money to plaintiff to purchase the goods sued for.

2. It was competent for defendant to prove any facts tending to show that plaintiff had no funds with which to buy and pay for the goods sued for.

3. Evidence that the bankrupt did not report any assets when he filed his petition in bankruptcy was admissible.

4. While it was competent for plaintiff to prove the transaction between him and the firm from which he purchased the goods, it was not competent for him to prove that that firm did not have any dealings with the firm composed of the bankrupt and his brother, as defendant made no claim that they did have such dealings.

5. Declarations of plaintiff's partner, while in possession of goods which they claimed to own as partners, as to the real ownership of the goods, were admissible against plaintiff.

6. Though defendant based his right to the goods in question upon the ground that the transaction by virtue of which plaintiff claimed them was fraudulent, the burden of proof was upon plaintiff, and he was entitled to the concluding argument to the jury.

Paynter, J., dissenting.

Appeal from circuit court, Hickman county.

"Not to be officially reported."

Action by Solomon Katz against J. A. Rudy to recover personal property and damages for its taking and detention. Judgment for plaintiff, and defendant appeals. Reversed.

Edward W. Hines and Wheeler & Worten, for appellant. Robertson & Thomas, for appellee.

GUFFY, O. J. The plaintiff, Solomon Katz, instituted this action in the Hickman circuit court against the appellant, J. A. Rudy, W. C. Ellis, and R. B. Flatt. It is substantially alleged in the petition that the plaintiff was the owner of a certain lot of goods of the value of at least \$10,000, and that he ought to recover \$1,000 in damages for the wrongful taking and detention of said property. It is further alleged that the defendants were wrongfully in possession of said property, and wrongfully detaining the same from plaintiff, wherefore he prayed for the possession of the property and \$1,000 damages. No judgment was rendered against Ellis or Flatt, hence no notice is taken of any defense introduced by them. The answer of appellant shows that he was trustee in bankruptcy in matter of Benjamin Katz, bankrupt, and sued in his individual capacity as Jas. A. Rudy. The substance of his answer is, first, a denial of the ownership of plaintiff in the goods and a denial of his right to the immediate possession thereof. It is further alleged in the answer that the goods were only worth \$7,500. It is further alleged, in substance, that at the time of the filing of plaintiff's petition that he was not, nor never had been, in possession of the stock of goods; that same was at that time, and had been since they were taken from Benjamin Katz, in the possession of the United States marshal. For further answer it is alleged that on the 28th day of February, 1899, Benjamin Katz filed his voluntary petition in bankruptcy, and on the 1st of March, 1899, was adjudged a bankrupt by the court, and on the 15th of March, 1899, defendant was duly elected by the creditors of said bankrupt and appointed by said bankruptcy court trustee of the said bankrupt, and qualified as such, and entered upon the duties of said position, and ever since has been acting as such; that by operation of law upon the filing of the petition in bankruptcy of the said Benjamin Katz the adjudication of said Katz as a bankrupt and the appointment and qualification of defendant as aforesaid entitled all the property of said Benjamin Katz to be at once vested in the defendant, as trustee, for the benefit of the creditors of said Katz; that, said Katz failing or refusing to schedule any property whatever with his petition in voluntary bankruptcy, although in truth and in fact he was the owner of the property described in the petition, he took possession of said property, sold the same at public auction for \$7,500, and now holds the same for the benefit of said Benjamin Katz's creditor; that said property was not at the time of the filing of this suit or at the time of filing the bankruptcy petition the property of Solomon Katz, and that it has never been his property; that he never had a dollar in it, never drew a dollar out of it, never exercised any ownership over it, or had anything to do with it, and that the only thing he ever did was to lend his name to his son.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Benjamin Katz, to aid and assist him in fraudulently and wrongfully covering up and concealing his property to prevent the same from being subjected to the payment of his debts; that Solomon Katz never had any money to put into this business, or anything else, and that in 1895 Benjamin and Herman Katz, sons of Solomon Katz, were engaged in business at Dyersburg, Tenn., and Clinton, Ky., at each place under the firm name of Katz Bros., and that in the fall of said year they bought goods heavily, increasing their stock at each place largely, and made slaughter or rush sales of their goods, cutting their stock down to a small amount, receiving from said sales \$25,000 or \$30,000, paying out practically nothing, and while in this condition were attached, and, before any appraisal or invoice could be made of the stock at Dyersburg, Tenn., the stock at Dyersburg was destroyed by fire, and the stock at Clinton sold under attachment proceedings for four or five thousand dollars; that this amount, together with eight or ten thousand dollars insurance growing out of the Dyersburg fire, was paid on the indebtedness of Katz Bros., leaving unpaid about \$26,000; that Solomon Katz was utterly insolvent, and that Katz Bros. had not less than \$25,000 ready money, and in less than 10 months these two brothers, Herman and Benjamin, were engaged in business, one at Clinton, Ky., in his father's name, and the other at Martin, Tenn., in the name of L. Rosenfield & Co., his father purporting to be the company of L. Rosenfield, Rosenfield being a son-in-law of Solomon Katz, the two businesses amounting to about \$25,000; that the whole transaction and connection of Solomon Katz with Benjamin Katz and Herman Katz and with L. Rosenfield & Co. is a fraud from start to finish, and that the stock of goods involved in this action was paid for out of the money belonging to Benjamin Katz, and the increase thereof is the result alone of the ingenuity, labor, and business skill of Benjamin Katz; and the plaintiff, Solomon Katz, never put a dollar in the business, or gave it an hour's time or labor, has not nor never did have any interest in the same further than to lend his name to said Benjamin Katz to carry out the fraudulent purpose heretofore pleaded of enabling said Benjamin Katz to cover up the property belonging to said Benjamin Katz in his efforts to cheat and defraud his creditors. Further answering, it is alleged that individually the defendant Rudy has no interest in, or is not concerned in, the matter or things involved in this controversy; for J. A. Rudy, trustee of Benjamin Katz in bankruptcy, alone is interested in this matter as such trustee, and he is wrongfully sued in his individual capacity herein, and he asks the court to compel the plaintiff to amend the petition and sue the defendant as trustee. Wherefore he prays for dismissal of plaintiff's petition, etc. The reply of the plaintiff is, in effect, a traverse

of the averments of the answer as to any fraud between the plaintiff and Benjamin Katz, as well as a denial of the charge of plaintiff's insolvency. In the fourth paragraph he shows that he bought the goods from H. B. Clafin & Co., and paid for the same with his own money, and that neither Benjamin nor Herman Katz nor Rosenfield, nor anybody else furnished him with any part of the money. It is admitted that in 1895 Benjamin Katz and Herman Katz were engaged in business at Dyersburg, Tenn., and Clinton, Ky., under the firm name of Katz Bros., but he has no information as to whether they bought goods heavily in the fall of that year, or increased their stock, or whether they made slaughter or rush sales, or sold their goods down to a small amount, etc. He practically admits the attachment set up by the defendant, but says he has no knowledge or information sufficient to form belief as to the amount of debts left unpaid by said firm. He also denies that Rudy was not individually interested in the suit, and denies his right to compel plaintiff to amend his petition so as to sue said defendant as trustee in bankruptcy. By agreement the affirmative matter contained in the reply was controverted of record. A jury trial resulted in a verdict and judgment against appellant, Rudy, individually for the sum of \$10,000. His motion for a new trial having been overruled, he appealed. The grounds relied upon are, in substance: (1) Because the verdict is not sustained by sufficient evidence, and is contrary to law. (2) Errors of law by the court at the trial, and excepted to by the defendant at the time. (3) Because the court erred in giving instructions 1 and 2 to the jury. (4) Because the court erred in excluding important material testimony offered by the defendant. (5) Because the court erred in permitting illegal and irrelevant testimony offered by the plaintiff to go to the jury. (6) Because the court erred in ruling that the burden of proof was upon the plaintiff, and giving to him the closing argument.

It is insisted by the appellant that the court erred in overruling the motion for a continuance, and thereby not permitting him to introduce one Will Gratz, by whom he proposed to prove that Katz Bros., in August, 1895, in a report made by them to I. G. Feeder, showed that Katz Bros. had on hand between twelve and fifteen thousand dollars cash, which had not been garnished or attached, and also showing the assets of Katz Bros. exceeded their liabilities in the sum of \$27,700; and it is also insisted that the court erred in refusing to allow the defendant to introduce said report, it being shown to have been made by Katz Bros., signed by Herman Katz, while they were in business; that the court also erred in excluding from the jury testimony tending to show that the aforesaid firm, before they were attached, and before plaintiff claims to have had any interest in the goods in

controversy, were selling out, making rush sales, etc., of a large amount of goods, at a greatly reduced price, much less than the cost. Without attempting to enumerate the various witnesses and the precise questions asked, we deem it sufficient to say that the proof or evidence referred to ought to have been admitted as tending to show that Benjamin Katz was probably in a position to have furnished the money to the plaintiff to purchase the goods from Claflin & Co. It was also competent to prove any fact tending to show that plaintiff had no funds with which he could have bought and paid for the stock of goods in question; but it seems to us from this record that the defendant was not materially hampered in the production of proof on that particular point. It was also competent to prove as a fact that Benjamin Katz did not report any assets when he filed his petition in bankruptcy.

Plaintiff also complains of the introduction of testimony showing that the sale from Claflin & Co. to Solomon Katz was a bona fide transaction; or, in other words, that Solomon Katz actually bought and paid for the Claflin goods. We are, however, inclined to the opinion that plaintiff had a right to prove the transaction that really occurred between himself and Claflin & Co.'s agent, but, as there was no claim that Katz Bros. bought those goods from Claflin & Co., or that Claflin & Co. had any direct dealing with said firm, it was not competent to introduce proof showing that Claflin & Co. had no dealings with Katz Bros. Upon the return of the cause the court will confine the proof to what transactions took place between Solomon Katz and Claflin & Co.

If it can be reasonably shown that Rosenfield and the plaintiff were partners in the firm of Rosenfield & Co. the statement of Rosenfield, while in possession of the goods, as to the true and real ownership of the stock, would be competent testimony for defendant.

We are not inclined to the opinion that the court erred in giving instructions, and we do not perceive that any was asked by the defendant.

It is very earnestly insisted by the appellant that the court erred in giving the concluding argument to the plaintiff. We cannot concur in this contention. Under the pleadings, if no evidence had been introduced, plaintiff could not have recovered; hence it follows that the burden was upon him to show ownership, or at least some right to the possession of the goods; and, if he had failed to do so, his petition would have been dismissed. It is doubtless true that the defendant based his right to the goods upon the fraudulent transaction alleged in his answer; still we think that the plaintiff had the burden of proof, and therefore entitled to the concluding argument.

It is well known that it is difficult to establish a fraudulent transaction such as is

charged by the appellant in this case, and it is a well-settled rule of law that when a party attacks a transaction upon the ground of fraud between a purchaser and a debtor, every circumstance that can reasonably and legally be admitted must be permitted to be introduced as evidence. Moreover, the rejection of some very slight circumstance might so weaken the general circumstances as to defeat a party who had in fact a meritorious claim. We do not intend to intimate that the rejected evidence necessarily defeated defendant's claim, but in a case like this we are not inclined to hold that the errors indicated were immaterial, or not prejudicial to the substantial rights of the appellant. Positive proof of fraud can rarely ever be established; hence the great importance of allowing a party to introduce all the competent testimony possible to procure.

For the reasons indicated, the judgment is reversed, and case remanded for a new trial upon principles consistent with this opinion.

PAYNTER, J., dissenting.

LOUISVILLE & N. R. CO. v. KEMERY'S ADM'R.¹

(Court of Appeals of Kentucky. Jan. 15, 1902.)

RAILROADS—DUTY TO TRESPASSER ON TRAIN—DISCOVERY OF PERIL—INSTRUCTIONS TO JURY—EVIDENCE—HARMLESS ERROR.

1. In an action against a railroad company to recover damages for the death of a trespasser on a train, resulting from a collision with another train, defendant was not prejudiced by an instruction telling the jury to find for plaintiff if defendant's servants knew before the injury of the decedent's presence on the train, and that he was in danger from a probable collision, and that after such knowledge they failed to use ordinary care to prevent injury to him, and that he was killed as the result of such failure.

2. Whatever opinion the court may have as to the facts, it does not feel authorized to set aside a second verdict for plaintiff.

3. While a trespasser may have had no right to rely upon a rule requiring freight trains following each other to keep 10 minutes apart, the error, if any, in permitting the rule to be read, was harmless, as defendant had already brought out on the cross-examination of a witness the fact that the rule was in existence.

4. There can be no reversal for an error in admitting evidence which did not prejudice defendant's rights, though the evidence was manifestly incompetent.

Appeal from circuit court, Simpson county.
"Not to be officially reported."

Action by the administrator of William T. S. Kemery against the Louisville and Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. A. Mitchell, B. D. Warfield, and Edward W. Hines, for appellant. Goodnight &

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Roark, Gerald T. Finn, and W. S. Pryor, for appellee.

DU RELLE, J. The administrator of Kemery brought suit to recover damages for the death of his intestate. Two jury trials have been had. Upon the first trial a verdict was returned for \$11,000, which was set aside by the court. Upon the second trial the verdict for appellee was \$8,000, upon which judgment has been entered, from which the railroad company has appealed; and the appellee has prosecuted a cross appeal, insisting that the court erred in setting aside the first verdict, and that judgment should now be entered upon that verdict.

The petition averred, in substance, that the death of the intestate was caused by the negligence of the company, its agents, employes, and servants, in operating its trains; that Kemery was traveling in the caboose of the company's freight train bound from Louisville to Nashville, having been duly admitted to "passway" by the conductor of the train, which was running from Bowling Green to Nashville in two sections, Kemery being on the first section; that when that section reached Sinking Creek, a regular watering place for the company's trains, it stopped to take water, in the nighttime; that the company's agents negligently delayed the section an unusual and unreasonable length of time,—much longer than was necessary to take water; that they knew the second section was running closely behind them, and that the crew of the second section were ignorant of the delay of the first section, but negligently failed to give any notice or warning or signal to the second section; that the delay of the first section was much longer than the crew of the second section would reasonably expect it to be, and was unusual and unreasonable, and though the crew of the first section knew that the second section was close behind, rendering a collision probable and danger imminent, they failed to flag or signal the approaching section, or give warning to it of the delay of the first, or of the impending danger which threatened it, and by their willful negligence caused it to collide with the first section; that the crew of the second section negligently ran their train unreasonably close to the first section, and at an unreasonably rapid rate of speed, in approaching the water station, rendering it impossible of control within reasonable space, and negligently failed to exercise reasonable caution to ascertain whether the first section had left the watering place, by reason of which negligence the second section collided with the first section, running into and through the caboose and setting it on fire, whereby appellee's intestate was caught and crushed by the broken timbers and burned, receiving injuries from which he died a few hours later. By the answer the negligence averred was denied specifically. The company further pleaded its establishment of

reasonable rules whereby its business as a passenger carrier was conducted separately from its transportation of freight, upon separate trains; that the train upon which appellee's intestate was traveling was used exclusively for the transportation of freight, and the carriage of passengers thereon was prohibited by its rules; that Kemery was a trespasser, and was fraudulently, wrongfully, and without right upon that train, and was not in charge of any live stock or freight or in the employ of the company, and that under its rules the only person who was, at the time of the accident, authorized to ride on said train, other than the employes of the company, was one Isalah Carter, who was on the train by the written permission of the company, in charge of two car loads of stock. The fraud by which Kemery succeeded in traveling upon the freight train was specifically set forth. The only testimony showing how Kemery succeeded in riding upon the train is that of the conductor and Isalah Carter. Carter was an employe of a firm which was shipping two car loads of live stock to New Orleans, and was on the train in charge of the live stock. He had possession of two papers, called "live-stock contracts." His name was signed upon the back of each contract. These contracts authorized the person whose name was indorsed thereon to ride free on the train which carried the live stock, but did not authorize any one else to be so carried. According to Carter's testimony, taken on behalf of appellee, Kemery seems to have been riding in charge of the stock from Louisville to Bowling Green, or at least to have so informed Carter. He stated to Carter that his stock was to be left at Bowling Green, and asked to be passed on Carter's contracts to Nashville. At Bowling Green a new caboose was attached, and a new conductor took charge; Carter and Kemery entering the caboose. When the conductor came to Carter, Carter produced the two contracts; pointing at Kemery to indicate that he, also, was to ride upon those contracts. At the same time, Kemery seems to have pointed to himself, for the purpose of indicating the same thing. This was clearly a fraud. So the court instructed the jury that Kemery "had no right to be upon defendant's train at the time and place of the collision of its trains at Sinking Creek, on the 14th day of January, 1897, and was trespasser thereon; and the jury should find for the defendant, unless they believe from the evidence that defendant's servants or agents in charge of its train at the time of said collision knew that said Kemery was then in danger from a collision about to occur between defendant's trains, and by the use of ordinary care could have prevented injury to said Kemery, but that notwithstanding said knowledge, if any, of said danger, they failed to exercise ordinary care to prevent said injury to said Kemery." Two instructions were offered for appellant and refused, in-

struction 1 being predicated upon the theory that there was no evidence tending to show negligence on the part of the train crew of the first section. The other instruction required the jury to believe that Kemery was willfully or wantonly injured, to authorize a recovery. There was evidence to show negligence on the part of the crew of the first section. There was a sharp conflict of testimony as to the length of time the first section had remained at Sinking Creek before a flagman was sent back to flag the second section. If the jury believed the evidence of appellee's witnesses,—and they seem to have done so,—they were authorized to find that a considerable time elapsed after the first section stopped before a flagman was sent back to stop the approaching second section. The instructions defining "ordinary care" and giving the measure of compensatory damages are not complained of.

The instructions given on motion of appellee, and which are complained of, are as follows: "The court instructs the jury that if they believe from the evidence that the defendant, by its servants in charge of the train upon which the plaintiff's intestate was riding, before the injury complained of, and in time to have avoided it by the exercise of ordinary care to do so, knew that William T. S. Kemery was then in danger from a collision about to occur between defendant's trains, and that said servants, after discovering the said Kemery's danger, if they did discover it, failed to use ordinary care to prevent injury to him by said collision, and that said Kemery was killed by reason of said failure, if any, by said servants to use ordinary care to prevent said injury after discovering his danger as aforesaid, if they did discover it, they should then, and in that event, find for the plaintiff such compensatory damages, if any, as they may believe from the evidence were caused to the said Kemery by the failure, if any, of the said servants to exercise ordinary care as aforesaid, not exceeding the amount claimed, to wit, \$40,000. Notwithstanding the decedent, Wm. T. S. Kemery, was a trespasser upon the train when the collision and injury complained of occurred, still, if the agents and employes of the defendant, before said Kemery's injury complained of, and in time to have avoided it by the exercise of ordinary care to do so, knew of his presence, and that he was then in danger from a probable collision between the defendant's trains, and that after said knowledge, if any, the said agents and employes failed to use ordinary care to prevent injury to Kemery resulting from collision, and that said Kemery was killed by reason of such failure, if any, by said servants to use such care, after and notwithstanding said knowledge, if any, then the jury should find for the plaintiff, as set out in instruction No. 1." The majority of the court are of opinion that these instructions

were not prejudicial to appellant; and, whatever opinion the members of the court may have as to the facts, they do not feel authorized to set aside the second finding by a jury.

It is also objected that the trial court permitted the rule of the company requiring freight trains following each other to keep 10 minutes apart to be read. In *Railroad Co. v. Howard's Adm'r*, 82 Ky. 215, a track trespasser was run over and killed, without knowledge by the company's agents of his presence upon the track. It was held that a rule requiring the sounding of a whistle on approaching abrupt curves and obscure highway crossings could not be read, as that rule was not for the benefit of such trespassers, and it was improper to read it to the jury. In this case, however, evidence had already been introduced by the company, upon cross-examination, showing the existence of this rule. Under these circumstances, we are not inclined to hold the introduction of the rule itself to be prejudicial error.

The introduction of certain other testimony manifestly incompetent is complained of, but the majority of the court are of opinion that it was not prejudicial to appellant's rights.

Upon the cross appeal, we are not inclined to interfere with the discretion exercised by the trial judge, under the circumstances disclosed in this case.

The judgment is affirmed upon the original and cross appeals.

PURDOM v. BRUSSELLS.¹

(Court of Appeals of Kentucky. Jan. 16, 1902.)

INSTRUCTIONS TO JURY—ABANDONED PLEADING—LANDLORD AND TENANT—SUBLETTING OF PREMISES BY TENANT—LIABILITY OF LANDLORD FOR TENANT'S BREACH OF CONTRACT.

1. It was error to base an instruction upon the averments of plaintiff's original petition, which he had abandoned by an amended petition.

2. The fact that a landlord has consented that his tenant may sublet the premises does not render him liable for a breach by the tenant of his contract, the tenant having no authority to act as his agent.

Appeal from circuit court, Marion county. "Not to be officially reported."

Action by H. M. Brussells against Cleland Purdom and others to recover damages for breach of contract. Judgment for plaintiff, and defendant Cleland Purdom appeals. Reversed.

H. P. Cooper, for appellant. J. P. Thompson, for appellee.

BURNAM, J. The appellee, H. M. Brussells, brought this suit against Cleland Purdom and O. C. Stanfield, alleging as his cause

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

of action that the defendant Purdom rented to his co-defendant, Stanfield, for the year 1898, a house, garden, orchard, blue-grass lot, of about 7 acres, and ice-house lot, of about 7 acres, to go in tobacco, and about 49 acres to go in corn, for which Stanfield was to pay \$——, and to give Purdom one-half of the corn raised thereon, and that, with the advice and consent of the defendant Purdom, he subrented the premises from Stanfield, and agreed to pay therefor \$75 in money rent for the house, garden, orchard, and blue-grass pasture, and was also to give one-half of the corn and tobacco raised thereon; that the defendant Purdom violated his contract with Stanfield, and the contract made by Stanfield with him, by refusing to allow him to cultivate the ice-house lot in tobacco, by pasturing sheep on the blue-grass lot, by wrongfully taking possession of the stubble field, and by failing to repair the roof on the dwelling house and to drain the cellar, by reason of which violations of his contract he had been damaged in the sum of \$463.60, for which he prayed judgment. The defendant Purdom filed his answer, which he made a counterclaim, in which he denied that he had rented to plaintiff any part of the premises for the year 1898, or that he had authorized Stanfield or any one else to do so for him. He further alleged that he had rented to one Purdy, for his son-in-law, O. C. Stanfield, the residence, lot, garden, barn, orchard, 7-acre lot, and 48 acres of land, to be cultivated in corn, for which Stanfield agreed to pay him on the 1st day of December, 1898, \$345 in money, and that he was to have, in addition, one-half of the corn raised on the blue-grass field, containing 15 or 18 acres, and the use of the stubble field; that, some time after he had rented the property to Purdy for Stanfield, he consented that they might sublet the property to the plaintiff, Brussels, but that he was not a party to the contract between Brussels and Stanfield and Purdy, or present when it was made, and did not know its terms; that he had only received \$99.00 as rent for the property during the year 1898, which was paid in corn fed to his hogs by the plaintiff, being part of the corn produced on the 18-acre field, of which, under his contract with Stanfield, he was to receive one-half, and asked judgment by way of cross petition against Stanfield and Purdy for \$345, subject to the credit of \$99.00 which had been paid to him in corn. He further alleged that in his contract with Stanfield he reserved the right to sow the corn land in small grain in the fall of 1898, but that plaintiff and Stanfield refused to permit him to seed the land in small grain, and that he was, in consequence, damaged in the sum of \$250, and that the plaintiff had cut and destroyed about 50 valuable walnut and cherry trees, of the value of \$100, and prayed judgment on his cross petition both against Stanfield and the plaintiff therefor. Both Brussels and Stanfield filed replies putting in issue

the averments of the answer. In October, 1899, the plaintiff filed an amended petition, in which he alleged that he had learned since the filing of his original petition that Stanfield did not rent the land spoken of from his co-defendant, Purdom, but that Purdy was authorized by Purdom to rent the premises as his agent, and that he rented the property from Purdy, as agent for Purdom, on the terms set out in his original petition, and that the contract made by him with Purdy, as agent of defendant, was subsequently ratified and approved by him. The averments of the amended petition were denied, and the defendants Purdom and O. C. Stanfield and P. S. Purdy united in a motion that the issues between them should be tried separately. This motion was sustained, and a trial before a jury resulted in a verdict for Purdom against Stanfield for the amount claimed in his counterclaim; and thereafter the defendant Purdom tendered and offered to file an amended answer setting up his judgment against Stanfield, and pleading same as a bar to the claim of appellee, which the court properly refused to allow. Purdom thereupon moved the court to require plaintiff to elect whether he would prosecute the cause of action set out in his original petition, in which he sought to recover as a subtenant of Stanfield, or that set out in the amended petition, in which he claimed to have rented the property directly from Purdom, through Purdy. The court sustained the motion, and the plaintiff, under protest, elected to prosecute the cause of action set out in his amended petition; and a trial before a jury resulted in a verdict against the defendant Purdom for \$152.30. His motion for a new trial having been overruled, he prosecutes this appeal.

The chief ground of complaint is that the trial court erred in instruction "a" given to the jury, and in refusing instructions offered by the defendant. The instruction given which is complained of is as follows: "(a) The court instructs the jury that if they believe from a preponderance of the evidence that plaintiff rented of O. C. Stanfield, through his agent, P. S. Purdy, and by and with the consent and approval of defendant Clel Purdom, a portion of the R. S. Burton farm which belonged to defendant Purdom, for the year 1898, by the terms of which renting the plaintiff was to cultivate thirty-three (33) acres in corn in the field north of the house for one-half of the corn, and plaintiff was to have the house, garden, orchard, and blue-grass lot, for which he was to pay \$75 money rent, and one-half of the corn raised on the field south of house, and one-half of the tobacco raised on the ice-house and woodpile lot, and that the defendant promised and agreed to repair the house by fixing the porch and putting a new roof on house, and that plaintiff was prevented by the defendant from cultivating the ice-house lot in tobacco, they will find for plaintiff such damages

as they may believe from the evidence, if any, the plaintiff may have sustained by being prevented from cultivating said lot in tobacco, not exceeding the amount claimed therefor in the petition. And if the jury believe from the evidence that, under the terms of said renting, plaintiff was to have the use of stalk land for pasture after the corn was gathered, and he was deprived of the use of same by defendant pasturing same with his own stock, they will find for plaintiff on said item of pasture as the jury may believe from the evidence the plaintiff has sustained, not exceeding the amount claimed in the petition; and if the jury believe from the evidence that plaintiff fed for defendant some steers, for which he agreed to pay plaintiff for the amount of corn consumed by the steers, they will find for the plaintiff on said item what they believe, from the evidence, the corn was worth; but if they believe from the evidence that plaintiff was to feed said steers for \$4.50 per hundred for all he put on them, or all they gained in weight, and that they gained nothing in weight from said feeding, the jury will find for defendant on said last-named item." Instruction "a" is erroneous for several reasons: First, it is not based upon the averments of plaintiff's amended petition, which he elected to stand on, but upon the averments of the original petition, which he abandoned; secondly, it is misleading, in that it authorizes a recovery if the jury believe that plaintiff rented the premises of Stanfield with the consent and approval of appellant. The gist of appellee's case is that Purdy and Stanfield were appellant's authorized agents to rent the premises, and whilst so acting rented the premises to him for appellant. The instruction does not present this aspect of the case at all. He may have had no objections to appellee subrenting the property from Purdy and Stanfield, and may have consented and approved such subrenting; but this does not make him responsible for their contract, unless they represented him in the transaction. The instruction is also erroneous in submitting to the jury the question whether appellant was to pay for certain corn fed to his cattle, or whether he was to pay a certain sum for additional pounds gained by them in weight, because the pleadings present no such issue.

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings not inconsistent with this opinion.

BEYER v. SCHEHR et al.¹

(Court of Appeals of Kentucky. Jan. 15, 1902.)

APPEAL AND ERROR—DISMISSAL FOR FAILURE TO FILE TRANSCRIPT IN TIME—PAROL TESTIMONY TO VARY WRITING.

1. Appellant having, after superseding the judgment appealed from, failed to file his transcript in time, and for that reason abandoned

his appeal granted by the lower court, and procured the clerk of the court of appeals to grant him a new appeal, appellees were entitled to have the abandoned appeal dismissed, with damages, the motion therefor being made before the new appeal was submitted.

2. Where a written agreement of compromise of a bastardy proceeding shows that the money paid by the father was paid to the mother, and there is nothing therein to create a trust for the child, one who now has the money cannot withhold it from the mother on the ground that he received it from the father in trust for the child, in the absence of a plea of mistake in the writing.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Barbara Schehr and another against Benjamin Beyer for money received. Judgment for plaintiffs, and defendant appeals. Affirmed.

Gibson, Marshall & Gibson and John Marshall, for appellant. Kohn, Baird & Spindle, for appellees.

WHITE, J. The questions arising in this case are two: (1) A motion to dismiss the appeal granted in the court below; and (2) on the merits of the judgment appealed from. It is clear from the record that the appeal granted below was lost by not being prosecuted within the time prescribed by law, and appellant prayed and was granted an appeal by the clerk of this court. Two supersedeas bonds were executed, one before the clerk of the lower court and one here. The motion to dismiss the first appeal was made in February, before the submission in May, 1901. There was then no waiver of appellees' rights to a dismissal. The appeal granted below is dismissed, with damages. The action on the merits was brought by appellees to recover money had and received by appellant for and on account of appellee Barbara Schehr, and which he promised and agreed to pay. Appellant, by answer, admitted receiving the money, but denied it belonged to appellee Barbara Schehr. His plea is that the sum of money was received by way of a compromise of a proceeding in bastardy instituted by Barbara Schehr against the father of her child born out of lawful wedlock; that this money was paid by the father of the child to appellant, to be held as trustee for the benefit of the child. He files with his answer a copy of the article of compromise. To this answer a demurrer was sustained, and upon his failure to plead further judgment was rendered, from which this appeal is prosecuted.

We have not been furnished with a brief on the merits of this case by either party, but from the record we conclude the answer fails to present a defense. The written agreement of compromise shows that the money was paid to appellee Barbara Schehr, and there is nothing therein to create a trust for the child. It was a sum paid in gross

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to the mother by way of compromise and settlement, in order to stop the prosecution of the bastardy case. There is no plea that the writing is untrue, or by mistake did not state the facts. This money that the instrument receipts for by appellee Barbara Schehr the appellant admits he received and still has. His answer presented no defense, and the demurrer thereto was properly sustained.

There appears no error in the judgment, and the same is affirmed, with damages.

LOUISVILLE & N. R. CO. v. HARNED.¹

(Court of Appeals of Kentucky. Dec. 19, 1901.)

CARRIERS OF LIVE STOCK—LIABILITY FOR NEGLIGENCE—BURDEN OF PROOF—EVIDENCE OF VALUE—CONTINUANCE.

1. A railroad company undertaking to transport live stock is liable for the negligence of its agents and servants, but not as insurer.

2. Where the shipper undertakes to care for the stock, and to load and unload it, the burden of proof is on him to show that any injury was the result of the carrier's negligence.

3. Where there was testimony tending to show that a racing mare, while being transported by defendant railroad company, was thrown down seven or eight times by reason of the unusual manner in which the train was handled in going around curves, the question of negligence was for the jury.

4. Courts and juries cannot disregard unimpeached and uncontradicted testimony as to the value of live stock killed or injured by the negligence of a carrier.

5. Defendant corporation was entitled to a continuance to enable it to take the deposition of a material witness in another state, where its attorney filed his affidavit stating that he had for several months made diligent inquiry to locate the witness, and had only succeeded in doing so the day before the affidavit was made; especially as plaintiff testified on the trial that he had endeavored to locate the witness, but had failed to do so, though more anxious to take his deposition than defendant was.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by M. R. Harned against the Louisville & Nashville Railroad Company to recover damages for breach of a contract for the shipment of live stock. Judgment for plaintiff, and defendant appeals. Reversed.

Lyttleton Cooke and Edward W. Hines, for appellant. Jas. C. Poston and J. P. O'Meara, for appellee.

PAYNTER, C. J. On April 7, 1897, the appellee delivered to the appellant several race horses for shipment, consigned to himself at Latonia, Ky., and among the others was a racing mare called "Pouting." The mare was delivered to the appellant at South Louisville, in a car specially constructed for the shipment of stock. While the mare was in transit, she was seriously injured, the appellee claiming that it was the result of

the carelessness and negligence of the agents and servants of appellant. The evidence for appellee tends to show that she was thrown down in the car several times, and badly crippled, and permanently injured, so much so that she is useless for racing purposes. Appellee claims that the injuries were inflicted by reason of the manner in which the train was handled. The appellant denies the mare was injured by reason of any negligence or carelessness of its agents or servants in charge of the train, but avers that she received the injuries in consequence of her viciousness, unruliness, and wildness or fright. At the time the horses were received for shipment, the appellee entered into a written contract with the appellant for their transportation, and by the terms of which the liability of appellant was attempted to be restricted in some respects. It is insisted upon behalf of appellant that the transportation of live stock on railways or by land carriers was unknown to the common law, and therefore that the shipping contract entered into between the parties was not a contract to relieve appellant from its common-law liability, and is not in violation of section 196 of the constitution. By orders the court eliminated this issue, which left alone the question as to whether the mare was injured by the carelessness or negligence of the agents and servants of the appellant. Many years before the adoption of the present constitution, this court, in *Railroad Co. v. Hedger*, 9 Bush, 645, 15 Am. Rep. 740, held that a railroad company which undertook the transportation of live stock is not liable as insurer for all loss and injury not caused by the acts of God or public enemy, as in case of other property, but that it is bound to the exercise of that degree of diligence such as a prudent and careful man would exercise in such matters, and is liable for ordinary negligence. And the court also held in that case that a carrier could not by contract relieve himself from liability for negligence of himself or agents, whether ordinary or otherwise. So this rule obtained independent of the provisions of the present constitution. The court did not think it was a reasonable rule in the shipment of live stock to hold carriers to the strict accountability for loss as in the case of inanimate property, because, owing to the wild and vicious nature of animals, they might hurt themselves or each other, and therefore it was not a just rule to make a carrier responsible for injury to them except where it was the result of a failure to exercise ordinary care. In the same case the court held that, where the owner of stock agrees to load and unload it,—as in this case,—the burden of proof is upon him to show the injury causing the loss was the result of the negligence of the carrier, its agents or servants. The appellee assumed the burden of proof. This is a reasonable rule, because the persons in charge of the

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stock should be better able to tell how injuries may have been inflicted upon it than any one else. The contract of shipment did not provide that the carrier should be released from liability for loss resulting "from the negligence of its agents or servants." It provided that the company should be relieved of certain liabilities, and in enumerating them expressly excepted loss "resulting from the negligence of the agents and servants of said party of the first part." So the court below properly took the view that there was no question in the case as to whether the company could relieve itself by contract of common-law liabilities; therefore, by proper orders, it reduced the issues to the one as to whether the injury had been inflicted by the agents or servants of the appellant.

It is insisted that there was no evidence introduced by the appellee which tended to show that the mare was injured by the negligence of appellant's agents or servants in charge of the train. He introduced two persons in charge of the horses, whose testimony tended to show that the mare "Pouting" was jerked down seven or eight times by reason of the unusual manner in which the train was handled in going around curves. They testified that the train would run at a high rate of speed, when the engineer would stop the engine too quick at the curves, which caused the cars to bump together, and thus threw the mare down. We are of the opinion that this evidence authorized the court to submit the case to the jury. The appellant introduced the engineer, George Irig, who testified that the train had 22 cars in it; that 10 or 14 of them next to the engine had air brakes; that the air brakes made it easier to handle the train; that by applying a little air the car is set "solid," and in going around a curve there is no jerk in it. He further testified, if there is anything unusual or unnecessary in the way of jerking, either in stopping or starting a train, that the engineer is responsible for it. We do not understand the witness to mean to say that jerking could not take place with air brakes if the train was improperly handled by the engineer. He testifies that there was no unusual movement of the train on the occasion in question. The witnesses for appellee testify that the jerking described took place. If their testimony is entitled to any credit, the jury was authorized to conclude that the engineer did not handle his train properly. There was other testimony offered by the appellee and appellant, but we do not deem it necessary to refer to it.

It is insisted that the case should be reversed because the verdict is excessive. Two or three witnesses for the appellee testified as to the value of the mare before and after her injury, which testimony showed that the damage the appellee sustained was greater than that fixed by the jury.

No countervailing testimony was offered. It is unreasonable to expect juries and courts to disregard uncontradicted and unimpeached testimony as to the value of stock claimed to be injured or killed by carriers.

The attorney for appellant filed his affidavit, in which he said that he had made diligent inquiry for some months to locate the whereabouts of Dr. Asa N. McQueen, a veterinary surgeon, who had treated the mare after her injury, and that he had only succeeded in finding his whereabouts the day before the affidavit was made, and upon that affidavit he moved the court to continue the case. The court overruled his motion, presumably upon the idea that the appellant had not shown diligence in ascertaining the whereabouts of McQueen. We are of the opinion that the court erred in not granting a continuance, as the testimony of McQueen was competent, and the appellant was entitled to have the jury determine what weight should be attached to it. We are of the opinion that the affidavit sufficiently showed that the appellant had used diligence to find McQueen before the trial. The appellee, on the trial of the case, said he had been endeavoring to locate him, but had failed to do so, and that he was more anxious to take his deposition than the appellant.

The judgment is reversed because the court overruled appellant's motion for a continuance.

WIEAND'S ADM'R v. STATE NAT. BANK OF MAYSVILLE.

(Court of Appeals of Kentucky. Dec. 20, 1901.)

"Not to be officially reported."

Dissenting opinion. For majority opinion, see 65 S. W. 617.

PAYNTER, C. J. In the disposition of this case the court should have followed the rule, and the deductions which necessarily followed it, enunciated in *Lester v. Given*, 8 Bush, 357, and reaffirmed in *Weinstock v. Bellwood*, 12 Bush, 130. In those cases the court held that a check is an absolute appropriation of so much money in the hands of the banker to the holder, to remain there until called for, and cannot, after notice, be withdrawn by the drawer. As between the drawer and holder of the check, the appropriation is absolute; but the law will not allow the bank to suffer, before notice that the check has been withdrawn, by the misconduct and the wrong of the drawer in beating the holder of the check to the bank. If there is an absolute appropriation of the money to the holder of the check, it logically follows that the drawer of it cannot deprive the holder of his right to the fund by notifying the bank not to pay the check. When the holder's right to the fund has attached, it is only by his consent that the drawer can again be reinvested with any right to the fund. This be-

ing true, when the drawer dies, it being necessary to have the consent of the holder of the check to reinvest the drawer with an interest in the fund, his (drawer's) death cannot reinvest his estate with a right to the fund, which in life he had voluntarily appropriated to another. The fact there were not funds enough in bank to pay the entire amount of the check did not deprive the holder of the right to have paid to him the assessment actually in bank. This court heretofore has followed the doctrine of Daniels on Negotiable Instruments, and I am of the opinion that it is the correct one.

HOBSON and BURNAM, JJ., concurring.

COMMONWEALTH v. DAVIS et al.¹

(Court of Appeals of Kentucky. Jan. 10, 1902.)

ROBBERY—TAKING OF PURSE BY FORCE—NATURE OF OFFENSE—INSTRUCTION.

Under an indictment for robbery the court should have instructed the jury as to that offense, and not merely as to the offense of petit larceny, it appearing that defendant, having seized a purse in the hand of one who resisted, overcame the resistance by force, though no blow was struck or injury inflicted.

Appeal from circuit court Jefferson county.

"Not to be officially reported."

An indictment against John Davis and Wallace Leavell was dismissed, and the commonwealth appeals. Opinion certified.

R. J. Breckinridge and S. S. Blitz, for the Commonwealth.

BURNAM, J. John Davis and Wallace Leavell were indicted for robbery. The special judge who presided at the trial of Davis held that the testimony did not warrant an instruction as to robbery, and only instructed the jury on the law of petit larceny. The commonwealth appeals for the purpose of having the court define the law of robbery as applicable to the facts of this case.

The prosecuting witness testifies that she was walking along Fourth street about 1 o'clock in the daytime; that she saw two boys in a yard of an empty house; that, after she passed beyond them, one of them slipped up behind her, grabbed a purse which she was carrying in her hand; that she resisted with all her force, but that he slipped one of his hands over her wrist, and wrenched her pocketbook out of her hand with his other hand; that it contained \$10, and that the boy ran off with it, she pursuing. The gravamen of the crime of robbery consists in taking the personal property of another from his person or in his presence and against his will by violence to his person or by putting such person in fear of some immediate injury to his person. See 2 East, P. C. 559. It is not so much the extent

and degree of violence which makes the crime as the success thereof. Any force which is sufficient to take the property against the owner's will is all that is necessary to make up the crime of robbery. Larceny, on the other hand, is accomplished secretly, or by surprise or fraud. In the case of Com. v. Prewitt, 82 Ky. 240, Judge Hines said that, "As our statute does not define either robbery or larceny, for their meaning we must have recourse to the common law," and adopted the definition of robbery given by Blackstone (4 Bl. Comm. 241), where robbery is defined to be "the felonious and forcible taking from the person of another of goods or money of any value by violence or by putting him in fear." The offense is also defined in Breckinridge v. Com., 97 Ky. 267, 30 S. W. 634. In that case the court adopts the definition of robbery given by Lord Mansfield in Donally's Case, 2 East, P. C. 725, and which is also quoted by Greenleaf, in his work on Evidence (volume 3, § 283), with approval. The question was also fully considered by this court in the case of Williams v. Com., 50 S. W. 240. In that case it was held that a person who seized a purse in the hand of a lady, who resisted, was guilty of robbery; that it was not necessary that a blow should be struck, or the party injured. All that was necessary to constitute the offense was that the robber should overcome resistance by force. The court below therefore erred in not instructing the jury, under the testimony in this case, as to the offense of robbery.

LOUISVILLE & N. R. CO. v. JORDAN.¹

(Court of Appeals of Kentucky. Jan. 14, 1902.)

CARRIERS—AGREEMENT OF CONDUCTOR TO PUT INFANT PASSENGER OFF AT DESTINATION—LIABILITY FOR PERMITTING TO LEAVE TRAIN BEFORE REACHING DESTINATION—AMENDMENT OF PETITION—EXCESSIVE VERDICT—APPEARANCE.

1. The promise of a conductor to put off at her destination a passenger eight years of age did not make it his duty to act as her special attendant, to see that she did not leave her seat, and therefore the mere fact that one who was not identified as the conductor assisted her from train before she reached her station does not render the carrier liable.

2. As the original petition relied for recovery solely upon the ground that defendant forcibly ejected plaintiff from its train, and her testimony was to that effect, it was error, after the evidence was all in, to permit the filing of an amendment alleging that defendant had negligently permitted her to get off the train, especially as there was no evidence on which to base the amendment, and, if there had been, it would not have supported a claim for damages.

3. A verdict for \$250 was grossly excessive, as plaintiff was detained only a few hours, during which time she was at the home of the station policeman, where she played with his children, and therefore could not have suffered great mental distress.

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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4. Defendant corporation, by prosecuting an appeal, entered its appearance, so that, on the return of the case to the trial court, that court will have jurisdiction of defendant's person, even though defendant's objection to the jurisdiction on the former hearing should have been sustained.

Appeal from circuit court, Hopkins county. "To be officially reported."

Action by Mattie Jordan, by next friend, against the Louisville & Nashville Railroad Company, to recover damages for the ejection of plaintiff from one of defendant's trains. Judgment for plaintiff, and defendant appeals. Reversed.

H. W. Bruce, Gordon & Gordon, and Edward W. Hines, for appellant. W. J. Cox, C. J. Pratt, and C. J. Waddill, for appellee.

BURNAM, J. This action was brought in the Hopkins circuit court by Mattie Jordan, an infant eight years of age, by next friend, against the Louisville & Nashville Railroad Company. She alleged that she took passage on one of the defendant's trains at Mortons Gap, a station in Hopkins county, for Nashville, Tenn., placing herself under the special care of the conductor, and that when the train arrived at Hopkinsville, Ky., the defendant, through the gross negligence of its servants in charge of the train, "wrongfully, forcibly, and in violation of her rights as a passenger, put her off of the train at Hopkinsville," where she was detained for several hours, awaiting the arrival of the next passenger train for Nashville, and that she did not arrive at the point of her destination until about 2 o'clock at night,—several hours after the time when she would have arrived if she had been carried through on the train on which she took passage,—and that by reason thereof she had suffered great mental and physical pain and anguish, and prayed judgment for \$1,500. The defendant, by its answer, alleges that the mother of plaintiff resided in Nashville, Tenn., and that plaintiff resided with her, and that by reason thereof the Hopkins circuit court had no jurisdiction of appellee's alleged cause of action. It further denied that it put plaintiff off its train, either forcibly or otherwise. A trial upon the issues resulted in a verdict for appellee for \$250.

Appellant moved for a new trial upon several grounds: First, because Thomas Warren, the next friend in whose name the suit was instituted, was permitted to testify that when he purchased the ticket at Mortons Gap he informed the local ticket agent that plaintiff was a small child, and asked him if there would be any danger of sending her by herself, and that he answered, "No," and informed him to "put her on the train, and tell the conductor where to put her off at, and that she would get there all right," and that he told him, so as to avoid any mistake, to write on the ticket the name "Links" (this being the station in Nashville where she wished to get off), and that when the

train came in he put plaintiff on, and told the conductor to put her off at Links, and that he said, "All right." Another ground relied on for a new trial is that the court erred in allowing the plaintiff, at the conclusion of the testimony, to file an amended petition in which it was alleged that the defendant, at the time and place mentioned in the original petition, and under the circumstances therein stated, negligently put her off the train at Hopkinsville, "and negligently suffered and permitted her to get off the train at that place," and that the court instructed the jury that if plaintiff's servants in charge of the train put plaintiff off, or negligently suffered her to get off, the train at Hopkinsville, they should find for plaintiff. And they further complained that the damages allowed by the jury were excessive, and given under the influence of passion and prejudice. The motion embraced, in addition to the grounds recited, several others, which we do not deem it important to consider.

The facts developed by the testimony are, in substance, that the mother of appellee, Mattie Jordan, was a widow residing in Nashville, Tenn.; that some time in July she sent Mattie to the home of Thomas Warren, who had married her older sister, and resided in Hopkins county, to live with them and assist in taking care of their baby; that, after residing with her sister for about two months, her mother wrote to Mrs. Warren to send her home; that, in conformity with the request, Warren bought her a ticket and put her upon the regular passenger train for Nashville, which left Mortons Gap at about half past 4 o'clock in the afternoon on the 16th of September; that he called the attention of the conductor of the train to her, and requested that he should see that she was put off at Links Hotel, a station in Nashville; and that the conductor assigned her to a seat, and promised to put her off at the station indicated. The plaintiff, in response to the question as to how she came to stop at Hopkinsville, responded "that the conductor, who wore a blue suit of clothes, put her off, and also took off her basket, containing the clothes which she was carrying"; but she failed to identify the conductor, when her attention was called to him, as the man who put her off at Hopkinsville, and testified on cross-examination that her sister had told her to say that she had been put off the train by a man who wore blue clothes. Her testimony is hazy and unsatisfactory throughout. The conductor testifies that Warren brought the plaintiff on the train when he arrived at Mortons Gap, and told him that he wanted her put off at Links station, in Nashville; that soon after leaving Hopkinsville he discovered that she was not on the train, and that he stopped the train at the first station, and sent a telegram to the agent at Hopkinsville, asking him to take care of plaintiff and send her to Nashville on the next train, and that he

received a message from the depot agent that he would do so; that when the train arrived at Hopkinsville a number of people got off, among whom were several children, but that he did not notice that plaintiff was one of them; that he did not promise to take any charge of plaintiff, except to see that she was put off at Links station, in Nashville; and that he assigned her to a seat, and told her to sit there until they arrived at Nashville. It further appears that appellee was put in charge of the station policeman during her stay in Hopkinsville; that he took her to his residence, near the depot, and gave her her supper; and that she played with his children some three or four hours, until the arrival of the next train, which took her to her destination. Beyond the inconvenience and annoyance of the delay, it appears that no harm occurred to the plaintiff. There is nothing in the testimony which conduces to show that there was any understanding or agreement, either with the ticket agent or the conductor, that plaintiff should receive any special attention or care whilst on the train. Neither of them were informed by Warren that plaintiff did not have sufficient intelligence to occupy her seat during the journey. All that was asked by Warren, or promised by the conductor, was that he would see that appellee was put off at Links station after the arrival of the train at Nashville. This was important, because there were two stations at Nashville and the friends of appellee expected to meet her at Links station. The law required of appellant that it should exercise the highest degree of care to safely transport appellee to her point of destination. But this duty did not require that appellant's conductor should act as a special attendant to the plaintiff during the journey, to see that she did not leave her seat. He had a right to presume that the friends and relations of appellee would not have consented to her going alone upon such a journey unless she was possessed of sufficient intelligence to obey the instructions given her to occupy her seat until her destination was reached. His duty was to see after the comfort and safety of the passengers generally, and not one in particular. See *Sevier v. Railroad Co.*, 61 Miss. 8, 48 Am. Rep. 74; *Railroad Co. v. Kendrick* (Tex. Civ. App.) 32 S. W. 42; *Nunn v. Railroad*, 71 Ga. 710, 51 Am. Rep. 284; *Gage v. Railroad Co.* (Miss.) 21 South. 657.

The original petition relied for recovery solely upon the ground that the defendant had forcibly ejected her from its train, and her testimony was to this effect; and it was error, after the evidence was all in, to permit an amendment alleging that the defendant had negligently permitted her to get off the train. There was no testimony on which to base such an amendment, and, if there had been, it would not have supported a claim for damages against the defendant.

And the verdict for \$250 was grossly excessive, in any aspect of the case. No harm came to the plaintiff. She was only detained on the journey for a few hours, and the mental distress incident thereto in a child of that age was not great, and was certainly much lessened by the fact that during her enforced stay in Hopkinsville she enjoyed the society of children of her own age in the hospitable home of the station policeman.

We deem it unnecessary to decide the question of jurisdiction relied on, as, under former rulings of this court, there can be no doubt that, upon the return of the case to the lower court, it now has jurisdiction to determine the issues raised by the pleadings.

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

COMMONWEALTH v. ROWE.¹

(Court of Appeals of Kentucky. Jan. 14, 1902.)

MALFEASANCE IN OFFICE—IMPEACHMENT NOT CONDITION PRECEDENT TO INDICTMENT—ELECTION BETWEEN COMMON-LAW AND STATUTORY OFFENSE—PUNISHMENT LIMITED TO THAT PRESCRIBED BY STATUTE.

1. Under Const. § 68, providing that "the governor and all civil officers shall be liable to impeachment for any misdemeanors in office; but judgment in such cases shall not extend further than removal from office and disqualification to hold any office of honor, trust or profit under this commonwealth; but the party convicted shall nevertheless be subject and liable to indictment, trial and punishment by law,"—impeachment of a commonwealth's attorney is not a condition precedent to his indictment for malfeasance in office and punishment thereunder.

2. A commonwealth's attorney, who takes a bribe to dismiss an indictment, may, at the option of the commonwealth, be indicted either for the common-law offense of malfeasance in office, or under Ky. St. § 1366, for the offense of taking a bribe; but, though the common-law offense be charged, the punishment is limited to the mode prescribed in the statute, every fact stated in the indictment being included in the statutory offense.

Appeal from circuit court, Daviess county.
"To be officially reported."

An indictment against J. Edwin Rowe for malfeasance in office was dismissed, and the commonwealth appeals. Reversed.

La Vega Clements and Robt. J. Breckinridge, for the Commonwealth.

HOBSON, J. Appellee was indicted in the Daviess circuit court for malfeasance in office. The court sustained a demurrer to the indictment and the commonwealth has appealed.

It was charged in the indictment that appellee, while commonwealth's attorney for

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the Sixth judicial district, corruptly entered into an arrangement with William Powell and Forest Hiter, who were indicted in the Daviess circuit court for the offense of suffering gaming on their premises, by which they paid him \$50, and he, in consideration of that sum, agreed to dismiss and did dismiss the indictment against them. The ground upon which the demurrer was sustained is that under the constitution a commonwealth's attorney cannot be indicted for malfeasance in office until impeachment and conviction thereon. Section 68 of the constitution is as follows: "The governor and all civil officers shall be liable to impeachment for any misdemeanors in office; but judgment in such cases shall not extend further than removal from office and disqualification to hold any office of honor, trust or profit under this commonwealth; but the party convicted shall nevertheless be subject and liable to indictment, trial and punishment by law." It is said that by the terms of the constitution the only person who is subject and liable to indictment, trial, and punishment by law is the party convicted. If this is true, the higher officers of the state can only be punished for malfeasance in office after impeachment. The purpose of the impeachment proceeding is to remove the delinquent from office, and it cannot be believed that the framers of the constitution seriously contemplated that those whose duty it is to enforce the laws of the state might defy them with immunity from punishment until they were removed from office. Other offenders against the criminal law have no such immunity. By section 3749, Ky. St., any officer of the state who is in a state of intoxication while in the discharge of his official duties, or is disqualified to discharge them by the use of spirituous, vinous, or malt liquors, shall be fined not less than \$100 nor more than \$1,000. By section 1360 it is provided that if a commonwealth's attorney receives or agrees to receive any money or other thing from any person prosecuted for or supposed to be guilty of violating any of the penal laws in consideration that he is not to prosecute such offender, or to dismiss an indictment, he shall be fined not less than the amount imposed upon the offense compounded, or imprisoned 90 days, or both. By section 1366 provision is made for the punishment of legislative and executive officers guilty of bribery. By section 1371 any judge of a court shall be fined not less than \$100 nor more than \$1,000 if he refuses to give place to a special judge, or if he uses or borrows any money under the control of the court of which he is judge or of any officer of the court. There are a number of other statutory provisions which were in force many years before the adoption of the present constitution. Section 68, above quoted, is taken verbatim from article 5, § 3, of the previous constitution, and was copied in that instrument from the constitution adopted in 1799, which also took it from the

first constitution of the state, adopted in 1792. It is therefore clear that the provision has never been understood to protect state officers from criminal punishment until impeachment and removal from office. *Com. v. Thomas*, 9 Ky. Law Rep. 289. Nor does the language of the provision require any such construction. The subject of the section is impeachment and removal from office. It has always been provided in the constitution of the state that one could not be twice put in jeopardy for the same offense. So, after providing in section 68 for impeachment of these officers, to prevent the impeachment proceedings from protecting the offender from criminal punishment the concluding words were added: "But the party convicted shall nevertheless be subject and liable to indictment, trial and punishment by law." The word "nevertheless," being equivalent to "notwithstanding," was inserted in the section to show that the meaning of this clause is that, notwithstanding the impeachment proceedings, the party convicted should be liable to indictment and punishment by law. The commonwealth's attorney is the representative of the state in all criminal prosecutions in his district. To a large extent he holds in his hands the administration of the criminal laws. If he may compound crime, allow the thief and murderer to go unpunished, then the administration of justice may be stifled until the legislature meets in its biennial session of 60 days. The tardy remedy by impeachment is wholly inadequate. It has always been the policy of the law to deal summarily with such offenses, and we see nothing in the constitution in conflict with this wise policy.

It is suggested that section 227 of the constitution by implication sustains this conclusion. That section is as follows: "Judges of the county court, justices of the peace, sheriffs, coroners, surveyors, jailers, assessors, county attorneys and constables shall be subject to indictment or prosecution for malfeasance or misfeasance in office, or willful neglect in discharge of official duties, in such mode as may be prescribed by law; and upon conviction his office shall become vacant, but such officer shall have the right of appeal to the court of appeals." The purpose of this section was not to provide that only the officers named should be subject to indictment for malfeasance or misfeasance in office, but to provide another and speedier way of removing from office these county officers, and to avoid as to them the necessity of impeachment proceedings. It cannot be held that, if a constable or sheriff is guilty of corruption in office, he may be indicted and punished; but that if the circuit judge or commonwealth's attorney assist him in the commission of the offense, he may not be punished until impeachment. For these reasons we are of opinion that there is nothing in the constitution to invalidate the indictment.

Sections 1360, 1366, Ky. St., provide: "It

shall not be lawful for any commonwealth's attorney or attorney prosecuting for the commonwealth, to receive or agree to receive directly or indirectly, any money or other thing from any other person or from any person prosecuted for or supposed to be guilty of violating any of the penal laws, in consideration not to prosecute such offender or not to prosecute him for more than one violation of any penal law or in any other way to waive or fail to make a prosecution under any penal law or to dismiss an indictment or enter a nolle prosequi, so as to enable the offender to escape or avoid the full penalty of the law. And if a commonwealth's attorney or an attorney prosecuting for the commonwealth shall violate any of the provisions of this section, he shall be fined not less than the amount imposed upon the offense compounded or agreed, or imprisoned ninety days, or both." Section 1360. "If a member of the general assembly, or if any executive or municipal officer, shall take or agree to take any bribe to do or omit to do any act in his official capacity, he shall forfeit his office, and be fined in a sum not less than two hundred nor more than one thousand dollars, and moreover, be disqualified from holding any office of trust or profit, and from the right of suffrage for ten years." Section 1366. This section is pursuant to section 150 of the constitution: "All persons shall be excluded from office who have been, or shall hereafter be, convicted of a felony, or of such high misdemeanor as may be prescribed by law, but such disability may be removed by pardon of the governor." The indictment is for the common-law offense of malfeasance in office, but the facts charged are those which may be punished under sections 1360 and 1366. The question, therefore, arises, can the defendant be proceeded against for the common-law offense, when, by statute, a different penalty has been imposed for the acts constituting it? In 1 Bish. Cr. Proc. § 569, the rule is thus stated: "If a statute makes an offense of what was such at common law, the punishment may be statutory or not, at the pleader's option." In his work on Statutory Crimes (section 164) the same learned author says: "It is everyday practice in criminal courts to proceed against a defendant either under the statute or at the common law as the prosecuting power elects. Even where an indictment is meant to be drawn on a statute, if it proves defective as such, yet is good at common law, it stands; the court rejecting the concluding words, 'against the form of the statute,' as surplusage." In *State v. Wilkinson*, 2 Vt. 480, 21 Am. Dec. 535, which was a common-law indictment for obstructing a highway, where a statute had provided a penalty for the offense, the court, upholding the indictment, said: "If the locus in quo is a highway, it is a right of franchise belonging to the people, and an indictment will lie for any obstruction of it. It is a clear principle of

the common law that every unauthorized obstruction of a highway is an indictable offense. In the case of *Rex v. Russell*, 6 East, 427, which was an indictment for a nuisance in a public street and highway by obstructing the same, the court said that the primary object of the street was for the free passage of the public, and anything which impeded that free passage without necessity was a nuisance. The provision in the statute which imposes a fine not exceeding seven dollars for placing any obstruction in the highway, to be recovered by a complaint made to a justice of the peace, if applicable to this case, is merely cumulative, and does not take away the remedy by indictment at common law. It is true, as was resolved in *Castle's Case*, Cro. Jac. 644, that when a statute appoints a penalty for the doing of anything which was no offense before, and appoints how it shall be recovered, it shall be punished by that means, and not by indictment; but it is otherwise if the doing of the thing was an offense at common law, and punishable before the making of the statute. The rule of distinction is very fully and clearly stated in the case of *Rex v. Robinson*, 2 Burrows, 799. It is there laid down by Lord Mansfield that, where a statute creates a new offense by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other; but where the offense was antecedently punishable by a common-law proceeding, there either method may be pursued, and the prosecutor is at liberty to proceed either by indictment at common law or in the method prescribed by the statute, because there the sanction is cumulative, and does not exclude the common-law punishment." On this point the authorities seem uniform. Section 1127, Ky. St., provides: "Offenses are either felonies or misdemeanors. Such offenses as are punishable with death or confinement in the penitentiary are felonies. All other offenses, whether at common law or made so by statute, are misdemeanors. * * * A common law offense for which punishment is prescribed shall be punished only in the mode so prescribed." We therefore conclude that, although the defendant may, at the option of the commonwealth, be indicted for the common-law offense or under section 1366, yet, as every fact stated in the indictment is included in the statutory offense, the punishment is limited to the mode prescribed in section 1366. Where the common-law offense embraces elements not contained in the statute, or vice versa, the rule is different. Thus a charge of nuisance may embrace more than a charge of obstructing a highway, although committed by such an obstruction.

Judgment reversed, and cause remanded, with directions to overrule the demurrer to

the indictment, and for further proceedings consistent with this opinion. Whole court, except GUFFY, C. J., sitting.

**BROADWAY CHRISTIAN CHURCH v.
COMMONWEALTH et al.¹
TRUSTEES OF BROADWAY CHRISTIAN
CHURCH v. GROSS.**

(Court of Appeals of Kentucky. Jan. 8, 1902.)
TAXATION—EXEMPTION OF CHURCH PARSONAGE—COLLECTION OF TAXES BY GARNISHMENT.

1. Under Const. § 170, exempting from taxation "places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship," and "all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion," a church parsonage which is not occupied by the minister, but is rented to another, is not exempt, though erected on the church lot, and though the rent is paid to the minister.

2. Under Ky. St. § 4184, authorizing the sheriff to institute a garnishment proceeding for the collection of taxes if he "believes he cannot otherwise collect the tax," it will be presumed, in support of such a proceeding, that the sheriff did so believe, where the taxes were past due, and the taxpayer was denying liability.

Appeals from circuit court, Fayette county.
"To be officially reported."

Action by the commonwealth against the Broadway Christian Church to recover taxes, consolidated with an action by the trustees of the Broadway Christian Church against E. T. Gross to enjoin the collection of taxes. Judgment for plaintiff in the former action, and for defendant in the latter action, and the Broadway Christian Church and the trustees of that church appeal. Affirmed.

Morton & Darnall, for appellants. J. D. & G. R. Hunt, for appellees.

HOBSON, J. The Broadway Christian Church, of Lexington, Ky., owns a lot in that city, not exceeding one-half acre in quantity, on which is erected a house for religious worship, and also a parsonage. The parsonage was not occupied by the minister, but was rented out. The minister owned another house in Lexington, in which he resided; and, by an arrangement between him and the trustees of the church, the parsonage was rented out, and the rent paid to him. The parsonage was assessed for taxation while it was thus used. The sheriff, who had the taxes in his hands for collection, began the first of these actions by a proceeding under section 4184, Ky. St., garnishing the tenant of the property and the treasurer of the church. Thereupon the trustees of the church filed the second action, enjoining the sheriff from collecting the taxes on the ground that the property was exempt from taxation. The circuit court held that the

property was not exempt, and the church has appealed.

By section 174 of the constitution, all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless specifically exempted. Exemptions from taxation are regulated by section 170, which is as follows: "There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family, not exceeding two hundred and fifty dollars in value; crops grown in the year in which the assessment is made and in the hands of the producer; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The general assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location." It is insisted for the church that the parsonage is exempt under this section, on two grounds: First, places actually used for religious worship, with the grounds attached thereto, and appurtenant to the house of worship, not exceeding one-half acre in cities and towns, are not to be taxed; second, all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, are exempt.

1. The first ground has been often passed upon by the courts under provisions substantially the same as that quoted. The use of the property, and not the ownership, determines the question of exemption. *Vail v. Beach*, 10 Kan. 214. Business houses erected on the church lot and rented out are not exempt. *Orr v. Baker*, 4 Ind. 86. Parsonages are not exempt, although erected on a portion of the church lot which would otherwise be exempt, and occupied by the minister free of rent, if the language of the exemption only includes places actually used for religious worship, with the grounds attached thereto, and appurtenant to the house

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

of worship. Methodist Episcopal Church v. Ellis, 38 Ind. 3; St. Mark's Church v. City of Brunswick, 78 Ga. 541, 3 S. E. 561; St. Peter's Church v. Scott Co. Com'rs, 12 Minn. 395 (GIL 280); Hennepin Co. v. Grace, 27 Minn. 503, 8 N. W. 761; First Presbyterian Church v. City of New Orleans, 30 La. Ann. 259, 31 Am. Rep. 225; State v. Axtell, 41 N. J. Law 119; Gerke v. Purcell, 25 Ohio St. 248; Ramsey Co. v. Church of Good Shepherd (Minn.) 47 N. W. 783, 11 L. R. A. 175; St. Joseph's Church v. Assessors of Taxes, 12 R. I. 19, 34 Am. Rep. 597. The authorities on this point seem to be unanimous. The taxation of all property is just. Exemption from taxation must not be enlarged by construction, for the presumption is that the state has exempted, in terms, all the property it intended should escape taxation. City of Louisville v. Board of Trade, 90 Ky. 414, 14 S. W. 408, 9 L. R. A. 629; Kilgus v. Orphanage of Good Shepherd, 94 Ky. 444, 22 S. W. 750; Cooley, Tax'n, 205. Under this rule a church parsonage cannot be included under an exemption of "places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship." It remains, therefore, to determine whether the parsonage in question is exempt upon the second ground.

2. The parsonage, for years after it was constructed, was used as a residence by the minister, but has not been used by the present pastor, for the reason that he preferred to live elsewhere. It has, therefore, been rented out for \$37.50 a month, and the question is whether the property while it is so rented is included by the exemption of "all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion." The property is not occupied as a home by the minister. It cannot be said that it is used for no other purpose, for it is in fact rented out for gain. If this parsonage, while it is so rented out, is exempt on the ground that the minister does not care to live in it, and that he prefers to receive the rent, rather than the use of the property, the same rule would apply if the minister was not a housekeeper, or if he did not reside in the state at all, or if the church had no minister, and desired to rent out the house for the benefit of the future pastor that it might thereafter employ. When the framers of the constitution undertook to define in exact terms what should be exempt, we are not at liberty to add to the terms which they selected with so much care and precision. They saw fit to exempt only parsonages occupied as a home, and for no other purpose, by the minister of any religion; and, if we depart from the narrow limits of exemption which they have set, we in so far destroy that equality of taxation which they so laboriously aimed to attain. We therefore conclude that the

learned circuit judge properly held the parsonage, while thus rented out, subject to taxation.

It is insisted that under section 4184, Ky. St., the sheriff is only authorized to institute the proceeding if he "believes he cannot otherwise collect the tax." There is nothing in this case to show that the sheriff did not so believe. The presumption is that the officer did his duty. The taxes were past due. The taxpayer was denying liability, and we do not see that the officer had not just grounds for proceeding by garnishment. Judgment affirmed.

OWSLEY v. BANK OF CUMBERLAND.¹

(Court of Appeals of Kentucky. Jan. 14, 1902.)
BANKS—INDIVIDUAL DEPOSIT—PARTNERSHIP
DEBT TO BANK—SET-OFF.

A bank may apply a deposit to the payment of a debt which it holds against a firm of which the depositor is a member, or may, when sued for the deposit, plead the firm debt as a set-off.

Appeal from circuit court, Cumberland county.

"Not to be officially reported."

Action by W. F. Owsley against the Bank of Cumberland to recover a deposit. Judgment for defendant, and plaintiff appeals. Affirmed.

Carroll & Carroll, for appellant. J. O. Ewing, Allen & Ewing, and Sandidge & Sandidge, for appellee.

BURNAM, J. This suit was instituted by appellant, W. F. Owsley, against the appellee, the Bank of Cumberland, to recover a balance of \$3,975.09,—a deposit alleged to be due him from appellee. He says that he had on deposit with appellee to his individual credit on the 3d day of May, 1899, \$10,254.97; that on that day appellee paid to him \$6,279.88, leaving due to him a balance of \$3,975.09, which it failed and refused to pay to him. The bank answered plaintiff's petition in three separate paragraphs. In the first it admits that plaintiff had on deposit with it to his individual credit the amount claimed; but it alleges that on the 3d day of May, 1899, it paid to him upon demand \$6,279.88, and on the same day it paid to him \$3,975.09,—being the full amount of his deposit,—and that he accepted the payments in satisfaction and settlement of the amount due him. In the second paragraph it alleges that appellant and his son, W. F. Owsley, Jr., were running a large stock farm as partners under the firm name of W. F. Owsley & Son, and that the firm kept an account as depositors with the bank; and that on the 3d day of May, 1899, the account of the firm with appellee was overdrawn to the amount of \$3,975.09; and that on that day it transferred that amount of the funds of appellant

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

on deposit with it to his individual credit to the credit of the firm, and charged appellant's account with the amount so appropriated, and had in this way settled the alleged balance due appellant from it. In its third paragraph it pleads that in the event the court should be of the opinion that it had no right, under the law, to transfer the \$3,975.09 of appellant's individual funds on deposit with it to the payment of the amount due by the firm of W. F. Owsley & Son, as set forth in the second paragraph, it then pleads the amount of the firm's indebtedness to it as a set-off against the demand sued for. Appellant filed a general demurrer to the entire answer, and to each paragraph thereof, which the court overruled; and appellant refusing to plead further, and electing to stand by his demurrer, the court rendered judgment dismissing his petition. The only question before the court on this appeal is the right of the bank to set off against the individual demand the debt due to it by a partnership.

It is a well-settled rule of pleading under the common law that an individual demand cannot be set off against a joint demand, nor a joint demand against an individual demand; and this rule prevailed in this state before the adoption of the Code of Practice, and still prevails in those states of the Union where common-law pleading still prevails. But this system of pleading has been long since abolished by the adoption of the Code of Practice. Section 26 of the Civil Code is as follows: "Persons severally liable upon the same contract, and parties to bills of exchange, to promissory notes placed upon the footing of bills of exchange, or to common orders and checks, the sureties on the same or separate instruments may all, or any of them or the representative of such as may have died be included in the same action at the plaintiff's option." And section 27 of the Civil Code provides: "If two or more persons be jointly bound by contract, an action thereon may be brought against all or any of them at plaintiff's option. If any of the persons so bound be dead, the action may be brought against all or any of the survivors with the representatives of all or any of the decedents or against the latter or any of them. If all the persons so bound be dead the action may be brought against the representative of all or any of them. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others." Under these provisions of the Code, appellee could have sued appellant alone for the overdraft due it by the firm of which he was a member, if it had so elected; and it necessarily follows that, when it was sued by him to recover an individual demand, it could plead by way of set-off to his demand the indebtedness of the firm of which he was a member. See *Waits v. McClure*, 73 Ky. 764, and *Williams v. Rogers*, 77 Ky. 776. It also had the right to appropriate his funds on deposit with it to

the payment of any indebtedness due to it by him, whether as an individual or as a member of a partnership. See *Pursfull v. Banking Co.*, 97 Ky. 154, 30 S. W. 203, 53 Am. St. Rep. 409. We are of the opinion that each paragraph of appellee's answer set out a good defense to plaintiff's petition, and that the lower court properly overruled the demurrer.

Judgment affirmed.

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LOUISVILLE & N. R. CO. v. BIDDELL.¹
(Court of Appeals of Kentucky. Jan. 15, 1902.)

RAILROADS—VENDOR AND PURCHASER—LIABILITY OF PURCHASER FOR TORTS OF VENDOR—STATUTE OF LIMITATIONS.

1. Where a railroad corporation, after acquiring all the stock of another railroad corporation, accepted a transfer of all the latter's property, subject to its bonded indebtedness and all "other indebtedness," without affecting the rights of "creditors" therein, the purchaser became liable for the torts of the vendor theretofore committed, as the word "indebtedness" should be construed in its broadest sense, as including claims for unliquidated damages, and not merely contractual liabilities, and the word "creditors" as including all persons holding claims against the grantor.

2. As the liability of the purchaser for a tort of the vendor could not be enforced until a judgment therefor had been rendered against the vendor, the statute of limitations did not begin to run in favor of the purchaser until such a judgment had been rendered.

Appeal from circuit court, Harrison county.

"To be officially reported."

Action by Maggie Biddell against the Louisville & Nashville Railroad Company to enforce a judgment. Judgment for plaintiff, and defendant appeals. Affirmed.

Blanton & Berry and E. W. Hines, for appellant. W. S. Oason, for appellee.

O'REAR, J. Appellee was injured while a passenger on the Kentucky Central Railway Company's train on September 20, 1891. Two days later, or on September 22d, the Kentucky Central Railway Company conveyed all of its property to the Louisville & Nashville Railroad Company. A few weeks after this, appellee filed suit against the Kentucky Central Railway Company, and recovered a judgment, which was finally affirmed by this court. 34 S. W. 904. She then filed this suit against the Louisville & Nashville Railroad Company to compel it to pay the judgment, after her execution against the Kentucky Central Railway Company had been returned, "No property found." The court below adjudged her the relief sought, and the railroad company has appealed.

The deed made by the Kentucky Central to appellant recited a consideration of \$10, and the other considerations in the deed

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

named, which other considerations are found in the following clause: "The railroad company now owns the entire capital stock of the railway company, and this conveyance and transfer is made subject to all the bonded indebtedness and other indebtedness of the said railway company and the said other companies, without in any manner affecting the same, or the rights of the creditors therein, which said railroad and property hereby conveyed are to be operated as required by the laws of the state of Kentucky. In witness whereof, the parties hereto subscribe their respective names, and have caused their corporate seals to be hereto affixed by their duly-authorized officers, this date aforesaid." A deed similar to this was under consideration by this court in the case of Railroad Co. v. Griest, 85 Ky. 619, 4 S. W. 323. There the vendee, dealing at arm's length with the vendor, bought and paid for the property of the old company, and paid what was an adequate consideration therefor. The court held that this money so paid was a fund out of which the person suing the old company for the tort was entitled to have his claim paid, and, if it had been distributed to the stockholders, he could pursue it. In this case the appellant became the owner of the entire capital stock of its vendor, the Kentucky Central Railway Company, before the execution of the deed to it. It appears from the allegations of the answer that it was on the same day on which the deed was executed. But as the deed recites that the Louisville & Nashville Railroad Company was the owner of the entire capital stock of its vendor, the Kentucky Central Railway Company, we must assume that it had acquired such interest in the stock before the execution of the deed. Thereupon it caused the execution of the deed in this case for the nominal consideration of \$10, assuming or at least taking the property subject to the bonded or other indebtedness of the vendor company. This was equivalent to an absorption of one corporation by another. "Where one corporation goes entirely out of existence, by being annexed to or merged into another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the surviving corporation will be entitled to all the property, and answerable for all the liabilities of the other. The liabilities of the old corporation are enforceable against the new one in the same way as if no change had been made." *Thomp. Corp.* § 372. "The intention of the parties to a bona fide transaction is, of course, to control. Where terms used have a doubtful meaning, or more than one meaning, then the court must look to the surroundings for aid in giving them proper construction. Therefore, in the use of the terms "indebtedness" and "creditor," as used in this deed, we must presume that the parties used them in their broadest

sense, as intending to embrace such obligations as might be legally imposed upon the obligee by the law, without reference to their more restricted meaning. Otherwise the narrow construction of "debts" (that is to say, that the word included only contractual liabilities) would have been to defeat the legal effect of this absorption, and to have perpetrated a wrong upon appellee. In the absence of an express averment to that effect, the court cannot presume that such was the intention of the parties. We therefore conclude that "debt," as used in this conveyance, under the circumstances of this case, meant all liabilities of the grantor, and the clause that "it shall in no wise affect the rights of the creditors" meant the rights of such persons as held claims or demands against the grantor. In view of the fact that there were no stockholders except the grantee at the time of this conveyance into whose hands purchase money could be pursued, and as the grantor was thereby divesting itself of every character of property and assets out of which the debt could be made, any other construction would be equivalent to convicting the parties of a fraud.

The statute of limitations cannot avail in this case, because in the case of Railroad Co. v. Griest, *supra*, we expressly held that before the person suing the old company for the tort could maintain his action against a vendee company, in any event, he would first be compelled to reduce his claim to a judgment against the old company. This course was followed exactly in this case.

The judgment must be affirmed.

MANHATTAN LIFE INS. CO. v. BEARD.¹

(Court of Appeals of Kentucky. Jan. 9, 1902.)

LIFE INSURANCE—PROVISION AGAINST SUICIDE WHILE SANE OR INSANE.

1. Under a policy providing that it shall be void if the insured "die by his own act, sane or insane," there can be no recovery if insured took his life when he had mind enough to know that the act by which he did so would probably result in his death, and he committed it with the intention that it should do so, though he may not from mental derangement have known that his act was wrong, and may not have had the will power to resist the insane impulse, and it was therefore error to instruct the jury that before they could find for defendant they must believe that insured "possessed sufficient will power at the time to refrain from taking his own life."

2. Under Civ. Code Prac. § 606, subsec. 1, providing that "neither a husband nor a wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage," the widow of insured was not competent to testify as to conversations between her and her deceased husband, or as to the contents of letters from one to the other, nor was she competent under Id. subsec. 2, to testify in her own behalf as bene-

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

fiary under the policy as to acts done by, or transactions with, decedent.

3. A medical expert, who had not seen the dead body of insured, and had not attended him in his last sickness, was not competent to express his opinion as to whether death was the result of accident or design.

Appeal from circuit court, McCracken county.

"To be officially reported."

Action by Jennie E. Beard against the Manhattan Life Insurance Company on a policy of life insurance. Judgment for plaintiff, and defendant appeals. Reversed.

Humphrey, Burnett & Humphrey, for appellant. Greer & Reed, for appellee.

O'REAR, J. The life of George F. Beard was insured by appellant by a policy issued August 30, 1898. The assured died September 10, 1899, while the insurance was in effect. The policy contained this provision: "If within two years the insured die by his own act, sane or insane, this policy shall be void, and all payments made upon it shall be forfeited to the company, except that the company will, in that case, pay for its surrender the legal net reserve at the time of death. Any indebtedness of the company, together with the balance, if any, on the current year's premium, will be deducted in any settlement of this policy." The circumstances attending the death of the insured indicate that it was caused by an excessive dose of morphine taken with suicidal intent. Evidence as to the sanity of the insured was introduced upon the trial. It tended to show eccentric conduct at times, which some of the witnesses thought was due to insanity, but which appear as probably to have been due to his intemperate habits, and a generally demoralized condition, resulting from being out of employment and involved in some financial embarrassments.

The principal question presented by this appeal is involved in the instructions given and refused. Those given precluded a finding for the company unless it made it to appear satisfactorily that the assured "by his own voluntary act came to his death by committing suicide with the intent and purpose of destroying his own life." And the jury were further instructed: "And before you can find for the defendant you will have to further believe from the evidence that if such assured destroyed his life, that he possessed at the time sufficient mind and understanding to know the nature of the physical act he was about to commit, and that he possessed sufficient will power at the time to refrain from taking his own life." The company presented two theories upon which it asked instructions, respectively: (1) That if the assured purposely destroyed his own life while sane or insane, the recovery was limited to the legal net reserve due on the policy at the date of the death; and (2) that if the assured, "while sane or insane, took and

swallowed a large quantity of morphine, with the intention of killing himself, and that he had sufficient mental power at the time to know that it would cause his death, and took it with that intention," then the law was for the defendant company. These were refused.

The "suicide" or "self-destruction" clauses of life insurance policies have received not a harmonious construction by the various courts of last resort. The cases may be classified under three general heads. The first and earliest involved the construction of such clauses as vitiated the policy in event the assured took his own life by "suicide," "at his own hands," or "self-destruction." However the courts may differ as to the correct construction of such clauses, in this state we are committed to what appears to be the most universal rule, and the one applied by the United States supreme court, which is that self-destruction in such provisions means such destruction by a sane person. *Insurance Co. v. Graves*, 6 Bush, 263; *Insurance Co. v. Terry*, 15 Wall. 580, 21 L. Ed. 236; *Insurance Co. v. Broughton*, 109 U. S. 131, 3 Sup. Ct. 99, 27 L. Ed. 878; *Ritter v. Insurance Co.*, 169 U. S. 140, 18 Sup. Ct. 300, 42 L. Ed. 603.

To obviate the effect of such construction, the insurers lately added a new clause to their policies, which may be designated as forming the second class of these cases, in which it is provided that self-destruction or suicide by the insured, while sane or insane, vitiated the contract, or at least reduced the sum payable to such item as the reserve fund apportionable to the policy, or to a refunding of the premiums collected on it. This second class of case has also been before this court for consideration. *Insurance Co. v. Davless' Ex'r*, 87 Ky. 541, 9 S. W. 812. In the case just cited the policy provided, "in case he shall die by his own hand while insane," the company agrees to refund the premiums. Following and approving *Bigelow v. Insurance Co.*, 93 U. S. 284, 23 L. Ed. 918, this court held: "It may now be regarded as well established that intentional self-destruction will avoid a policy containing conditions like this, whether the act was committed voluntarily or from irresistible impulse, unless the mind of the insured was so far gone when he took his life as to render him unconscious that he was taking his life at the time he committed the act." We do not deem it necessary to restate the reasonings upon which these decisions are based. They are elaborately discussed in the opinions. It is sufficient to determine the class to which the policy in question belongs, and then apply the doctrine setting apart that class. The third class arises out of constructions to be placed upon additional clauses added to the suicide proviso, e. g., whether the self-inflicted injury were "voluntary or involuntary, while sane or insane." *Haynie v. Indemnity Co. (Mo.)* 41 S. W. 464. The

case at bar, in our opinion, belongs to the second class herein described. It is therefore unnecessary to now consider the validity of such clause as that last quoted. It is not here. Therefore the court properly refused to give an instruction apparently predicated upon the idea involved in that clause (instruction Z offered by defendants).

The instructions given, though, were such as would have been proper in, and as are sustained by authorities under, the first class of cases named. They preclude a forfeiture of the insurance if the self-destruction occurred during, or was the result of, an insane impulse. So do these instructions. Their effect is to destroy one feature of the contract, which this court has held (87 Ky. 541, 9 S. W. 812) was a legal provision; that is, the feature of self-destruction while insane. The court construes the term "self-destruction," or "death by his own act," to mean that the act is not his if he has not mind enough to know what he is doing. In such event the act is to be regarded as an accident. But, although the insured may not be able from mental derangement to know the extent of his offense, that it is a crime, or even that it is wrong, and although his will power may be for the time subverted by one or more of his other faculties, whether by their derangement or not, if he has mind enough to know that the act would probably result in his death, and he inflicts it with that intention, it is a cause against which the company has not insured.

There are various degrees of insanity recognized by medical men and by the courts. Partial insanity may be such as to leave the mind capable of fully comprehending the nature of an act, and of its moral effect, and with the will to do or abstain from it. Excessive morbidity may so far affect the disposition as to overcome the instinctive desire to live, yet leave the patient with mind to understand the nature and consequences of the act of self-destruction, and with will power to execute his resolves. Hallucinations may indicate a degree of insanity. They need not necessarily derange the understanding of the act of suicide, nor impair the will with reference thereto; yet they may be such as to impel the subject to brave all the consequences of his act, which are fully realized, rather than suffer the ills conjured by his diseased imagination. The normal nature instinctively desires life. Such lives are sought as the subject of insurance. We perceive no reason why the parties might not contract that if the disposition of the insured becomes abnormal by mental derangement, thus increasing the probabilities of self-destruction to the extent that his instinct for life may be subordinated by his disease, the insurance shall cease. The insured is not bound to accept such a contract. But, if he does, why should it not be enforced? We are of opinion that the instructions offered by appellant, presenting

this view of the law, should have been given in lieu of those given by the court.

On the trial the widow of the deceased, the beneficiary under the policy, was permitted to testify to numerous conversations with her husband, to facts learned from him, and to the contents of letters written from one to the other. Under subsection 1, § 606, Civ. Code Prac., providing: "Neither a husband nor a wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage,"—all the foregoing testimony was incompetent; and, under subsection 2 of section 606, she was likewise incompetent as a witness to testify in her own behalf as to acts done by, or transactions with, the decedent.

The circumstances about the death of the insured were such as to admit of the theory of suicide. It might, though, have been an accident. On the trial a physician, introduced as an expert on the subject of insanity, after testifying about the indication of certain symptoms of insanity, and that in his opinion, if the deceased showed these symptoms, he was insane, was asked whether, in his opinion, the death was the result of accident or design, and was permitted to answer. This was error. The witness did not see the body, nor was he in attendance on his sickness. It was competent for him to say what was the probable effect of certain drugs, and what state of mind, as to sanity or insanity, certain symptoms would indicate. But whether the act of the deceased in taking the drug was by design or accident was not the subject of expert testimony. That act was an issue to be solved by the jury upon all the evidence.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial not inconsistent herewith.

JACOB v. CLARK'S COMMITTEE.¹

(Court of Appeals of Kentucky. Dec. 11, 1901.)

GAMING—RECOVERY OF MONEY LOST—RES JUDICATA.

1. Under Ky. St. §§ 1956, 1958, providing that if any person shall lose money at gaming, and shall "pay" the same to another, such loser, or any creditor of his, may recover the same from the winner, and that if such loser or his creditor fail to sue within six months any other person may sue the winner and recover treble the amount lost, where a surety in a superseas bond has been compelled, by reason of his liability thereon, to pay a judgment on a note executed for money lost at gaming, the payment is to be regarded as having been made by the loser himself, and if neither he nor any creditor of his sues within six months to recover the amount any other person may do so.

2. Money lost at gaming, though the payment be made on a judgment therefor, may be recovered by the loser or his creditor, or by any other person, if the loser or his creditor fails to sue within six months.

Burnam, Du Relle, and Hobson, JJ., dissenting.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by William J. Jacob against W. W. Hill, committee for William Clark, to recover money paid. Judgment for defendant and plaintiff appeals. Reversed.

A. E. Willson, C. B. Seymour, and M. B. Gifford, for appellant. Simrall & Doolan, for appellee.

PAYNTER, C. J. W. W. Hill, committee for William Clark, brought suit against J. Easton Cooke on two promissory notes executed and delivered by him to Clark, aggregating \$1,000. Cooke pleaded payment, but judgment was rendered against him. He prosecuted an appeal to this court, and suspended the collection of the judgment by executing a supersedeas bond, with R. T. Jacob as surety. The judgment was affirmed, and the surety was sued on his bond. In that action Jacob sought to plead that the notes were executed by Cooke to Clark for a gaming debt. The court below and this court held that he could not plead that as a defense to the action on the supersedeas bond. Jacob, being obligated to pay the judgment rendered on the notes by reason of the supersedeas bond, paid it. More than six months having elapsed from the time he paid the judgment, and no action having been instituted against Clark or his committee by Cooke or any one of his creditors to recover the money paid, the appellant, W. J. Jacob, instituted this action against Clark's committee to recover it. The court sustained a demurrer to the petition. The right to recover, if at all, is under certain sections of the Kentucky Statutes, which are as follows:

"Sec. 1956. If any person shall lose to another at one time, or within twenty-four hours, five dollars or more, or property or other thing of that value, and shall pay, transfer, or deliver the same, such loser, or any creditor of his, may recover the same, or the value thereof, from the winner, or any transferee of the winner, having notice of the consideration, by suit brought within five years after the payment, transfer or delivery. * * *

"Sec. 1958. If such loser or his creditor does not sue for the money or thing lost within six months after its payment, or delivery, and prosecute the suit to recovery with due diligence, any other person may sue the winner, and recover treble the amount of value of the money or thing lost, if suit be so brought within five years from the delivery or payment."

It is insisted that the statute only authorizes a recovery where the loser has paid the gambling debt; that, as R. T. Jacob paid it under the circumstances detailed, there was not a payment by the loser, in the contemplation of the statute. It is further insisted

that the judgment against Cooke makes the matter *res judicata*.

Gaming statutes should be construed strictly, and should not be extended beyond their direct and obvious import. It was said in *Greathouse v. Throckmorton*, 7 J. J. Marsh. 28: "We cannot think that any of the statutes against gaming can be made available to the plaintiff in error. These statutes have hitherto been, and should ever be, construed strictly. Such was the judicial interpretation of the statutes of Charles II. (16 Car. 2, c. 7) and of Anne (9 Anne, c. 14) in England. * * * And the statutes of Virginia and of this state have never been constructively extended beyond their direct and obvious import." Where one loses and pays money lost at gaming, he may, within five years after the payment, institute an action to recover it. A creditor of the loser, if he does not, may maintain the action for the same purpose. The general assembly evidently intended by these statutes to prevent, so far as possible, one winning money from enjoying it, and therefore gave to an entire stranger to the parties to the transaction the right to maintain an action within five years to recover the money so paid, if the loser or one of his creditors does not institute an action within six months after the payment of the debt and prosecute it with diligence.

If Cooke had paid the debt, certainly no one would controvert his right to recover it. The judgment which was rendered upon the note was not void as the statute so declaring is no longer in force. It could be enforced. If it was not void, and could be enforced, the party against whom it was rendered had the right to appeal from it and suspend its collection during the pendency of the appeal by the execution of a supersedeas bond. When Jacob executed the supersedeas bond he in fact agreed to pay the judgment for Cooke if it was affirmed. He, in a certain sense, became his surety. Therefore when he paid it he became Cooke's creditor, and Cooke became his debtor in the sum so paid. He paid the money for Cooke, as Clark's judgment against Cooke was thereby satisfied. Clark could no longer enforce it against him. The reason he could not do so was because it was paid. The debt was satisfied in exactly the same manner and to the same extent as it would have been if Cooke, instead of his surety, had paid it. In fact and in law it was a payment to Clark by Cooke. The mere fact that Jacob became bound as surety for the judgment rendered for the debt did not alter the character of the debt for which the judgment was rendered, nor did that fact affect, one way or the other, Cooke's liability therefor; it continued until the debt was paid. A debt is paid whether payment be made before or after a judgment has been rendered therefor. If paid before judgment, it is voluntarily done; if after,

presumably by compulsion. If judgment has been rendered for usury, and execution issues thereon, and the debtor's property is sold in satisfaction thereof, could any one with reason contend the debtor had not made payment of the usury so as to entitle him to maintain an action against the creditor to recover it? Again, suppose the debtor had replevied the judgment, and his surety in the replevin bond had paid it; it could not with reason be contended that the debtor had not made payment thereof so as to entitle him to maintain an action to recover the usury thus paid. If there was a payment by the debtor in the cases supposed, then there was a payment by the loser in the case.

If the cause of action arose in favor of Cooke after the payment of the debt or judgment against Clark, it likewise arose in favor of one of his creditors. If neither prosecuted an action to recover by reason thereof within six months, then the appellant has the right to do so. The statutes referred to provide that the cause of action shall arise on payment of the gaming debt. It does not say whether it is to be before or after judgment. The language of the statute giving the right to recover does not so qualify it as to only give the right of action when the debt is paid before the judgment on the gaming debt. When the judgment was rendered against Cooke, he could not have maintained an action, for the reason that no cause of action could arise in his favor until he paid the judgment, and for this reason neither he nor his surety could plead the gaming consideration of the note as a defense to the action on the supersedeas bond. The statute provides that an action may be prosecuted to recover usury thereafter paid for the loan or forbearance of money within one year next after the payment thereof. It does not provide that this recovery shall take place for usury paid before or after judgment therefor. This court in construing that statute holds that when the judgment has been rendered for usurious interest, and it has been paid, an action to recover it can be maintained, as the judgment is not a bar to such a recovery. No cause of action would arise until payment of the usury, and, if it was not paid until after judgment, the cause of action did not exist at the time the judgment was rendered. A recovery for usury that was paid after judgment therefor does not nullify or modify it.

This court in *Ross v. Ross*, 3 Metc. 274, said: "In the case before us the relief sought is not to modify or annul the judgment. That has been satisfied. It is to recover from the plaintiff in the judgment money paid to him, but which he had no right to recover or receive. The fact that the defendant in the former judgment might have successfully resisted a recovery of the usury embraced in the debt sued for does not prevent him from reclaiming it when

paid, by a proceeding in equity, for the reason that the Revised Statutes permit such recovery, and it is not forbidden by the section of the Code, supra; and because, moreover, the right of action—that is, the right to recover back—did not nor could not accrue until the usury has been paid."

In *Sherley v. Trabue*, 85 Ky. 71, 2 S. W. 656, the court said: "There is no opposing of a decree. The relief sought does not annul or modify a judgment. It has been satisfied. The borrower sues to recover from the lender that which he had no right to exact, and which was paid without any consideration. The right to recover it does not accrue until the payment. There is no modification or change of the former judgment, but a new and distinct cause of action arises in favor of the borrower and against the lender upon the payment of the usury. The law then raises a promise, by implication, of repayment. A cause of action, by virtue of the statute, arises eo instanti in the borrower's favor. Nor do we see any reason why he cannot recover it by action at law. His right of recovery rests upon a statutory provision, which fixes no particular forum, and does not limit him to an equitable action. If he seeks a discovery of usury, he must go into equity; but, where he has paid it, there is a mere claim for money received by the lender, to which he, in good conscience, was not entitled. Our conclusion is that the borrower may recover usury paid by him, either upon a judgment at law or in equity, and that he may do so by an action at law; and, the amount of usury being admitted by the pleadings, the judgment below is reversed, with directions to render a judgment for the appellant for the amount claimed in his petition."

Under a statute which authorizes a recovery of usury within one year after payment, this court holds that it can be done, although the payment is made after the judgment is rendered for usury. Under this statute, the loser or his creditor is entitled to recover within five years after payment. The general assembly seemed more anxious that the money lost at gaming should be recovered than money which had been paid as usury. In the former case it authorized a loser or a creditor to maintain an action. If neither of them would institute the action and prosecute it with diligence, then a premium was offered to any one who would institute the action for that purpose. As an inducement for the institution of such an action, the amount of recovery was not confined to the amount lost, but treble the amount may be recovered.

If the theory of the appellee is correct, that the judgment is a bar under the doctrine of *res judicata*, then all that the party need do who holds another's note for money lost at gaming is to institute an action immediately, and obtain a judgment. Then neither himself nor creditor can maintain an action

although it might be instituted and the judgment recovered within a few days after the gaming transaction. In most of cases, if the suit was brought by the party holding the note with a gaming consideration, the loser's honor would prevent him from protecting his family and creditors; so judgment would go against him which would conclude the rights of all, if the appellee's theory be correct. In our opinion, whether the payment is made before or after judgment, a cause of action arises when done; that the judgment does not take away the right of the loser or his creditor to maintain the action when the payment is made; and that if either has such right, and fails within six months to exercise it, then a stranger may maintain an action.

The judgment is reversed for proceedings consistent with this opinion.

(Jan. 6, 1902.)

BURNAM, J. (dissenting). In 1894, W. W. Hill, as committee of William Clark, who was at that time an inmate of the Eastern Lunatic Asylum, instituted a suit against J. Easton Cooke on two promissory notes, one for \$300, dated in December, 1878, and one for \$700, dated in June, 1880. Cooke defended upon the ground that he had paid both notes and interest. Upon appeal to this court by Cooke, the judgment of the trial court was reversed on the ground that interest did not begin to run on the \$700 note until demand of payment, but with directions to enter judgment on the verdict for \$300 note, with interest from the 16th of December, 1878, and for \$700, with interest from the institution of the suit. See *Cooke v. Clark's Committee* (Ky.) 51 S. W. 316. Upon the return of the case to the lower court, judgment was entered in conformity with the opinion of this court, upon which execution was issued, which was returned, "No property found." Hill, as committee of Clark, then brought suit upon the supersedeas bond executed by J. Easton Cooke against the sureties, R. T. Jacob and Mary F. Cooke. R. T. Jacob defended that suit upon the ground that the notes which were the basis of the judgment were executed for a gaming consideration, and contended that the judgment rendered thereon was void, and that the supersedeas bond given to suspend the collection of the judgment was also void. The circuit judge sustained a demurrer to this answer; whereupon R. T. Jacob prosecuted an appeal to this court, and the judgment of the circuit court was affirmed, the court holding that, "under the statute now in force, the defense of 'gaming contract' must be presented before judgment, which if done will defeat a judgment, but if not then presented it will be too late after judgment to attack the judgment collaterally or directly on that ground." Thereupon R. T. Jacob, as surety upon the supersedeas bond, paid to Hill, as committee of Clark, the amount of

the judgment. More than six months having elapsed from the payment of the judgment by R. T. Jacob, W. J. Jacob, a stranger, instituted this suit under section 1958 of the Kentucky Statutes, seeking to recover three times the amount of the notes executed by J. Easton Cooke to Clark. A general demurrer was sustained to this petition by the circuit judge, and his petition was dismissed, which upon appeal to this court is reversed, upon the ground that the payment of the judgment by the surety on the supersedeas, more than 20 years after the transaction between Clark and Easton, was in effect a payment by Cooke. The language of the statute is so plain that there is no room for judicial construction. It provides, in plain language, that "if any person shall lose to another at one time, within 24 hours, five dollars or more, or * * * other thing of that value, and shall pay, transfer or deliver the same, such loser or any creditor of his may recover the same." And section 1958 provides that "if such loser or his creditor does not sue for the money or thing lost within six months after its payment or delivery, * * * any other person may sue the winner and recover treble the amount of value of the money or thing lost, if suit be so brought within five years from the delivery or payment." At the common law a note executed in consideration of "a gaming contract" was enforceable, and the sole basis for the proceedings is found in the statutes, and it is an essential condition to the maintenance of such a suit, either by the loser, a creditor, or outsider, that the loss should have been actually paid by the loser. This record conclusively shows that Cooke never paid one cent to Clark or his committee by reason of either the notes or judgment. The liability of R. T. Jacob to Clark's committee stands upon an entirely different footing, and was incurred more than 20 years after the date of the alleged gambling transaction between Cooke and Clark by voluntarily signing a statutory bond, which suspended the collection of the judgment against Cooke. I know of no process of reasoning by which Jacob's liability arising by virtue of the supersedeas bond can be made to depend upon the alleged gaming consideration, which was the foundation of Cooke's original liability, and it is wholly illogical for the court to hold in one case that both Cooke and Jacob are estopped by the judgment from relying upon the alleged gaming consideration as a bar to recover, and in another opinion, rendered at the same term of the court, to hold that that judgment presents no obstacle to the maintenance of a suit by a complete stranger to the record, more than 20 years after the alleged transaction, without a scintilla of proof showing that Cooke had ever in fact at any time paid any part of the judgment. The statute is a highly punitive one, and the unbroken current of decisions, both in this and other states, holds that it should be

strictly construed. The authorities cited in the opinion do not support the conclusion reached by the majority. The two cases relied on were suits to recover usury paid by the plaintiff within the statutory period after such payments, and have no bearing upon the case at bar.

For these reasons I dissent from the majority opinion.

DU RELLE and HOBSON, JJ., concur.

HENNING et al. v. STENGEL et al. FISHBACK et al. v. MEHLER. OLARK et al. v. BITZER.¹

(Court of Appeals of Kentucky. Jan. 16, 1902.)

STREET ASSESSMENTS—FILING OF SPECIFICATIONS—PRESUMPTION AS TO OFFICIAL DUTY—ATTESTATION OF COPIES—FAILURE TO OBJECT—REPEAL OF STATUTE BY CONSTITUTION—EXCESSIVE ASSESSMENT.

1. Under Ky. St. § 2829, requiring the board of public works of a city of the first class to file drawings and specifications for any work ordered by them before publication of notice calling for bids, it will be presumed, in the absence of positive proof to the contrary, that the officers did their duty.

2. The objection that copies filed with the petition are not properly attested comes too late when made on appeal for the first time, it being alleged in the petition, and not denied in the answer, that the papers are true copies.

3. Act March 4, 1867, providing that no city or town shall charge the ground fronting any street with the cost of the improvement thereof beyond one-half the value of such ground, was repealed, at least after six years from the adoption of the constitution, by Const. § 156, providing for the classification of the cities of the state, and for their government by general laws, as the act was a local or special one, in that it did not apply to the whole state, one county being excepted from its operation.

4. The proof as to the value of the property and the extent it is benefited being conflicting, the chancellor's finding that the assessment does not amount to spoliation will not be disturbed, especially as the property owners desired the improvement, and the trouble complained of arises in a large measure from the effort to construct a cheap street in their supposed interest; the fault being in the specifications, and not in the contractors.

Appeals from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Actions by Stengel & Bickel and others against Sallie K. Henning and others to enforce liens for the cost of street improvements. Judgment for plaintiffs, and defendants appeal. Affirmed.

Lane & Harrison, Barker & Woods, and R. W. Wooley, for appellants. Wm. Furlong, for appellees Stengel & Bickel. Bodley, Baskin & Morancy, for appellee Bitzer.

HOBSON, J. These three appeals are heard together. They are prosecuted from judgments of the Jefferson circuit court en-

forcing liens for the improvement of three sections of Transit avenue, in Louisville, Ky. The first objection made relates to the filing of the drawings and specifications of the work with the board of public works, according to section 2829, Ky. St.: "Whenever said board shall order any work to be done which either by order of said board or according to law, is to be performed by independent contract, said board shall prepare and place on file in the office of said department complete drawings and specifications of said work. Thereupon said board shall cause a notice to be published in one daily or weekly newspaper of general circulation in said city, once in each week for two weeks, informing the public of the general nature of the work, of the fact that the drawings and specifications are on file in said office, and of the nature and extent of the bond or security required, and calling for sealed proposals for said work by a day not earlier than ten days after the first of said publications." It is insisted that the plans and specifications are shown by the proof not to have been filed with the board as required by the statute before the publication of the notice. We have carefully examined the proof, and are of the opinion that it sustains the conclusion of the chancellor on this point. While there is some testimony from which it might be inferred that the papers were not filed until the day of the letting, there is positive testimony of one of the bidders that they were filed and he examined them ten days before the letting. Two other bidders testify to examining them five days before the letting. No bidder testifies to being unable to see them. There were a number of bidders, the work was let unusually low, and there is nothing to show that any of the bidders failed to understand what was proposed. The law presumes the officers did their duty, and if they failed to do it in this case positive proof of it could have been made. The presumption of regularity is not overthrown by the evidence.

It is also insisted that the copies filed with the petition are not properly attested by the comptroller. Some of them read thus: "A true copy. Attest: W. M. Finley, C. B. C. Attest: John H. Hancock, Comptroller." On some of them the words "A true copy" is omitted before the signature of Finley. It is insisted that the comptroller does not attest these papers as true copies. We think it is evident that this is the intent of the attestation of Hancock. No objection appears to have been made to the attestation in the trial court, and we do not think the question should be made for the first time in this court. In the petition the papers are alleged to be true copies, and this is not denied in the answer.

It is also insisted that the amount adjudged against some of the property is more than its value, and amounts to spoliation. The act of March 4, 1867, entitled "An act

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

in relation to the improvement of streets in cities and towns in this state," is relied on. The act reads as follows:

"Sec. 1. Be it enacted by the general assembly of the commonwealth of Kentucky, that no city or town shall, by virtue of any authority it has to improve its streets at the cost of the owners of ground fronting thereon, have authority to charge the ground or the owner thereof, on a count of such improvements, with more than one-half the value of such ground. This act shall not apply to Barren county.

"Sec. 2. This act shall be in force from its passage." 1 Acts 1867, p. 64.

Section 156 of the constitution provides for the classification of the cities of the state and for their government by general laws. Pursuant to it the present statutes on this subject were enacted. By section 1 of the schedule all laws inconsistent with such provisions of the constitution as required legislation to enforce them remained in force not longer than six years after its adoption, on September 28, 1891. The act of 1867 was a local or special act, in the sense that it did not apply to the whole state, and was inconsistent with the provision of the constitution looking to the government of all the cities in the state by general laws, according to their classification. It was therefore not in force, at least, after six years from the adoption of the constitution, when these proceedings were had.

The proof as to the value of the property and the extent it is benefited is conflicting, but the chancellor knew the ground and the local situation, and some weight should be given his finding. We are the more inclined to do this because it is conceded that the property holders wanted the ordinance passed and the improvement made; that things were hurried up for them, and that they still would have paid without objection if the street had been properly metaled, and the city had carried out the plan, and improved a gap between them and one of the thoroughfares of the city. It is clear the contractors are responsible for none of these things. They could not control the council or the board of public works. They did their work according to their contract, and the trouble is in the specifications, not in them. The specifications were changed contrary to the judgment of the city engineer in the interest of the property holders, if not at their wish, and the trouble now complained of seems to be due in a large measure to an effort to construct a cheap street. The property lay in the outskirts of the city, it was not available for sale in lots for building purposes without the improvement of the street, and some weight must be given to what seems to have been the common judgment of the property owners as to their interest in the premises.

We see no objection to the manner in which the cost of the improvement was apportioned by the city council against the

property owners. The mode or apportionment seems to have followed the statute.

Judgment affirmed.

MIDDLETON et al. v. KENTUCKY LUMBER CO.¹

(Court of Appeals of Kentucky. Jan. 9, 1902.)
BURDEN OF PROOF—PEREMPTORY INSTRUCTION.

1. In an action to recover the price of timber sold, defendant, having admitted a contract to pay for the trees and pleaded a new contract in avoidance, properly took the burden of proof.

2. There being a conflict of testimony upon the issues presented by the pleadings, it was error to grant defendant's request for a peremptory instruction.

Appeal from circuit court, Harlan county.
"Not to be officially reported."

Action by James H. Middleton and another against the Kentucky Lumber Company to recover the price of timber sold. Judgment for defendant, and plaintiffs appeal. Reversed.

Jas. Andrew Scott, W. F. Hall, and J. G. Forester, for appellants. Tinsley & Faulkner, for appellee.

DU RELLE, J. In January, 1889, the appellants, a firm engaged in buying and selling land and standing timber, sold to appellee lumber company 455 poplar trees, which were thereupon marked with the lumber company's brand, for the agreed price of \$1,657.25; one half of which was to be paid on the execution of a deed for the timber, and the other half June 1, 1889. A deed was accordingly executed for this timber and other property sold to the company, reciting the payment of one-half the purchase money, which, however, was not paid. The 455 trees seem to have been the property of Pace, and to have been standing on his land. Suit was brought for the unpaid purchase money in September, 1894. The answer of the company admits the contract and the execution of a deed which covered the 455 trees, but alleges that soon after the execution of the deed the company ascertained there was dispute over the title to the timber, which was claimed by the Commonwealth Land & Lumber Company, and that "it declined to take or pay for said timber under said deed, which was agreed to and acquiesced in by said Middleton & Pace"; that afterwards, in November, 1891, the company made a new contract with J. H. Middleton, for Middleton & Pace, and one Hiram Cawood, by which it agreed to deed back said timber, but the deed was afterwards waived by said parties; that under the last contract it bought of J. H. Middleton and Hiram Cawood from three to five thousand poplar and ash logs, to be delivered on floating water, at the agreed price of 70 cents for 22-inch logs and upwards, and 50 cents

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

for 18 to 22-inch logs, which was the fair market price for such timber, and which contract contained this clause: "This contract is to cover timber deeded by James H. Middleton and Calvin Pace to second party, and mentioned in an agreement to make a deed executed by second party under this date, and also all the timber now owned and controlled by party of the first part tributary to Gabe's Branch;" that the new contract was intended to and did abrogate the deed as to the 455 trees; that the company offered to deed back to appellants the 455 trees, but Middleton said it was "no use, as they would go on and put in the timber under said last-named contract, which they did"; and that the company had paid for the most of said timber at the prices agreed on in the second contract. The second contract, which was filed with the answer, was between Hiram Cawood and James H. Middleton, of the first part, and the Kentucky Lumber Company, of the second part, and not, as alleged in the answer, between Middleton, for himself and Pace, and Cawood. By an amended answer it was alleged that the partnership between Middleton and Pace was dissolved in 1890, and Pace took all claims against the company arising out of the transaction concerning the 455 trees, and that neither Middleton nor the firm of Middleton & Pace had any interest in that claim. By reply and amended replies the appellants denied the affirmative averments of the answer in regard to the disputed title to the trees; denied that a new contract was made by them, or by Middleton for Middleton & Pace, by which the company agreed to deed back said timber, or that any such deed was waived by the parties; and alleged that Middleton and Cawood owned a large amount of timber on Gabe's Branch near the 455 trees deeded to the company by Middleton & Pace, and that the company offered to pay Cawood and Middleton at the rate set out in the second contract for delivering on floating water the timber already deeded to the company, if they would deliver all the timber they owned on Gabe's Branch at the same price, which offer was accepted by Cawood and Middleton; that there was no agreement that Middleton & Pace should take back the 455 trees, and that the clause quoted in the answer was fraudulently inserted in the written contract by the draftsman. There was also a denial of the averment as to the dissolution of the partnership of Middleton & Pace and the taking by Pace of the claims against the company. By rejoinder the company denied the affirmative averments of the reply as amended. The answer contained a plea of the statute of limitations; to which a reply was filed, and a rejoinder to the reply. No question in regard to these pleadings, however, is made upon this appeal. The first trial resulted in a verdict and judgment for the appellants. Upon appeal to this court (*Lumber Co. v. Middleton*, 41 S.

W. 48) that judgment was reversed for error in the admission of evidence, the principal error being the refusal to admit what is called a supplemental contract by the company with Cawood and Middleton,—being apparently the agreement referred to in the clause set up in the answer,—bearing the same date with the second contract, by which supplementary contract the Kentucky Lumber Company agreed to convey to Middleton and Cawood the 455 trees on condition that Middleton and Cawood should cut and deliver all the timber mentioned in the new contract at as early a date as possible. This supplementary agreement appears to have been signed only by the lumber company. Upon the second trial there was a distinct conflict of testimony as to whether this supplementary agreement was ever seen by Middleton, Pace, or Cawood before the suit was brought, and as to whether the new contract, which was signed with the firm name of Cawood & Middleton,—the firm name being signed by Cawood,—was intended to contain the clause set out in the answer.

The lumber company, having admitted the original contract to pay for the trees, and pleaded the new contract in avoidance, properly took the burden of proof. There was evidence tending to show an admission by Middleton that Pace had sold out his interest in the firm to Cawood. There was some evidence which tended to contradict this, but we are unable to find any issue upon this question made by the pleadings. At the conclusion of the testimony the lumber company asked a peremptory instruction to find for the defendant. This was granted. This action by the court seems to us to have been erroneous. Some of the questions argued in the briefs are not fully presented by the pleadings; but, as there was a conflict of testimony upon the issues presented, the appellants were entitled to have those issues submitted to the jury, by proper instructions, for determination.

For the reasons given, the judgment is reversed, and cause remanded, with directions to award appellants a new trial, and for further proceedings consistent herewith.

WILEY et al. v. BIRD et al.

(Supreme Court of Tennessee. Nov. 19, 1901.)
SUIT BY REMAINDER-MEN—RIGHT TO POSSESSION—CANCELLATION OF FRAUDULENT TITLE—EQUITABLE RELIEF.

Where a bill by infant remainder-men alleged that defendants were setting up invalid claims to the land, and prayed that complainants be declared the true owners of the land, and that all claims of defendants be declared void and canceled, it was not necessary to dismiss without prejudice on the ground that the remainder-men's right to recover would not accrue until the determination of the particular estate, but, as possession was not the only relief sought, complainants were entitled, on proper showing, to a decree fixing their rights.

Appeal from chancery court, Anderson county; H. G. Kyle, Chancellor.

Bill by E. F. Willey and others against L. Bird and others. From a decree dismissing the bill without prejudice, both parties appeal. Modified.

Lucky, Sanford & Fowler, for plaintiffs.
O. J. Sawyer, for defendants.

WILKES, J. The original bill in this cause was filed against L. Bird et al., among whom was Amos Carroll. The only controversy now before the court is between complainants and Amos Carroll, all other controversies being eliminated. The controversy is over a large body of land, consisting of several tracts. The chancellor held that, as to the land claimed by Amos Carroll, his title had been perfected by adverse possession, so far as it conflicted with the title of complainants, and the bill was dismissed as to him. The court of chancery appeals affirmed the decree of the chancellor upon the grounds that the conveyance under which Amos Carroll held was not a forgery, and that Amos Carroll had maintained adverse possession under it for the statutory period to vest title in him, and the boundaries thus acquired were fixed by the court of chancery appeals. Upon a petition to rehear the court of chancery appeals modified its original opinion as to the interest claimed by J. H. Vanderson and his children, who owned an undivided third interest in the disputed land. It appears that J. H. Vanderson is tenant by curtesy of this interest, and the remainder is in the children. The court of chancery appeals finds as against the children the adverse possession commenced in 1882, and they were then minors, and entitled only to a remainder after the termination of their father's curtesy estate, and, this being so, the statute of limitations had not run against the children because of their minority, and their right of action would not accrue until the termination of their father's life estate. The complainants and defendants have appealed, and both assign errors.

As to the errors assigned by the complainants, except the said remainder-men, it is only necessary to say that we think they are precluded by the finding of the court of chancery appeals that Amos Carroll had held the land in dispute for more than seven years adversely, and hence his title to the land thus held could not be disturbed. As to the said remainder-men, the court of chancery appeals held that, while they were not barred, because their right of action had not accrued, still their suit was premature, inasmuch as the tenant by curtesy was still alive, and the right to recovery by the remainder-men had not accrued. Hence the suit as to them was dismissed, but without prejudice, and they appealed from the decree of dismissal, and Amos Carroll appealed from so much of the decree as dismissed the suit without preju-

dice. The court of chancery appeals proceeded upon the idea that the possession as to the remainder-men was not adverse until the life estate should fall in, and complainants, as remainder-men, could not maintain their action until the happening of that event. If this were a pure ejectment suit alone for the immediate recovery of the land and its possession, the decree of the court of chancery appeals might be proper, but the scope and prayer of the bill is broader than that of a pure ejectment bill for present possession. The bill alleges, among other things, that the various defendants, and among them Amos Carroll, are setting up some sort of claims to the land which are not valid, and are frauds upon the rights of complainants, and that they are entitled to have the same canceled and declared void. The rights of the remainder-men are set out in full; that is, that their father had a life estate, and they were entitled in remainder. There is a specific prayer that complainants be declared to be the true owners of the land, and that all claims of every kind and character which may be set up by defendants, and each of them, be declared void and canceled. We are of opinion that the allegation and prayer of the bill are broad enough to warrant the court in declaring the right of the remainder-men, and setting aside the claims of Amos Carroll so far as they are a cloud upon their title. *Dodd v. Benthall*, 4 Heisk. 608, 610; *Anderson Co. v. Hays*, 99 Tenn. 543, 42 S. W. 266; *Weaver v. Davidson Co.*, 104 Tenn. 321, 59 S. W. 1105; *Alken v. Suttle*, 4 Lea, 109.

The decree of the court of chancery appeals is modified to the extent that decree will be entered here fixing the rights of the remainder-men, Wm. Henry Vanderson and Eliza Belle, or Lida Cheney, to a one-third interest in remainder in the lands which are shown by the decree to have been adversely held by Amos Carroll as to the other complainants, and the claims of said Amos Carroll as to said undivided third interest in said land are extinguished and removed as a cloud upon the title in remainder of said Wm. Henry Vanderson and Lida Cheney. The costs of the cause will be divided, two-thirds to be taxed to complainants except said Wm. Henry and Lida, who will pay no costs, and one-third to the defendant.

HARDING v. COMMISSIONERS' COURT OF McLENNAN COUNTY.

(Supreme Court of Texas. Jan. 16, 1902.)

LOCAL OPTION—INJUNCTION—SPECIAL INTEREST OF RELATOR.

Where the petition in a suit to enjoin the commissioners' court from declaring a local option election valid, on the ground that it would interfere with petitioner's business as retail liquor dealer, did not state that he was "legally" carrying on such business, he was not entitled to relief, though it appeared from the evidence that he was legally so engaged.

Application for writ of error to court of civil appeals of Third supreme judicial district.

Suit for an injunction by R. Harding against the commissioners' court of McLennan county to restrain respondent from declaring a local option election invalid. A judgment denying the writ was affirmed by the court of civil appeals (65 S. W. 56). Application by complainant for writ of error. Denied.

E. E. Easterling, for plaintiff in error.

GAINES, C. J. We are of opinion that the writ of error applied for in this case should be refused, but are not prepared to concur in the conclusion upon which the court of civil appeals rest their decision. That court decided the appeal upon the agreed facts upon which the case was tried, from which it appears that the applicant "was legally carrying on" the business of a liquor dealer in the district in which the election was held. *Harding v. County Commissioners*, 65 S. W. 56. But the allegation in the petition is merely "that your petitioner is engaged in the sale of beer and other liquors in Axtell, Texas, within the limits of said described local option precinct, and in said school district," etc. There is no averment that he was legally so engaged. If such were the fact, it should have been alleged. Unless he was a licensed dealer, which is not averred, and which we are not at liberty to assume, we are of opinion that he would have no such interest in the question agitated by his suit as would have entitled him to bring the action. Since it does not appear that the effect of declaring that the election had carried in favor of local option was to imperil any pecuniary right of the applicant, the question as to him is merely a political one, and the courts agree that a party cannot sue to determine a controversy of such a character. The trial court decided against the applicant on the ground that the election was valid, and the court of civil appeals held that he was not entitled to sue, although a licensed dealer. Both are questions of much difficulty; but since it was not averred that the applicant was lawfully engaged in the business of selling liquors, we do not find it necessary to decide either of them. The courts, in determining a case, are not at liberty to consider a fact appearing in evidence which is not alleged in the pleadings.

The application for the writ of error is refused.

MOORE v. BELL, Atty. Gen.

(Supreme Court of Texas. Jan. 13, 1902.)

RAILROAD COMMISSION—PROSECUTIONS—AUTHORITY OF ATTORNEY GENERAL—CONSTITUTIONAL LAW.

1. Rev. St. art. 4579, provides that the railroad commission shall report all violations of the laws concerning railroads to the attorney gen-

eral, or other officer charged with the enforcement of the laws, and request him to institute proper proceedings. Article 4577 provides that all the penalties therein provided for shall be recovered, and suits thereon shall be brought in the name of the state, by the attorney general, or under his direction. *Held*, that the district attorney for the county in which such suit is brought has no authority to appear and prosecute it, except by request of the commission, and hence is not entitled to the fees provided therefor.

2. Const. art. 5, § 21, provided that county attorneys shall represent the state in all cases in the district and inferior courts in their respective counties. An amendment to article 10, § 2, provides that the legislature shall pass laws to regulate railroad tariffs, etc., and enforce the same by adequate penalties, and may provide and establish all requisite means and agencies, invested with such powers as may be deemed adequate and advisable. *Held*, that the legislature had power to authorize the attorney general to institute and control suits in the district courts to enforce penalties for violation of the railroad laws.

Original application for writ of mandamus, on the relation of Warren W. Moore, against C. K. Bell, attorney general. Writ refused.

Warren W. Moore, in pro. per. C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for respondent.

BROWN, J. This is an original suit in this court seeking a mandamus against the respondent, C. K. Bell, attorney general of the state, to compel him to pay over to the relator certain moneys alleged to be in the hands of the respondent, and claimed to belong to the relator. The petition alleges, in substance, that at the date of the collections made in the several cases therein stated the relator was, and is now, district attorney for the judicial district which embraces Travis county, and that C. K. Bell was then, and is now, the attorney general of the state of Texas. It is alleged that the attorney general of the state, at the request of the railroad commission of Texas, instituted a number of suits in the district court of Travis county against the Texas & New Orleans Railroad Company to recover of that corporation penalties incurred by it for refusing to permit a person authorized by the railroad commission of Texas to examine its books and papers; that all of said suits were consolidated and tried as one case, which resulted in a judgment for the state of Texas in the sum of \$2,500, which sum, with interest to the amount of \$67.50, was collected by the said attorney general, the respondent herein. It is also alleged that at the instance of the railroad commission of Texas the attorney general instituted in the district court of Travis county a suit, in the name of the state of Texas, against the Houston, East & West Texas Railway Company, to recover of it penalties incurred by the corporation in charging, demanding, and collecting from one person less compensation than it charged another person for like and contemporaneous service; that said suit was tried, and resulted in a judgment in favor of the state of Texas

for the sum of \$1,500, which judgment the respondent, the attorney general, collected and received for the state of Texas. Relator alleges that he was district attorney for the said district during the pendency of the said suits; that he informed the attorney general that he (the relator), as district attorney, claimed the right exclusively to represent the state of Texas in all suits pending or that might hereafter be brought by the state of Texas in the district court of Travis county, and that the relator would claim the fees to which he would be entitled in the event he represented the state in the said proceedings, but the respondent denied the right of the relator to represent the state in the aforesaid suits, and insisted that he (the respondent) had the right, as attorney general, to bring and prosecute said suits in the name of the state of Texas, but he informed relator that after he had collected the moneys recovered from the said defendants, if successful, he (the respondent) would reserve in his hands said fees "until the right of the relator to the same could be ascertained and determined." It is also alleged that the attorney general has paid into the treasury of the state all of the said moneys, except the sum of \$586.75, which he is holding to await the determination of the rights of the relator therein. It is alleged that the relator, as district attorney, was entitled to the sum of \$586.75, which is in the hands of the attorney general; that he is entitled to \$50 for each penalty recovered, and 10 per cent. of the remainder of the amount collected, making the sum so reserved by the respondent. The relator alleges that he did not make a motion in the district court of Travis county to be allowed to take charge of the litigation in the cases mentioned, because respondent agreed that he would waive the failure of the relator to make such motion, and have the right of the relator to the fees herein claimed determined. It is prayed that the court shall adjudge a writ of mandamus against the attorney general, C. K. Bell, requiring him to pay over to the relator the said sum, \$586.75, and for proper and equitable relief. The respondent, C. K. Bell, attorney general, filed a general demurrer to this petition, upon which this case was submitted.

In 1890 the people of Texas adopted the following amendment to section 2, art. 10, of the constitution: "Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways and railroad companies common carriers. The legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties, and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such

powers as may be deemed adequate and advisable." The legislature which assembled in 1891 enacted what is known as the "Railroad Commission Law," which appears in the Revised Statutes of 1895 as chapter 13, tit. 94. By that law the railroad commission was created, and invested with very large powers and extensive control over the operation of railroads in Texas. To carry into effect the amendment to the constitution, and to enable the railroad commission to enforce the laws enacted "to correct abuses and prevent unjust discrimination and extortion," the following articles of the Revised Statutes were embraced as a part of the commission law:

"Art. 4568. Any person, firm, corporation or association, or any mercantile, agricultural or manufacturing association, or any body politic or municipal organization complaining of anything done or omitted to be done by any railroad subject hereto, in violation of any law of this state or the provisions of this chapter for which penalty is provided, may apply to said commission in such manner and under such rules as the commission may prescribe, whereupon, if there shall appear to the commission to be any reasonable grounds for investigating such complaint, it shall give at least five days' notice to such railroad of such charge and complaint, and call upon said road to answer the same at a time and place to be specified by the commission. The commission shall investigate and determine such complaint under such rules and modes of procedure as it may adopt. If the commission finds that there has been a violation, it shall determine if the same was willful; if it finds that such violation was not willful, it may call upon said road to satisfy the damage done to the complainant thereby, stating the amount of such damage, and to pay the cost of such investigation; and if the said railroad shall do so within the time specified by the commission, there shall be no prosecution by the state; but if said railroad shall not pay said damage and cost within the time specified by said commission, or if the commission finds such violation to be willful, it shall institute proceedings to recover the penalty for such violation and the cost of such investigation," etc.

"Art. 4579. It is hereby made the duty of such railroad commission to see that the provisions of this chapter and all laws of this state concerning railroads are enforced and obeyed, and that violations thereof are promptly prosecuted, and penalties due the state therefor recovered and collected. And said commission shall report all such violations, with the facts in their possession, to the attorney general or other officer charged with the enforcement of the laws, and request him to institute the proper proceedings; and all suits between the state and any railroad shall have precedence in all courts over all suits pending therein."

By the foregoing articles the railroad com-

mission was empowered to investigate all charges which might be made against railroad companies for the violation of any of the provisions of that law, and was empowered (1) to determine whether there had been a violation or not; (2) whether the violation was willful or not; (3) if not willful, to prescribe terms upon which the railroad company could settle with the injured party, which, if complied with, would prevent suit for the recovery of the penalty; (4) if the terms should not be complied with, or if the violation was willful, it would be the duty of the railroad commission to institute proceedings to recover the penalties, by reporting the facts "to the attorney general or other officer charged with the enforcement of the law," and requesting him to institute proceedings thereon. The powers conferred are largely discretionary. They embrace every phase of the proceedings preliminary to the filing of a suit to enforce obedience to the law, and there is no law by which any officer or department of the government may institute a suit for those purposes, except upon the recommendation of the railroad commission. It is manifest that powers so broad and comprehensive operate to exclude any other officer from interfering with the enforcement of the railroad commission law. The question arises, had the relator a right to appear in or to control the conduct and management of the cases against the two railroad companies for penalties? The following article of the Revised Statutes definitely answers the question: "Art. 4577. All of the penalties herein provided, except as provided in article 4575, shall be recovered and suits thereon shall be brought in the name of the state of Texas in the proper court having jurisdiction thereof in Travis county or in any county to or through which such railroad may run, by the attorney general or under his direction; and the attorney bringing such suit shall receive a fee of fifty dollars for each penalty recovered and collected by him, and ten per cent. of the amount collected, to be paid by the state," etc. That language, in connection with article 4579, shows the intention of the legislature to make the chief law officer of the state the representative of the state's interests in all such prosecutions, and to place them strictly under his direction. The language, "all of the penalties herein provided for * * * shall be recovered and suits thereon shall be brought in the name of the state of Texas by the attorney general or under his direction," is mandatory in form, and strongly indicates the intention of the legislature to limit the prosecution and control of such cases to the attorney general. We therefore conclude that by the terms of the law the institution, prosecution, and management of all suits for penalties against railroads for the violation of the provisions of that law were committed exclusively to the commission and to the attorney general,

and that the relator had no authority to institute a suit of the class in question, nor to appear in and prosecute it, except by request of the railroad commission.

It is claimed by the relator that the language, "and said commission shall report all such violations and the facts in their possession to the attorney general or other officer charged with the enforcement of the laws," must be construed to mean that they should report to the attorney general the violations of laws which he had the right under the constitution to prosecute, and to the county attorneys or district attorneys the classes of cases which fell within their constitutional power. Article 4577 negatives any such intention on the part of the legislature, for it directly provides that the attorney general shall bring suits for all penalties arising under that chapter; and the language, "or under his direction," strongly supports the view that the phrase, "or other officer charged with the enforcement of the law," referred to the violations of other laws of the state that the commission is charged to enforce, and for breach of which the district or county attorney might sue. No other officer is charged with the enforcement of the commission law. In any event, the relator had no authority to institute the suits or to prosecute them,—not having been requested to do so,—and has no cause of action. It is not necessary for us to decide whether the railroad commission might commit the prosecution of such cases to the county or district attorney, and we do not pass upon that question.

Relator insists that by virtue of section 21, art. 5, of the constitution, and the laws made in pursuance thereof, he was entitled to control the two suits named in his petition, and that, so far as the commission law interferes with that right, it contravenes the following portion of that section of the constitution: "The county attorneys shall represent the state in all cases in the district and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall, in such counties, be regulated by the legislature. The legislature may provide for the election of district attorneys in such districts as may be deemed necessary and make provision for the compensation of district attorneys and county attorneys." In support of his contention, relator cites the case of *State v. Moore*, 57 Tex. 307. In that case, however, the court said: "These two sections, taken together, render it evident that it was not intended to confer upon county attorneys the power, or to impose upon them the duty, of representing the state in all suits in the district and inferior courts." County and district attorneys have no authority to bring actions of quo warranto and the like. *State v. Paris Ry. Co.*, 55 Tex. 80; *Same v. International & G. N.*

Ry. Co., 89 Tex. 562, 35 S. W. 1067. In the case of *State v. Moore*, before cited, the supreme court held that the legislature had no power to take from an officer authority vested in him by the constitution, and confer it upon a different officer, because not authorized by the constitution; but in that connection Judge Stayton used this language: "That the constitution might empower the legislature to withdraw power from the hands in which the constitution placed it, and confer the same upon another officer or tribunal, cannot be doubted." The amendment to section 2, art. 10, of the constitution, before quoted, was adopted when section 21, art. 5, was in force, and had been construed in the case of *State v. Moore*; and if there be any conflict between the provisions of the two sections of the constitution, we think that it ought to be held that the people intended, by adopting the amendment, to modify the existing provision of the constitution upon the subject. We are of opinion that the amendment to section 2, art. 10, of the constitution, empowers the legislature, whenever it might be deemed necessary, to confer upon the agencies created by it for the purposes named powers which were, before its adoption, vested in other officers by the constitution. All of the powers of government were then distributed to different departments, and a new department or agency could be created only by drawing upon existing departments. It would be difficult to frame a sentence which would give more unlimited power over a particular subject than is expressed in this language: "The legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of this state and enforce the same by adequate penalties, and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable." The people, in the exercise of their sovereign power, have seen fit to commit to the legislature the decision as to what means and agencies may be "adequate and advisable" for the control of railroad corporations, and the correction and prevention of the evils named in the constitutional amendment. The discretion which is thus placed in the legislature is beyond judicial control, so long as the law is confined to the subject-matter and the purposes for which the constitution authorized it to be enacted. It cannot be contended that the creation of the railroad commission, with the power of investigation and the direction of suits, is not an agency or means employed for the purposes named in the constitutional amendment; and we think that there is as little doubt that the services of an attorney in prosecuting cases for the recovery of penalties is as much a means or agency in the

correction of the abuses and enforcement of the laws as the commission itself.

We are of opinion that the law which authorizes the attorney general to institute and control such suits as those named in the relator's petition is constitutional, and a valid exercise of the discretionary power vested in the legislature, and that the relator had no right either to institute the suit, or to claim a participation in or control of it after it was instituted; and the writ of mandamus is therefore refused.

ELLIS COUNTY v. THOMPSON.

(Supreme Court of Texas. Jan. 9, 1902.)
COUNTIES—COUNTY CLERK—SALARY—FEES—
COLLECTION—PERCENTAGE—DEPUTIES' SALARY.

1. Under *Sayles' Civ. St. art. 2495f*, providing that where fees are due a county, and not collected during the fiscal year when they became due, they shall be collected by the officer to whose office the fees accrued, who shall be entitled to 10 per cent. of the fees so collected, a county clerk has no right to collect delinquent fees after the expiration of his term of office, he having then ceased to be "the officer to whose office the fees accrued."

2. *Sayles' Civ. St. art. 2495g*, providing that the fees allowed by law to district and county clerks, county attorneys, and tax collectors in suits to collect taxes shall be in addition to their salaries, and article 2495k, excepting certain fees of the sheriff from the operation of the law requiring county officers to account for all fees received by them, are such definite exceptions as to indicate that all fees not specifically mentioned as excepted must be accounted for, so that under article 2495c, prescribing the maximum amount of "fees of all kinds" that may be retained by county officers, a county clerk is not entitled, in addition to the maximum amount, to retain commissions on fines collected by him, such commissions being included in "fees of all kinds."

3. In *Laws Sp. Sess. 1897, p. 8, § 10*, providing that in certain counties the county clerk may retain \$2,500, and in addition thereto one-fourth of "the excess of" all fees collected by him, the phrase "the excess of" was added to supply an omission in, and not to change the effect of, the original act providing that a county clerk shall be entitled to retain \$2,500, and in addition thereto one-fourth of all fees collected by him; and hence under the original act a clerk is not entitled to one-fourth of all the fees collected, but only to one-fourth of the excess after deducting the \$2,500.

4. Under *Laws Sp. Sess. 1897, p. 8, § 12*, providing that the county judge may authorize the appointment of deputy county officers, fixing their compensation to be paid out of the fees of the office, and not included in fixing the maximum salary of the clerk, and *Sayles' Civ. St. art. 2495c*, providing that county clerks may retain \$2,500, and in addition thereto one-fourth of the excess of all fees collected by them, a county clerk is not entitled to one-fourth of all fees remaining after deducting his own salary, but only to one-fourth of the amount remaining after deducting the salaries of himself and his deputies.

On motion for rehearing. Granted, and judgment reversed.

For former opinion, see 64 S. W. 927.

Jack Beall and T. B. Williams, for plaintiff in error. Templeton & Harding and

Finley, Etheridge & Knight, for defendant in error.

BROWN, J. The earnestness which characterizes the presentation of this motion calls for notice by this court of the most important objections against the construction we have given to the statute in question. By inadvertence the sum of \$167.50, collected by the successor of Thompson of the delinquent fees reported by the defendant, was charged against him in our statement of the account. This will be corrected.

Thompson collected \$239.55 after he went out of office, and claims that he is entitled to 10 per cent. of that amount. Article 2495f, Sayles' Civ. St., provides: "All fees due and not collected as shown in the report required by article 2495d, shall be collected by the officer to whose office the fees accrued, and out of such part of delinquent fees as may be due to the county, the officer making such collection shall be entitled to ten per cent. of the amount collected by him." Thompson had ceased to be the "officer to whose office the fees accrued," and had no authority to collect the money after he went out of office. That duty devolved upon his successor, and the defendant is not entitled to 10 per cent. of the money which he voluntarily collected.

The defendant in error contends that the sum of \$190.55, commission on fees collected by him, should not be charged as fees to be accounted for. Article 2495c, Sayles' Civ. St., reads thus: "The maximum amount of fees of all kinds that may be retained by any officer mentioned in this article as compensation for services shall be as follows." The phrase "fees of all kinds" embraces every kind of compensation allowed by law to a clerk of the county court, unless excepted by some provision of the statute. Article 2495g, Id., reads as follows: "It is not intended by this act that the commissioners' court shall be debarred from allowing compensation for ex-officio services to county officials not to be included in estimating the maximum provided for in this act, when in their judgment such compensation is necessary; provided, such compensation for ex-officio services shall not exceed the amounts now allowed under the law for ex-officio services; provided, further, the fees allowed by law to district and county clerks, county attorneys and tax collectors in suits to collect taxes shall be in addition to the maximum salaries fixed by this act." Article 2495k, Id., excepts certain fees of sheriffs from the operation of the law. The exceptions are so definite that by implication all fees not mentioned in the exceptions are excluded therefrom, and thereby included within the requirements of the act.

Counsel claim that the court failed to give proper effect to the amendment made by the legislature to section 10 of the act in

question (Laws Sp. Sess. 1897, p. 8). The language of the original section pertinent to the questions is as follows: "The maximum amount of fees of all kinds that may be retained by any officer mentioned in this section shall be as follows: * * * In counties in which there were cast at the last presidential election 7,500 votes, the county clerk, an amount not to exceed \$2,500, * * * and in addition thereto, one-fourth of the fees collected by him." Defendant's counsel assert that this language means that the clerk should first retain one-fourth of all fees, and then apply the three-fourths until he had received \$2,500; but by the terms of the original section the fees might have been retained to the amount of \$2,500, and then one-fourth of all fees collected might have been added "thereto,"—that is, to the \$2,500 retained. The fallacy of defendant's construction is made manifest by the statement of the proposition. But the amendment introduces into the section the words "the excess of," equivalent to "surplus," which is defined by Bouvier thus: "That which is left from a fund which has been appropriated for a particular purpose; the overplus; the residue." Insurance Co. v. Parker, 34 N. J. Law, 479; People v. Board of Com'rs, 76 N. Y. 74. The fees constitute a fund devoted to the payment of the expenses of the office, and to ascertain the "excess" or "surplus" every item of expense mentioned in the act must be deducted. The effect of the amendment was not favorable to defendant's position, but we believe that the words "the excess of" were omitted by mistake in the original act, and that the intention was simply to cure the mistake. We have considered it as if in the original section 10.

Counsel for Thompson urge upon the consideration of this court the twelfth section of the act of 1897, which, applied to the facts, is, in substance, that when defendant in error desired aid in his office he was authorized to present an application to the county judge of Ellis county for authority to appoint deputies, accompanied by affidavit "that they were necessary for the efficiency of the public service," and at the instance of the county judge to make "a statement showing the need of such deputies." The county judge might authorize the appointment of such number "as, in his opinion, was necessary for the efficient performance of the duties of said officer," fixing the compensation "to be paid out of the fees of the office," and not to be "included in estimating the maximum salary" of the clerk. Before the enactment of that law, county clerks determined for themselves the question of employing deputies, and made contracts for their compensation, being personally liable therefor. But the state now determines the necessity for deputies, their number and compensation, and their salaries are payable out of the fees. The clerk is

not personally liable further than to receive the fees and pay over the money to the deputies. Out of abundant caution, however, the provision that the compensation of deputies should not be included in estimating the maximum salaries—that is, not included in the \$2,500—was inserted to make sure that the salaries of the deputies should not be a charge upon the clerk. If, however, we are mistaken, then the language must mean that, before the “one-fourth of the excess” is estimated, the maximum salary of the officer and the amount paid to deputies shall be deducted, leaving the excess contemplated by the statute. The amount paid to deputies having been deducted would not be included in estimating the “maximum salary,” whether it be the fixed sum or includes the one-fourth of the excess. The word “estimating” means the act of ascertaining the salary, in which the compensation for deputies must not be included; that is, must be deducted before the estimate is made. Learned counsel fail to show how the amount allowed for deputies is excluded from the estimate of the maximum salary, according to their interpretation. Let us try the position by a statement. The whole amount of fees collected, after deducting \$187.50, is \$7,180.74. The \$2,500 is fixed; therefore not to be estimated. And we subtract that sum, leaving \$4,680.74, which includes \$4,151.59 paid deputies. The one-fourth of the excess is to be ascertained, but it cannot be computed on \$4,680.74, because that would include the pay of deputies “in estimating” the one-fourth; hence we must deduct \$4,151.59 in order to exclude it from the estimate, which would leave \$529.15, the excess of which one-fourth is to be taken. The purposes for which the law was enacted is a matter of prime importance in arriving at a correct interpretation of its terms. If it were true, as claimed, that the object of the legislature in enacting the law was to enlarge the rights of the officers named, it should be construed so as to accomplish the legislative intent; and our conclusion would not be correct, because it is not reached from that view point. Before the enactment of that statute the officers received and appropriated to their own use all fees derived from the performance of their official duties, and their interests would have been best served by leaving the law as it was, as was done with counties having a population of 15,000 or less. Where the fees do not amount to the maximum fixed for the officer, he gets no more than the fees yield; if they exceed the maximum allowed, the officer must account for the excess, limiting the existing rights of officials in the fees, instead of enlarging them. The legislature undertook to regulate this matter so as to give to each officer, out of the fees collected by him, a reasonable compensation for the services rendered, to make the offices self-sustaining, and to apply the

excess of fees to public use. To accomplish this end, the business of the offices named is placed strictly on the basis of a public service, and the fees are treated as a part of the public revenue to be received by the officer and accounted for as directed. So marked is this feature of the law that the officer cannot remit a fee. The provision for appointing deputies was made to provide for the contingency that the duties might be greater than the officer could perform, and is based upon the inability of the officer to do the work, and that the fees would be sufficient to pay the deputies, and the number to be appointed would be regulated by the work to be done and the probable yield of the fees. Placing the authority to determine the number and pay of deputies with the county judge guards the fund against extravagance, while the deputies are protected against exactions of the principal officer by prohibiting him, under severe penalties, to retain any part of the amount allowed them, or to pay to them less than the salary fixed by the county judge. Section 14, p. 11, Laws Sp. Sess. 1897. Whether it be a wise or foolish policy, the legislature has clearly emancipated the deputies as employes of the principal officer, and has relieved that officer from personal liability to the deputies. What would be their respective rights in case the fees would not compensate principal and deputies is not before the court. When the services of principal and deputies have been paid for, if there be an excess, the law generously gives one-fourth to the officer. The fees being collected from the public, the amount in excess of fair compensation for services rendered ought to be returned to the public, which is done by turning it into the county treasury as a part of the county fund.

Counsel for Thompson plant themselves upon what they call the literal meaning of section 10 of the act of 1897, and seek to subordinate everything to that. The words of section 10, unaided, designate no sum nor furnish any rule by which to determine the excess upon which to estimate the one-fourth. It would be necessary to resort to construction by supplying words implied and necessary to express the meaning, according to the defendant's contention, thus: “In addition thereto, one-fourth of the excess of \$2,500 of the fees collected by the county clerk.” If we considered the tenth section alone, this would be a correct interpretation, because no sum other than the \$2,500 would be expressed as a charge against the fund. We cannot, however, consent to be confined to one section of the act in disregard of all other parts, even if the language were unambiguous. The paramount rule of construction is to find out the legislative intent, which is the law, and must prevail. *Suth. St. Const. § 218; Runnels v. Belden, 51 Tex. 48; Russell v. Farquhar, 55 Tex. 359.* In *Runnels v. Belden*, Chief Justice Moore said:

"It is unquestionably a fundamental canon of construction that such interpretation shall be given to acts of the legislature as will effectuate the intent and purpose of the law-makers in their enactments, when the intent of the law is plain and obvious, rather than to follow its literal import or mere grammatical construction." In the case of *Russell v. Farquhar* the same learned judge used the following language: "If courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they are couched, it might well be admitted that appellants' objection to the evidence was well taken. But such is not the case. To be thus controlled, as has often been held, would be for the courts, in a blind effort to refrain from an interference with legislative authority by their failure to apply well-established rules of construction, to in fact abrogate their own power, and usurp that of the legislature, and cause the law to be held directly the contrary of that which the legislature had in fact intended to enact. While it is for the legislature to make the law, it is the duty of the courts to 'try out the right intendment' of statutes upon which they are called to pass, and by their proper construction to ascertain and enforce them according to their true intent; for it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertence or otherwise by the legislature to express its intent, and to follow which would pervert that intent." The evil results consequent upon an adherence to literalism in construing a statute so clearly set forth by Judge Moore are well illustrated by the construction contended for by defendant. From the language of the whole act of 1897 it is plain that the legislature intended to make efficiency in the public service the standard by which the affairs of the offices named should be regulated and conducted. When the defendant, Thompson, applied to the county judge for authority to appoint deputies, he virtually affirmed two propositions: First, that the duties of the office were greater than he could perform alone, which showed a necessity for the appointment of deputies; and, second, that the fees of the office would be sufficient to pay for the aid needed. The latter fact would appear from the statement which might have been demanded by the county judge, who was required to keep in view the promotion of the public service, and who, in determining the number of deputies necessary to "the efficient service of the public" and the salary to be allowed to each, must have had in mind the service required and the probable amount of the fees of the office. Let us try construing the law in the interest of the officer by a statement of the account, and note the result. The fixed salary of the clerk is \$2,500. By determining the number of deputies to be appointed, and fixing their compensation, the cost of their services per an-

num could be ascertained, which we will place at the actual cost, \$4,151.59, and from the statement an estimate of the fees could be made, which, for present purposes, we will fix at the sum actually collected, \$7,180.80. Deduct \$2,500, fixed salary, and there remains \$4,680.80. Add one-fourth of that amount, \$1,170.20, to the salary of the clerk, and he would receive \$3,670.20, leaving \$3,510.40 to be applied to the payment of the deputies for their services, worth \$4,151.59. The clerk would get \$1,170.20 more than the value of his services, and the deputies would receive \$641 less than the amount allowed. The result would be that the number of deputies must be reduced so as to bring their compensation within the amount of fees collected, whereby the public service would suffer, or they must be denied fair pay for their labor. This interpretation sacrifices everything to the private interests of the officer. Construed according to the obvious intention of the legislature, the deputies would receive the fair value of their labor, the clerk would receive the full value of his services, and "in addition thereto one-fourth of the excess," leaving a small sum for the county treasury, and "the efficiency of the public service" would be maintained.

It is ordered that the motion for rehearing be granted, and that the judgment heretofore entered be set aside. It is ordered that the judgment of the district court and court of civil appeals be reversed, and this court will now render judgment in favor of Ellis county against T. F. Thompson for the sum of \$217.17, with 6 per cent. interest per annum from November 28, 1898, to this date, and for the sum of \$179.67, with 6 per cent. interest from May 20, 1900, aggregating \$455.04, to bear 6 per cent. interest from date.

KELLETT v. TRICE.

(Supreme Court of Texas. Jan. 16, 1902.)

HUSBAND AND WIFE—SEPARATE ESTATE—
RIGHT TO CONVEY—COMMUNITY PROP-
ERTY—CONSIDERATION.

1. Under the statutes of Texas giving to a married woman power to convey her separate property in the mode prescribed when joined by her husband, and the statutes defining community property as all that acquired during coverture except by gift, devise, or descent, a deed of the wife's property to a trustee, reciting that it is for the purpose of being conveyed to the husband, to thereafter be community property, and the trustee's deed in execution of such trust, are void.

2. Where a husband and wife joined in a deed to convey a large amount of her separate property and a small amount of his to a trustee for a recited consideration of \$1, paid by each to the other, for the purpose of having all the property conveyed to the husband as community property, the conveyance of the wife's property was without consideration.

Certified questions from court of civil appeals of Third supreme judicial district.

Action for divorce by Callie R. Trice (formerly Kellett) against William M. Kellett.

Judgment for defendant was modified by the court of civil appeals (56 S. W. 766), and questions certified.

A. C. Prendergast and L. W. Campbell, for appellant. Wm. L. Prather and Clark & Bolinger, for appellee.

WILLIAMS, J. Certified questions from the court of civil appeals for the Third district. The certificate states that this was an action by appellee against appellant for a divorce, and for the adjustment of their rights of property, and to set aside the deeds hereinafter stated. After the divorce was granted, the deeds were set aside, and the questions certified arise in this branch of the case.

The circumstances under which the deeds were executed were that plaintiff and defendant had a disagreement, in which plaintiff was in fault. Defendant left home, and remained away from December 9, 1896, until January 24, 1897, when he returned, and remained at home until after the suit for divorce was brought, May 21, 1898. On the 22d day of January, 1897, plaintiff and defendant joined in the following deed to E. Rotan, trustee: "The State of Texas, County of McLennan. Know all men by these presents, that we, W. M. Kellett and Callie R. Kellett, husband and wife, in consideration of one dollar, from each to the other paid, and for the purpose of divesting the separate estate and title of us and each of us in and to the property (hereinafter described) in which each of us shall hereafter own, hold, have, and enjoy an equal undivided community interest, to the end that all of the same may stand and be as all other property now owned by us, viz., community property, regardless of in whose name the title thereto may stand, and thereby avoid any further necessity of keeping separate accounts of the increase thereof, of the income therefrom, of the expenses of improvements, repairs, insurance, and all other expenses thereon, and that all of the expenses and improvements thereon and on all other of our property may be paid and made from a common fund, and all increase, profit, and income of every kind whatsoever from said property hereinafter described shall be and become after this date community property under the laws of the state of Texas; and for the further consideration and purpose of settling all questions now or which may hereafter arise between us, and avoiding any question hereafter between our respective heirs upon the death of either of us; and in consideration of five dollars, to us in hand paid by E. Rotan, trustee, for the purposes herein named,—have bargained, sold, assigned, transferred, and conveyed, and do by these presents bargain, sell, assign, transfer, and convey, unto the said E. Rotan, trustee, the following described property, situated in the city of Waco, county of McLennan, and state of

Texas, to wit. [The property described consists of several parcels of real estate and two hundred and thirty-eight shares of bank stock.] Together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging or in any wise incident or appertaining; to have and to hold all and singular the premises and property above mentioned unto the said E. Rotan, his heirs and assigns, forever, in trust for the purpose of conveying the same to the said W. M. Kellett as the community property of the said W. M. Kellett and Callie R. Kellett, and we do hereby bind ourselves, our heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said E. Rotan, trustee, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof. Witness our hands this, the 22nd day of January, A. D. 1897. Wm. M. Kellett. Callie R. Kellett." All of the real property and 180 shares of the stock described were the separate property of plaintiff. The other 108 shares of stock were community property. This deed was freely and voluntarily executed by both parties, acting under advice of their respective attorneys, and was duly acknowledged by plaintiff as a married woman. The only purposes and considerations were those recited. On the 23d day of January, 1897, Rotan executed and delivered the following instrument: "The State of Texas, County of McLennan. Know all men by these presents, that I, E. Rotan, trustee, of said county and state, for and in consideration of \$10, to me in hand paid by Wm. M. Kellett, and in further consideration of and for the purpose of carrying into effect the object and purpose of the conveyance to me by said Wm. M. Kellett and his wife, Callie R. Kellett, dated January 22nd, 1897, of the hereinafter described property, and under and by virtue of the power to me in said conveyance given, and in obedience and compliance therewith, have bargained, sold, assigned, transferred, and conveyed, and by these presents do bargain, sell, assign, transfer, and convey, unto the said Wm. M. Kellett, the following described property, situated in the city of Waco, and county of McLennan, and state of Texas, viz. [Here follows an accurate description of all the property conveyed.] All of which is and shall be the community property of said Wm. M. Kellett and his said wife, Callie R. Kellett, under the laws of the state of Texas; together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging or in any wise incident or appertaining; to have and to hold all and singular the premises and property above mentioned unto the said Wm. M. Kellett as such community property, his heirs and assigns, forever. Witness my hand this January 23rd, 1897. E. Rotan, Trustee."

The questions asked are as follows: "(1) Do the facts recited in the deed or contract executed by appellant and appellee to Rotan constitute a valuable consideration? (2) Can the wife, by conveyance in the manner indicated in the above deed, when joined by her husband in the manner required by statute, convert her separate estate into the community estate of herself and husband? (3) Is a valuable consideration resulting to the wife necessary in order to support such a conveyance?"

On the side of the appellant it is asserted that the transaction was a lawful exercise of the wife's statutory power to convey her separate property, and that thereby her title was conveyed to her husband, and made a part of the community estate. On the other side it is urged that the instruments, although having the form of conveyances, could not legally operate as such, but disclosed merely an attempt by the agreement of husband and wife to convert that which the law made separate property of the latter into common property of the two. On a former appeal the court of civil appeals sustained the latter contention (*Kellett v. Kellett*, 56 S. W. 766), and, after due consideration of the arguments of both parties and the authorities relied on, this court is of the opinion that the conclusion was correct. It is settled by the decisions in this state that married women have no power, except such as is affirmatively given by statute, to bind themselves personally by contracts. *Wadkins v. Watson*, 86 Tex. 184, 24 S. W. 385, 22 L. R. A. 779; *Kavanaugh v. Brown*, 1 Tex. 481. Among the powers so given is that of making conveyances of their separate property in the mode prescribed in the statute, when joined by their husbands. It is obvious, therefore, that an agreement by a married woman, attempting to convert her separate estate into community property, however executed, must be invalid, unless her act amounts to a conveyance such as is recognized by the law. While it may be true that a wife cannot convey her separate property directly to her husband (*Graham v. Stuve*, 76 Tex. 532, 13 S. W. 351), it is nevertheless true that by their joint deed, properly acknowledged, the husband and wife may convey such property to a third person, and the grantee may convey it to the husband, either with or without consideration, although the sole purpose of the transaction is to cause the property to become that of the husband. *Riley v. Wilson*, 86 Tex. 240, 24 S. W. 394. In virtue of her power of conveying, the wife, by pursuing the statutory mode, may mortgage her property to secure the debt of her husband or of a third party, the power to convey the absolute title being held to include the lesser power of mortgaging, and the mortgage being sustained as a species of conveyance. It is also held that different methods of conveyance may be adopted, and

that husband and wife are not confined to deeds jointly signed by them. Thus they may convey through the agency of an attorney in fact, empowered by their joint power of attorney duly executed and acknowledged (*Patton v. King*, 26 Tex. 685, 84 Am. Dec. 596); or the wife may be empowered by the husband to sign his name to the deed, and the conveyance thus executed by her for both will pass title. *Rogers v. Roberts*, 13 Tex. Civ. App. 196, 35 S. W. 76. These are but instances of different kinds of conveyances. In each of them the separate title which the wife possesses, or an interest in it, passes to and vests in the grantee, and her act is therefore strictly within the power given to convey her property. On the other hand, the policy of the law protects the wife's property from liability for her husband's debts, and she cannot make it subject to them by mere agreement not amounting to some kind of legal conveyance. *Magee v. White*, 23 Tex. 180. Her property is protected also against alienations by the husband, and she cannot, by power of attorney or other mere agreement, enable him to divest her title. *Cannon v. Boutwell*, 53 Tex. 626. The power to convey does not, therefore, enable her to contract generally with reference to her separate property, but only to dispose, in whole or in part, of her title; and the only operation which her conveyances have is to pass such title or some interest in it. *Wadkins v. Watson*, supra. The effect of her conveyances, as well as those of others, is governed by the law applicable to the existing facts under which they are made; and the case therefore resolves itself into the inquiry: Did the facts essential to make the property in question community property exist when the transaction took place; and, if not, could the husband and wife, by their mere volition, make it such in the manner attempted? Property of husband and wife in this state gets its character as belonging separately to one of them or in common to both from the statutes defining their separate and community estates. Property which either of them owns before marriage and that which he or she acquires afterwards by gift, devise, or descent is his or her separate property. Property acquired by either after marriage otherwise than by gift, devise, or descent is their common property. By construction, property which is acquired after marriage in exchange for separate property, or which is purchased with separate funds, is held to belong to that estate which furnished the consideration. Separate property of either spouse may be conveyed to the other in such way as to become his or her separate property, and community property may be so conveyed by the husband to the wife as to make it hers separately. This is true, not because the parties chose to name the property separate, but because the facts transpire to bring it within the statutory

definition; and the law, operating upon such facts, vests title in accordance with them. The act of the parties is such as the law defines as necessary to create the separate right. Therefore the question whether particular property is separate or community must depend upon the existence or nonexistence of the facts, which, by the rules of law, give character to it, and not merely upon the stipulations of the parties that it shall belong to one class or the other. Thus, when one spouse passes to the other by gift his or her title to separate property, it could not become the community property of both, because the law declares that property so acquired shall be the separate property of the donee; and a gift by the husband to the wife of his interest in community property would become the separate property of the donee for the same reason. And so property acquired in the name of either spouse during marriage, otherwise than by gift, devise, or descent, or in exchange for separate property, would, by force of the statute, be community property. It is true that in the acquisition or afterwards the husband may give to the wife all his interest in the property, and thus, by gift, make it hers; but at last this would be true only because the facts defined in the law exist, and the separate right is derived through a gift, the husband having full power over the community estate.

If the deeds in question were without consideration, and passed title to the husband, under these rules of law they would vest in him a separate title to the land, because it is the wife's separate title that is attempted to be conveyed, and the conveyance would be a gift. Yet the deeds in effect declare that they shall not have this, but a different, operation. The one power the wife had was to convey her title, and, by her conveyance, invest her grantee with the right conveyed. The power she tried to exercise was, by the form of a conveyance, to make a contract changing the legal character of the property. As we have seen, the power of conveying does not include the power to do any such thing. It has been held in several cases that husband and wife cannot, by their mere agreements, alter the character given to property by the law acting upon the facts under which it is acquired. *Cox v. Miller*, 54 Tex. 27; *Green v. Ferguson*, 62 Tex. 520. The admissions made in these cases that community property in existence, or as it comes into existence, may be made the separate property of the wife by gift from the husband, are thoroughly consistent with what we have said. The gift fulfills the requirements of the law under which the title of one is transferred to the other so as to become separate. Here the attempt of the wife is to make a gift without at the same time so conveying her title as to make the gift have its proper effect.

Recurring to the principles already stated,

we see that, while a married woman, through the intervention of a trustee, may give or sell her property to her husband so as to make it his, and therefore subject to his control and to his debts, and may also mortgage it to secure his debts, the power is withheld from her, while retaining, to empower him to alienate it, or to subject it to his debts. A more effectual method of defeating the last-named restrictions could not be devised than that employed in this case if it were upheld. All the mischiefs sought to be guarded against would at once flow from such a transaction, and this shows that the objections to it are not of a merely technical character. In our opinion, such transactions have no place in our laws regulating marital rights. A statement of the effect of a real conveyance by the wife of her separate property, through the medium of a trustee, to her husband, such as has been upheld by this court, will serve to illustrate the difference between it and the transaction in question. By such a conveyance, the wife's title, or a part of it, to the whole or a part of the property would pass to and vest in the husband, and such interest as was conveyed would become his separate property. If only a part were conveyed, the remainder would continue to be her separate property, and would be protected from her husband's debts, as well as from alienation by him. Here the wife, while she pretends to divest her whole separate title, does not convey it to her husband, but declares that the instrument shall only operate to make the property belong to the community estate, the effect of which would be to vest in her husband an interest and in herself an interest of a different character from that which she owned and pretended to convey, and to put the whole forever beyond her control, and subject to that of the husband alone. This makes it apparent that this is not really a conveyance of her title such as she could make, but only an agreement by which a change in the character of such title is attempted, without the existence of the facts necessary, under the law, to effect the change. The wife may hold the title to community property, legally acquired, as well as the husband. If, without consideration, she and her husband should execute such an instrument to a trustee upon the trust that he should reconvey the property to her, and should provide that it should thereby become community property, would it not be evident that the entire substance of such instruments would be the agreement to change the property from separate to community, and that in reality there would be no conveyance of her separate title? We instance a case in which there is no consideration, because we do not wish to go beyond the facts of this case. It is not necessary to hold that a married woman's separate property may not be so conveyed as to become, in law, community property. It may be that a purchase may be

made of such property by the husband with community funds, so that the consideration will belong to the wife separately, and the property taking its place will belong to the community estate. If this is true, it is because the law, and not the mere agreement, would give such effect to the transaction. No such case is presented here. The deeds are without valuable consideration. The recitals of money paid are evidently merely formal and nominal (*Lewis v. Simon*, 72 Tex. 475, 10 S. W. 554); and, besides, according to the recitals, equal sums were paid to each party, so that the wife received no more than she paid. The other recitals merely give the reasons and purposes actuating the parties, and show no benefit to the wife, or detriment, disadvantage, or inconvenience to the husband, whatever. The transaction, if the instrument should have effect, would operate wholly to the benefit of the husband without pecuniary consideration received by the wife.

We conclude that the transaction did not change from separate to community the property mentioned in the deeds, and this, with what we have said, answers the questions asked.

LUEDE et al. v. HOOPER.

(Supreme Court of Texas. Jan. 18, 1902.)

REPLEVIN—BOND BY DEFENDANT—JUDGMENT FOR PLAINTIFF—DAMAGES—VALUE OF PROPERTY—TIME.

Rev. St. art. 4876, declares that where a defendant in sequestration retains possession of the property by giving a bond, and judgment is rendered for plaintiff, final judgment shall be entered against the obligors in such bond for the value of the property replevied. *Held*, that the "value" means the market value at the time of the trial.

Certified questions from court of civil appeals of Third supreme judicial district.

Action by O. H. Hooper against G. H. Luedde and others. There was judgment in favor of plaintiff, and on appeal the court of civil appeals certified a question to the supreme court.

Henry & Stribbling and Dyer & Dyer, for appellants. J. W. Taylor and Lud Williams, for appellee.

BROWN, J. The court of civil appeals for the Third district has certified to this court the following statement and question:

"The court of civil appeals of the Third supreme judicial district of the state of Texas certifies that there is now pending and undecided in this court the above styled and numbered cause, which was an action by appellee, Hooper, against the appellants, in the nature of a sequestration suit to recover possession of certain personal property described in his petition, alleged to be of the value of \$738. Affidavit and bond in sequestration were executed, and part of the property described in the petition was levied upon by virtue of the writ of sequestration, and

thereafter, on the 18th day of February, 1898, the defendant in the sequestration suit replevied the same, with the appellants as sureties on his replevy bond. Upon the trial of the case the judgment prescribed by law in sequestration suits was entered, and the value of the articles assessed by the jury by their verdict was \$783.50. We find that at the date of the sequestration suit and prior thereto the appellee was the owner of the property in controversy, and was entitled to the possession of the same; that the defendant in the suit was, in contemplation of law, a trespasser, and had possession of the property without the consent of the appellee. We also find that the verdict of the jury as to the value of the property corresponds with the evidence as to the value thereof offered by appellee in its condition about the time it was first taken possession of by the defendant in the sequestration suit and the date of the replevy bond. Upon the trial of the case the appellee offered evidence of the value of the property at the time he was deprived of possession of the same, which was objected to on the ground that evidence of value at the time of trial should govern. The court overruled the objections, and, in effect, permitted the witness to testify as to what was the value of the property in its condition at the time that the appellee was deprived of its possession. In this connection it is well to state that the record shows that this case was tried on the 29th day of March, 1901, in the county court of McLennan county, Texas, and the time testified to by the witness in giving the value of the property was in 1898. Upon the trial of the case the appellants offered to prove the value of the property at the time of the trial, which, upon objection, was refused by the court. The bill of exception that raises this question shows that the witness was familiar with the value of this property at the time of trial, and that, if he had been permitted to testify, his evidence would have been to the effect that in its then condition the value was less than in 1898. To the ruling of the court in the two particulars above noticed the appellants properly preserved the questions by bills of exception, upon which proper assignments of error are made in their briefs, and they are properly before this court for determination. We also find that there was no evidence offered of the value of the use of the property from the time that the appellee was deprived of possession of the same and the execution of the replevy bond up to the date of the trial. Notwithstanding the decisions of some of the courts of this state as to the time in which the value of property will be inquired into in cases like the above, the court of civil appeals of the Third supreme judicial district of Texas certifies to the supreme court the following question:

"Should the value of property in a case like the present be ascertained and determined at

the time of trial, or at the time that the owner was illegally deprived of possession of the same, or at the date of the execution of the replevy bond by the defendant and his sureties in such a bond?"

When a plaintiff sues to recover personal property, and by writ of sequestration places it in the custody of the sheriff or other officer, the defendant may retain possession of the property by giving bond conditioned as prescribed in article 4874, one of the conditions being "that he [defendant] will have such property, with the value of the fruits, hire or revenue thereof, forthcoming to abide the decision of the court, or that he will pay the value thereof," etc. The judgment to be rendered by the court in case plaintiff shall recover is prescribed in the following article of the Revised Statutes: "Art. 4876. The bond provided for in the three preceding articles shall be returned with the writ to the court from whence the writ issued, and in case the suit is decided against the defendant, final judgment shall be entered against all the obligors in such bond, jointly and severally, for the value of the property replevied, and the value of the fruits, hire, revenue or rent thereof, as the case may be." If the property be not damaged, the defendant may discharge the judgment by delivering the property itself to the sheriff; and, if it be damaged, then he may deliver the property by paying the damages, to be assessed by the sheriff. Articles 4877, 4878. The language used in article 4876, "the value of the property replevied," has been construed by this court to mean the market value at the time of the trial. *Watts v. Overstreet*, 78 Tex. 571, 14 S. W. 704. The opinion in that case is well supported by sound reasons, and we deem it unnecessary to add anything to it. That decision is sustained by the following cases, construing statutes with similar provisions to ours: *Brewster v. Silliman*, 38 N. Y. 423; *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Chapman v. Kerr*, 80 Mo. 158; *O'Meara v. Mining Co.*, 2 Nev. 112. There is seeming conflict of authority on this question, but we are satisfied to rest the construction of the statute as already announced, by which the practice of the courts of this state has been shaped. We answer that the value of property sequestered and retained by a defendant under replevy bond should be determined by its market value at the time of the trial when the question arises in the original suit and under the statute.

SCHULTZE v. SCHULTZE et al.¹

(Court of Civil Appeals of Texas. Dec. 2, 1901.)

DIVORCE—DECREE—SUPPORT OF CHILD—ENFORCEMENT—LIEN—COURT—FRAUDULENT CONVEYANCE—PRIORITY—MORTGAGE.

1. Where a decree of divorce awards the custody of a child to the wife, and requires the pay-

ment by the husband of a monthly stipend for the child's support, but does not make such allowance a lien on his property, such allowance ceases on his dying testate, leaving such child sole legatee.

2. The decree in divorce is conclusive on the parties if not appealed from, whether legally right or not.

3. Where, in an action by a divorced wife to collect an allowance made to her in the decree of divorce for the support of a child, a conveyance of property made by her husband is adjudged void as to her, she cannot complain that it is adjudged valid as between him and the grantee, subject to her claims.

4. Where, in an action by a divorced wife to collect an allowance to her in the divorce decree, she seeks to set aside a mortgage executed by her husband for a larger amount, to take up a prior mortgage and a new loan, it is not error, on setting aside the mortgage, to subordinate her claim to the amount of such prior mortgage.

5. Where, in an action by a divorced wife to collect an allowance to her in the divorce decree for the support of a child, the payment was not secured by a lien on the husband's property, and on his death, pending the action, his executor is substituted, the payment of the amount found her due should not be enforced by execution, but certified to the county court.

6. Where, under a mortgage valid as between the parties, the mortgagee is given possession, a decree adjudging the mortgage fraudulent as to a creditor is not erroneous, because leaving such mortgagee in possession until the premises are sold, the security being ample for both claims.

7. Where a defendant in divorce conveys his real estate to his father in secret trust for his own benefit, and one knowing all the facts takes a conveyance from the father as security for debts owing by the son, such conveyances should be adjudged fraudulent as against the claim of the wife for allowances to her in the divorce decree.

8. Where a son, without consideration and in secret trust for his own benefit, conveys land to his father, and the father, to secure an indebtedness of and loan to the son, aggregating less than one-half the value of the property, conveys to the creditor, who the next day executes a contract to convey to the son on payment of the amount of such debts and loan, with interest and costs, the transaction is a mortgage.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Caroline Schultze against H. Schultze, Jr., and others. From a judgment for only a portion of the relief prayed for, plaintiff appeals. Affirmed.

Geo. O. Altgelt, for appellant. Paschal & Ryan and Keller & Williams, for appellees.

JAMES, C. J. This suit was brought in the district court on September 4, 1900, by plaintiff, Caroline Schultze, divorced wife of H. Schultze, Jr., against H. Schultze, Sr., H. Rilling, and H. Schultze, Jr. The last named died before trial, and by the amended original petition his executrix was made defendant in his stead. By this pleading plaintiff sought to recover a money judgment against H. Schultze, Jr., a decree canceling certain conveyances, and for the appointment of a receiver or trustee. Plaintiff's debt, as alleged, consisted of a judgment rendered in 1896 in the divorce proceeding between her-

¹ Rehearing denied January 8, 1902, and writ of error granted by supreme court.

self and husband, by which she was decreed the care and custody of their only child, Ruth, and the sum of \$12.50 per month for the education and maintenance of the child, payable on the 1st day of every month, beginning with the 1st day of July, 1896, which debt plaintiff alleges amounted to \$587.50 at the end of September, 1900, and her prayer asks for this sum, already accrued and to accrue, with interest; also for cancellation of certain deeds, so far as her claim is concerned; also that possession and management of certain property be vested in a receiver or trustee, who shall be directed to manage said property for the best interest of all parties hereto; that from the income of the property the receiver shall, after paying all necessary expenses, pay petitioner's debt, and thereafter pay the said monthly allowance, until said child shall attain her majority, or marry or die; and that all defendants be enjoined from interfering with the management and control of said property, etc.; and, if it be found that the net income of the property is not enough to pay petitioner's debt and future allowances, that sales be made by orders of this court for such purpose. If not entitled to this form of relief, she prayed that the conveyances be annulled, and the property sold to satisfy her claim by orders of this court, and payment of her future installments of allowance provided for out of the fund.

The case was tried by the judge, who filed his conclusions of fact and law. The conclusions of fact are lengthy, and it will conduce to a proper understanding of the issues for us to state the material facts:

The judgment of 1896 divorced plaintiff and H. Schultze, Jr.; partitioned between them their community property, plaintiff assuming to pay all outstanding taxes and all liabilities against the community estate, except a note to H. Rilling for \$500 (and one or two other claims not necessary to be here mentioned); it being understood (so stated in the decree) that H. Schultze, Jr., should discharge said debt to Rilling, which was secured by a deed of trust on what was known as the Presa street property, in San Antonio. In this partition he received certain lands in Medina county, and what is known as the "Presa Street Property," besides 16 lots in San Antonio. This divorce decree awarded the child to Carolinæ Schultze, and adjudged in her favor against H. Schultze, Jr., for the future maintenance and education of said child, the sum of \$12.50 per month, payable on the 1st of each month, beginning July 1, 1896. This judgment gave no lien on any of H. Schultze, Jr.'s, property to secure said payments, and merely provided for its collection by executions to be issued by the district clerk. No execution was ever issued on said judgment. H. Schultze, Jr., died October 1, 1900, leaving a will probated in Bexar county in November, 1900, Louise Schultze qualifying as executrix thereof at same term. The

child Ruth is the sole devisee. Louise is administering the estate under said qualification. Schultze, Jr., paid plaintiff the allowance for several months, including January, 1897, but no further, and the mother has since the divorce maintained and educated the child. On September 9, 1896, Schultze, Jr., conveyed to his father, H. Schultze, Sr., the property awarded him by said decree for a pretended consideration. This deed the court found to be with intent to hinder and delay plaintiff. H. Schultze, Sr., held the property in secret trust for his son until March 1, 1900, when, at his son's instance, he executed to H. Rilling a conveyance of certain of said property, viz., that situated in the city of San Antonio, being the Presa street property, and 16 other lots, reciting a consideration of \$1,500. Rilling took this deed knowing the facts that existed with relation to the conveyance of Schultze, Jr., to his father. The deed was not intended as an absolute conveyance to Rilling, but as between Schultze, Jr., who was the real owner, and Rilling, it was in fact a mortgage. The fact upon which this conclusion is founded is that Schultze, Jr., procured his father to make the deed to Rilling. The father received no consideration therefor, and the deed was not intended by the parties as an absolute conveyance. The consideration consisted in a judgment for \$487.89 that Rilling had against Schultze, Jr.; also the note provided for in the divorce decree of \$500, of which there was then a balance of \$400, and \$19 interest, and \$25 attorney's fee incurred in negotiating this transaction, and a check for \$570 to H. Schultze, Jr.,—making in all \$1,501.89. It appears that \$1.89 was then and there paid by Schultze, Jr., to Rilling, making the amount \$1,500, and the next day an instrument was entered into between Rilling and Schultze, Jr., which recited that the latter desired to become the owner of the property, and Rilling was willing to sell same to him upon certain conditions. Therefore: "(1) Schultze agrees to pay Rilling therefore \$1,500, with interest after date, said \$1,500 to be paid in monthly installments of not less than \$25, not later than the 15th day of the month, until the full sum of \$1,500 and interest shall have been paid. (2) Schultze, Jr., agrees to pay all taxes, liens, incumbrances, if any, on the property, etc., if any exist or may accrue, to keep up certain insurance and make repairs; it being understood that if he fail in these things Rilling might, at his option, pay taxes, premiums, or other charges, the same to be repaid by Schultze, with interest. (3) Upon Schultze, Jr., complying with his agreements, Rilling was to convey the property by special warranty or quitclaim to the former at his expense; provided, however, that should said Schultze fail to promptly make payment of any of the moneys herein agreed to be paid by him, or should fail to carry out any one or more of his covenants here-

in, then this contract shall at once be of no further force and effect, and may, at the option of Rilling, be canceled without further action; in which event all moneys paid by said Schultze shall be forfeited to Rilling as liquidated damages, it being understood that Schultze shall have and acquire no title whatever to said property until said sums of money shall have been paid in full, neither shall he be entitled to any possession thereof until such payment in full shall have been made; provided that said Schultze may, if he so desires, collect or cause to be collected the rents and revenues of said property at his own expense, and same, when paid over to Rilling, to be credited on said \$1,500, interest, etc., agreed to be paid. It finally provided for a reasonable attorney's fee in favor of Rilling in case litigation should arise over this contract, or it should become necessary to resort to legal proceedings in respect thereto." After said conveyance of March 1, 1900, Rilling went into possession and collected the rents for 14 months, at \$25 per month, and has paid out certain sums in expenses, and received also certain sums from Schultze, Jr., as interest, and he has been in possession ever since. The child is about six years of age. The property, other than the Presa street property, does not rent, and the latter alone is reasonably worth \$3,000. The day after the divorce decree Caroline Schultze executed a deed to H. Schultze, Jr., conveying the property in controversy, expressing as consideration \$10, the payment of the \$500 debt to Rilling, and the further consideration of H. Schultze, Jr.'s, deeding to her certain property (presumably the property decreed to her by the divorce decree). The deed contains covenants of general warranty.

The judge's conclusions of law are substantially: (1) That Caroline Schultze was entitled to the \$12.50 monthly allowance up to the death of H. Schultze, Jr., and that liability for such allowance ceased upon the latter's death. (2) That the conveyance from H. Schultze, Jr., to his father is void and fraudulent as against plaintiff's claim, and that the deed to Rilling was likewise void as to plaintiff, but good as a mortgage between him and H. Schultze, Jr.'s, estate. (3) That the \$400 balance of the \$500 debt mentioned in the divorce decree as due Rilling, and which constituted part of the \$1,500 consideration recited in the deed from H. Schultze, Sr., to Rilling, is a lien upon the property superior to plaintiff's claim, and should be first paid out of the property conveyed to him. (4 and 5) That \$100, a reasonable attorney's fee, should be allowed Rilling, and that after charging Rilling with net rents there is due him, including said attorney's fee, the sum of \$1,452.13, with 8 per cent. interest from May 15, 1901. (6) That plaintiff's judgment should be first paid out of the Medina county property, and next from the proceeds of the San Antonio property, after Rilling's \$400 and interest there-

in, said \$400 constituting part of said \$1,452.13, and that after paying Rilling said \$400 and interest from said proceeds to pay any unsatisfied balance due Caroline Schultze, after the sale of the Medina county property, and then the balance due Rilling shall be paid out of the proceeds of the sale of the San Antonio property. (7) That the title of all said lands be devested from defendants H. Schultze, Sr., and H. Rilling and all other parties to this suit, and be vested in Louise Schultze, executrix of H. Schultze, Jr., for the use and benefit of the heirs and devisees of H. Schultze, Jr., deceased, according to his will, but subject to the terms of this decree, provided that the possession of the property on Presa street shall remain in Rilling until the same be sold or his debt paid, he to account for the reasonable rentals of the same. (8) That the costs of this proceeding be paid out of the estate of H. Schultze, Jr. (9) That J. O. Terrell be allowed \$50 as guardian ad litem herein for the child Ruth M. Schultze. (10) That plaintiff is not entitled to have a receiver or trustee appointed as prayed for. (11) That the judgment be not executed by the sheriff under orders of sale, but the same should be certified to the county court having jurisdiction of the estate of H. Schultze, Jr., for observance.

Practically all these conclusions of law are assailed on this appeal. The prime object of plaintiff appears to be to obtain an adjudication that the allowance did not cease with H. Schultze, Jr.'s, death; that plaintiff is entitled to have provision made for its payment monthly, indefinitely in the future, as long as the child remained a minor and unmarried, as a preferred charge against the estate; and that she was entitled to have the estate administered in the district court as a trust, until the decree for allowance is accordingly satisfied. We are unable to coincide with appellant in these positions.

Our reasons for holding that after Schultze's death payment of the allowance should not be required are as follows: The parent is under a legal as well as moral obligation to provide for the child, and this duty devolves on both father and mother. It has been held that, where the custody of the child is awarded to the mother by decree, this ought to be considered as carrying with it the obligation to support, although this does not exclude the father's liability. *Tiff. Pers. & Dom. Rel. § 116*. The decree between Schultze and wife awarded her as indemnity or provision in respect to her performance of her legal obligation a simple judgment against the husband for monthly payments to her of \$12.50, with executions monthly if necessary, but no lien was imposed upon his property for the installments. His property was as subject to other debts of his as for this, and might have been dissipated by other debts to the exclusion of this.

The question is relieved from some of its difficulties by the fact that Schultze left his entire estate to the child. It may be that had Schultze provided otherwise, or left no will, Mrs. Schultze's right to this monthly allowance would have continued after his death. This we do not consider. The provision in the decree granting the allowance was really in the interest of the child, and it was founded upon the obligation of the father to support it out of his property, and contemplated his continued existence. Whether the decree was legally right or not in this respect is not the question, because the decree, as between the father and mother, was conclusive, it not having been appealed from. Upon Schultze's death the estate became the property of the child, and from that time on, if plaintiff was allowed to enforce these payments, they would come from its property. Plaintiff would, by virtue of a judgment against her husband, be appropriating the child's property for its support. This is incompatible with the statutes of this state relative to minors' estates, which provide the mode and manner by which their property may be taken for their maintenance and support. Our statutes not only throw restrictions around the use of a minor's estate for its support, and commit the jurisdiction of such matters in the county courts, but they also, in the administration of deceased persons' estates, provide for the granting of allowance to children of the deceased. There being, under the circumstances of this case, no liability by virtue of said decree for these payments after Schultze's death, the basis falls upon which appellant endeavors to construct a receivership or trusteeship for this estate. We overrule appellant's first, seventh, and eighth assignments of error.

The third, fifth, and sixth assignments refer to matters which do not concern appellant. She has no cause to complain of the judgment which decreed the deed from H. Schultze, Sr., to Rilling to be a mortgage as between them; it having, so far as appellant is concerned, been declared of no effect, and her rights adjusted upon that basis.

The fourth assignment is that the court erred in decreeing that Rilling was entitled to a lien for \$400, superior to appellant's claim. This cannot be error, because the annulment of the said deed would leave Rilling's claim as it was before, and he had a deed of trust on the property for \$400, which was recognized in the divorce decree.

The ninth assignment is that the court erred in vesting the title of the lands in defendant Louise Schultze, executrix of H. Schultze, Jr., and the tenth is that it erred in decreeing possession of the Presa street property in Rilling until it should be sold and his debt paid. The eleventh is that the court erred in holding that its judgment should not be executed by the sheriff under an order of sale, and in decreeing that it

should be certified to the county court for observance.

The award of allowance created no lien on the property of H. Schultze, Jr.; nor can there be any pretext for a claim that his property was a trust fund to serve the purposes of the allowance. But, the suit having been brought in the lifetime of H. Schultze, Jr., that court was authorized by statute to cite his executrix, and to proceed to adjudicate the matters in controversy. Appellant's judgment was against the executrix as such. If the court had undertaken to execute its decree, it would have assumed that there were no other claims against the estate, and the effect of such proceeding would have been to administer the estate for the benefit of the parties to this suit. That other claims existed of a prior class we may presume, such as funeral expenses and allowances for the child. Article 2049, Rev. St. The order certifying the decree to the county court for observance was correct, as also that vesting title in the executrix. According to the values of the property as shown in this record and the claims in question, the estate appears to be solvent, and it ought to be so presumed. The vesting of the temporary possessory right to the Presa street property in Rilling is a matter of which the executrix does not complain, and we cannot see how appellant is prejudiced thereby. According to the instruments held good as between Rilling and Schultze, Jr., and as between them, Rilling was entitled to possession, and it seems had possession when Schultze died. This property alone is worth \$3,000 more than enough to satisfy all the claims involved in this decree, to say nothing of the other property of the estate. We fail to see wherein appellant is prejudicially affected by the temporary disposition the decree makes of the possession and the rents of this particular property, and, such being the case, she ought not to be heard to complain.

Nothing of which appellant has any real cause to complain is shown by the twelfth assignment.

The second assignment complains of the judgment in respect to costs. Plaintiff was successful in part only, she being denied much of the relief she sought. In many respects the other parties were successful. That appellant's counsel does not regard her as the successful party is made manifest by the fact that she is here complaining of nearly every ruling of the court. Article 1425, Rev. St., does not apply. *Wheatley v. Griffin*, 60 Tex. 214, and cases cited. The costs were all adjudged against the estate, which, as before stated, appears to be solvent.

The appellee Rilling presents seven cross assignments. The first three we think need not be discussed. They evidently are without merit. The fourth and fifth also, because of the court's finding that the deed

from H. Schultze, Sr., to Rilling was fraudulent and void as to plaintiff. There was no estoppel in the facts set forth in connection with the sixth. The fact was clearly established that the father held the title for his son, and did not claim the property for himself. The seventh is that "the court erred in holding the deed from Schultze, Sr., to Rilling to be a mortgage as between the latter and Schultze, Jr., and that the title did not pass to Rilling subject to the right of purchase by Schultze, Jr., in accordance with the contract of sale of March 2, 1900, and in not holding that Schultze, Jr., had breached the same, and therefore acquired no right thereunder." Appellee insists that the contract was a conditional sale, and because of Schultze, Jr.'s failure to comply with its terms, he and his estate had no rights thereunder as to Rilling.

The facts bearing on this matter are: Schultze, Jr., owed Rilling a judgment amounting to \$487.89; also \$419, being the balance of the \$500 debt mentioned in the divorce decree, with interest. These sums, together with Rilling's check to him for \$570, and an attorney's charge of \$25 for services in this negotiation, constituted the consideration for the deed from Schultze, Sr., to Rilling; and, to make these sums aggregate \$1,500 even, the sum of \$1.89 was paid by Schultze, Jr., to Rilling at the time. The conveyance from Schultze, Sr., to Rilling was really a transaction between Schultze, Jr., and Rilling; and the next day an instrument was drawn up and signed by Rilling and Schultze, Jr., which stated that Rilling had become the owner of the Presa street property, also the 16 lots in San Antonio, by deed from H. Schultze, Sr., to him; and H. Schultze, Jr., being desirous of purchasing the property, Rilling agreed to sell it to him for \$1,500, with 8 per cent. interest from date, the same to be paid in monthly installments of not less than \$25, not later than the 15th of each month, the first payment to be made on March 15, 1900, which sums Schultze, Jr., so agreed to pay, and also to pay all taxes, liens, and incumbrances, if any, now or thereafter accruing, and to carry insurance for not less than \$1,500, payable to Rilling, and to keep the property in the same condition as it now is, at his (Schultze, Jr.'s) cost; it being understood that, if he failed to pay taxes, premiums, and other charges, Rilling might, at his option, pay them, and that Schultze in that event promised to immediately repay same, with interest at 8 per cent. per annum. The instrument then binds Rilling to convey the property to Schultze, Jr., by special warranty or quitclaim, upon compliance by the latter of all the above agreements. It further provides that in the event Schultze should fail to promptly make payments as agreed, or fail to carry out any one or more of his covenants, the contract was to be of no further effect, and might, at the option of Rilling,

be canceled without further action, in which event the moneys theretofore paid by Schultze shall be forfeited to Rilling as liquidated damages; also that Schultze shall have and acquire no title whatever to said property until said sums of money shall have been paid in full; neither shall he be entitled to any possession thereof until such payment in full shall have been made, provided that said Schultze may, if he so desires, collect, or cause to be collected, the rents and revenues of said property at his own expense, the same when paid over to said Rilling to be credited on the \$1,500 and interest and other sums hereinbefore agreed to be paid.

The court's finding of fact was "that the conveyance from Schultze, Sr., to H. Rilling was not intended by the parties thereto as an absolute conveyance, but involved a separate condition of defeasance, which was expressed by the parties in the following instrument, and which was executed and delivered the next day." (The one above stated.) There is no statement of facts, and we do not know upon what evidence the court predicated the conclusion that the deed to Rilling was not intended by the parties as an absolute conveyance. We cannot go behind this finding, and, if it was not intended by the parties as conveying title to Rilling, we cannot well hold that the court erred in treating the contract between him and Schultze, Jr., as a mortgage, and not a conditional deed. If, however, this be not correct, and we assume that Rilling acquired a title, under the circumstances, which he could sell to Schultze, Jr., we nevertheless are of opinion that the instrument should be regarded as a mortgage. The Presa street property alone was worth \$3,000, to say nothing of the 16 lots. There appear to have been no incumbrances on the property except in favor of Rilling. The two instruments, under the findings, may be treated, as between Schultze, Jr., and Rilling, as having taken place concurrently. Schultze, Jr., was indebted to Rilling for about two-thirds of the \$1,500, and, although these are claimed to have been settled by the conveyance to Rilling, there is no doubt that they were figured in to make the \$1,500 consideration which Schultze agreed to pay Rilling, and that he in fact continued to owe those sums as before.

The findings of fact state in detail by items what went to make up the consideration of the deed to Rilling, and we infer this was not the way the consideration was expressed in the deed, but that it expressed the consideration of \$1,500. There was evidently nothing in the deed expressing the fact that the judgment and the deed of trust to Rilling were settled, and they do not appear to have been released by separate instruments. So these debts really continued to exist in the consideration that Schultze, Jr., was to pay Rilling. It may well be inferred from all the circumstances that the \$570 advanced by Rilling, and which the contract bound

him to repay, was to induce Schultze, Jr., to have the title and agreements appear in this form. If we adopt appellee's view, and treat the two instruments as separate and independent transactions, it would appear even more clearly that the contract was a mortgage. Say that Rilling obtained title by the deed from Schultze, Sr. No consideration was paid Schultze, Sr. At the time the deed was made it appears that Rilling gave to Schultze, Jr. (not Schultze, Sr.), the check for \$570. So the next day, when the contract was entered into with Schultze, Jr., the \$1,500 consideration was made up, barring the attorney's fee of \$25, entirely of his then existing indebtedness to Rilling. Taking all the circumstances, together with the fact that it was not the intention of the parties that the deed to Rilling should be an absolute conveyance to him,—which latter fact we think was essential in order to enable him to make Schultze, Jr., a conditional deed,—we conclude that the court was right in pronouncing the instrument a mortgage.

The judgment is affirmed.

SWAIN et ux. v. MITCHELL.*

(Court of Civil Appeals of Texas. Oct. 30, 1901.)

TRUST DEED—FORECLOSURE—DEED TO PURCHASER—RECITALS—EFFECT—NOTICE—TRESPASS TO TRY TITLE—PETITION—CITATION—VARIANCE—ENACTMENT OF REVISED STATUTES—EFFECT.

1. A deed of trust to secure a note provided that any recital in the deed given by any trustee thereunder as to the time, place, and terms of sale having been duly published, or as to any other preliminary act having been done by said trustee, should be taken as prima facie true. A deed thereafter executed by a trustee recited that whereas, "the holder of said note has, since said default, requested me, the said trustee, to sell said property," etc. *Held*, in trespass to try title by the purchaser at the trustee sale, to make a prima facie case that the request to sell was made by the holder of the note.

2. Sayles' Ann. Civ. St. art. 2369 (Acts 1889), provided that notice of a sale of real estate under a trust deed shall be given "as now required in judicial sales." The statute as to judicial sales in force at the time when the article was enacted did not require personal service of notice. *Held*, that a statute thereafter enacted in 1895 requiring service of notice on a defendant in execution did not affect article 2369, and personal service on the maker of a trust deed was therefore unnecessary.

3. The act adopting the Revised Civil Statutes in 1895 provided that "the provisions of the Revised Statutes so far as they are substantially the same as the statutes in force at the time when the Revised Statutes shall go into effect . . . shall be construed as continuations thereof and not as new enactments of the same." Sayles' Ann. Civ. St. art. 2369 (enacted in 1889), declared that notice of a sale of real estate under a trust deed shall be given "as now required in judicial sales." *Held*, that article 2369 was not re-enacted by the adoption of the Revised Statutes, but continued in force, and the statute in force as to judicial sales in 1889 prescribed the method of notice.

4. A deed of trust provided that any sale thereunder should be under execution according to law, and declared that any recitals in the deed by the trustee as to the time, place, and terms of sale having been duly published, etc., should be prima facie true. *Held*, that a recital in such deed that the land was sold "after having given public notice of the time, place, and terms of such sale by giving public notice as required by said trust deed," was a statement of fact, and prima facie evidence that the law as to notice was complied with.

5. In trespass to try title, where the petition described the land as situated on "Corinth" street, and the citation as on "Coruth" street, but the description was otherwise the same, the variance did not render the citation void.

Error from district court, Dallas county; J. J. Eckford, Judge.

Trespass to try title by James R. Mitchell against W. F. Swain and wife. From a judgment for plaintiff, defendants bring error. Affirmed.

P. M. Stine and J. C. Patton, for plaintiffs in error. Philip Lindsey, for defendant in error.

FLY, J. This suit was instituted by James R. Mitchell against W. F. Swain and his wife, Viola Swain, in trespass to try title to certain land in the city of Dallas. The trial was by jury, and a verdict was instructed in favor of defendant in error. Defendant in error claims the land through a trustee's deed made to him under and by virtue of a deed of trust executed by plaintiffs in error to secure a certain promissory note. In the deed of trust is the following provision: "And it is further and lastly specially agreed by the parties hereto that in any deed or deeds given by any trustee hereunder any and all statements of facts or other recitals therein made as to the nonpayment of the money secured, or as to the time, place, and terms of sale and property to be sold having been duly published, or as to any other preliminary act or thing having been duly done by said trustee, shall be taken by any and all courts of law and equity as prima facie evidence that the said statements or recitals state facts, and without further question shall be accepted as such." In the deed made by the trustee to defendant in error it was recited: "Whereas, default has been made in the payment of said indebtedness, and James R. Mitchell, the holder of said note, has, since said default, requested me, the said trustee, to sell said property in accordance with the provisions of said trust deed, for the purpose of paying said indebtedness; and whereas, pursuant to said request and to the provisions of said trust deed, I proceeded to sell said property at public auction at the court house door of Dallas county, Texas, between the hours of 10 o'clock a. m. and 4 o'clock p. m. on Tuesday, the first day of August, 1899, after having given public notice of the time, place, and terms of such sale, by giving notice as required by said trustee's deed." The foregoing recitals were the only evidence of compliance with the law and terms of the

* Rehearing denied December 2, 1901, and writ of error denied by supreme court.

trust deed in making the deed, and it is insisted by plaintiffs in error that the proof is insufficient, because it was not shown that the request to sell was made by the holder of the note, or that personal notice was given to the makers of the trust deed.

The deed of the trustee was made to defendant in error, to whom the note was executed, and he is defending the title that he obtained at the trustee sale, and would raise the presumption that he was the holder of the note, and requested the sale of the property. We are inclined to the opinion that the recitals in the deed made by the trustee would, under the provisions of the deed of trust, have made a prima facie case anyway. Under an act passed in 1889, now article 2369, Sayles' Ann. Civ. St., it was provided that "all sales of real estate made in this state under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated," and that "notice shall be given as now required in judicial sales." That law has not been changed or amended. At the time the law in question was enacted the law as to judicial sales did not require the service of a notice of sale on the defendant in execution, and no such requirement existed until 1895, when the present law was enacted. The law as to sales under trust deeds was not changed to conform to the requirements of the amendment of 1895, and the requirements of the law as to judicial sales as it existed in 1889 must be looked to in ascertaining the notice that should be given of a sale under a trust deed. Had the language of the act of 1889 been "notice shall be given as required in judicial sales," the statute as to judicial sales in effect at the time of sale under the trust deed would prescribe the method of giving notice, but the language confines the notice to such as is "now required"; that is, at the time of enactment of the law. It cannot be maintained that there was a re-enactment of this law by the adoption of the Revised Civil Statutes in 1895, for in the act adopting them it is provided "that the provisions of the Revised Statutes, so far as they are substantially the same as the statutes of the state in force at the time when the Revised Statutes shall go into effect, or the common law in force in this state at said time, shall be construed as continuations thereof, and not as new enactments of the same."

In the deed of trust it was provided that the sale should be as under execution, in accordance with the laws of the state of Texas governing sales under deed of trust, and in the deed of the trustee it is recited that the land was sold "after having given public notice of the time, place, and terms of such sale, by giving public notice as required by said trust deed." This was the statement of a fact, and not a conclusion of law, and the recital was prima facie evidence that the law as to notice was complied with.

There is no merit in the contention that W. F. Swain was not properly cited. A variance between the description of the land in the petition and that in the citation did not render the citation void. *Cave v. City of Houston*, 65 Tex. 619. The only variance complained of is that the land was stated in the petition to be situated in Dallas on "Corinth" street, while in the citation it was stated to be on "Coruth" street. The description of the land in other respects was the same in both instruments.

The judgment is affirmed.

PUCKETT v. IRICK.¹

(Court of Civil Appeals of Texas. Dec. 14, 1901.)

CONVERSION—EVIDENCE—MATERIALITY.

1. Where plaintiff alleged that he had sold defendant a half interest in a stock of goods for \$750, but that the defendant converted the other half to his own use, and defendant claimed that he had purchased the entire stock, defendant, in cross-examining plaintiff, could show that about two months before the sale plaintiff had offered the entire stock to another person for \$350 or \$400.

2. It was error to admit evidence of the value of plaintiff's services while working with the stock; the action being to recover for a half interest in the stock, and not for wages.

Appeal from Cooke county court; B. F. Mitchell, Judge.

Action by James A. Irick against J. W. Puckett. From a judgment for plaintiff, defendant appeals. Reversed.

Hayworth & Cobb, for appellant. Potter & Potter, for appellee.

HUNTER, J. This suit was brought by Irick to recover of Puckett the value of a half interest in a stock of merchandise which it is alleged Puckett converted to his own use, the value thereof being placed at \$750. The defendant filed a general denial and a special answer, not necessary to notice here. The case was tried by a jury, who brought a verdict for plaintiff for \$644.25, upon which judgment was rendered, and from that judgment this appeal is taken by Puckett.

The material question in the case was whether Irick sold the entire stock or only a half interest to Puckett. On the trial the defendant, Puckett, offered to prove by the plaintiff, Irick, on cross-examination, that he (Irick) had, about two months before the sale to Puckett, agreed to sell the entire stock of goods to Miller for 50 cents on the dollar of their invoice price, which would have amounted to about \$350 or \$400, but the sale was not completed because of a disagreement between them as to which should pay certain attorney's fees connected therewith. This evidence was objected to on the ground that it was irrelevant and immaterial, and the objection was sustained. The

¹ Rehearing denied January 11, 1902.

same evidence was offered by deposition of said Miller, and was also excluded on the same grounds. We think the court erred in excluding this evidence. It was both relevant and material. It was a circumstance from which the jury might reasonably conclude that Irick made the same or a similar offer to Puckett. Of course, if the circumstances surrounding the two transactions were different, these would be admissible in rebuttal to break the force of the circumstance.

The court also admitted evidence of Robert Cearnal to prove that while Irick worked in the store his services were worth \$18 per week. It was objected by the defendant that this evidence was irrelevant, as plaintiff had not sued for wages, but for the value of a half interest in the stock, and we think this objection ought to have been sustained.

For these errors the judgment therein must be reversed, and we deem it unnecessary to discuss the other assignments made. The judgment is reversed, and the cause remanded for a new trial.

HOPKINS v. WOLDERT GROCERY CO.

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

WRITTEN CONTRACTS—PAROL EVIDENCE TO VARY—FRAUD—DEFENSE—PLEADING.

1. Where defendant contracted in writing to deliver a certain quantity of pecans at a specified place, time, and price, parol evidence that such pecans were to be grown in certain territory would add to the contract, and is inadmissible.

2. Where defendant contracted in writing to deliver a certain quantity of pecans at a specified time, place, and price, a plea that he was induced to enter into such contract by fraudulent representations that the pecan crop was good in the adjacent territory, while in fact such crop was there a failure, is insufficient, where it is not alleged that by reason of such failure it would have cost more to fill the contract.

Appeal from Milam county court; R. B. Pool, Judge.

Action by the Woldert Grocery Company against E. J. M. Hopkins. From a judgment for plaintiff, defendant appeals. Affirmed.

Morrison & Wallace, for appellant. Hefley, McBride & Watson, for appellee.

KEY, J. This is an action for damages for breach of a written contract for the sale of 30,000 pounds of pecans. The breach of the contract and the damage resulting therefrom were clearly shown by undisputed testimony, and the court directed a verdict for the plaintiff. The contract referred to reads as follows: "Rockdale, Texas, Aug. 24, '90. I have this day sold and agree to deliver to Woldert Gro. Co., f. o. b. cars Rockdale, one car load (30,000 pounds) thirty thousand pounds new crop pecans, (at 4c.) four cents per pound, delivery to be made on or be-

fore Nov. 14, 1890. Pecans to be sacked. [Signed] E. J. M. Hopkins." While some other questions are presented, the main contention is that the defendant had the right to show that at the time the contract was made it was understood and agreed that the defendant was to fill it with pecans of the crop of 1899, grown in the territory tributary to Rockdale, and that the plaintiff represented to the defendant at the time the contract was made that said pecan crop was good, which was untrue, and in fact that the crop in said territory was a total failure. To have permitted the defendant to prove that the pecans referred to were to be grown in the territory tributary to Rockdale, and not elsewhere, would have added a condition to the contract in respect to which there was no ambiguity. If the defendant had tendered to the plaintiff 30,000 pounds of pecans of the crop of 1899 grown in Travis county, the plaintiff could not have declined to receive them, because they were not grown in the vicinity of Rockdale. In fact, the contract is plain and clear. It required the defendant to furnish a stated quantity of pecans, and the plaintiff to pay four cents a pound therefor, and it was wholly immaterial where the defendant procured the pecans.

The defendant's plea of fraud, charging that the plaintiff's agent misrepresented to the defendant the condition of the pecan crop in the territory adjacent and tributary to Rockdale, was insufficient, because it did not aver that, by reason of the failure of the pecan crop in that territory, it would have cost the defendant more to procure the pecans with which to fill the contract than it would if the crop in that territory had been as bountiful as represented by the plaintiff's agent. The court heard all the testimony offered by the parties, and, after hearing argument upon the question, decided to submit the issues contended for by counsel for the defendant to the jury, but adjourned the case over until the following day. When the trial was resumed the next morning the judge announced to the defendant's counsel that he had changed his mind, and thereupon proceeded to instruct the jury peremptorily to find for the plaintiff. In the motion for a new trial counsel for the defendant claimed that they were misled by the conduct on the part of the judge, and offered, if a new trial was granted, to amend the defendant's answer so as to plead with more particularity their contention in reference to it being understood and agreed that the contract was to be filled with pecans grown in the territory tributary to Rockdale, and that while said crop was then blighted, so that in fact no such pecans then existed, still the agent of the plaintiff fraudulently represented to the defendant that there was a good and abundant crop in that territory. The proposed amendment would have been but a further

attempt to do what we have already held was not permissible; viz., add an additional clause to the contract on a subject about which there was no ambiguity.

We have considered all the assignments of errors, and, finding no grounds for reversal, the judgment is affirmed. Affirmed.

COX et al. v. PATTEN et al.¹

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

LIMITATIONS — AMENDMENT OF PETITION — WILLS — CONSTRUCTION — POSSESSION OF ESTATE — AGENT OF EXECUTOR — LIABILITY FOR AGENT'S DEBTS — CONVERSION — RIGHT TO SUE — POSSESSION OF PROPERTY — CHARACTER OF THE INJURY — LEVY AND SALE — SHERIFF'S RETURN — ESTOPPEL — IRREGULAR LEVY — WRIT OF ERROR — TAXATION OF COSTS — WITNESS FEES — STENOGRAPHER'S BILL — DISCRETION OF LOWER COURT — FAILURE TO OBJECT — WAIVER.

1. Under Rev. St. art. 4897, providing that sheriffs shall be responsible for the acts of their deputies, an original petition charging that property was levied on and sold by the sheriff, whereas in fact, as set out in an amended petition filed after the action is barred, the acts were done by the sheriff acting by his deputy, is sufficient to arrest the running of the statute of limitations, even though such original petition should be held defective in not setting out the full facts concerning the levy and sale.

2. Testatrix directed her executor, either by himself or agent, to control her property, so that her brother should have the right to occupy the homestead, together with such personal property as should be necessary to the brother's convenience; that the net proceeds of the estate should be paid to the brother during his life, and after his death the estate should be disposed of as provided in the will. Plaintiff, after qualifying as executor, delivered possession of the estate to the brother as his agent, who held it for two years, when it was leased to a third party, who held it until levied upon and sold by defendant. *Held*, that Rev. St. art. 2547, making personal property held for two years under pretended loan liable for the debts of the holder, had no application to the holding of the estate by testator's brother as agent of the executor under the express provision of the will, since the statute expressly excepts from its operation property held under a will declaring the purpose of its use.

3. The statute could not be construed to divest a principal of the title to property held by an agent, at the suit of the agent's creditors.

4. The contention that, as plaintiff was not holding nor entitled to possession of the property, he could not maintain an action for conversion thereof, could not be sustained, since this rule has no application to a case where the owner's rights are permanently injured.

5. Although part of the property was divided between the lessee of the estate and the executor, and the executor's part delivered to the brother of testatrix, the part so delivered was not liable for such brother's debts, since it was delivered to him as agent of the executor, and, under the terms of the will, belonged to the estate.

6. In an action against a sheriff for conversion of cotton sold under execution, the sheriff's return indorsed on the execution, showing a levy upon the cotton, precludes him from denying the legality of such levy.

7. Whether or not the officer making the levy was in the field where the cotton stood ungathered, when the levy was made, is immaterial,

as plaintiff can maintain an action against the officer for the value of the property lost to him thereby, even though the levy was irregular.

8. Where error is assigned in that fees were allowed for more than two witnesses to the same fact, the record being silent as to the testimony of the witnesses, and there being testimony that each of them testified to more than one fact, the appellate court will not review the decision of the lower court in allowing such fees.

9. The matter of taxing costs being largely in the discretion of the trial court, its ruling will not be reviewed by the appellate court, unless it plainly appears from the record that such discretion has been abused.

10. Under Rev. St. arts. 1295, 1296, providing for and prescribing the pay of a court stenographer, a stenographer's bill which did not exceed the limit prescribed by the statute, and which was approved by the judge of the district court trying the case, was properly taxed as costs.

11. Where a district court, under authority so to do conferred by Rev. St. arts. 1428-1438, adjudges the costs accrued against a plaintiff as a condition for granting him permission to withdraw his announcement of ready for trial and continue his case for the purpose of amending his pleading, by submitting to such ruling and paying the costs the plaintiff will be held to have waived any objection thereto.

12. Such judgment against plaintiff for costs accrued is an adjudication of the matter, and the refusal of the lower court to set it aside will not be reviewed by the appellate court, unless it appears that the statutory discretion in awarding such judgment has been abused.

Error from district court, McLennan county; Marshall Surratt, Judge.

Action by George M. Patten, executor, and others against John P. Cox and others. M. D. Herring and D. A. Kelly made themselves parties to defend the action, and impleaded Nathan and George W. Patten. From a judgment for plaintiffs against defendant Cox and his sureties, and over in their favor against D. A. Kelly and the estate of M. D. Herring, deceased, defendants bring writ of error. Affirmed.

Clark & Bolinger and D. A. Kelly, for plaintiffs in error. John W. Davis, for defendants in error.

ROBERTSON, Special Justice. This suit was originally brought in the district court of Hill county February 6, 1893, by George M. Patten, as executor of the estate of Martha A. Patten, deceased, against John P. Cox, as sheriff of Hill county, and the sureties on his official bond, to recover damages for the conversion of certain personal property alleged to belong to said estate, which had been seized and sold by said Cox, as such sheriff, as the property of Nathan and George W. Patten, under and by virtue of an execution against them in favor of M. D. Herring and D. A. Kelly. Herring and Kelly made themselves parties for the purpose of defending the suit, and impleaded Nathan and George W. Patten, defendants in said execution. The defendant Cox, and the sureties on his official bond, and Herring and Kelly, in their answer alleged that the property sold under said execution was the property of Nathan and

¹ Writ of error denied by supreme court.

George W. Patten, or that they had such interest therein as rendered it subject to sale under said execution; and that at the time said property was seized and sold, and at the time this suit was brought, the same was in possession of M. V. Rites, who was holding same under a five-years lease, and therefore plaintiffs could not maintain this suit. They also pleaded the statute of limitations of two years. In 1897 a trial was had in the district court of Hill county, which resulted in a verdict and judgment for the plaintiff, from which defendants prosecuted an appeal, and the court of civil appeals for the Fourth district reversed the cause, and in the opinion rendered most of the questions now presented for decision were considered and passed upon. *Herring v. Patten* (Tex. Civ. App.) 44 S. W. 50. M. D. Herring died in November, 1897, and his widow, Alice G. Herring, as executrix of his estate, was made a party defendant. On April 11, 1899, the venue was, by consent of the parties, changed to the district court of McLennan county, and on February 8, 1901, a trial there resulted in a verdict and judgment in favor of plaintiff, and against the defendant Cox and the defendants who were sureties on his official bond, for \$1,690.33, and over in their favor against D. A. Kelly and the estate of M. D. Herring, deceased, from which judgment this writ of error is prosecuted. In the trial below, the court submitted the case to a jury on special issues, and the findings of the jury, which are amply supported by the evidence, establish the following facts: (1) That the property described in plaintiff's petition, and to recover the value of which this suit was brought, belonged, at the time of its seizure and sale, to the estate of Martha A. Patten, deceased, except an undivided one-third interest in a part thereof, which belonged to M. V. Rites; (2) that defendant John P. Cox, as sheriff of Hill county, Tex., acting by and through his deputy, J. R. Ballard, by virtue of an alias execution issued out of the county court of McLennan county against Nathan and George W. Patten and in favor of M. D. Herring and D. A. Kelly, for \$406.83, levied upon the property described in plaintiff's petition, except the interest of the said Rites, on October 31, 1892, as the property of Nathan and George W. Patten, and advertised and sold the same under said execution, when same was bought in by and delivered to said Herring and Kelly on November 14, 1892; (3) that at the time said property was levied upon it was in the possession of said Rites, who was holding the same for plaintiff, as the executor of the estate of Martha A. Patten, deceased, under a five-years lease, only three years of which had elapsed at the time of the sale; when the property was sold it was delivered to Herring and Kelly, and they employed Rites to hold and care for said property for them as their agent, and Rites held said property under this agreement until after this suit was brought; and the property was then

divided, Herring and Kelly taking all of same except the interest owned by said Rites; (4) that the interest in said property owned by the estate of Martha A. Patten, deceased, was equal in value, at the time of the levy and sale, to the amount of the judgment from which this writ of error is prosecuted. In his original petition, filed February 6, 1893, the plaintiff alleged that "defendant John P. Cox, in his capacity as sheriff of Hill county," wrongfully levied said execution upon and sold the property in question. During the progress of a trial begun upon this petition in 1896 it developed that the levy and sale were made by Cox as sheriff, by and through J. R. Ballard as deputy, and the district court held that proof of a levy on and sale of said property by Cox as sheriff, by Ballard as his deputy, would not support the allegation in the petition of a levy and sale by Cox as sheriff. After this ruling was made the plaintiff was permitted to withdraw his announcement of trial and to continue the case for the purpose of amending his pleadings to meet the views of the court upon this subject. Plaintiff filed his first amended original petition on February 7, 1897, in which he, for the first time, alleged that the "defendant John P. Cox, acting by and through his deputy, J. R. Ballard, and in his capacity as sheriff of Hill county," levied said execution upon and sold said property. When this amended petition was filed, the defendants, by special exception, pleaded the statutes of limitations of two years, asserting that the cause of action against John P. Cox and his sureties on his official bond, on account of the acts of his deputy, J. R. Ballard, was not embraced in the original petition, or commenced within two years after its accrual, and could not then be prosecuted. This exception being overruled by the court, the defendants excepted, and this ruling is made the basis for the first assignment of errors.

This question was considered by the court of civil appeals on the former appeal herein, and decided against the present contention of plaintiffs in error. *Herring v. Patten* (Tex. Civ. App.) 44 S. W. 50. We believe this decision was correct. The cause of action asserted in the original petition and that set forth in the amended original petition were the same. In each pleading plaintiff, as executor of the estate of Martha A. Patten, deceased, sought to recover from John P. Cox as sheriff, and the sureties on his official bond, the value of the same articles of property alleged to have been seized and sold by the said Cox as sheriff, the only difference being that in the original petition it was alleged that Cox levied upon and sold said property as sheriff, while in the amended pleading it was alleged that the levy and sale were made by Cox as sheriff, acting by his deputy, Ballard. It is provided by article 4897, Rev. St., that sheriffs shall be responsible for the official acts of their deputies. *Heye & Co. v. Moody*, 67 Tex. 618, 4 S. W.

242. In legal contemplation, as between the sheriff and the plaintiff, the acts of Ballard, as deputy sheriff, became the official acts of the sheriff, Cox, and, even if it could be held that the original pleading was defective in not setting out the full facts concerning the levy and sale, it was sufficient to arrest the running of the statute of limitations, and the court did not err in overruling the exception.

The will of Martha A. Patten, deceased, under and by virtue of which the plaintiff, as independent executor, held the property seized and sold, among other provisions contained the following: "I desire that at my death my said executor shall take possession of my property, both real and personal, and shall keep and control the same at my place in Hill county, either by himself or by such agent or agents as my said executor shall select, and it is my will that my brother, George W. Patten, shall have the sole right to use and occupy my homestead, dwelling, lots, and appurtenances thereto, together with such personal property belonging to me as may be necessary and proper to keep and maintain for the comfort and convenience of my said brother, George W. Patten, said home place, and my executor shall, from time to time, turn over to my said brother, George W. Patten, such article or articles of personal property for his personal use (without security therefor) as may be required to keep and maintain for my said brother such a home as under the circumstances of my estate will be right and proper. My said executor is directed to manage and control the balance of my estate in such manner as in his judgment may tend to promote the interest of my said estate, having care to preserve said estate intact, if possible, and, after first paying all proper expenses of management of my said estate, my said executor is directed to pay over to my said brother, George W. Patten, the net proceeds of my estate during each year, and as often as may be necessary to supply the wants of my said brother, George W. Patten, without waiting for stated periods of settlement." It was provided that this method of handling the estate should continue until the death of the said George W. Patten, and after his death the further disposition of said property was provided for by the will. Martha A. Patten died in the fall of 1886, her will was probated, and the plaintiff qualified as independent executor thereof November 29, 1886. After qualifying as executor, plaintiff made George W. Patten his agent, and placed him in possession of all the property belonging to the estate, giving him, subject to plaintiff's approval, complete control thereof. There was no instrument of writing executed between them, and nothing of record to show the character of possession or authority held by George W. Patten over said property. This condition continued for two years, and until the year

1889, when the property was leased by George W. Patten, for plaintiff, to Rites, which lease was made about three years before the levy and sale. After the lease, Rites held possession of the property until the levy, for plaintiff as executor. It is contended by the plaintiffs in error that the property seized and sold was subject to sale under execution as the property of George W. Patten, because of his possession thereof, as above stated, and that therefore the court erred in rendering judgment for plaintiff. This contention is based upon the provisions of article 2547, Rev. St., which reads as follows: "Where any loan of goods or chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained for the space of two years without demand made and pursued by due process of law on the part of the pretended lender; or when any reservation or limitation shall be pretended to have been made of a use of property, by way of condition, reversion, remainder or otherwise of goods and chattels, the possession whereof shall have remained in another, as aforesaid, the same shall be taken as to the creditors and purchasers of the person aforesaid so remaining in possession, to be fraudulent within this chapter, and the absolute property is with the possession, unless such loan, reservation or limitation of use of property were declared by will, or by deed or other instrument in writing duly acknowledged or proved and recorded." On the former appeal it was held, and, as we think, correctly, that the article of the statute quoted had no application to the facts of this case. The executor was, by the express provisions of the will, authorized to place an agent in possession of the property, and the uses to which the will required the property and its proceeds to be devoted were entirely consistent with the selection of George W. Patten as agent to hold the same for the executor. The will by its terms reserved to the estate the title to the property, and expressly declared the use to which the property could be put by plaintiff or his agent in possession thereof. This statute by its terms excepts from its operation property held under a will declaring the purpose of its use, as in this case. Even if this were not true, it could not be given the effect to divest the principal of title to property held by an agent, at the suit of the agent's creditors. The application of this statute is limited to the condition of possession stated therein, and the holding of this property by George W. Patten was not that character of possession. *Templeman v. Gibbs*, 86 Tex. 358, 24 S. W. 792.

It is contended by the fifth and seventh assignments of error that the plaintiff cannot recover because he was not entitled to nor in possession of the property at the time of the seizure, and, there being no tres-

pass against plaintiff, he had no cause of action. The rule sought to be invoked, that when the title is in one person and the possession in another the person holding or entitled to the possession of property alone is entitled to sue for damages because of a trespass, applies to cases where the injury to the property or its possession is temporary, and where complete recovery from the injury will be accomplished before the right of possession reverts to the owner. But when the entire property is destroyed, or the owner's rights therein permanently injured, this rule has no application. Then the right of action exists in favor of the owner, although the property, at the time of the trespass, was in the actual possession of another, and the owner not entitled to its possession. Here the entire property was converted and carried away, and plaintiff's title thereto and his interest therein entirely destroyed. That he could maintain an action for his damages, because of the conversion of the property, is well settled. *Railway Co. v. Settegast*, 79 Tex. 263, 15 S. W. 228; *Railroad Co. v. Fulmore* (Tex. Civ. App.) 26 S. W. 238; *Railway Co. v. Smith*, 3 Tex. Civ. App. 483, 23 S. W. 89; 18 Am. & Eng. Enc. Law (2d Ed.) p. 450; *Tayl. Landl. & Ten.* § 769, and note.

The contention presented in the ninth assignment of errors that the corn, a part of the property levied on and sold, having been divided between the tenant Rites and the plaintiff, and the plaintiff's part delivered to George W. Patten, thereby became subject to the sale under the execution as the property of George W. Patten, cannot be sustained. The record shows that the corn was received by George W. Patten as agent for the plaintiff George M. Patten, as executor of the said estate, and under the terms of the will it became the property of the estate of Martha A. Patten, deceased. It cannot be contended that the will authorized the sale of any property belonging to the estate to pay the debts of George W. Patten or Nathan Patten. It plainly appears from the will that it was the purpose of Martha A. Patten to prevent the sale of any property belonging to her estate under execution against George W. or Nathan Patten.

It is contended by plaintiffs in error by their tenth assignment of errors that the finding of the jury to the effect that all the property levied upon was in the presence of the sheriff when the levy was made is not supported by the evidence, and that, it being shown by the evidence that the deputy sheriff, in making the levy, did not go into the field where the cotton stood, and there make his levy, there was no such trespass as to the cotton as would give a cause of action against the sheriff and the sureties on his official bond. The return of the sheriff indorsed on the execution, which was in evidence, showed a levy upon the cotton. The fact of a legal levy being made upon the

cotton, under the pleadings in this case, could not be denied by the sheriff. *Schneider v. Ferguson*, 77 Tex. 576, 14 S. W. 154, and authorities cited. The cotton was sold by the sheriff's deputy under the execution to Herring and Kelly, and under this sale they caused it to be gathered, and appropriated it to their own use, and, even if the sheriff could deny his return, we deem it immaterial whether or not the officer was in the field where the cotton stood ungathered when he made the levy thereon. By his levy upon and sale of the cotton, the plaintiff lost its possession and value and could maintain his suit against the sheriff and the sureties on his official bond for the value thereof, even though the levy was irregular.

The contention of the plaintiffs in error by their eighth assignment of errors, that the evidence does not support the findings of the jury that all the property levied on belonged to the estate of Martha A. Patten, deceased, cannot be sustained. The evidence shown by the record is amply sufficient to support the findings of the jury that the property levied on and sold belonged to said estate, and, the jury having so found, their verdict should not be disturbed.

The plaintiffs in error complain of the rulings of the lower court upon their motion to retax the cost, because it is claimed—First, that fees were allowed for more than two witnesses to the same fact; second, that the stenographer's bill for \$80.40 was not allowed by the court, and was an excessive charge. Upon the first question it appears from the record that the testimony of the witnesses to whom the fees complained of were allowed is not set out in the record, and from the testimony of counsel for defendant in error it appears that each of said witnesses testified to more than one fact. This being the condition of the record, we could not determine that the court below erred in taxing said cost against plaintiffs in error. *Marks v. Fields* (Tex. Civ. App.) 29 S. W. 664. Besides, as said in the case of *Jones v. Ford*, 60 Tex. 182: "The matter of taxing cost is left largely to the discretion of the district court." This court would not be authorized to revise the ruling of the district court as to taxing cost, unless it plainly appeared from the record that this discretion had been abused. As to the stenographer's bill, it appears that the services for which this charge was made embraced the reporting and transcribing the testimony in the case at one trial, the same amounting to 40,000 words, and that the stenographer was allowed a fee of 20 cents per 100 words for this service, and that the bill was approved by J. M. Hall, judge of the district court of Hill county, and filed among the papers in this cause on the 10th day of April, 1897, while this case was pending in said court, and that shortly after it was filed the defendant in error paid the same. It is provided by articles 1296 and 1297

Rev. St., that the district court may appoint a stenographer to take down and transcribe the testimony in the case, and may allow him reasonable compensation, not to exceed 20 cents per 100 words for this service, to be fixed by the court and taxed in the bill of cost. The amount allowed does not exceed that authorized by the statute, and the bill was approved by "J. M. Hall, District Judge, Hill Co." This is the approval of the court, and, having been so allowed and approved, it was properly taxed as cost. *Mansfield v. Hogsett* (Tex. Civ. App.) 60 S. W. 785.

This disposes of all assignments of error insisted upon by plaintiffs in error, and it follows that, reversible error not having been shown, the judgment of the lower court against them must be affirmed.

By cross assignments of error, the defendants in error complain of the ruling of the lower court in requiring plaintiff to pay the cost accrued in this cause up to the time of the filing of his first amended original petition. As stated in discussing the first assignment of errors above, the district court of Hill county during the progress of the first trial, in 1896, permitted the plaintiff to withdraw his announcement of ready for trial and continue the case for the purpose of amending his pleadings and alleging that the levy and sale were made by Cox by and through his deputy, Ballard, upon condition that he pay all accrued cost. The plaintiff submitted to this ruling without objection, and shortly thereafter paid up the cost then accrued, amounting to \$284.38, and filed his amended petition. There was no objection urged or exception taken to the action of the court at the term at which this ruling was made. The first objection made to this judgment was embraced in a motion to set the same aside, filed by the plaintiff on the 30th day of July, 1898, which motion was overruled by the district court of Hill county on the 5th day of April, 1899, and a second motion to the same effect was made in the district court of McLennan county on the 30th day of July, 1900, and overruled January, 1901; to both of which rulings plaintiff excepted. Under the provisions of articles 1423 to 1438, inclusive, Rev. St., the district court had the power to adjudge the cost accrued in the case against the plaintiff as a condition for granting him permission to withdraw his announcement and continue the case for the purpose of amending his pleadings. The plaintiff, by his failure to except to this ruling at the term of the court at which same was made, must be held to have waived any objection thereto. *Gorman v. McFarland*, 13 Tex. 237. This judgment against plaintiff for the cost then accrued was an adjudication of that question which should not have been set aside except for strong and cogent reasons, and the refusal of the lower court to do so could not be revised by this court unless it clearly appeared that the discretion

given by the statute in awarding judgments of this character had been abused.

The other cross assignments of error insisted upon by defendants in error complain of rulings made with reference to taxing costs in the case. They have all been considered, and we conclude that the court did not, in any of said rulings, abuse the discretion conferred upon it in this matter by the articles of the statute above referred to, and that the rulings complained of should not be disturbed.

Defendants in error insist that the writ of error in this case was prosecuted for delay, and without sufficient cause, and that the plaintiffs in error should be adjudged to pay 10 per cent. damages, as provided by article 1024, Rev. St. We cannot agree that this is a case in which this penalty should be inflicted.

No reversible error being shown, the judgment of the lower court is in all things affirmed.

GULF, C. & S. F. RY. CO. v. HOLLAND.¹
(Court of Civil Appeals of Texas. Dec. 7, 1901.)

RAILWAYS — PERSONAL INJURIES — PUBLIC CROSSING—LOOKING AND LISTENING — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Plaintiff walked along the side of defendant's tracks until he arrived at a street crossing, when he started diagonally across the street, and was struck by a freight car with which defendant was making a "kicking switch." When plaintiff started across the street, he stopped and looked for the train, which he knew had been switching, and saw it standing at a distance of about 250 feet, and he continued to cross without again looking. There was evidence that the cars approached at an unlawful speed, making little noise; that the flagman at the crossing was not attending to his duties; that a wagon crossing the tracks at the same time was making considerable noise; and that some boys were playing noisily near by. *Held*, that the evidence supported a verdict for the plaintiff, and that it would not be disturbed.

Appeal from district court, Washington county; Ed. R. Sinks, Judge.

Action by Adolphus Holland against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Terry, for appellant. Beauregard Bryan, for appellee.

GILL, J. This suit was brought by appellee against the appellant to recover damages for personal injuries alleged to have been sustained by appellee as a result of the negligent operation of one of appellant's trains in the city of Brenham, Tex. The defense urged was contributory negligence on the part of appellee in failing to look and listen for the approaching train. A trial by jury resulted in a verdict and judgment for appellee for \$500, from which the railway company appealed and assigned errors.

¹ Rehearing denied.

A reversal is sought alone upon the ground that the verdict is so against the great weight and preponderance of the evidence as to make it manifest that the jury, in holding defendant liable for the consequences of the accident, were influenced by passion, prejudice, or some other improper motive. The history of the accident may be thus briefly stated: One of defendant's trains was being handled by its crew within the corporate limits of the city of Brenham, Tex., and at the time in question the crew was engaged in making what is termed a "kicking switch"; that is to say, the engine with five cars attached was being backed down in the direction of a street crossing with the purpose of leaving some of the cars on a side track at a point beyond the street crossing, it being intended that, when the train had gained enough impetus to send the cars to the point desired, the engine and a part of the cars would be detached, and the cars intended to be left on the switch would be permitted, under the control of a brakeman, to roll down to the place on the switch where it was intended they should be stopped. The street crossing in question was in charge of a flagman in the employ of the company, and it was his duty to warn persons of approaching trains. Appellee had walked down the east side of appellant's track until he arrived at a point a few feet from the north side of the street crossing in question, when he turned and undertook to cross to the west side of appellant's track and switches at that point. In going across he did not use the street crossing, but took a somewhat diagonal course, and just as he was about to step from the most westward of appellant's tracks he was struck by appellant's train, knocked down, and injured as alleged. The train which struck him was engaged in making the "kicking switch" above described, and the cars were being placed on the switch from which appellee was about to pass when injured. At the time of the collision the engine had been detached from the cars so intended to be placed upon the switch, and they were moving by reason of the momentum which had been given to them by the engine. The brakeman in charge of the moving cars was not on the car which struck appellee, but was on a box car nearer the engine. When appellee started across the tracks at the point of the accident, he stopped and looked for the train, for he knew it had been switching in the yard. He then discovered that it was standing still beyond the point where the Houston & Texas Central tracks cross the appellant's tracks, and about 250 feet from the point at which the accident occurred. With reference to this appellee testified that when he looked, and saw them standing still, he thought everything was safe, and proceeded to cross at his usual gait. He did not look again, and did not hear the approaching cars. The facts show

that, if he had looked again, he could have seen them. Whether he should have heard the approach of the cars is a question which has been resolved in favor of appellee by the verdict, and we cannot say it is without support in the evidence on this point, other evidence showing that a wagon was crossing the tracks at the time, making considerable noise, and that the flagman and some boys were playing noisily near by. It is also in evidence that several persons called to him when they saw his danger, but he heard them too late to save himself. The moving cars were making very little noise.

An ordinance of the city of Brenham made it unlawful for railway companies to operate their trains within the city limits at a greater rate of speed than six miles an hour. The evidence was conflicting as to the speed of the train, plaintiff's witnesses putting it at 15 miles an hour. The verdict is supported upon this point. Appellee had none of the usual and expected warnings of the approach of the cars, and the evidence supports the conclusion that the flagman was not attending to his duty. The evidence was also sufficient to show that the part of the right of way used by appellee in crossing at that point was commonly used by the public for the purpose, had so been continuously used for years, and this renders it immaterial whether or not he was actually on the street crossing when injured. He, however, testified that he was, and he was in fact picked up on the street crossing after the injury. From these facts can it be said that appellee was so clearly negligent in failing to look again for approaching cars as to lead us to conclude that the jury arrived at their verdict through the influence of some improper motive? It is not enough that this court would have arrived at a different conclusion had the facts been presented to us primarily. The jury has its distinct place in our system of jurisprudence. The law is that the jury shall be the exclusive judges of the facts proved, the weight of the evidence, and the credibility of the witnesses; and the power of this court to disturb a verdict on the facts where there is any evidence to support it is called into activity only when it is made to appear that the evidence upon which it is based is so inadequate, or the verdict is so manifestly against the great weight and preponderance of the evidence, as to lead to the conclusion that the jury rendering it were influenced by an improper motive. Our laws provide for the selection of jurors of intelligence, honesty, and competency. It is to be presumed that the jury in this case possessed these qualifications. What a reasonably prudent person would do or how he would act in a given situation is an unknown quantity. No general rules have ever been formulated for the control of courts and juries in arriving at a conclusion on the question. It is addressed almost entirely to the common sense

and sound judgment of the jury in the light of their everyday experience, and, as the jury is made up of men taken from the everyday walks of life, and are supposed to bring to bear upon the case their judgment and experience untrammelled by legal training or technicality, they are admirably fitted to determine a question which is so purely one of fact. They are better fitted for the task than the trial judge, for their conclusion is the result of the average judgment of 12 average men, fresh from participation in the practical affairs of everyday life. Of course, cases arise in which the contributory negligence of a party so plainly appears that, notwithstanding there may be evidence presenting some conflict, it is the duty of the trial court to interpose his discretion, and set aside the verdict. The duty of a trial judge in this respect is more immediate, and arises more frequently, than that of an appellate court, for he is an actor in the trial, sees and hears the witnesses, and is in much the same position as the jury as to his opportunity to wisely and justly determine the issue. The appellate courts are less frequently confronted with this duty, for not only does the approval of the verdict by the trial judge stand between them and the verdict, but their absence from the scene of the trial, and a just sense of their lack of opportunity to know many things occurring on a trial, and which cannot be embodied in a record, renders them reluctant to interfere. Cases arise not infrequently, however, which call for the exercise of their power in this respect. Such was the *Wilson Case* (Tex. Civ. App.) 60 S. W. 438. Such was the *Garcia Case*, 75 Tex. 583, 13 S. W. 223; and many others might be cited. But, after a careful inspection of the facts of the case before us, we have concluded we are not justified in interfering. In this state the mere failure to look and listen does not, as matter of law, constitute negligence. It may be true, as found by the jury, that a person of ordinary prudence, when he looked and saw the train standing still some distance away, would have concluded that he could safely cross without exercising further vigilance. If appellee's account is true, the excessive speed of the train is responsible for the accident, for, but for this, his precaution in looking before starting to cross would have been ample protection against accident. His failure to hear the noise of the approaching cars is accounted for by the presence of other noises and the fact that the cars were making very little noise. He had the right to expect that the company would observe the city ordinance as to speed and the statutory requirements as to signals. He had the right to expect timely warning from the flagman. None of these were given. Had the brakeman on the moving cars taken a position on the car nearest the appellee, he could have averted the accident by the exercise of the slightest

care, for in exercising the general duty of lookout which he owed to the public he would have discovered plaintiff's danger in time to effectively warn him. A defendant shown to be guilty of negligence resulting in an accident is not acquitted of blame because the injured party was also guilty of negligence contributing to his injury, but recovery is denied on grounds of public policy because they are both wrongdoers. That the railway company was shown to be negligent in this case is not questioned.

We are of opinion the evidence supports the verdict. The judgment is therefore affirmed. Affirmed.

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BARTLETT et al. v. BISBEY et al.¹

(Court of Civil Appeals of Texas. Dec. 12, 1901.)

BUILDING CONTRACTS—DESTRUCTION OF PROPERTY BEFORE COMPLETION.

The sole limitation on the absolute character of a building contract was that if completion was delayed by damage caused by fire, lightning, earthquake, cyclone, etc., the time fixed for completion should be extended. *Held* that, where an unprecedented storm destroyed the building before completion, the loss would fall on the contractors, though the payments were to be made as the work progressed.

Appeal from district court, Galveston county; Wm. H. Stewart, Judge.

Action by Bartlett & Lucas against S. A. Bisbey and others. From a judgment for defendant J. C. League, plaintiffs appeal. Affirmed.

J. Z. H. Scott, for appellants. G. E. Mann, for appellee League.

GILL, J. In the month of June, 1900, S. A. Bisbey applied to J. C. League to purchase lot No. 12, in the northwest block of outlot No. 61, according to the Galveston City Company's map of the city of Galveston. Bisbey stated to League that he wanted to purchase it for the purpose of building a house on it and making it his home, but that he had then only \$300 to pay on same, but if League would loan him the money to build on the lot he, Bisbey, could get Bartlett & Lucas, contractors, to put up a suitable house for \$1,550. League and Bisbey thereupon verbally agreed upon the matter, and in pursuance of such agreement Bisbey, on the 21st of June, 1900, entered into a written contract with Bartlett & Lucas, whereby Bartlett & Lucas obligated themselves to erect for Bisbey on the lot in question a house of certain description and dimensions, the consideration being the sum of \$1,550, to be paid by Bisbey as follows: \$515 when the foundation is completed, frame up, rafters on and sheathed; \$515 when inclosed; and \$520 when completed. Thereafter, on the 23d of June, 1900, League and Bisbey entered into a written contract, by which League agreed to sell to

¹ Rehearing denied January 9, 1902.

Bisbey the lot above described for the consideration of \$850, and to advance and loan to Bisbey the money in installments which Bisbey had obligated himself to pay to Bartlett & Lucas for the construction of the house, the understanding being that Bartlett & Lucas should execute and deliver to League their bond to indemnify League against any failure on the part of Bisbey to have the house completed according to contract by the 1st of October, 1900. The written contract between League and Bisbey for the sale of the lot stipulated that after Bisbey had completed the house League was to convey to Bisbey the lot, together with the improvements to be erected thereon, upon Bisbey paying to League the sum of \$2,400, less the \$300 paid in advance by Bisbey, the deferred payments to be made in monthly installments of \$25 each and interest. Bartlett & Lucas, the contractors, performed the work for which they were to be paid the first installment, and the architect, representing both Bisbey and Bartlett & Lucas, approved the \$515 first installment, and same was paid to them by League, at the request of Bisbey. /By morning of September 8, 1900, the contractors had performed the work for which they were to receive the second payment of \$515, and the architect so certified, but before same was presented for payment the storm which occurred on the last named date totally destroyed and swept entirely away the unfinished house. Bisbey and League each refused to pay the \$515 due on that date, and Bartlett & Lucas brought this suit against them, setting up the facts, prayed for judgment against both Bisbey and League for the amount of the installment, and for the establishment and foreclosure of a builder's and furnisher's lien upon the lot as against both Bisbey and League. Certain parties who had furnished material and work which went into the construction of the destroyed structure, and whose claims had not been paid, were also made parties defendant, and answering they pleaded their claims and prayed for judgment against Bartlett & Lucas, and for the establishment and foreclosure of laborers' and material men's liens on the lot, both as against Bisbey and League. It is not necessary for the purposes of this opinion that we should name the various defendants above referred to, or to indicate the amounts of their respective claims. Bisbey, pleading over against his codefendant, League, prayed judgment for the \$300 which was paid by him on his contract of purchase of the lot. League defended, on the ground that he had done no more than loan Bisbey the money for the construction of the house, and reserved the right to pay it over as the work progressed only as a means of more fully securing him against loss, and that none of the parties were entitled to liens on the lot, because the title remained in him, and a lien could not be fixed on his lot for work done for Bisbey without his (League's) consent, which had

not been given. He also resisted Bisbey's claim for the recovery of the \$300 cash paid on the purchase of the lot. A trial was had before the court without a jury and resulted in a judgment in favor of Bartlett & Lucas against Bisbey for the amount sued for, and in favor of the material men and laborers against Bartlett & Lucas for the respective amounts claimed by them. The liens asserted against the lot were denied and judgment generally was rendered in favor of League. From this judgment Bartlett & Lucas and their subcontractors, material men, and laborers have appealed. Bisbey has not appealed. There is no statement of facts in the record, and the facts above found are taken from the findings of fact prepared and filed by the trial court.

Appellants, Bartlett & Lucas, sought to hold League personally on the building contract, on the ground that League was in effect a party thereto, was the real beneficiary therein, the improvements being placed by his consent and authority upon land belonging to him. It is also contended that this more certainly appears from the fact that he required the builders to execute to him an indemnity bond conditioned for the faithful performance of their contract with Bisbey within the time prescribed therein, and that in the body of the bond it is stipulated that League shall pay the three installments as they become due under the builders' contract. Neither the contract of Bartlett & Lucas with Bisbey nor the bond executed by them to League nor the contract between League and Bisbey for the purchase of the land is set out in the findings of the court, but only the substance of those instruments is disclosed. Copies of each of the three instruments are appended as exhibits to the petition of Bartlett & Lucas. While it appears from the petition itself that they undertook for the sum named to furnish all labor and materials except for plumbing and gas fittings, and to complete the house according to plans and specifications, it appears both from the petition and the findings of the court that the house was never in fact finished, and that nothing was done toward the construction thereof after the storm. Plaintiffs sought to avoid the force of the fact that the contract had not been fully performed by them by allegation and proof that the incomplete work had been destroyed by an unprecedented storm, and its completion rendered impossible. Appellee urges here that the excuse is not sufficient, under the facts, and insists for that reason, and under the undisputed facts, the judgment as to League should be affirmed. It seems to be well settled that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding inevitable accidents, because he might if he chose have provided against it in his contract. So, one contracting to furnish labor

and material and construct an entire work is not excused from the performance of the contract by the destruction of the work, whether from his own negligence or unavoidable accident, and not only can he recover nothing for the work already done, but is liable to the employer for money advanced upon the contract, and for damages for its nonperformance. 29 Am. & Eng. Enc. Law (old Ed.) p. 906; *Wels v. Devlin*, 67 Tex. 510, 3 S. W. 726, 60 Am. Rep. 38; *President, etc., v. Bennett*, 27 N. J. Law, 513, 72 Am. Dec. 373; *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762; *Stees v. Leonard*, 20 Minn. 494; *Lawson, Cont.* pp. 460, 461; *Bish. Cont.* § 590; *Logging Co. v. Robson*, 16 C. C. A. 400, 69 Fed. 773; *Adams v. Nichols* (Mass.) 31 Am. Dec. 137. In cases, however, where one undertakes, without qualification, to do an entire job, but the work to be done is in the nature of repairs on or addition to a thing already in existence, and the thing to be repaired or added to is destroyed before the completion of the work, the rule above stated is not applied,—not on the ground that even in such a case he may not bind himself absolutely, but on the ground that from the nature of the contract and the work to be done it may fairly be inferred that the contracting parties contemplated the continued existence of the thing to be repaired. 29 Am. & Eng. Enc. Law (old Ed.) p. 908; *Wels v. Devlin*, *supra*; *Lawson, Cont.* *supra*; *Angus v. Scully* (Mass.) 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318. Bearing in mind these rules of law, let us determine in the case before us whether the contractors bound themselves without reservation to furnish all labor and material and complete and turn over to the owner the building they undertook to construct. It is clear that the contract does not come within the category of contracts to repair, and therefore the effects of the storm did not render the performance of the contract impossible. The contract declared on in this case (a copy of which is appended to the petition as an exhibit) contains this sole limitation on its otherwise absolute nature, both as to time and substance: "That if the completion of the work is delayed by the acts of the owner, or by damage which may happen by fire, lightning, earthquake, cyclone, or by the abandonment of the work by the employes of the contractor through no fault of theirs, then the time fixed for the completion of the work shall be extended for a period equivalent to the time thus lost," etc. It thus appears that the contractors stipulated what they might claim for themselves in the very event which happened. So, if it be conceded that League would be liable if any liability at all was shown, we think it follows inevitably that the loss occasioned by the storm must be borne by the contractors. In this view we are fully sustained by the authorities cited, and, indeed, by the

great weight of authority to which we have had access. It may be contended, however, that the rule of liability here adopted is inapplicable, because of the stipulation that certain payments should be made as the work progressed. This view has not escaped our attention, but we are unable to see in what respect this provision affects the entirety of the undertaking. If the contractors had abandoned the work when the second installment became due, the owner would have had the right to procure the completion of the work. If because the contract price was too low, or if for any other reason it cost as much as the full contract price to complete it, the owner could recover back from the contractors the sums already paid them. Or if nothing had been paid the contractor for the work already done, and the owner is compelled to complete the work, the contractor cannot recover the value of the part of the work done by him. The measure of his compensation would be the difference between what it cost the owner to complete the work and the entire contract price. On this theory it has been decided that stipulations for payment as the work progresses do not amount to an acceptance of the work and payment *pro tanto*, but amount to no more than providing a method and time of payment, its most ordinary purpose being to enable the contractor to pay for his labor and material, and thus speed the work. The payments are mere advances on account of the entire sum. *Butterfield v. Byrom* (Mass.) 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; *President, etc., v. Bennett*, 27 N. J. Law, 513, 72 Am. Dec. 373. We are of opinion, therefore, that, conceding that League would have been personally liable had the contract been discharged, and that the contractors would have been entitled to a lien on the lot, yet, because the contract was not fulfilled, and nothing has been shown legally sufficient to excuse its nonperformance, no liability on the part of League has been shown. The claims of the subcontractors, material men, and laborers under plaintiffs, having no higher basis than the rights of plaintiffs themselves, must likewise fail. For the reasons given, we think the judgment of the trial court should be affirmed, and it is so ordered.

Affirmed.

HOUSTON & T. CENT. R. CO. v. JOHNSON et al.¹

(Court of Civil Appeals of Texas. Dec. 9, 1901.)

DEATH—EVIDENCE—INSURANCE POLICIES— CONTENTS—MEASURE OF DAMAGES.

1. In an action for the death of plaintiff's decedent there was a conflict as to whether deceased had contributed anything to plaintiff for several years prior to his death. Plain-

¹ Rehearing denied January 9, 1902.

tiff testified that deceased had taken out several accident policies in her favor, but did not remember when, nor their contents, further than that a friend had read them to her, and, being shown a policy for \$1,000 in her favor, stated that she could not tell its contents further than that it was an accident policy for \$1,000, and that the other policies were like this one, and the policy was submitted in evidence to prove the contents of the other policies. Held, that the testimony and policy were inadmissible.

2. In an action for the death of plaintiffs' decedent it was error for the court to instruct that the measure of damages was the money value of decedent's life, without saying that it was the money value "to the plaintiffs."

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by Mercy Johnson and others against the Houston & Texas Central Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Frank Andrews, for appellant. Stanley Thompson, O. T. Holt, and L. B. Moody, for appellees.

PLEASANTS, J. This suit was brought by the appellees to recover damages for the death of Charles Johnson, deceased, alleged to have been caused by the negligence of appellant. The cause was tried to a jury in the court below, and appellees obtained a verdict and judgment for the sum of \$2,000.

We shall only notice two of the various assignments of error contained in appellant's brief. The third assignment of error is as follows: "This court erred in permitting the plaintiff Mercy Johnson, while testifying in her behalf, to testify as to the existence of accident policies taken out by the deceased in favor of the witness prior to his death, and to state the contents of said policies; and erred in permitting the plaintiff to offer in evidence an accident policy in her favor issued August, 1896; and erred in permitting the plaintiff to offer said policy in evidence for the purpose of proving the contents of her policies,—all of which was admitted over the objections of the defendant—First, that her testimony as to the said policy was not the best evidence, and that the same were shown to be in writing, and that the writing should be produced; second, that the loss thereof had not been sufficiently accounted for; third, that the plaintiff showed that she had no knowledge of the contents of the policies, did not know the company which issued it, the amount of it, the date of it, nor what agent signed it for the company, and did not know its contents; fourth, that the policy offered, which was issued in August, 1896, was so long before the death of deceased that it had no tendency to show the relations of the parties, the deceased and the plaintiff, at the time of his death, did not tend to prove any fact in the case, and was wholly irrelevant and immaterial; fifth, that the contents of a policy, the existence of which she had testified to, could not be proved by the introduction of a policy, the con-

tents of which she admitted she did not know and could not identify in any manner,—all of which will more fully appear from defendant's bill of exceptions No. 1, here referred to and made a part hereof." There was a conflict in the evidence upon the issue as to whether the deceased had contributed anything to the plaintiff Mercy Johnson for several years prior to his death. On this issue the plaintiff was allowed to testify, over the objection of the defendant, that the deceased had taken out several accident policies in her favor; that she did not remember and did not know when these policies were issued, nor their contents, further than that a friend had read them to her; that she had not read them herself. Counsel for plaintiff then handed her a policy for \$1,000 in her favor, issued on August 3, 1896, and asked her to state the contents of said policy, which she said she could not do further than that it was an accident policy for \$1,000. She further said that the other policies testified to by her were just like this one. Whereupon counsel offered in evidence the policy of August 3, 1896, for the purpose of proving the contents of the other policies testified to by plaintiff. We think this testimony was inadmissible. If plaintiff had testified that she had read all the policies, and knew their contents to be the same, the trial court having held that the proof of loss of the policies first testified about was sufficient to admit secondary evidence as to their contents, such contents might have been shown by the policy offered in evidence. But, plaintiff's knowledge of the contents of all of the policies having only been obtained by hearing them read to her, her statement as to such contents was only hearsay, and the policy offered in evidence, in connection with her hearsay statements that its contents were similar to those of the lost policies, was not competent to prove the contents of said lost policies, and should not have been admitted for that purpose.

The sixteenth assignment of error is as follows: "The court erred in paragraph 8 of its general charge to the jury, which reads substantially as follows: "On the measure of damages, should the jury find for plaintiffs, Mercy Johnson and her child, Pearl Johnson, or for Chloe Thomas, the mother of the deceased, you are instructed as follows: That in an action for negligently causing death the measure of damages, if any, is such sum as, from all the evidence in the case, the jury may consider proportionate to the pecuniary injury, if any, occasioned to the person or persons, if any, entitled to recover by the death of the deceased person, allowing nothing for the distress of mind of any of the survivors, or loss to such survivors, if any, of the deceased person's society, as the law in such cases gives compensation only for pecuniary loss, by estimating the money value, if any, of the life of the dead person. If from the evidence you be-

lieve that Mercy Johnson suffered no pecuniary loss through the death of Charles Johnson, you will, in such event, find for defendant as against Mercy Johnson, whatever may be your finding on other questions. If you believe from the evidence that Pearl Johnson has suffered no pecuniary loss through the death of Charles Johnson, you will, in such event, find for the defendant as against Pearl Johnson, whatever may be your finding on other questions. Should you, from the evidence, believe that Chloe Thomas has suffered no pecuniary loss through the death of the deceased, Charlie Johnson, you will, in such event, find for the defendant as against Chloe Thomas, whatever may be your finding on other questions." It is clear that this charge is erroneous in that it instructs the jury that the amount of damages to which the plaintiffs would be entitled in event the jury should find in their favor would be the money value of the life of the deceased. The court evidently intended to say the money value to the plaintiffs of the life of the deceased, which would have been an accurate statement of the law; but the charge as given is clearly erroneous, and we cannot say that it did not mislead the jury.

For the errors above indicated, the judgment of the court below is reversed, and the cause remanded. Reversed and remanded.

AMERICAN TELEGRAPH & TELEPHONE CO. v. KERSH et al.¹

(Court of Civil Appeals of Texas. Nov. 21, 1901.)

TELEPHONE COMPANIES — LIABILITY — NEGLIGENCE — DAMAGES FOR PERSONAL INJURIES — EVIDENCE — OWNERSHIP — INSTRUCTIONS.

1. Plaintiff, a railway employé, was injured by being struck by a telephone wire suspended across a railway track. This wire was a part of a branch line to connect with defendant's main line. Defendant constructed the branch line and furnished the wire, while a private person furnished the right of way and poles and assisted in its construction. Defendant rented the telephone to such private person and divided with him the tolls. Defendant had at different times made repairs on the branch line, but it denied ownership or duty to keep it in repair. *Held*, that the jury were justified in finding that the defendant owned and controlled the branch line, and hence was liable for negligence in failing to so suspend the wire across the railway tracks as to permit the passing of trains with safety to persons on the top of a car.

2. In an action against a telephone company for injuries by being struck by a telephone wire suspended across a railway track, where there was no evidence that defendant had leased the line of which the wire crossing the track was a part to a third person, so as to be relieved of the duty of keeping the line in repair, it was proper to refuse an instruction embracing the theory of such lease.

3. Rev. St. art. 701, authorizing a corporation created for the purpose of constructing magnetic telegraph lines to lease, or attach to, the lines of other telegraph corporations, is inapplicable

to a branch line constructed to connect a mill owned by a private person to the main line of a telephone corporation.

4. In an action against a telephone company for personal injuries caused by failure to properly repair its line, where the evidence conclusively showed that the person making the repairs was employed by one authorized to employ him for that purpose, it was proper to refuse an instruction making the company's liability depend upon whether or not the person making the repairs was directed by one authorized to act for the company.

5. A person's direct testimony that he is the agent of another is not objectionable, as proving the agency by the declarations of the agent.

6. Failure to instruct the jury on the subject of impeaching testimony, in the absence of a request therefor, was not error.

7. In an action against a telephone company for injuries caused by its failure to properly repair a branch connected to its main line, where it denied ownership of such line, it was not error for the court, in its instructions, to refer to the line to which the branch was connected as defendant's "main line," such reference not being upon the weight of the evidence, as calculated to express the opinion that defendant was absolute owner of the branch line.

Appeal from district court, Shelby county; Tom C. Davis, Judge.

Action by C. C. Kersh against the American Telegraph & Telephone Company and another. Judgment for plaintiff, and the American Telegraph & Telephone Company appeals. Affirmed.

Branch, Harris, Matthews & Beeson, for appellant. Blount & Garrison and Baker, Botts, Baker & Lovett, for appellees.

GARRETT, C. J. This action was brought in the district court of Shelby county, by the appellee C. C. Kersh, against the appellant, American Telegraph & Telephone Company, and the appellee Houston, East & West Texas Railway Company, to recover damages for personal injuries received by the appellee while in the employ of the railway company by being dragged from the top of a car by a wire suspended over the line of the railway. It was alleged in the petition that the wire was a part of the line of the appellant, and was not suspended high enough above the railway track to permit cars to pass under it without injury to the employés of the railway company. The defense on the part of the telephone company was that the line, where it crossed the railway track, did not belong to the appellant, and that it was not charged with the duty of keeping it in repair. There was a trial by jury, which resulted in a verdict in favor of Kersh against the telephone company for the sum of \$2,000, and in favor of the railway company.

Appellant owned and operated a telephone line running along the dirt road from Nacogdoches to Logansport through Appleby and Garrison. Payne's mill was situated on the railway between Appleby and Garrison, about seven miles east from the former place, and about a half mile from its line. Payne had a store at Appleby, and, desiring to connect his store and mill by telephone, he contracted

¹ Rehearing denied January 9, 1902, and writ of error denied by supreme court.

with the appellant to put in telephones for him and make connections with its line at Appleby and the mill. For the telephone at Appleby, Payne paid the appellant \$10 a month, he receiving the tolls on outgoing messages, and the appellant those on all messages to Appleby. In order to make the connection at Payne's mill, it was necessary to build a line one-half a mile long, crossing the railway track. The construction of this line was the subject of some negotiation between Branch, the president of appellant, and Payne, the result of which was that Payne agreed to furnish the right of way and the poles and assistance in the construction, and the appellant agreed to furnish the wire and construct the line. Appellant furnished the telephone, for which it received a rental of \$4 a month and the tolls on all messages sent to the mill, and Payne received the tolls on outgoing messages. At both places Payne gave attention to the telephones, and notified persons called for to answer incoming messages. There was evidence to show that the appellant, at different times, had repaired the line to the mill. We conclude that the finding of the jury that the line from the main line to the mill was the property of the appellant is fully sustained by the evidence, and it is adopted by us. On August 25, 1899, the appellee Kersh, while in the employ of the railway company, was riding on the top of a box car, and was struck by the wire extending from appellant's main line to Payne's mill over the railway track, and thrown to the ground and seriously injured, sustaining damages to the amount of the verdict. It was shown by the evidence that the wire had been down and on that day had been put up again by a man in the employ of the appellant, and that after it had been put up it hung so low as to obstruct the passage of the train. We conclude that the appellee Kersh was injured without fault on his part by the negligence of the appellant in failing to suspend the wire high enough to permit the train to pass under it with safety to a person on the top of a car.

The first and second assignments complain of the refusal of the court to give peremptory instructions to the jury to find in favor of the appellant on the ground that it did not own and had no control over the line. These were properly refused because, as above stated, the evidence fully sustains the finding of the jury to the contrary. There was no error in refusing special charge No. 8 requested by the appellant upon the theory of a lease of the line to Payne, because there is no evidence tending to show a lease that by implication of law would relieve the appellant of the duty to keep the line in repair. The language used by Payne, that he owned the line by a lease, was explained by him and the facts as stated both by him and Branch fail to show such a lease. The right to lease conferred by statute (Rev. St. art. 701) is the power to acquire or join the lines of other

corporations, and is not applicable to this case. Special instruction No. 3 was properly refused, because it made appellant's liability depend upon whether or not Lawson was directed to repair the line by any one authorized to act for the company, when the evidence showed that Atkinson had charge of the telephone at Appleby, and at the direction of Branch employed Lawson to repair the line east of Appleby; that Lawson did so, repairing it about four miles out, and again at the place of the accident; that Lawson reported to Atkinson that the line had been repaired at Payne's mill, and Atkinson paid him for the work, and reported to Branch that the line had been repaired at Payne's mill; that Lawson reported to Atkinson after the accident happened, and the money paid to him was retained by Atkinson out of the company's receipts. Atkinson says that the only instructions he gave Lawson were to go and fix the line. Lawson says he told him to fix it from Appleby to Payne's mill. Other evidence showed that the company repaired the Payne's mill line at other times, and that whenever the line needed repair in and about Appleby Atkinson would have it fixed up at the request of Branch; and that Branch had promised Payne to send a lineman to repair the line. Thus it so conclusively appears from the evidence that the appellant was not only bound to keep the line in repair, but that Atkinson had authority to employ Lawson to do the work in the particular instance, it would have been error for the court to have submitted to the jury, as an issue upon which the appellant's liability depended, the authority of Atkinson to have the work done. For the above reasons special instruction No. 9 was properly refused. Special instruction No. 6 was not applicable to the evidence. Atkinson testified directly that he was the agent of the company at Appleby. This is not proof of agency by proving the declarations of the agent.

The fact that Payne should have given instructions to Lawson, when he went to repair the line, how it should be fixed, taken in connection with the other evidence, did not warrant the fourth and tenth special instructions requested by the appellant. As already stated, the finding of the jury as to the ownership and control of the line was fully sustained by the evidence. It was proper to introduce in evidence the written statement made by Payne for Branch to discredit or impeach his testimony, but the failure of the court to charge upon the subject of impeaching testimony was not error, as complained of under the eleventh assignment. There were no special circumstances to call for such a charge, and if there had been the mere omission of the court to charge without request would not have been ground for reversal of the judgment.

We find no error in the charge of the court. By referring to the appellant's line to which

the line to Payne's mill was connected as the "main line" was not upon the weight of evidence or calculated to cause the jury to believe that the court was of the opinion that the Payne mill connection belonged to appellant. Nor did the use of the word "accommodation" in the charge indicate that appellant must have put up the line free of cost to make it the property of Payne. The thirteenth and fourteenth assignments cannot therefore be sustained. What has been already said disposes of the fifteenth and sixteenth assignments of error, which attack the sufficiency of the evidence. The judgment of the court below will be affirmed.

Affirmed.

STILL v. CITY OF HOUSTON.

(Court of Civil Appeals of Texas. Dec. 20, 1901.)

MUNICIPAL CORPORATIONS — NEGLIGENCE — STREETS — INJURIES — TITLE IN CITY — NOTICE OF CONDITION — CHARTER PROVISION.

1. In action against a city for injuries sustained by stepping into a hole beside a sidewalk, it was not necessary for plaintiff to show title to the property in the city, it appearing that the city had assumed ownership and control of such property for street purposes.

2. Where, in an action for injuries sustained by stepping into a hole beside a sidewalk, it was shown that the city had sold improvements previously on the property where the street was situated, and authorized their removal, as preparatory to opening the street, and had in fact opened the street, there was sufficient evidence to submit to the jury the question whether the city had assumed ownership and control of the property for street purposes.

3. A city charter provided that the corporation should not be liable for any injuries sustained owing to the defective condition of sidewalks, etc., unless such condition should have continued for 10 days after notice to the mayor or certain committees. A city sold certain fences on property through which a street was opened, and authorized the purchaser to remove them, which he did to the knowledge of the city, but he failed to fill a hole left where a fence post was removed, and subsequently a pedestrian stepped into such hole, it being just beside the sidewalk. Held that, though no notice of such hole had been given, the charter provision did not protect the city, inasmuch as the act of the purchaser was, under the circumstances, to be considered the act of the city, and the provision had no application to such case.

4. Where the trial court directs a verdict the question of error in refusing charges is not in the case on appeal.

Appeal from district court, Harris county; C. E. Ashe, Judge.

Action by H. C. Still against the city of Houston. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Kirby, Martin & Engle and C. B. Martin, for appellant. Stewart, Stewart & Lockett and Joe M. Sam, for appellee.

GILL, J. This suit was brought by H. C. Still against the city of Houston to recover damages for personal injuries alleged to have been sustained by him as a result of a de-

fective sidewalk along one of the public streets of the city of Houston, the defect being due to the negligence of the city. The answer of the city contained a general denial and a special plea to the effect that by the force of one of its charter provisions it was exempt from liability resulting from defects in streets and sidewalks except when they had been permitted to remain out of repair for 10 days after written notice of the defect, the notice to be served on the mayor or street and bridge committee; and that no such notice had been given in this instance. After hearing the evidence adduced on the trial, the court instructed the jury to return a verdict for defendant, and the resultant verdict was duly followed by a judgment in favor of the city. The reasons which induced the court to take this course do not appear, but, as the plaintiff's evidence showed that he was injured on a public sidewalk in control of the city, and that the injury was due to an open post hole at the edge of the sidewalk, which had been there for months prior to the injury, we apprehend the court refused to submit to the jury the issues thus presented, because no written notice had been shown as required by the charter provision pleaded, and because the court was of opinion the facts brought the case within the purview of that provision. The evidence adduced by plaintiff tended to establish the following state of facts: The city of Houston is a municipal corporation operating under a special charter. On the 3d day of January, 1898, Center street, a public street in said city, was not continuous, its continuity being interrupted at or near its intersection with Ashe street. The property lying between the two ends of Center street was owned by one Clark, and was broader than the street. The city determined to open Center street, and for this purpose purchased the entire Clark property. On this property there were then situated certain improvements and fencing, which it was necessary to remove in order to open the street and prepare it for use by the public. To accomplish this the city sold the improvements and fencing to one Fashion, and authorized him to remove it from the property, which he did, and when he had finished he verbally reported the fact to the mayor of the city. Thereafter the city, through its duly-authorized agents, opened Center street through the property, and prepared it for use by the public. In removing the fence posts from the part of the Clark property on the east side of Ashe street and near the intersection of Ashe and Center streets, Fashion did not fill up the holes left by the taking up of the posts, and it was into one of these holes that Still stepped, and injured himself. This hole was not on the part of the property used for the opening of Center street, but was on the excess of the property left on the north side of Center street and the east side of Ashe street after Center street was

opened. The hole in question was just at the edge of and touching the east side of Ashe street sidewalk, and had been there in that condition long prior to the accident. On the night of the 11th day of February, 1899, plaintiff was going to his home in Houston, carrying in his hand some light groceries. In so going he walked along the dirt sidewalk on the east side of Ashe street along where the post holes were situated. The night was dark and rainy, and the street was not lighted. He was not in the habit of using that sidewalk, and had no knowledge that the holes were there.

The action of the court in directing a verdict is assailed by an appropriate assignment of error. Appellee seeks to justify the action of the court upon three grounds: (1) Because the city had no written notice of the defect 10 days prior to the accident, and is therefore protected by its charter provision; (2) because the property on which the hole was situated was not shown to be the property of the city; (3) because the removal of the improvements and posts was not shown to be the act of the city, but the act of Fashion, to whom the improvements were sold.

We are of opinion it was not necessary for plaintiff to show title to the city in the property. It was sufficient to show that the city had in fact assumed ownership and control; had in fact sold the improvements, and authorized their removal, as a part of the preparation for opening the street, and had in fact opened the street for use by the public. We think this was sufficiently shown to authorize the submission of the question to the jury. The charter provision under which the city seeks protection is as follows: "That said corporation shall not be liable to any person for damages caused from streets, ways, crossings, bridges, or sidewalks being out of repair from negligence of said corporation unless the same shall have so remained for ten days after special notice in writing to the mayor or street or bridge committee." Section 35, Charter 1897. The provisions of this section are stringent and sweeping, and amount to a denial of recovery to any person for damages resulting from want of repair to any of the public ways of the city when the city had not the requisite notice, whether the injured person knew of the defect or not. The question presented is whether it applies to cases like the one under consideration. A similar provision was construed in the case of *City of Houston v. Isaacks*, 68 Tex. 116, 3 S. W. 693. In that case it was held that the provision did not exempt the city from liability for injuries resulting from defects in the streets caused by the city's own procurement. In disposing of the question, Chief Justice Gaines, who delivered the opinion in the case cited, used the following language: "There may be some reason for requiring notice to the city authorities of a defect accruing from ordinary causes such as

the action of floods, the use of the street by the public, or, it may be said, from any cause except by the action of the city itself. But in the present case the city put a contractor to work, stipulating to have an excavation made which was to be filled with gravel, and after the work had been begun, and the street had been rendered unsafe for travel, discharged the contractor, and left the work in an unfinished condition. This action was taken by the very officers to whom the charter required the notice to be given. The city is not sought to be held liable for any injury caused by a defect accruing from any extrinsic cause, but for having by its own procurement made the street unsafe, and knowingly left it in that condition. * * * Under these circumstances we are of opinion that no proof of written notice was necessary in order to hold the city liable." We are of opinion that the case before us cannot be distinguished on the facts from the case cited. In that case the city had procured an affirmative thing to be done whereby the street was rendered unsafe. In this case the city, in furtherance of its design to open Center street, had procured the removal of the improvements from the premises, and this involved the taking out of the posts, which inevitably left the holes, unless the city had arranged with the purchaser of the property to fill the holes; and this does not appear to have been done. It is immaterial that the city procured the removal of the improvements by a sale of them. It was but another means of getting the improvements out of the way, and was as much the act of the city as if it had been done by one of its regular officers. The mayor and other officers concerned necessarily knew of the sale, for they had brought it about. They necessarily knew of the fact that the property had been moved, for they proceeded at once to prepare the street across the property for public use. In addition to this, the mayor himself was notified at once by the purchaser that the work had been done. It amounted to no more than if the city had employed Fashion to remove a large stone or other obstruction from an established street, giving him the stone or obstruction for his services. If the removal of the obstruction would leave a dangerous excavation in the street, the city would necessarily be chargeable with notice, and with the duty to obviate the consequent danger. We think the removal of the posts by Fashion under the circumstances stated was the act of the city, coming within the class of cases to which the doctrine announced in the *Isaacks Case*, supra, applies. The cause should have been submitted to the jury to determine among other issues in the case whether the city was guilty of negligence in leaving the unfilled post hole so near the sidewalk.

Appellant reserved exceptions to the admission of evidence, and has assigned errors thereon. They present questions not likely

to arise on another trial, so we do not consider them.

Errors are assigned on the refusal of the trial court to give requested charges. The trial court, having directed a verdict, did not indicate whether he thought them sound propositions of law or not. The question of error in refusing them is not in the case on this appeal. We have held that on a like state of facts the court should, upon another trial, submit the issues to the jury. Inasmuch as we have no reason to believe that this will not be correctly done by the trial judge, we will not assume to advise him in advance.

For the errors indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

HOUSTON & T. O. R. CO. v. GEE.

(Court of Civil Appeals of Texas. Dec. 19, 1901.)

PERSONAL INJURIES — EVIDENCE — EARNING CAPACITY — TRIAL — READING OPINION TO JURY — COMMENTS BY COUNSEL — PREJUDICE.

1. Evidence that plaintiff in an action for personal injuries had been superintendent of a farm some five years prior to the date of trial at a salary of \$700 per year, and that such positions usually paid from \$700 to \$900, was inadmissible, in the absence of any showing that plaintiff had such a position in view on leaving a position which he was to lose at the end of the month in which the trial occurred.

2. In a suit for personal injuries it was an abuse of discretion to allow counsel for plaintiff to read to the court in the presence of the jury cases not bearing on any contested question of law, but strikingly similar to the case at bar in respect to the character of the injuries and the circumstances of the accident, and afterwards to comment to the jury on the fact that in the case involving a similar injury substantial damages had been approved on appeal, and in the case involving similar circumstances the appellate court had held the plaintiff free from negligence.

Appeal from district court, Brazos county; J. O. Scott, Judge.

Action by John W. Gee against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Frank Andrews, for appellant. Sam R. Henderson, V. B. Hudson, and Lamar Butler, for appellee.

GILL, J. This suit was brought by appellee to recover damages for personal injuries alleged to have been sustained by him as a result of the negligence of appellant. The answer of appellant, after a general denial, presented the defense of contributory negligence. A jury trial resulted in a verdict and judgment in favor of appellee for \$1,000, and the cause is before us for revision on the appeal of the railroad company.

Appellee was the only witness who testified to the circumstances of the alleged accident, and according to his testimony it

occurred substantially as follows: A little after dark on the day of the accident he had started to the post office in the town of Bryan, and in going it was necessary for him to cross appellant's track at a street crossing. Just as he got to the track, one of appellant's freight trains was passing, and he stopped and stood within a few feet of it, intending to cross when it passed. While so doing he was looking toward the engine, which had passed the point where he was, his attention being attracted to the sparks which were being emitted. He turned his head to look toward the rear of the passing train, and at that instant, and before he could do more than assume a stooping posture, he was struck by a piece of timber projecting from a loaded flat car, whereby he was knocked down, and rendered unconscious for a few minutes. The injuries he claimed to have sustained consisted of bruises on the hip, back, and head, and a rupture in the groin. He had prior thereto sustained a rupture in the other groin, and was then wearing a single truss. He claimed to have been confined to his bed for about three weeks, to have suffered much pain, and, as a result of the rupture, was partially disabled from work. The evidence was conflicting as to whether any piece of timber was extending from the side of the car, and also presented the issue of contributory negligence on his part in standing too near the train without keeping a lookout toward the rear end of the train. In view of the result of this appeal we deem it unnecessary to set out the facts more fully, and we will notice only two of the several assignments of error.

By the third assignment appellant complains of the action of the trial court in permitting plaintiff to testify that about five years prior to the injury he was superintendent of a farm at a salary of \$700 per year, and that such positions paid from \$700 to \$900 per year. At the date of the injury and trial appellee was keeper of the jail, and had been for five years, at a salary of \$35 per month. It was shown that he would lose that position at the end of the month in which the trial occurred, and it was proper to hear testimony as to what work plaintiff was fitted for, and the extent to which he was disabled to perform the work for which he was fitted. But, since it was not shown that he had in view or prospect any such position after his discharge as keeper of the jail, we think the fact that he held such a position five years before was too remote to properly affect the amount of his damages in this case. Bonnett v. Railway Co., 89 Tex. 72, 33 S. W. 334.

Appellant also complains because the trial court, over objection duly urged, permitted appellee's counsel, after argument began, to read to the court, in the presence and hearing of the jury, the opinions in the cases

of *Railway Co. v. Davis* (Ky.) 58 S. W. 698, and *Railroad Co. v. Shafer*, 54 Tex. 641. The bill of exception reserved to this action is very full, and discloses the following: When the evidence was closed, and appellee's counsel was about to begin his opening argument to the jury, he stated to the court that the law applicable to the case was so plain and simple he did not deem it necessary to make any suggestions or present authorities, but he wished to present before the court and jury the Kentucky case of *Railway v. Davis*, supra, the facts of which were similar to those in the case before the court. Appellant objected to the reading of the case to the jury, or before the court in the presence of the jury, on the ground that it would tend to improperly influence them, and could not lawfully constitute a part of his argument to the jury. The court stated that counsel would not be permitted to read the case to the jury, but he would allow him to read it to the court, which was accordingly done. The case so read in the hearing of the jury had no bearing on the duty of the court in charging the jury, but the facts of the case, as stated in the opinion, showed that a boy, while standing near a passing train, and looking toward the engine, was caught around the neck by an overhanging piece of iron swinging from one of the moving cars, and was injured. The court approved the verdict of the jury that the boy was not negligent in so standing, and affirmed the judgment for \$10,000. Counsel, after reading the case to the court in the presence and hearing of the jury, thereafter, in argument to the jury, referred to the case, and called their attention to the fact that an appellate court had held that the boy who had acted much as appellee had was without negligence, and ought to recover. Thereafter, and during the course of his argument, counsel turned to the court, and stated that he wished now to read the case of *Railway Co. v. Shafer*, supra, which, over like objection from appellant, was permitted, and the case was read to the judge in the presence and hearing of the jury. In the *Shafer* Case the opinion disclosed that the accident for which *Shafer* sued had greatly aggravated an old hernia or rupture with which he had theretofore been suffering, and a verdict for \$1,500 was approved by the supreme court. After reading the case, counsel proceeded to comment on it before the jury, and referred to the fact that in that case, in which the injury was in the main similar to this, the supreme court had approved a \$1,500 verdict. To all this, and to the remarks of counsel to the jury, appellant duly reserved his exceptions. The bill comes to us without qualification, and, so far as appears, the jury were not advised by the court to disregard either the remarks of counsel or the cases read. Counsel for appellee seek to meet the assignment, not by justifying the course as correct, but

by insisting that it was harmless error, and that it is not such a case as would authorize this court to revise the discretion exercised by the trial court. In support of this contention they cite the case of *Railway Co. v. Lamothe* (Tex. Sup.) 13 S. W. 194. That case, it is true, announces in a general way the rule for which they contend, but, in our opinion, is against them when applied to the facts before us. In the case cited, counsel, in his opening argument to the court on questions of law, read in the presence of the jury two cases, one showing a verdict for \$10,000 and the other for \$15,000, against railroad companies. The court, speaking through Justice Henry, in disposing of the question, said: "We think it must be largely left for trial judges to determine for themselves what authorities, and how much of each, may be read to them. If in any case it is apparent that the purpose is to influence the jury, rather than to inform the judge, the attempt should be promptly rebuked when it occurs. * * * We think, however, that before any case should be reversed for that reason a clear instance of an abuse of the rule ought to be presented, as well as strong ground to believe that the verdict may have been improperly influenced by the course pursued. We do not think the record before us presents such a case." In the case cited counsel was apparently seeking to inform the court on matters of law then under discussion, and incidentally read the part of the opinion stating the amount of the verdict. There was no apparent purpose to influence the jury, and no reference to the cases in subsequent argument. In the case before us counsel for appellee conceded that he did not deem it necessary to enlighten the court on any question of law involved in the trial. No question was made as to the sufficiency of the facts to authorize the court to submit the cause to the jury. The cases read could be useful to the court only on motion for new trial. The sufficiency of the facts to authorize a verdict and the amount of damages to which appellee was entitled were questions with which the trial court at that stage of the proceedings had nothing to do. The law forbade him to comment on the weight of the evidence, and, had he done so, his conduct would have resulted in a reversal of the judgment. Yet counsel for appellee, by reading the cases in the presence of the jury, injected into their minds forceful comments from high courts on the weight and sufficiency of like evidence. This was emphasized by subsequent argument, in which the jury's attention was especially called to the force of the cases as bearing on the matter in hand. That the cases were read for the benefit of the jury, and not the court, plainly and unmistakably appears, and counsel went unrebuked when he called the cases to the attention of the jury, and sought thereby to influence their conclusion. Of all the cases in the books we can imagine no two more dan-

gerous to appellant's rights, or which could with less propriety have been read in their hearing. The striking similarity of the facts in the one case and the injuries in the other to the present case, taken together with the comments of the appellate courts thereon, rendered them peculiarly hurtful. There are two means of deterring counsel from indulging in this harmful impropriety. One is the power of the trial court promptly exercised. When the trial court fails, it becomes the duty of appellate courts to administer the remedy in every proper case by a reversal of the judgment thus obtained. In *Railway Co. v. Wesch*, 85 Tex. 593, 22 S. W. 957, the supreme court, speaking through Chief Justice Gaines, condemns the practice, and, among other forceful utterances on the subject, uses the following language: "It was the duty of the jury to assess the damages of the plaintiff from the evidence before them, and they should not be influenced by the action of other juries in giving large verdicts, or by the action of this court in sustaining such verdicts. The object of reading the opinions to the jury was doubtless to swell the damages, and it was calculated to have that effect. We are of opinion the court erred in its action, and that this error is sufficient to cause a reversal of the judgment." In the case under consideration both the liability of the company and the amount of damages to which plaintiff might be entitled were issuable facts to be determined by the jury, and we cannot say that they may not have been affected by such apt opinions as were read through the court to them. This action of the court in permitting the acts complained of was error, for which the judgment should be reversed.

There is one other matter which we will notice in view of another trial. Appellant contends that the charge of the court on the measure of damages is a comment on the weight of evidence. We would not reverse on this ground, as we are of opinion the construction placed by appellant on that portion of the charge is rather strained. But, as the charge is not perfectly clear on that point, we suggest that it be more carefully worded on another trial.

The other assignments either present no errors, or only such as are not likely to happen on another trial, so we do not consider it necessary to notice them further.

For the errors indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

TENNANT v. FAWCETT.¹

(Court of Civil Appeals of Texas. Dec. 12, 1901.)

CONTRACTS—PLEADING—FRAUD—ISSUES.

Where, in a suit by an attorney to recover for services, the defense was that the

contract was that defendant was to fix the amount of compensation, which he had done, and paid the same, plaintiff could not avoid defendant's action in fixing the compensation by showing bad faith on defendant's part, in the absence of any allegation of fraud or bad faith in plaintiff's pleading.

Appeal from district court, Harris county; Wm. H. Willson, Judge.

Action by L. S. Fawcett against J. H. Tennant. From a judgment in favor of plaintiff, defendant appeals. Reversed.

L. B. Moody, for appellant. W. C. Oliver and L. S. Fawcett, for appellee.

GARRETT, C. J. This action was brought by L. S. Fawcett against J. H. Tennant to recover upon an account for the reasonable value of certain services as an attorney at law. The defense relied on was that the plaintiff had contracted with defendant that, in the event no fee should be agreed on in advance, the defendant himself should fix the fees, and that the defendant had fixed them for the services alleged, and paid the same. This is the second appeal in the case. Upon the first trial the court below held that under such a contract the defendant was liable for the reasonable value of the services, and its judgment in favor of the plaintiff was affirmed by the court of civil appeals for the Third district, to which the cause had been transferred. 55 S. W. 611. On writ of error to that court the supreme court reversed the judgment, holding that the defendant was entitled to fix the compensation in good faith, and that the plaintiff could recover no more. 58 S. W. 824. Upon the last trial the court below submitted the case to the jury upon the issue of good faith on part of the defendant in fixing the fees. There was evidence in behalf of the defendant tending to show that for such item of service the defendant had paid the plaintiff a sum of money which he claimed should be in satisfaction thereof. The plaintiff introduced evidence tending to show that no such agreement had been made, and to show the reasonable value of his services, as well as that the sums paid were paid generally upon account, and not in satisfaction of any particular item, and recovered judgment as for the reasonable value of the several items of service rendered by him.

It is contended on this appeal that the court below erred in submitting the issue of good faith to the jury, because it was not pleaded by the plaintiff that the defendant had not acted in good faith in fixing the compensation to be paid to the plaintiff. Fraud or bad faith is not to be presumed, but the party asserting it must allege and prove it. The defendant having set up a contract by which he was entitled to fix the compensation to be paid to the plaintiff, and having introduced evidence to prove such contract, the latter could not avoid the action of the defendant in fixing such compensation, and recover the reasonable value of the services

¹ Rehearing denied January 9, 1902.

upon quantum meruit, without allegation and proof that the defendant had acted in bad faith. *Tennant v. Fawcett* (Tex. Sup.) 58 S. W. 824; *Butler v. Mill Co.*, 28 Minn. 205, 9 N. W. 697, 41 Am. Rep. 277; *Lee's Appeal*, 53 Conn. 363, 2 Atl. 758; *Howard v. Kenyon* (Wash.) 30 Pac. 1058, 1059. Hence the court erred in submitting to the jury the issue of good faith or not on the part of the defendant in fixing the compensation for the services of the plaintiff, there being no pleading to support it. There was no error in refusing the special instruction set out in the fifth assignment of error, because it is clearly upon the weight of the evidence. The letter dated February 15, 1898, written by the plaintiff to the defendant, would be admissible as bearing upon the question of good faith under proper pleadings, but would not be evidence of the facts recited therein. We do not pass upon the assignments questioning the sufficiency of the evidence to support the judgment.

For the error in the charge of the court, the judgment is reversed and the cause remanded. Reversed and remanded.

LOGAN v. CURRY et al.¹

(Court of Civil Appeals of Texas. Dec. 21, 1901.)

PUBLIC LANDS—OCCUPANCY—CERTIFICATE—CONCLUSIVENESS—COLLATERAL ATTACK—BONA FIDE RESIDENCE—PASTORAL LAND.

1. Under Rev. St. 1895, arts. 4218f, 4218j, 4218k, providing that public lands shall be subject to sale to actual settlers by the commissioner of the general land office, who, on proof of three years' occupancy of the land, shall issue a certificate showing that fact, after which the purchaser shall be entitled to a patent, such certificate is not conclusive as against parties making application to purchase after issuance of the certificate, but upon proof that the person to whom a certificate has been issued was not an actual settler a later applicant may make proof and receive a patent.

2. Under Rev. St. 1895, art. 4218i, providing that any bona fide settler who has purchased a section of agricultural land may purchase three pastoral sections adjoining, a sale of a pastoral section to a settler on an adjoining agricultural section is void if the settlement on the agricultural section is not bona fide.

Appeal from district court, Nolan county; W. R. Smith, Judge.

Actions by J. W. Curry and R. P. Arnold against W. C. Logan consolidated by consent. From judgments in favor of plaintiffs, defendant appeals. Affirmed.

Theodore Mack, Capps & Canty, and Beall & Beall, for appellant. E. N. Kirby, A. H. Kirby, and J. M. Wagstaff, for appellees.

HUNTER, J. On the 9th day of November, 1900, J. W. Curry filed his suit against W. C. Logan for all of school section No. 38, block 20, T. & P. Ry. Co., Nolan county, and on the 7th day of February, 1901, R. P. Ar-

nold filed suit against W. C. Logan for all of school section No. 50, same grantor, block, and county as that of section 38. On the 15th day of April, 1901, the appellant, as defendant in said causes, filed his answer in said cases by general demurrer, general denials, and plea of not guilty. By agreement of parties, the two suits were consolidated, and tried before the court upon the same testimony and statement of facts, resulting in a judgment for the plaintiffs on the 29th day of April. The court filed his conclusions of fact and of law in the consolidated case on the 29th of April. Appellant excepted to the judgment of the court in each case, gave notice of appeal, and on the 7th day of May filed statement of facts, and now brings said consolidated case to this court for revision.

The record discloses the following facts: H. C. Reid made an application in due and legal form to purchase section 38 as an actual settler thereon, and filed it in the general land office January 17, 1896, and an award of the section was made to him by the commissioner on February 21, 1896. All payments required of him were duly made up to the time of his sale. On October 13, 1897, he and his wife joined in a conveyance of this section to W. C. Logan, the appellant. This deed was duly recorded in Nolan county, where the section lay, and on January 20, 1899, was filed in the general land office. On March 30, 1900, appellant filed in the general land office his proofs of occupancy by Reid and himself for three years, and the commissioner issued to him, on that day and of that date, the certificate of such occupancy, as is provided by law. After this suit was filed, on, to wit, January 19, 1901, the commissioner issued and delivered a patent to said section to appellant, and this constitutes his title. Before the patent issued, however, J. W. Curry, one of the appellees, being an actual settler on the east half of section 48, on October 8, 1900, filed his application and obligation in due form to purchase section 38 as additional grazing land, and tendered the proper cash payment, which application was rejected by the commissioner because of the sale to Reid.

A question is made on the sufficiency of the evidence to prove that Curry was an actual settler on the east half of section 48, but we have concluded that it was sufficient to warrant the district court in so finding. This much as to the documentary evidence relating to section 38. Now, as to section 50. On April 2, 1900, appellant, Logan, filed two applications to purchase section 50 as additional grazing land to his home section,—one dated March 30, and the other March 31, 1900,—and it was awarded to him May 24, 1900. R. P. Arnold, one of the appellees, being an actual settler on the south half of section 46, on May 25, 1900, filed his application and obligation in due form to purchase section 50 as additional grazing land to 46, and made the payments required by law, but

¹ Rehearing denied January 11, 1902, and writ of error granted by supreme court.

the commissioner rejected same because of sale to Logan. Arnold's actual settlement on section 46 is questioned, but we think the evidence was sufficient to warrant the district court in finding actual settlement by Arnold thereon. Logan resided on section 38 from the time he bought it from Reid until the trial of this cause, but there is evidence tending and sufficient to prove that his application and purchase of section 50 and his purchase of No. 38 were in collusion with others, in whose pasture these sections were, and who, it seems, loaned—or at least furnished—Logan all the money he paid on said purchases, and we sustain the conclusion of the district court that said purchases were made in collusion with others, and for their benefit, and that the award of section 50 to Logan was therefore void, and left that section still on the market, and subject to the application of Arnold. There was evidence sufficient to prove that Reid, who had a family, was not an actual settler on 38 when he filed his application to purchase it, and never did reside upon it with his family; and there is perhaps also sufficient evidence to establish his actual settlement thereon. The court below found that he was not an actual settler at the date of his application, and hence it is our duty, where the evidence is thus conflicting, to sustain the finding of the lower court, which we do. The facts are sufficient, we think, to show the grounds upon which we dispose of this case, and we now come to the most serious question in the case; that is, whether the certificate of occupancy for three years issued by the commissioner of the general land office is conclusive upon persons who, after the issuance thereof, make application to purchase the land. The Revised Statutes adopted in 1895, and under which Reid's application to purchase section 38 was made, provides as follows: Article 4218f: "When any portion of said land has been classified to the satisfaction of the commissioner under the provisions of this chapter or former laws, such lands shall be subject to sales, but to actual settlers only." Article 4218c vests the commissioner with all power and authority necessary to carry into effect the provision of the chapter relating to the sale and lease of the public free school lands, "with such exceptions and under such restrictions as may be imposed by the provisions of this chapter, or by the constitution of the state." Article 4218j provides: "All sales shall be made by the commissioner of the general land office, or under his direction, and he shall prescribe suitable regulations whereby all purchasers shall be required to reside upon as a home the land purchased by them for three consecutive years next succeeding the date of their purchase, except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the commissioner of

the general land office within two years next after the expiration of said three years by his affidavit, corroborated by the affidavits of three disinterested and credible persons, to be certified by some officer authorized to administer oaths, and on making such proofs the commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact. If, however, any purchaser has sold his purchase, or any part thereof, his vendee shall be permitted to compute the time of the occupancy of his vendor as a part of his own occupancy; and if any person has sold the whole or any part of his purchase under this or any former law, his vendee, or if he refuses to do so, the vendor himself, may make proof of occupancy as provided herein." Article 4218k provides that when the land has been occupied for three consecutive years, and proof thereof has been made as provided, the purchaser shall be entitled to a patent upon payment of the full amount due on the land and the patent fees. If the patent had been issued by the commissioner to Logan for section 38 before Curry made his application to purchase it, we should have a more serious question; for we have a line of authorities holding in effect that, where the grant from the state has issued to a person, no one claiming under an after-acquired right in the land can attack his title; that only the state can do so by a direct proceeding to cancel the patent (*Johnston v. Smith*, 21 Tex. 722; *Bowmer v. Hicks*, 22 Tex. 162; *Luter v. Mayfield*, 28 Tex. 325; *Smith v. Walton*, 82 Tex. 547, 18 S. W. 217); and it is insisted by appellant, in effect, that we should give to the certificate of proof of three years' occupancy issued by the commissioner the same conclusiveness and exemption from collateral attack in all cases as is given to the patent. We are cited to the case of *Pardue v. White*, 50 S. W. 501, where we held the certificate conclusive of continued occupancy for three years as against a subsequent application to purchase; but in that case it was conceded that the original purchaser from the state was an actual settler, and therefore one of the class of persons to whom the commissioner had power to sell the land, and, being an actual settler, the commissioner had jurisdiction to pass on the question of occupancy. See *Metzler v. Johnson*, 1 Tex. Civ. App. 137, 20 S. W. 1116; *Willoughby v. Townsend* (Tex. Sup.) 53 S. W. 581; *Grace v. Hendrix* (Tex. Civ. App.) 51 S. W. 847. In the case under consideration the district court has found, upon competent and sufficient testimony, that Reid was not an actual settler on section 38. This fact being established, the sale to him by the commissioner was absolutely void, because such lands could only be sold to actual settlers; and, being void the sale was subject to attack by subsequent applicants who had complied with the law at any time before the patent issued, the sale not being completed until then. Wheth-

er such a collateral attack in such a case could be made after the patent issues, we do not undertake to decide, but, the sale being void ab initio, and the commissioner being without power to sell the land to any one but an actual settler, it is difficult to conclude that he had any more power to convey it than he had to sell it. But upon grounds of public policy, and for the security of titles, it is perhaps well enough to cut off all collateral attacks upon the title by subsequent applicants after the patent has issued; but until the grant is made the sale or transaction is in fieri, and subject to collateral attack for want of actual settlement.

This disposes of Logan's title to section 38, and we pass now to his claim to section 50, which Arnold recovered from him. Our conclusion that the evidence contained in the record was sufficient to sustain the district court's finding to the effect that Logan's applications were made in collusion with others, and for their benefit, settles the controversy over section 50; for our statute provides: "Any person desiring to purchase land in accordance with the provisions of this chapter shall forward his application to the commissioner, describing the land sought to be purchased, which application shall be accompanied with the affidavit of the applicant, in effect that he desires to purchase the land for a home, and has in good faith settled thereon, except where otherwise provided herein, and he shall also swear that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof." Rev. St. art. 4218j. The exception referred to above is where the actual settler on one section applies to purchase additional grazing sections, and the validity of Logan's application to purchase section 50 must therefore be determined by the law regulating such applications. Logan resided on section 38 at the time he applied to purchase section 50, but the law regulating his right to purchase section 50 is as follows: "Any bona fide settler who has heretofore purchased, or who may hereafter purchase not exceeding one section of agricultural land, shall have the right to purchase three strictly pastoral sections, upon his making oath that he is not acting in collusion with others for the purpose of buying for any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase of the same." Id. art. 4218i. In this case Logan was not a bona fide purchaser of section 38, but, as we have concluded, settled upon it, and attempted to purchase it for the benefit of others, and therefore his purchase of No. 50 was void. If his affidavit was false in the particular named, Logan acquired no right to the land as against one subsequently applying to purchase the same in good faith ac-

cording to law, and with the requisite qualifications entitling him to purchase.

We therefore conclude that the judgment of the district court was correct as to both sections, and the same is affirmed.

GULF, C. & S. F. RY. CO. v. BURROUGHS.

(Court of Civil Appeals of Texas. Dec. 10, 1901.)

CONTINUANCE—DISCRETION—ABSENT WITNESS—CREDIBILITY—WEIGHT—RAILROADS—NEGLIGENT ESCAPE OF FIRE—DESTRUCTION OF TREES—VALUE—EVIDENCE—HARMLESS ERROR—TITLE.

1. A motion for a third continuance is addressed to the discretion of the court, and an order overruling such a motion will not be considered erroneous unless a clear abuse of discretion is shown.

2. In an action for negligently allowing fire to escape and burn plaintiff's grass, orchard, and fencing, defendant applied for a third continuance on the ground that absent witnesses would swear that the property had been destroyed by a former fire. The evidence showed that such prior fire destroyed plaintiff's house, but burned very little of his fence, grass, or orchard; and the verdict was for a smaller amount than claimed, indicating that the jury did not include damages caused by the former fire. The application did not state the number of acres the absent witnesses would have sworn was burned over in the prior fire, and the evidence showed the amount burned in the latter fire was less than the amount claimed in the petition, so that the evidence might have been immaterial. Held, that it was improbable that the absent witnesses would have testified as stated in the application, or that such testimony, if given, would have been true, so that the denial of the application was not an abuse of discretion.

3. In an action for the negligent destruction of pear trees, witnesses' opinions that such trees added nothing to the value of the soil in that locality was inadmissible.

4. In an action for injuries to realty from fire, the alleged erroneous admission in evidence of a deed showing plaintiff's title to the land was harmless; it appearing that plaintiff was in possession under a claim of ownership, and that his title was not put in issue by defendant.

5. In an action for injuries to realty from fire, an affidavit by plaintiff's grantor that at the time of his deed to plaintiff the land was the homestead of himself and wife, but not stating that affiant's wife did not join in the conveyance, or that either affiant or wife claimed any interest in the land, stated no material facts; and an application for a new trial on the ground that the facts stated in the affidavit constituted newly-discovered evidence was properly refused.

6. In an action against a railroad company for negligently allowing fire to escape, where the undisputed evidence showed that the fire resulted from the negligence of defendant, evidence that at the time the fire was set the train crew did not return to assist in extinguishing it, even if irrelevant, was not prejudicial to defendant.

Error from district court, Harris county; Wm. H. Wilson, Judge.

Action by J. J. Burroughs against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

J. W. Terry and Blake Dupree, for plaintiff in error. J. M. Gibson and F. G. Hooser, for defendant in error.

PLEASANTS, J. Defendant in error brought this suit to recover of plaintiff in error damages for the destruction of certain personal property and for injury to certain real estate owned by defendant in error, alleging that said loss and injury was caused by a fire negligently set out by the plaintiff in error. The personal property alleged to have been destroyed consisted of a lot of nursery trees and the growing crop of hay upon about 50 acres of plaintiff's land. The injury to the land was caused, as alleged in the petition, by the burning of an orchard and of shade ornamental trees, shrubbery, and fences situated on said land, and by the destruction of the grass roots, and damaging the sod so that the production of grass would be greatly decreased for several years. The aggregate sum of the damages claimed in the petition amounted to \$3,261. The defendant below answered by a plea of general denial and plea of not guilty. The trial in the court below was by a jury, and resulted in a verdict and judgment in favor of the plaintiff for \$600.

Plaintiff in error presents no assignment questioning the sufficiency of the evidence to sustain the verdict of the jury, and our conclusions of fact are, as found by the jury, that plaintiff's property was injured and destroyed, as alleged in his petition, by fire negligently set out by the defendant, and that by such negligence plaintiff has been damaged in the amount found by the jury.

The first assignment of error complains of the action of the trial court in overruling the defendant's motion for a continuance. The continuance was asked for because of the absence of Evans and Polk, two of defendant's witnesses. The application for a continuance sets up that plaintiff in error would have proved by the witness Evans, if he had been present, that defendant in error's trees, which he claimed had been burned by plaintiff in error, had been neglected for several years, had not been cultivated, were practically worthless, small, not bearing, and were very scrubby; that the witness was acquainted with the property for at least five years, and for several years before the alleged injury to it; that, several months prior to the date that defendant in error alleges plaintiff in error damaged his property, the buildings and improvements thereon were destroyed by fire, and a large number of trees and shrubbery and plants and the fencing and grass upon said property were burned by said prior fire, and not by plaintiff in error, as claimed by defendant in error; that the fence on said property claimed to have been burned by plaintiff in error was old, and had been used formerly by plaintiff in error to inclose its right of way; that the said witness Evans inspected the property immedi-

ately after it was burned by the fire charged by defendant in error to have been set out by plaintiff in error, and that the marks between said prior burn and said new burn were at that time easily distinguished; and that the fire which destroyed the improvements and damaged the trees and shrubbery upon said property was not the fire alleged by defendant in error in his petition in this case. Said motion for a continuance further showed as to the witness Evans that he had been in attendance upon the court at every previous term at which this case had been set for trial; that he was at the date of the trial in the employ of the defendant, and would then have been in attendance upon the court, except that he was too sick to be so in attendance; that he had then recently undergone an operation for appendicitis; that plaintiff in error, knowing of said illness of said witness, inquired of his physician whether he could with prudence and safety give his deposition in this cause; and that plaintiff in error was informed that the witness could not give his deposition, on account of his physical condition. Attached to said motion, and made a part of it, was the affidavit of the attending physician of said witness, A. C. Scott, showing the serious illness of said witness. Said motion for a continuance also showed that but for said illness said witness would have been in attendance upon the court at the trial term, just as he had theretofore been in attendance at every previous term of the court when this cause was set for trial. By said motion for a continuance it is also shown: That the witness W. A. Polk was a resident of Harris county, Tex., and that process had been duly issued on the 14th day of November, 1900, to secure his attendance, and that plaintiff in error had in every way used due diligence to secure the attendance of said witness Polk, and that his absence and the failure of the officer to serve him with process were due to the fact that he was temporarily absent from the county upon a surveying expedition. That plaintiff in error would have proved by said Polk, if he had been present at the trial, that, shortly after the damage to defendant in error's property alleged in his petition, said witness, at the request of plaintiff in error, made a survey of the same; that the number of acres burned over is much less than alleged by defendant in error in his petition; that the trees upon said property of defendant in error were small and scrubby, and practically worthless; that there were less posts, plank, and fences burned than alleged in the petition. That, so soon as it came to the knowledge of plaintiff in error that the witness Polk was absent from the county, it immediately thereupon made inquiry of different parties, whom it had reason to believe would know, of the whereabouts of said Polk, and that it had been wholly unable to locate him; that he was not located at any particular

point on his surveying expedition, but was daily moving up and down the Brazos river making a survey thereof. It is shown further by said motion that the plaintiff in error knew of no other source from which said absent testimony could be procured, and that the witnesses were not absent through the consent or procurement of plaintiff in error, and that the continuance was not sought for delay only, but that justice might be done, and said motion was duly verified by affidavit. The record shows that this was defendant's third motion for a continuance, and, such being the case, it is well settled that said motion was addressed to the discretion of the court, and, if we concede that the application shows a substantial compliance with the statute regulating continuances, the court having in the exercise of his discretion overruled the motion, such ruling is not subject to revision by this court unless it clearly appears that the trial court has abused his discretion. *Brooks v. Howard*, 30 Tex. 278; *East Texas Land & Improvement Co. v. Texas Lumber Co.* (Tex. Civ. App.) 52 S. W. 645. The evidence in the case shows that there had been a fire on plaintiff's premises which consumed his dwelling house several months prior to the fire complained of in this case, but said prior fire did not destroy the grass on plaintiff's land, nor any part of his orchard, and only destroyed a few panels of his fence, and very little, if any, of his shrubbery. In view of all the evidence in the case, it is not at all likely that the witness Evans would have sworn that the grass, orchard, nursery trees, and all of the shrubbery and fencing, for the destruction of which plaintiff claims damages in this suit, were burned in said prior fire; and, if he had so testified, such testimony would not have been probably true. The verdict of the jury was for much less than the amount of the damage shown by plaintiff's testimony, and we think it may reasonably be assumed that the jury did not include in their verdict any damages shown by any of the evidence in the case to have been caused by the prior fire. The application does not state the number of acres of plaintiff's land that the witness Polk would have sworn was burned over, and, as the evidence in the case shows that the number so burned was less than the amount claimed in the petition, it is not clear from the statement in the application that the testimony of said witness would have been material. The testimony of these witnesses as to the other facts stated in the application would have been merely cumulative of other evidence in the case, and would not have probably changed the verdict of the jury. While the application is apparently not without merit, when considered in connection with all the evidence in the case we cannot say that it was an abuse of discretion on the part of the trial court to overrule the motion for a

continuance, and the assignment cannot be sustained.

The second and third assignments of error are as follows: "The court erred in excluding the testimony of the witness G. W. Butler, as is fully shown by defendant's bill of exceptions No. 3, which is as follows: 'Be it remembered that on the trial of the above numbered and entitled cause, after the defendant had shown by the witness G. W. Butler that he was acquainted with the condition of the orchards and the character of the soil in and near Harrisburg and the vicinity thereof, and plaintiff's property was near Harrisburg, the defendant asked the witness the following question: "In your opinion, what value, if any, is added to land in the vicinity of Harrisburg by the presence of pear trees upon it?" The plaintiff simply objected to the admission of the evidence, giving no reason therefor, which objection the court sustained, and excluded the answer of said witness, which answer the defendant expected to be that it was no value to the land to have pear trees growing upon it, which answer the court excluded, to which the defendant excepted, and here now presents its bill of exceptions No. 3, and asks that the same be made a part of the record in this cause.' (3) The court erred in excluding the testimony of defendant's witness J. H. Wizzell, as shown by its bill of exceptions No. 4, which is as follows: 'Be it remembered that on the trial of the above numbered and entitled cause the defendant asked the witness J. H. Wizzell, after showing by the witness G. W. Butler that the same conditions of soil, as to pear trees, existed throughout the coast country of Texas, and after showing that the said witness Wizzell was acquainted with the soil, and that he was experienced in handling and raising pear trees at Alvin, Texas, about 20 miles from the tract of the plaintiff's place, the following question: "State, in your opinion, from your experience in handling and raising pear trees, what value, if any, is given to land by the presence of pear trees from five to six years old,"—to which question, and the answer thereto, the plaintiff objected because it was not the proper method of rebutting the testimony of the plaintiff, and because the witness shows that the only knowledge he has is at Alvin, and the question called for a conclusion, which objection the court sustained, and the defendant excepted. By the answer to said question the defendant expected to prove by the witness, if he had been allowed to testify in answer to said question, that he had experience of six or seven years at Alvin and the coast country, and that pear trees added no value to the property, and that there was no market value for them in November, 1898; and that he would further have answered, as a matter of fact, that it would have been better to have them off than on the land, and that

they would die from blight about the time they were beginning to bear, which was about six or seven years old, and that they would die from the blight shortly after said age, and would add nothing to the value of the place for the purpose of sale or value,—which answer was by the court excluded, to which ruling of the court the defendant excepted, and now presents its bill of exceptions No. 4, and asks that it may be allowed as part of the record in this cause.” We do not think the court erred in excluding this evidence. Neither of these witnesses knew anything about plaintiff’s orchard, and therefore neither was shown to have been qualified to express an opinion as to its value. Their opinion, based upon their general knowledge of the condition of pear orchards in the section of the country in which plaintiff’s orchard was situated, that such orchards added nothing to the value of the land on which they grew, was not admissible for the purpose of showing that plaintiff’s orchard was without value. The trial court, in his qualification to defendant’s bill of exceptions, states that he admitted the testimony of this witness as to the general condition of pear orchards in that section, and all the testimony offered showing the physical qualities or properties of pear trees. From these facts the jury were properly allowed to draw their own conclusion as to the value of plaintiff’s orchard, unaided by the opinion of the witnesses.

The fourth assignment complains of the action of the trial court in admitting in evidence a deed purporting to have been executed by W. B. Nichols and wife to the plaintiff. We deem it unnecessary to consider the objections raised by plaintiff in error to the introduction of this deed, because, if said deed was improperly admitted, its introduction in evidence was harmless. Plaintiff in the court below was not required to prove his title as in a suit of trespass to try title against a defendant in possession, and, having shown that he was in possession of the property under a claim of ownership, such evidence made a prima facie case of title in plaintiff, and, in the absence of any pleading or proof on the part of the defendant that said property was owned by some other person, entitled plaintiff to recover for injury to said property. Such being the law, it was unnecessary for plaintiff to introduce any record title, and it is immaterial whether or not the deed in question was properly admitted.

The fifth assignment of error complains of the refusal of the trial court to grant a new trial on the ground of newly-discovered evidence. The evidence for which the new trial was asked is set out in an affidavit made by W. B. Nichols, and attached to the motion for new trial. This affidavit is to the effect that, at the time of the execution of the deed from said Nichols to the plaintiff for the land in controversy, said land was the home-

stead of said Nichols and wife. There is nothing in the affidavit tending to show that Mrs. Nichols had not joined her husband in the execution of said deed, and there is no intimation that the land is owned or claimed either by Nichols or his wife. The facts stated in the affidavit being immaterial to any issue in the case, the trial court properly refused the motion for a new trial on the ground alleged.

The sixth assignment of error is as follows: “The court erred in admitting over the defendant’s objection the testimony of the plaintiff’s witness Charles Flemmell, as is shown by defendant’s bill of exceptions number 2, which is as follows: ‘Be it remembered that on the trial of the above numbered and entitled cause the plaintiff’s attorney asked the witness Charles Flemmell the following questions: “Did the crew stop when the fire started? Did any of the railroad men come there to help put it out? Did the train stop, and any of the railroad men running the train come back to assist in putting out the fire?”—to which questions and the answers thereto the defendant objected for the reason that they are improper questions, and irrelevant and immaterial and misleading, which objection the court overruled, and permitted the plaintiff to answer as follows: “No, sir; not that day. The train kept on going,”—to which ruling of the court the defendant excepted, and here now presents its bill of exceptions No. 2, and asks that the same be made a part of the record in this cause.’” The undisputed testimony in the case shows that the fire which caused the injury to plaintiff’s property was set out by the negligence of the defendant, and, conceding that the testimony complained of in this assignment was irrelevant and immaterial, its admission could not possibly have prejudiced defendant in any way. It could only bear upon the question of defendant’s negligence, and that having, as before stated, been established by uncontroverted evidence, this testimony could not have resulted in any harm to defendant.

We think the judgment of the court below should be affirmed, and it is so ordered. Affirmed.

MEDLEY v. AMERICAN RADIATOR CO. et al.¹

(Court of Civil Appeals of Texas. Dec., 1901.)
BUILDING CONTRACT — INSTALLMENTS — ACCRUAL OF DEBT — GARNISHMENT — PROPERTY SUBJECT — DEMANDS NOT MATURED — LIEN — OPERATION OF WRIT.

1. A provision in a building contract that a certain per cent. shall be paid as the work progresses, does not affect the entire and indivisible nature of the contract, and where, at a given time, the per cent. specified has been paid, the balance of the estimated value remaining unpaid has not accrued, and is not due to the contractor.

¹ Rehearing denied January 9, 1902.

2. A balance to become due on an uncompleted building contract, entire and indivisible in its nature, is not subject to garnishment.

3. The lien of a garnishment attaches only to such liability as has accrued at the date of service, or which accrues between the service and the date named for the answer; and the operation of the writ will not be extended, by the request of the garnishee for time in which to file an amended answer, to liability accruing up to the time when such amended answer is filed.

4. Where a creditor, by virtue of a garnishment, asserts a lien on funds not subject thereto, other creditors, who have acquired rights in such fund, may raise the defense, and it is not personal to the garnishee.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by the American Radiator Company against W. F. Coakley, Paul J. Medley, and another, in which a garnishment was sued out against John Sealy, Jr., and in which the J. L. Mott Iron Works intervened. From the judgment rendered, Medley appeals. Affirmed.

Lovejoy, Sampson & Malevinsky, for appellant. John C. Walker and Kleberg & Neethe, for appellee.

GILL, J. On August 26, 1899, the American Radiator Company, a private corporation, brought this suit against W. F. Coakley for the sum of \$1,218.84, the value of materials furnished to Coakley by said company for the placing of a heating system in the John Sealy Hospital of Galveston, Tex. Coakley was alleged to be the contractor who undertook the work, and a garnishment was sued out against John Sealy, Jr., on the 16th day of January, 1901, for the purpose of subjecting to the payment of the debt sued for any sum due to Coakley by Sealy on the contract. Paul J. Medley, the appellant, was also made a party defendant as asserting a prior right to the fund. The city of Galveston was made a party defendant as the owner of the building on which the work was done. The J. L. Mott Iron Works intervened, alleging that it had furnished to the contractor, Coakley, goods to the value of \$630.66, which were used in the repair of said building; that on the 14th of January, 1899, Coakley gave intervenor an order on John Sealy, Jr., for the sum of \$630.66, to be paid out of any sum owing by said Sealy to Coakley on the contracts; that the order was presented to Sealy, and payment refused, though at the time of presentment Sealy had funds due and owing to Coakley sufficient to pay same. Judgment for the amount of the written order was asked against both Coakley and Sealy. On March 25, 1901, Medley filed amended answer, which, after a general denial, set up the fact that he had instituted suit against Coakley on July 15, 1898, for a debt of \$807.98; that on December 31, 1898, he procured a writ of garnishment to be issued out of said cause, and served on said Sealy; that in response to the writ Sealy had answered on the 17th of Jan-

uary, 1899, that he was indebted to Coakley in the sum of \$100, and fully setting up the facts, Sealy praying in his answer that the garnishment matter be postponed until he could file a more complete answer; that the county court before which the garnishment proceeding was pending postponed the matter until the garnishee, Sealy, could answer disclosing more fully the facts; that on the 5th day of May, 1900, the garnishee did file an amended answer, stating that he was indebted to Coakley in the sum of \$1,093.20; and that said proceeding is still pending in the county court, and is undisposed of. The prayer was that, as all the parties claiming the fund were parties to this suit, Medley have judgment against Sealy, as garnishee, for a sum sufficient to satisfy his claim against Coakley. By supplemental petition and trial amendment the radiator company resisted the claims of Medley and the Mott Iron Works to the fund in the hands of Sealy, maintaining that nothing was due Coakley by Sealy at the date of service of Medley's writ of garnishment or at the time when the writ became functus officio, and that the sum now due by Sealy to Coakley accrued after the death of that writ. Replying to the intervention of the Mott Iron Works, plaintiffs set up that nothing was due by Sealy to Coakley at the date of the presentation of the order, and, as the order was not accepted, it did not attach to funds thereafter accruing to Coakley in the hands of Sealy. Sealy answered, stating fully the facts, giving the amounts in his hands due Coakley, setting up that he was a mere stakeholder having no interest in the fund, and asking protection as such. The pleadings are lengthy, and we have undertaken to give no more than a general outline of them. The real nature of the contest will more fully appear from the facts hereinafter stated. A trial before the court without a jury resulted in a judgment in favor of Medley against Sealy for \$120; in favor of Mott Iron Works against Coakley for the amount claimed by it, and against Sealy as garnishee for \$308.20; in favor of the radiator company against Coakley for the amount claimed by it, and against Sealy for the sum of \$665, who, upon payment of the sums adjudged against him was to be discharged with his costs, and specifically protecting him against the further prosecution of the garnishment suit of Medley pending in the county court. The city of Galveston was discharged with its costs. From this judgment Medley alone has appealed. The facts are as follows: The Sealy Hospital, a building which had been donated to the city of Galveston by John Sealy, Sr., deceased, was in the year 1808 found to be in need of certain repairs and improvements. For the purpose of making these, the heirs and legal representatives of John Sealy, Sr., donated certain funds, and placed them in the hands of John Sealy, Jr., in trust for disbursement for the purpose

named. The city of Galveston accepted the gift, and assented that it should be used by the trustee as directed by the donors. The repairs and improvements contemplated were a new heating system and certain plumbing, —sewerage and gas fittings. In pursuance of this arrangement, John Sealy, Jr., on September 2, 1898, employed defendant Coakley to furnish the material and labor and to put in the new heating system, the price named in the written contract being \$3,760. The payments were to be made as the work progressed; 80 per cent. of the value of the work ascertained by the architect to have been done to be paid every 30 days; the final payment to be made when the completed work was tested and proven satisfactory according to requirements and specifications. On July 11, 1898, said Sealy, Jr., employed said Coakley to put into said building certain sewerage plumbing and gas fittings according to plans and specifications made a part of the written contract between them. The price agreed on for this work, including all labor and material necessary therefor, was \$3,573. On this contract three payments were to be made to Coakley during the progress of the work, and each payment to be made on the actual work executed, paying 75 per cent. of such work; final payment to be made when the work was finished, and accepted by the architects and owner. Coakley entered upon the execution of the work, buying from the radiator company the material for the price of which it sues, and from the Mott Iron Works the material for which the order for \$630.68 was given; and the materials thus purchased from the parties named went into the construction of the proposed improvements. Medley held a claim against Coakley, which was entirely independent of the contract with Sealy, the indebtedness to Medley having accrued prior thereto. On this claim Medley sued Coakley in the county court, as alleged, and ultimately procured judgment therefor. As ancillary to that suit, he procured a writ of garnishment to be issued out of the county court against John Sealy, Jr., as garnishee, which writ was served on the 31st day of December, 1898. The writ commanded Sealy to answer thereto on the 17th day of January, 1899. On the last-named date Sealy, the garnishee, answered the writ, setting up his contracts with Coakley, stating that the work to be done was not completed, showing the time and method of payment as prescribed by the contracts, and stating that at the date of the service of the writ and of his answer he was indebted to Coakley in the sum of \$100, and no more. The answer showed that he had paid Coakley on the heating contract \$2,940, and on the plumbing contract \$2,203.40; that, if the contracts should be fully performed by Coakley, there would be due him on the heating contract \$820, and on the plumbing contract the sum of \$1,369.60. Garnishee prayed that, as he could not then ascertain

what was due on the contracts, the work being then in progress, he be given until the full performance of the contract in which to file a fuller and more definite answer. The court so ordered. On the 5th day of May, 1900, Sealy filed in the county court his amended or supplemental answer to Medley's writ of garnishment, and, referring to his original answer therein, showed that since the filing of the original answer Coakley had failed to complete the work, and Sealy had procured it to be done through the bondsmen of Coakley; that upon the completion of the work he found himself owing to Coakley the sum of \$308.20 on the plumbing contract and \$785 on the heating contract, which sums include the amount admitted to be due in his original answer. This amended answer also suggested to the court the filing of the suit by the radiator company, and asked that the proceedings be suspended until the disposition of the suit brought by the radiator company. The judge of the county court, on hearing the amended answer, so ordered. Medley at no time caused another writ of garnishment to be issued and served, nor did he contest either of the answers of the garnishee. The radiator company's writ of garnishment was sued out on January 16, 1901, at a time when the work had been completed, and commanded Sealy to answer on the first Monday in February, 1901, which the garnishee accordingly did, setting up the facts as he did in his amended answer to Medley's writ. On June 14, 1899, the Mott Iron Works served Sealy with notice that they held against him Coakley's written order for \$630.68, but this was not accepted by Sealy. It was shown that the value of the work done by Coakley on the heating contract at the date of Sealy's original answer to Medley's writ was \$3,040, and there had been paid on same \$2,940.

Appellant contends: (1) That, the garnishee having paid at the date of the answer only 80 per cent. of the value of the work done on one contract and 75 per cent. on the other, the answer itself showed that he was indebted to Coakley in a greater sum than the amount of \$100 at that date. (2) That as Coakley quit work as soon as the writ was issued, and the contract was completed by others, leaving a balance yet due on the contract price, such balance represents the amount which Coakley had actually earned, and what had actually accrued to him at the date of the answer; and this is not affected by the fact that the sum thus accrued could not be ascertained until the completion of the work. (3) That he is entitled to the sum due at the date of the garnishee's answer, and, because the entire sum had been ascertained and was due at the date of the filing of the amended answer in the county court, the sum so ascertained and answered to be then due was affected by the writ, whether accrued on the return day of the writ or not.

If either of these propositions is sound, the judgment must be reversed. Because the original answer of the garnishee to Medley's writ set up the two contracts and the method of payment prescribed therein, it is necessary to ascertain what effect an agreement to pay in installments has upon the ultimate rights of the parties. It seems to be fairly well settled that payments in installments on a contract in its nature entire amount to no more than part payments on account of the entire sum, and are not an acceptance of the work *pro tanto*, and a quitclaim of the contractor to that extent. *Bartlett v. Bisbey* (this day decided by this court) 66 S. W. 70, and authorities therein cited. Should the contractor abandon his contract before completion, and the owner should necessarily expend more than the balance of the contract price, he may recover back from the contractor enough of the sums thus paid to make him whole. So the agreement in this case that a certain per cent. of the value of the work should be paid in installments as the work progressed did not affect the entire and indivisible nature of the contract, and the answer setting up such provisions and the fact of such payments did not amount to an answer that the per cent. of the value not covered by the payment had then accrued as a debt against the garnishee. The latter not only did not then owe the unpaid balance of the estimated values, but had a certain interest in the sums already paid in the event the contract was abandoned and the owner had to finish the building.

This brings us to the second point made, which is nearly akin to the first, and which involves the question whether such a liability as that asserted against the garnishee is subject to garnishment. In order for a fund or liability to be subject to garnishment there must be no condition precedent, no impediment of any sort between the garnishee's liability and the defendant's right to be paid. The establishment of liability after garnishment is not sufficient. *Wap. Attachm. p. 197, 14 Am. & Eng. Enc. Law (2d Ed.) p. 765*. On page 766 of the last-cited authority it is stated in the text that money to become due on entire but uncompleted contracts is not subject to garnishment. To the same effect is *Elkel v. Frellich*, 1 White & W. Civ. Cas. Ct. App. § 1117; *Blake Co. v. Moore* (Tex. App.) 16 S. W. 780. *Webber v. Bolte*, 51 Mich. 113, 16 N. W. 257, applies the doctrine to building contract in particular. See, also, *Williams v. Railroad Co.*, 38 Me. 201, 8 Am. Dec. 742; *Robinson v. Hall*, 44 Mass. 301. In *McClellan v. Routh* (Tex. Civ. App.) 39 S. W. 607, Justice Williams says: "According to many authorities, a fund thus incumbered would not be subject to garnishment, but under the cases of *Carter v. Bush*, 79 Tex. 31, 15 S. W. 167, and *Mensing v. Engelke*, 67 Tex. 537, 4 S. W. 202, it may be that, if any balance remained in *McClellan's* hands after

the building was completed and paid for, and the fund freed from all contingencies, the garnishment would hold it." The point was not up for decision, and the language implies a doubt. The fund mentioned had been placed in the hands of a third party to pay for the construction of a building, and the holder was garnished before its completion. The cases mentioned as possibly upholding the doctrine do not, in our judgment, sustain it. In *Mensing v. Engelke*, *supra*, the cotton in the garnishee's hands was held subject to the terms of the contract by which it was affected, and after the garnishee was reimbursed the surplus was held subject to the garnishment. In that case the actual cotton was charged with the quasi lien of the garnishment, and its subsequent sale to pay the claims of the garnishee was merely a means of ascertaining that a surplus of value actually existed at the date of the answer of the garnishee. In *Carter v. Bush*, *supra*, a trustee named in a deed of trust for the benefit of creditors was served with a writ of garnishment for the purpose of subjecting the surplus remaining after the secured debts had been paid. It was held, in effect, that, if there was a surplus in value, it existed at the time of the garnishment, and was the property of the debtor at that time. The ultimate sale of the goods simply demonstrated the existence of the surplus at the time of the answer. We are aware that authorities can be found to the contrary, but we can imagine no liability subject to more contingencies than the balance which may become due on an uncompleted building contract entire in its nature. We are therefore of the opinion that neither the answer of the garnishee nor the facts adduced in evidence disclosed that at the date of the original answer to Medley's writ any amount subject to garnishment was due or had accrued at that time except the \$100 about which no question is made. Of course, when the building was completed by the direction of the garnishee, the sum then ascertained to be due was subject to garnishment, for it was then certainly due. But Medley had not procured a new writ, and the question arises, was the operation of the old writ extended by the request of the garnishee for time to file an amended answer? Coakley had obligated himself to Medley for his debt, but had given him no lien. Such lien as he had was a creation of the garnishment. Its operation could not be extended, either as against Coakley or his creditors, by any act of the garnishee. *Drake, Attachm. (3d Ed.) § 451b*. It is well settled that a lessor owing rent as it accrues monthly cannot be held by garnishment except for the rent earned at the date of his answer. *Id. § 551*. When a garnishee is commanded to answer on a certain day, he must answer on that day, or subject himself to judgment by default. Hence it will be presumed that in all the decisions in which the date of the garnishee's answer

is referred to it must be taken to have been made on the return day of the writ. To sustain the contention of appellant would empower the garnishee and the plaintiff in garnishment to extend the life of the writ by postponing the answer from time to time, thus gradually extending the quasi lien to funds which could not otherwise be reached by the writ. It is not the answer that fixes the lien, but the writ; for if the garnishee answer falsely, and the answer is contested, the writ will attach to the funds in his hands as disclosed by the result of the inquiry. We think it clear that the writ attaches to only such liability as had accrued at the date of service or accrues between the service of the writ and the date named for the answer. We construe *Bank v. Floeck* (Tex. Civ. App.) 48 S. W. 539, as so holding. See, also, *Drake*, *Attachm.* § 452.

Appellant further contends, however, that the defense is personal to the garnishee, and cannot be interposed by the other creditors of Coakley. Since appellant thus asserts a lien on funds upon which no lien exists, it is probable that Coakley himself could interpose it. But, however this may be, we are clear that parties acquiring rights in the fund to which the lien has not attached can assert the defense. It would be an extraordinary extension of the doctrine contended for to hold that the garnishee, who has no concern in the matter, and who is willing to pay the fund to any one the court may name as entitled to it, could, by his silence, defeat the rights of third parties who had acquired an interest in the fund.

Finding no error in the judgment, it is in all things affirmed. Affirmed.

MASTERSON v. BURNETT et al.¹

(Court of Civil Appeals of Texas. Dec. 7, 1901.)

MORTGAGE DEED—SINGLE TRANSACTION—PAROL PROOF—PURCHASE—MONEY MORTGAGE—PRIORITY.

1. That a deed, reciting the consideration fully paid, and a deed of trust to secure a loan, constitute one transaction, whereby the purchaser takes the land and executes the mortgage to secure payment of the price, may be shown by parol.

2. Parol proof that a deed, reciting the consideration fully paid, and a deed of trust to secure a loan, constitute one transaction, is not inadmissible as against a prior judgment creditor of the purchaser because he was not shown to have had notice of the transaction.

3. A., having mortgaged his land to B., obtained a loan of C. (half of which was actually advanced), which he was to secure by mortgage on other land he was about to purchase of B., unless he could get a greater loan of B. himself. B. having agreed to make the larger loan, the sum advanced by C. was repaid out of the proceeds of the B. loan, which loan was accomplished by A. conveying the land mortgaged to B. to him absolutely, and taking a conveyance from B. of B.'s land, and executing a mortgage to B. for the larger loan. B. testified he would

not have made the exchange unless he could make the loan secured as it was, and A. testified he would not have made the exchange unless he could have secured the loan. *Held*, that as against C., who was also a judgment creditor of B., claiming that his judgment lien intercepted B.'s mortgage, the evidence justified a finding that the deed from B. to A. and mortgage from A. to B. constituted one transaction.

4. A purchaser of land executing a mortgage thereon to the vendor as part of the same transaction, to secure the price, takes the land burdened with the lien, and, though the mortgage is capable of registration, yet, as it cannot be registered prior to the attaching of a previously existing judgment lien against the purchaser, the failure to register it will not impair its priority, except as to bona fide purchasers, the judgment lien attaching only to whatever interest the purchaser acquired under his deed.

5. Where a judgment creditor purchasing land at his own execution sale testifies in a subsequent suit that he credited his bid on his judgment, and the court finds that the question whether he had notice of a superior but unregistered mortgage is immaterial, it will be presumed on appeal, in support of the judgment, that the trial court found, under well-settled rules of law, that the judgment creditor was not a bona fide purchaser for value.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Suit by J. H. Burnett and others against W. B. Turney and others. From a decree for plaintiffs, defendant M. Masterson appeals. Affirmed.

H. & A. R. Masterson, for appellant.
Ewing & Ring and J. R. Burnett, for appellees.

GILL, J. This was a suit by appellee J. H. Burnett against W. B. Turner, J. O. Ross, trustee, and the appellant, H. Masterson, to foreclose a mortgage deed of trust upon four certain tracts of land in Harris county, one designated as "Day Land & Cattle Company Survey," another as "J. H. Burnett Survey," and the two others as "Sections 6 and 8, Washington County Railroad Company Surveys," off of each of which 160 acres had been sold, leaving a remnant of 540 acres each. The foreclosure was resisted by the defendant H. Masterson on the ground that he had become the owner of the land under an execution sale against the debtor, W. B. Turner, which it was claimed had been made in virtue of a judgment lien that was prior and paramount to the lien of the mortgage deed of trust. The court, trying without a jury, sustained the defense as to the first-named two tracts, but denied it as to the sections 6 and 8, giving judgment for the full amount of the mortgage debt, principal and interest, against the debtor, W. B. Turner, and foreclosing the mortgage lien on such sections, less the sold portions thereof, against him and the other defendants. From this judgment the defendant H. Masterson has alone appealed.

The facts are as follows: On February 14, 1899, J. H. Burnett conveyed to W. B. Turner, by two deeds of that date, for a recited cash consideration, the first above mentioned

¹ Rehearing denied.

two tracts of land, being the two designated as Day Land & Cattle Company and J. H. Burnett surveys, respectively, which deeds were filed for record of April 7, 1899. The mortgage deed of trust was not executed until April 5, 1899, and previous to its execution the judgment lien to be noticed had attached to such tracts; hence, as to them, the defense urged was allowed to prevail. On March 7, 1899, the appellant, H. Masterson, obtained judgment against W. B. Turner for the sum of \$1,166.32, besides interest, and caused an abstract of the judgment to be duly recorded, indexed, and cross indexed, in Harris county, March 9, 1899. At this time W. B. Turner had no interest in said sections 6 and 8, nor did he acquire any until April 5, 1899, at which time the mortgage deed of trust was contemporaneously executed. The trade by which Turner acquired from Burnett the sections 6 and 8, less the sold-off portions, was, in substance, that Burnett would convey such tracts to Turner in exchange for other lands, estimated in value at \$16,200, and also lend him \$7,500 on the security of such tracts; and that Turner would convey to Burnett the other lands, valued as stated, for such tracts, and also execute to him a mortgage deed of trust on the latter to secure the \$7,500 loan. The consideration on the one part was the acquisition of such tracts and obtaining the loan of \$7,500, and it was on the other part the acquisition of the exchanged property and the obtaining of the mortgage interest in such tracts as security for the loan. The conveyances and mortgage deed of trust bore the same date, to wit, April 5, 1899, were simultaneously executed and delivered between the same parties, and were filed for record at the same instant of time, to wit, at 11:40 o'clock, forenoon, on April 7, 1899. The mortgage deed of trust bore date, as above stated, April 5, 1899, and secured the payment of three notes, of even date, for the principal sum of \$2,500 each, bearing interest at 8 per cent. per annum from their date, and providing for 10 per cent. attorney's fees in case of default in payment. The loan of \$7,500 was made by J. H. Burnett, as agreed, the appellant, H. Masterson, being present when the money was paid over, and actually receiving \$3,000 of the money on a debt owing him by Turner; but he was not present when the instruments were executed and delivered. After Turner acquired the unsold parts of sections 6 and 8, executions were run on the aforesaid judgment in favor of H. Masterson against W. B. Turner, under which such unsold parts of said sections were sold and conveyed by the sheriff, on June 6, 1899, to one J. M. Cobb, who conveyed the same to appellant, J. H. Masterson, to whom Turner afterwards executed a confirmation deed. H. Masterson, under like execution sales, also acquired the other tracts hereinbefore mentioned, but, as they are not involved in this appeal, they will not be no-

ticed further. The trial court found that the deed of Burnett to Turner and deed of trust sued on were executed at the same time; that the loan on the one hand and the execution of the deed of trust on the other were a part of the consideration moving the parties to make the exchange, and without which the trade would not have been consummated; that the two instruments constituted an indivisible transaction by which the land passed to Turner burdened with the lien created by the deed of trust. He also found that Masterson, at the date of the transaction between Burnett and Turner, had no knowledge or notice of the mortgage on the land to Burnett, and at that time Masterson's judgment had been duly abstracted and recorded. As to whether Cobb had notice of the facts of this transaction when he bought the two tracts of land at execution sale, and as to whether he acted, for himself or for Masterson in making the purchase, the court did not find; nor is there any finding as to whether Masterson, prior to the time when he acquired the land, had learned of the nature of the transaction between Burnett and Turner, or had become possessed of facts which should have put him upon inquiry.

Appellant, complaining of the judgment of the trial court, makes, by his assignments of error, the following questions: First. Did the court err in permitting Burnett to show by parol that the two instruments above named were executed and delivered at the same instant of time; that each was a component part of an indivisible transaction; and that the loan of the money by Burnett to Turner and the execution by the latter of the deed of trust to secure the payment of same entered into and became a part of the consideration, so that the transaction would not have been made but for them? Second. If it be conceded that it was proper to resort to parol proof for such a purpose, were the two instruments of such a nature (the one being a deed reciting the consideration fully paid, and the other a mortgage to secure a loan) as to be susceptible of a blending into a single and indivisible transaction? Third. Inasmuch as the court found that he had no notice of the arrangement between Burnett and Turner at the date of the transaction and at the date when his judgment lien took effect, could his lien be properly postponed to the lien of the mortgage? Fourth. The deed of trust being an instrument capable of being placed of record, could it take precedence over the judgment lien, in the absence of a proper record of it prior to the attaching of the judgment lien?

The questions thus presented embody our conception of the questions presented by appellant's brief. We will not, therefore, take up and dispose of the assignments of error in detail. Did the court err in permitting Burnett to establish by parol the unity of the transaction, the deed and the deed of trust failing to disclose fully the relationship

of each to the other? A deed absolute on its face, but in fact made as a security for a debt, is held to be a mortgage. Its real nature may be shown by parol, and the owner of a judgment lien prior in date cannot successfully assert it against the real owner of the land if he have notice of the true state of the title before foreclosure, nor can the purchaser at execution sale prevail against it unless he is a purchaser for value without notice. *Michael v. Knapp* (Tex. Civ. App.) 23 S. W. 280. We are unable to perceive any distinction in principle between the case supposed and the case before us, so far as this question is concerned. It is also generally true that the consideration supporting an instrument may be shown by parol. Though a deed recites a cash consideration paid in full, it may be shown as between the parties and those having notice that such consideration was in fact not paid. These propositions are not questioned, and it would follow, it seems to us, that, if the loan and the trust deed were in fact a part and parcel of the sale of the land to Turner, constituting a material part of the consideration moving to the bargain, it was proper to permit plaintiff to establish the fact by parol. The assignments predicated upon this phase of the case and assailing the action of the court in admitting parol and other evidence upon the issue cannot be sustained. Appellant, however, contends that the evidence should have been excluded, because he had no notice of the details of the transaction. In reply to this it is sufficient to say it is always permissible for a person to establish the existence of the facts when, in order to maintain his rights, it devolves on him to visit notice of such facts on the adverse party. How can notice of the facts be shown unless the existence of the facts themselves is first established? Here it was necessary not only that Burnett should show the unity of the transaction represented by the two papers, but to show that appellant had notice thereof, or was in possession of facts which should have led to such knowledge, prior to the acquisition by appellant of his rights under the purchase at execution sale. Does the proof sustain the finding of the court that the two instruments were component parts of the same transaction? It is shown by the record that the tract of land exchanged by Turner to Burnett for the land in controversy was, prior to the exchange, incumbered by a mortgage to Burnett growing out of a former transaction. Turner wished to borrow money, but could not raise it on the security of his incumbered property. He had gone to appellant, and sought to secure a loan, and appellant had agreed to lend him \$6,000 on the unincumbered land he was to get from Burnett and actually advanced him \$3,000 a short time before the Burnett transaction. Turner stated to appellant that he would take the \$3,000, and secure him for the whole sum by mortgage on the land he was to get

from Burnett, unless he could get a greater loan from Burnett himself. Propositions were exchanged between Turner and Burnett, and, when Turner learned that Burnett would lend him \$7,500, he advised appellant of the fact, stating that he would return the \$3,000 out of the money received on the proposed Burnett loan. Burnett testified that he would not have made the exchange unless he could make the loan secured as it was. Turner testifies that he would not have made the exchange unless he could also procure the loan. The testimony as to the nature and incidents of the transaction is undisputed, and \$3,000 of the Burnett loan was paid to appellant at the request of Turner to repay the \$3,000 due appellant by Turner.

We know of no principle of law forbidding the making of a secured loan a part of the consideration of a sale or exchange of land. In this instance Burnett could have lawfully refused to make the exchange unless Turner would borrow the money which he (Burnett) had to loan, and secure him with the land exchanged. Turner could lawfully have refused to make the exchange unless the loan accompanied it. In either of these events Turner would have acquired no interest in the land to which the judgment lien of appellant could attach, either as a primary or secondary charge thereon. We are of opinion the facts justified the conclusion of the trial court that the deed and mortgage constituted one transaction. Appellant contends, however, that the mortgage deed of trust could not have taken effect until the title passed to Turner by the deed, and that this was accomplished by the deed itself; and that, as the trust deed was subject to registration, and was junior both in point of date and record to the judgment lien, it should not be given priority over the judgment lien, especially in the absence of notice to appellant at the time the lien took effect. Appellee contends that, since the two instruments are shown to be one and the same transaction, the land passed to Turner burdened with the lien of the deed of trust, and that the lien of the judgment attached only to such interest as Turner actually acquired; that is to say, the title to the land burdened by the lien of the mortgage. Appellant, in support of this conclusion, relies largely upon the case of *Weil v. Casey*, from the supreme court of North Carolina (34 S. E. 506, 74 Am. St. Rep. 644). In that case one Casey bought from Raynor a tract of land, and at the same time executed to Weil Bros. a mortgage thereon to secure the money advanced by Weil Bros. to pay the purchase money and another debt incurred at a prior date. The parties sought to make it one transaction. The court, in disposing of the question, held that a mortgage executed simultaneously with the delivery of a deed from the grantor to the mortgagor for another consideration than the purchase money of the land conveyed,

and to a person other than the grantor, would not hold good as against a judgment in existence at the date of the delivery of the deed and the lien of which immediately attached. The case cited is, it seems to us, easily distinguished from the case before us. In the case cited the mortgagee was not in privity with the vendor, and was not a party to the contract of sale. The transaction between him and the vendee was in its very nature separate and distinct from the sale of the land. The vendor did not undertake to reserve any interest to himself, but explicitly parted with all interest in the transaction. The mortgagee was in no better position than if, prior to that sale, he had taken a mortgage from the mortgagor upon all the lands he might thereafter acquire, the supposed mortgage being junior to the judgment lien. Such a provision in a mortgage is held to be valid, and the lien thus created attaches to all subsequently acquired real estate the instant the title passes to the mortgagor, and is superior to all liens of junior date. *Irrigation Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327; *Railroad Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; *Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. Ed. 1014; *Railroad Co. v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199. *Garland's Case*, supra, distinctly holds that a prior mortgage containing the "after-acquired property clause" could not prevail against a junior lien on after-acquired property if the property passed to the vendor burdened with the lien. Our own courts have recognized the rule, and applied it in many cases. Thus a vendor's lien will prevail over a judgment lien prior in date, and this though, in the nature of things, the instrument evidencing the facts creating the vendor's lien could not possibly be placed of record prior to the attaching of the judgment lien. (This unless the rights of a bona fide purchaser for value, without notice, intervene.) It is also held that the registration laws do not apply to such a state of facts. *Bailey v. Tindall*, 59 Tex. 541; *Ellis v. Singletary*, 45 Tex. 40. In this connection it is well to discuss a few of the Texas cases which, in our judgment, announce the doctrine which, after all, must control us in determining this appeal. In *Wallace v. Campbell*, 54 Tex. 87, it is held that the party claiming under a judgment lien acquires his rights at the date of the attaching of the lien, and such rights are not affected by subsequent notice that the interest of the debtor in the property against which the lien is sought to be enforced is apparent, and not real. It is, in effect, held in that case that, unless the holder of the asserted lien has notice of the true state of the title at the date the lien attaches to the apparent interest, notice prior to execution sale will not serve to postpone the judgment lien to the outstanding equity, even though it is of such a character as is not susceptible of record.

We are not aware that this decision has been overruled in terms, but the doctrine has been limited to the particular case in which it was announced. *Bailey v. Tindall*, supra. In *Senter v. Lambeth*, 59 Tex. 259, it is held that a vendor's lien in a form incapable of record will be allowed to prevail over a judgment lien prior in date, and that such lien, as against claims or liens incapable of record, takes effect only upon the actual interest of the judgment debtor in the land sought to be charged. It is distinctly announced in that and the other cases cited below that the laws of registration do not apply. *McKamey v. Thorp*, 61 Tex. 648; *Parker v. Coop*, 60 Tex. 111; *Blankenship v. Douglas*, 26 Tex. 229, 82 Am. Dec. 608; *Stoker v. Bailey*, 62 Tex. 299; *Ross v. Kornrumpf*, 64 Tex. 390; *Yoe v. Montgomery*, 68 Tex. 338, 4 S. W. 622; *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248. We understand that the doctrine announced in the case last cited is that the laws of registration do not apply where, by reason of the nature of the interest asserted as superior to the judgment lien, it was incapable of prior registration; that a judgment lien attaches only to the actual interest of the debtor in the property sought to be charged; that a judgment lien is allowed to prevail over liens of prior date only by force of the registration laws, and, where these have no application, the lien will not be allowed to prevail unless the party asserting under the judgment lien has acquired the property at execution sale under circumstances which make him a bona fide purchaser for value, without notice, of the unrecorded equity or claim; that notice of the facts at any time before the sale will postpone the rights of the purchaser to the rights of the actual owner or the owner of the right or lien with which the land was burdened when it passed into the debtor's hands; that a creditor who purchases at his own execution sale, and credits his bid on his pre-existing debt, is not a bona fide purchaser for value, within the meaning of the rule, and, since his position has not been changed to his detriment by reason of the purchase, he cannot successfully assert the title thus acquired against the owner of a right which, if the element of notice were present, would defeat the asserted title. *Ayres v. Duprey*, 27 Tex. 606, 86 Am. Dec. 657. We are of opinion the court did not err in permitting Burnett to establish the actual facts by evidence *alunde* the deed and deed of trust.

We also think the court was amply justified in holding that the transaction between Burnett and Turner as to the land involved on this appeal was a transaction one and indivisible, and that the title to the land went into Turner burdened with the lien of the deed of trust. While it is true the deed of trust was such an instrument as was capable of registration, it was not, under the circumstances, susceptible of reg-

istration prior to the attaching of the judgment lien. The lien attached instantly, upon the delivery of the deed, to whatever interest Turner thereby acquired, and, of course, it took some time to place the deed of trust in the hands of the clerk for record. We think the interest of Burnett evidenced by the deed of trust was in the light of the transaction of such a nature as to come fairly within the category of rights or equities incapable of registration. The case can therefore be affirmed upon two grounds:

The court found that at the date of the Burnett-Turner transaction Masterson had no notice of the details of the trade, but he did not find that either Masterson or Cobb had no notice prior to the purchase at execution. There was no request for additional findings, nor does appellant insist that the court erred in failing to find that neither he nor Cobb had notice of the facts at the date of the execution sale. If they had such notice, the judgment of the trial court is correct on this theory, for the court might well have found that there were facts and circumstances in their possession which should have put a reasonably prudent man on inquiry.

Second. The court distinctly finds that, under the facts, whether or not Masterson had notice is immaterial. What is meant by this is not clearly expressed in the court's findings, but, in view of Masterson's testimony to the effect that he paid up the costs, and credited the bids on his judgments, we may infer, in favor of the validity of the judgment, that the court found under well-settled rules of law that Masterson was not a bona fide purchaser for value, and this conclusion is sustained by the record.

We are of opinion the judgment of the trial court is correct, and, since we have found that no reversible error was committed during the trial, the judgment is affirmed. The grounds upon which the appeal is disposed of renders it unnecessary for us to notice appellee's cross-assignment of error. Affirmed.

On Motion for Rehearing.

(Jan. 11, 1902.)

In our opinion in this cause we inadvertently stated that "Turner testified he would not have made the exchange unless he could procure the loan." As a matter of fact, Turner did not testify in the case. Appellant, in his motion for rehearing, has called our attention to the error, and we take this occasion to correct it. Wilson, Turner's broker, who made the transaction for him, testified that "Turner would not have made the exchange unless he could procure the loan," and the opinion should so read. The erroneous statement has no bearing on the result reached, as the evidence was undisputed on the point. We have carefully considered the motion for rehearing, and find no reason to

change our views as expressed in the main opinion.

The motion is overruled. Overruled.

MORTON v. MORRIS.¹

(Court of Civil Appeals of Texas. Nov. 27, 1901.)

VENDOR AND PURCHASER — ATTORNEY IN FACT — AUTHORITY — DEED — VALIDITY — CANCELLATION OF DEED — REFORMATION — EVIDENCE — ADMISSIBILITY — JUDGMENTS — RES ADJUDICATA — APPEAL.

1. A court of equity has jurisdiction to order the cancellation of a deed, though it is void on its face, as such deed operates as a cloud on the title of the property described therein.

2. A power of attorney to sell and convey real estate on such terms as the agent shall deem meet is not sufficient to authorize him to sell such real estate, and defer the payment of a portion of the purchase price until the determination of the validity of an attachment of the land, levied in an action of tort by the grantee against the owner, which is not sufficient to sustain such attachment, and of which the owner has no notice.

3. A conveyance of the land executed by such attorney, and reciting that a portion of the purchase price is not payable until the determination of the validity of the attachment, is void on its face.

4. The court, on finding that the attorney has exceeded his powers in agreeing to such deferred payments, cannot, at the request of the grantee, fix a reasonable time for the latter to make such payments, and provide that he shall be protected against the attachment, as it would amount to a change in the contract which is beyond the authority of the court.

5. The mistake of the parties as to the effect and validity of the deed is a mistake of law, and insufficient to authorize a reformation of the instrument.

6. The rejection of evidence that it is the general usage and custom of attorneys in fact, in selling real estate, to protect the purchaser against outstanding liens on the property, is not sufficient, in such suit, to sustain an assignment that the court erred in refusing to allow defendant to show that it was the usual and general custom of the country where the land is situated to execute conveyances on the terms of credit specified in the deed.

7. Where the answer in an action to cancel a deed executed by plaintiff's agent, who was alleged to have acted in excess of his authority, does not allege that the plaintiff afterwards enlarged the power conferred on the agent, it is not error to refuse to admit evidence tending to establish such fact.

8. Where an attorney in fact exceeds his authority in making a sale of real estate, the vendee, being chargeable with notice of the attorney's power, cannot recover of the vendor money paid to the agent in carrying out the sale; the vendor not having received such money.

9. Where the subject-matter of a suit and the terms of a sale in issue differ from the subject-matter and terms of a sale involved in a subsequent suit, the decree in the former suit is not res adjudicata, though the parties are the same in both suits.

10. Where a deed executed by an agent is void as not being within the authority of the agent, it is not error to reject defendant's evidence that the agreed price was the full value of the land.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

¹ Rehearing withdrawn January 8, 1902.

Suit by Nannie Morris against W. T. Morton to procure the cancellation of a deed. From a decree in favor of the plaintiff, the defendant appeals. Affirmed.

Jas. Routledge and G. H. Martin, for appellant. J. T. Bivens and W. A. H. Miller, for appellee.

NEILL, J. This suit was brought by the appellee, Nannie Morris, against the appellant, W. T. Morton, to cancel a certain alleged pretended deed purported to have been made by appellee, by her attorney in fact, under a power therein given by her to him. The grounds upon which the cancellation was prayed for are (1) that the deed, upon its face, shows that the agent exceeded the scope of the authority conferred on him by the power of attorney; (2) that the deed was fraudulently made in pursuance of a conspiracy between her agent and the appellant to deprive her of her property; (3) that the agent, at the time he made the contract of sale and executed the deed, was drunk, and incapacitated by reason thereof to make the contract for her; and (4) that the consideration agreed upon was inadequate. The appellant answered (1) by general and special exceptions; (2) by general denial; (3) a plea of *res adjudicata*; (4) that after the power of attorney was executed, and before the sale was made, the appellee had enlarged the authority given therein by authorizing her agent to sell as quickly as possible, and for as much or as little as he could get, upon any terms, credit, or conditions or form of payment; (5) that when the sale was made there was an attachment lien upon the property, and that it is the general usage and custom of the country, in making real estate conveyances by attorneys in fact or otherwise, to protect the purchaser against any liens that may be outstanding against the property, and sell on such credits, and that her agent simply followed the general usage and custom in this respect; (6) that if, in any respect, her agent exceeded his authority in the conditions of said sale, the deed should not be canceled on that account for this; that appellee is ready to pay the balance of the purchase money at any reasonable time to be fixed by the court, as long as he is protected against said attachment lien on the land. Upon the trial of the cause, after the introduction in evidence of the deed and powers of attorney, the court held that the deed, in connection with the powers of attorney, showed upon its face that appellee's attorney in fact had exceeded the authority conferred upon him, and that the deed was therefore void. Then, after hearing evidence as to the rental value of the land during the time it was occupied by appellant under the deed, the jury were peremptorily instructed to return a verdict in favor of the appellee for the cancellation of the deed and for the rental value of the property.

Conclusions of Fact.

Upon the 1st day of November, 1898, the appellee, Nannie Morris, by an instrument in writing of that date, appointed and constituted W. A. Brooks her attorney in fact; thereby granting and conferring upon him authority and powers as follows: "For me, and in my name, place and stead, to enter into and upon and take possession of all such messuages, land, tenements, hereditaments, and real estate whatever in the state of Texas whereof I am or may be in any way entitled or interested, and to grant, bargain, and sell the same, or any part or parcel thereof, for such sum or price and on such terms as to him shall seem meet, and for me and in my name to make, execute, acknowledge, and deliver good and sufficient deeds and conveyances for the same, either with or without covenants and warranty; and, until the sale thereof, to let and demise, lease or rent, the said real estate for the best rent that can be procured for the same, and to ask, demand, recover, and receive all sums of money which shall become due and owing to me by means of such bargain, sale, or lease and rent of said real estate, and to receipt for the same, and to take all lawful ways and means for the recovery thereof, to compound and agree for the same, and to execute and deliver sufficient acquittances and discharges therefor; and I do further empower my said attorney in fact to employ counsel, and authorize him to bring a suit in any court having jurisdiction for a partition of any or all of property situated in the state of Texas which is now owned by myself and the heirs of my daughter Cora E. Morton, late of Bexar Co., Texas, now deceased, and, in the event of a sale of said last-named property by order of court, to receive and receipt for my part of the proceeds of such sale, with power of substitution and revocation, giving and granting unto my said attorney full power and authority to collect and receipt for, or to sue for and collect, any other moneys that may now be or which may become due me from any and all persons whomsoever in the state of Texas, and to attend to any and all business which I may have in the state of Texas, and perform all and every act and thing whatsoever necessary and requisite to be done and performed in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation; hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof." This instrument, after having been duly acknowledged, was on the 23d day of November, 1898, duly recorded in the office of the county clerk of Atascosa county, Texas. On the 18th day of November, 1898, W. A. Brooks, by an instrument of that date, after reciting the authority and power conferred upon him by the foregoing instrument, nominated

and appointed J. M. Eckford as his substitute attorney in fact to do and perform each and every act and thing which, by the power of attorney from Nannie Morris to him, he (Brooks) was authorized to do and perform in respect to the moneys and real and personal property and other business matters in said power of attorney named. This instrument, after being acknowledged, was duly recorded on November 26, 1898. On the 3d day of January, 1899, J. M. Eckford, as attorney in fact, by virtue of the last-stated instrument, for Nannie Morris, executed a warranty deed to the appellant, W. T. Morton, purporting to convey him 1,510 acres of land (which is the property in controversy, and is specifically described in the deed) belonging to the appellee. The deed recites a consideration of \$1,510, but the manner and conditions of its payment are recited in the deed as follows: "It is agreed that the sum of two hundred dollars has been paid in cash, the receipt of which is hereby acknowledged, and a note has been given for the balance of \$1,810.00, bearing 6% interest; and it is agreed that the said note is nonnegotiable, and shall not become due until one year after a certain lien upon said property created by reason of a writ of attachment issued out of Atascosa district court in case of Morton vs. Nannie Morris has been removed therefrom. Should the said suit end adversely to said Nannie Morris, the said Morton shall use the amount due on said note to liquidate the amount due on said lien by reason of said writ of attachment, and any judgment that might be rendered therein, and any balance remaining to be paid to Nannie Morris; or should said lien be removed, and no judgment be rendered therefor by payment or settlement of same by said Nannie Morris or otherwise, then the whole amount of said note shall be paid to said Nannie Morris or her agent, J. M. Eckford, within one year after the removal of such lien." This deed, which is the one sought to be canceled, after being acknowledged by Eckford, was duly recorded in Atascosa county on January 6, 1899. It is shown by appellant's own pleadings that he was the plaintiff in the case of Morton v. Nannie Morris, referred to in the deed, and it is shown by the undisputed testimony that the attachment was issued and levied at his instance after the powers of attorney were executed. It is undisputed that the appellee was never informed by Eckford of this sale to the appellant, that she never received any of the purchase money or the note given for the land, and that she never in any way confirmed or ratified the sale, but, as soon as she was informed of it, repudiated the whole transaction. Immediately after the execution of the deed, the appellant went into possession of the property; and the evidence shows that its rental value was \$250 per annum for the years 1899 and 1900, and up to the date of judgment, which was March

20, 1901, during all of which time appellant was in possession of said property.

Conclusions of Law.

1. We will say in limine that it is generally held outside of this state that where the defect appears upon the face of an instrument, and a resort to extrinsic evidence is unnecessary to show its invalidity, the jurisdiction of a court of equity cannot be invoked to cancel the instrument. 3 Pom. Eq. Jur. § 1399. But, commenting upon this general rule in the same section, the author says: "While this doctrine may be settled by the weight of authority, I must express the opinion that it often operates to produce a denial of justice. It leads to a strange scene almost daily in the courts,—of defendants urging that the instruments under which they claim are void, and therefore they ought to be permitted to stand unmolested, and of judges deciding that courts cannot interfere, because the deed or other instrument is void, —while, from a business point of view, every intelligent person knows that the instrument is a very serious injury to plaintiff's title, greatly depreciating its market value, and the judge himself, who repeats the rule, would neither buy the property while thus affected, nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency." In *Day Land & Cattle Co. v. State*, 68 Tex. 527, 4 S. W. 895, the supreme court, after quoting with approval the foregoing criticism, held that, though an instrument may be void upon its face, a court of equity not only has the power to declare its nullity, but should exercise that power and cancel it when a defendant asserts a right under it. Regarding this as settling the question of jurisdiction, we will pass to the consideration of the main question in the case.

2. Does the instrument sought to be canceled show upon its face that it is in excess of, and unauthorized by, the power conferred by the grantor in the letter of attorney given to her agent? It is elementary that a power of attorney must be strictly construed according to its plain import. *Frost v. Cattle Co.*, 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831; *Skaggs v. Murchison*, 63 Tex. 348; *Wynne v. Park* (Tex. Civ. App.) 80 S. W. 52. When an agency is created by a written instrument, the nature and extent of the authority given by it should be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases, as that would be to contradict or vary the terms of the written instrument. *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Railway Co. v. Poindexter*, 70 Tex. 107, 7 S. W. 310; *McAlpine v. Cassidy*, 17 Tex. 449; *Skaggs v. Murchison*, supra. A power to sell land does not of itself imply an authority to sell on a credit. The presumption is that the sale is to be for cash.

Pars. Cont. 58; 2 Kent, Comm. 622; Story, Ag. § 77; 1 Am. & Eng. Enc. Law, 360. But, when an agent is authorized to sell "on such terms as to him shall seem meet," he may grant a reasonable time. *Mechem*, Ag. § 325; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 839; *Brown v. Land Co.*, 42 Cal. 257; *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539. Nor will a power to sell and convey land imply an authority to barter or exchange it for other property, or to give it away, or to take pay in merchandise or in settlement of claims or debts. *Frost v. Cattle Co.*, 81 Tex. 509, 17 S. W. 52, 26 Am. St. Rep. 831; *Reese v. Medlock*, supra; *Rhine v. Blake*, 59 Tex. 240; *Trudo v. Anderson* (Mich.) 81 Am. Dec. 795; *Mann's Ex'rs v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771; *Woodward v. Jewell*, 140 U. S. 253, 11 Sup. Ct. 784, 35 L. Ed. 478; *Morrill v. Cone*, 22 How. 75, 16 L. Ed. 253; *Kleinhans v. Jones*, 15 C. C. A. 644, 68 Fed. 746, 37 U. S. App. 185; *Hampton v. Moorhead*, 62 Iowa, 91, 17 N. W. 202. In *Frost v. Cattle Co.*, supra, the powers granted to the agent were more extensive and of much broader scope than those conferred by the power of attorney under consideration in this case. It was there held, after considering some of the authorities we have cited, that a power to sell and convey does not include the power to convey in discharge of a debt or claim. Leaving out of view, as we must in determining the naked question as to whether the appellee's agent went beyond the scope of his authority, the facts that the appellant was the party plaintiff in the case recited in the deed sought to be canceled; that he procured the issuance and levy of the attachment on the property in controversy upon a demand founded upon an alleged tort, which from its nature would furnish no foundation for the writ (this, too, after the power of attorney had been executed); and that appellee was wholly ignorant of the pretended lien asserted in the deed when and long after it was executed,—facts undisputed and fully established by the evidence,—we will now, in the light of the well-established principles stated, consider the question. As is seen from our conclusions of fact, the note of \$1,310 given for the purchase money is nonnegotiable, and cannot become due until one year after the recited lien has been removed from the property. The power of attorney is silent as to any suit against its maker, or any lien upon her property. Were it not for the fact that it empowers the agent "to sell on such terms as to him shall seem meet," there could be no implication that authority was given to sell on a credit, but the presumption would be that the sale should be for cash. As it is, he was authorized to sell on reasonable credit. While what is a reasonable credit is ordinarily a question of fact to be determined by the jury, yet that is referable to a definite length of time which must elapse before the purchase money, according to the terms of

sale, becomes due, not to the contingency or to the time of the happening of an event which is indefinite, or over which the grantor has no control. No authority was conferred upon the agent to determine that a lien existed upon the property, and make the time when the purchase money should become due contingent upon its removal or discharge. True, that is certain which can be made certain. And it may be said that by discharging the supposed lien the appellee could, under the terms of the deed, have fixed definitely the time of the note's maturity. But no indebtedness had been established against the appellee, or acknowledged by her. Its existence was a matter for judicial determination, and, if not so determined, the supposed attachment lien would fall to the ground. Can it be said, then, that the agent was authorized to make a sale on such terms as would require his principal to discharge a lien by the payment of a disputed claim, in order to make certain the time when the purchase money for her property would become due? To assert such a proposition is to refute it. The only way by which the time when the note would become due could be known would be to await the termination of the suit in which the attachment was levied. One must be imbued with the spirit of prophecy to foretell when a lawsuit will end. It may drag its weary length along until starvation stares the hopeless creditor in the face, while the debtor grows fat in the possession of her property. Is 12 months after the uncertain time of the ending of a lawsuit a reasonable credit to be given by an agent for the payment of the purchase money due for the sale of his principal's property? As a matter of law, we think not. But the uncertainty and indefiniteness of the time of payment is not the only matter in which appellee's agent went beyond the scope of his authority. It depends upon how the lawsuit mentioned in the deed terminates whether she is ever paid anything or not. "Should it end adversely to her, the appellant shall use the amount due on said note to liquidate the amount due on said lien by reason of said writ of attachment, and any judgment that may be rendered therein;" thus, by the deed, empowering the purchaser not only to withhold the purchase money for an indefinite time, but to use it himself in discharging the lien or any judgment that may be rendered in the suit, regardless of whether the lien is established or not. In our opinion, to hold that the power conferred such extraordinary authority would be to disregard all the principles, not only of law and equity, but of justice and reason. The agent himself had no authority under the power to apply the proceeds of the sale to the discharge of a lien or payment of a debt against his principal. How could he, then, confer authority upon the purchaser that he did not himself possess? Had such authority been given him, he had no right to delegate it to the

party to whom he sold the property. Every power of an agent must find its ultimate source in some act of his principal. Mechem, Ag. § 276. This power sought to be given by the deed to appellant is nothing more or less than authority, upon a certain contingency, to discharge a debt or claim. As the agent, under his power to sell and convey, had no such authority (*Frost v. Cattle Co.*, supra), he could not confer it upon the appellant. Suppose, in the event of a judgment on the claim against appellee, the appellant should not appropriate the money due on the note to its liquidation; she would then have to pay the judgment herself, or have other property taken in execution, and, it may be, have to wait for 12 months afterwards for the note to mature before she could sue upon it. The authority for such a contract of sale cannot be traced to any act of the appellee as its source. We must therefore hold that the appellee's agent exceeded the scope of his authority in selling her property upon the terms stipulated in the deed, and that such instrument is void on its face.

3. It is urged by appellant that even if the agent exceeded his authority as to the extent of the credit, or as to the agreement that Morton might apply the amount due on the note to clearing up and removing any lien that might exist on the land, still as he had offered to pay the balance of the purchase money due in cash, and asked for a reformation of the instrument in so far as it exceeded the authority conferred, the deed should not have been declared void in toto, but only the particular clause which was in excess of the agent's authority, and such instrument should have been reformed, and not canceled. It is a sufficient answer to this contention to say that the appellant never "offered to pay the balance of the purchase money in cash." The averments in his answer are: "But if, in any respect, he [the agent] exceeded his authority in the condition of said sale, the sale should not be canceled on that account; that this defendant is ready to pay the balance of the purchase money at any reasonable time to be fixed by the court, as long as he is protected against said attachment lien on said land." Thus it is seen the tender is conditional, and authorizes the court to fix a reasonable time for the payment of the purchase money. The law has conferred no such authority upon the court, nor was it given by the appellee. If the deed was void for lack of authority given the agent, the court cannot validate it by an assumption of authority not given by the law or the contract between the parties. The instrument must stand or fall upon the authority given by the principal to her agent, and the court is without power to subtract anything from or add anything to such authority. It is only when there is a mutual mistake (that is, where there has been no meeting of minds), and an agreement actually entered into, but the deed or other instrument,

in its written form, does not express what was really intended by the parties thereto, that a court of equity will reform an instrument on the ground of mistake. Pom. Eq. Jur. § 1375. A mistake by a party as to the legal effect of an executed agreement is no ground for affirmative relief. In the absence of elements of fraud, concealment, etc., or other inequitable conduct in the transaction, the party who knew or had an opportunity to know the contents of an agreement or other instrument cannot obtain its reformation because he mistook the legal meaning and effect of the whole or any part of its provisions. Pom. Eq. Jur. § 843. The appellant nowhere in his answer indicates wherein by mistake of the parties the deed failed to express the agreement or terms of sale. His contention throughout is that it does express the true intent of the parties, and it is only in the event he has mistaken the legal meaning and effect of the instrument he asks for its reformation.

4. The fourth assignment of error is as follows: "The court erred in refusing to permit defendant, Morton, to show that it was the usual and general custom of the country where said land was situated to execute conveyances and make sales of land on the terms of credit specified in the deed in this case, and to provide and agree therein that the purchaser might apply any balance of the purchase money that might remain due to the satisfaction of any lien that might exist on said land in this case, because such testimony tended to, and would, show that such terms of credit, agreement, conditions, and usage were in contemplation of the parties at the time the power of attorney was executed, and that the agent had not exceeded his authority, and that the sale was not void." No statement can be made from the record that will support this assignment or the proposition thereunder. The only allegations in appellant's answer which can have any relation to the assignment are as follows: "That it is the general usage and custom of the country, in making real estate conveyances by attorneys in fact or otherwise, to protect the purchaser against any liens that may be outstanding upon the property, and sell on such credit, and Eckford [the agent] simply followed the general usage and custom in this respect." The appellant's bill of exceptions shows that he "offered to introduce evidence in support of each and every allegation and defense contained in his answer and pleadings." Evidence that would sustain the allegations quoted would fall far short of establishing such facts as are recited in the assignment of error. It may have been the usage and custom in the country, in making real estate conveyances by attorneys in fact, to protect the purchasers against any liens on the property and to sell on a credit; but it would not follow that it was the "general custom of the county where the land was situated to execute conveyances and

make sales of land on such terms of credit as are specified in the deed in this case, and to provide and agree therein that the purchaser might apply," etc. The authority of the attorney must be ascertained from the language of the instrument which confers the authority (*Blum v. Robertson*, 24 Cal. 127), and all persons dealing with the attorney must take notice of the powers conferred by it, and that the agent cannot exercise authority in excess of his powers. Publicly known usage may be proven to show that the authority was conferred in contemplation of it, but such usage cannot be so substituted for the power as to give authority not conferred by the instrument itself. That would be to contradict or vary the terms of a written instrument (*Reese v. Medlock*, supra), not to explain its meaning by the light of known usage.

5. There is no allegation in appellant's answer "that, before the execution of the deed to him, Nannie Morris had enlarged the authority and powers conferred in the powers of attorney so as to fully authorize the sale and conveyance of said land under the terms and conditions by which the same was conveyed and sold." There being no such allegation, the court did not err in refusing to admit the evidence of such enlargement, as is complained of in appellant's fifth assignment.

6. A party dealing with an agent is bound, at his peril, to ascertain the extent of the agent's powers. *Story*, Ag. §§ 210, 211, et seq. The appellant was charged with knowledge that the sale to him was unauthorized and therefore void. Knowing this when he paid the money to Mr. Eckford, he has no right to look to the appellee, who never received a dollar of it or in any way ratified the sale, for its repayment on the cancellation of the void deed. Or, in the language of appellee's counsel, "where an agent, in attempting to sell land for his principal, exceeds his authority, there is no sale, and, the deed being void, the principal is not bound to the would-be purchaser for any money he might have paid, unless it came into the possession of the principal," or he received the benefit of it. 1 *Devl. Deeds*, pp. 347, 348 and note; *Hampton v. Moorhead* (Iowa) 17 N. W. 202: None of the authorities cited by appellant's counsel support his proposition under his sixth assignment of error.

7. The court did not err in sustaining the exceptions to appellant's plea of *res adjudicata*. While the parties were the same to the judgment pleaded in bar as they are in this case, the subject-matter of the suits is different, as well as the terms of sale.

8. If the deed were void by reason of the agent's going beyond the scope of his authority, it would be immaterial whether or not the price stated in it was the full value of the land. Therefore the evidence offered by appellant to show that it was worth no

more than the price so stated was properly excluded.

9. All questions presented by the remaining assignments of error are involved in those already considered, and have been determined adversely to appellant.

The judgment is affirmed.

TEXAS & N. O. R. CO. v. MORTENSEN.¹
(Court of Civil Appeals of Texas, Nov. 20, 1901.)

MASTER AND SERVANT—NEGLIGENT INJURY TO SERVANT—RAILROADS—COLLISION—INSTRUCTIONS—SUBMISSION OF ISSUES—EVIDENCE—ADMISSIBILITY—SUFFICIENCY—APPEAL—HARMLESS ERROR.

1. The issues made by the pleadings and the evidence in a jury case should be defined in the instructions, and the jury should not be referred to the petition to determine the issues.

2. Where the evidence in an action for personal injuries by a servant clearly shows the negligent acts of the defendant which are in issue, it is harmless error to refer the jury to the petition to determine what acts are in issue, instead of reciting such issues in the instructions.

3. Where the court, in presenting the defense in the instructions in an action by a servant for personal injuries, clearly defines the issues, it is harmless error to refer the jury in another part of the instructions to the petition, to determine what negligent acts of defendant are in issue.

4. Where instructions requested by defendant referred the jury to plaintiff's petition for a determination of the issues, defendant cannot complain on appeal of a similar error in the instructions given by the court.

5. The defendant railroad company, in an action by an engineer of the second section of a train for injuries received in a collision with the first section at a certain station, introduced a rule requiring freight trains to approach and pass all stations carefully, with train under full control, expecting to find the main track occupied by trains doing work, and to look out for switch engines inside the yard limits. The evidence showed that the engineer, who had left a station 21 miles east of the station where the accident occurred, 45 minutes behind the first section, had the right of way through the latter station, and that he was running carefully and had his train under full control. *Held*, that the evidence warranted the instruction that if the plaintiff violated a rule of the defendant, and his injuries were the result thereof, he would not be debarred from recovery, if, under the circumstances, a reasonably prudent person would have done as he did.

6. It is not error to refuse defendant's instruction which undertakes to set out the acts of negligence for which it would be liable, and provides that negligence in the failure to flag or signal the approaching train, and in failing to display signal lights on the front train, should be submitted to the jury, but which requires judgment for defendant unless all the enumerated acts of negligence are found in favor of the plaintiff, as a finding in his favor as to either of the two acts of negligence submitted to the jury is sufficient to authorize a recovery.

7. Where requested instructions are fully covered in the main charge, a refusal thereof is not erroneous.

8. Where defendant alleges that plaintiff was negligent in entering the yard without giving any signals or controlling or attempting to control his engine, although he knew of a custom

¹ Rehearing denied January 9, 1902, and writ of error denied by supreme court.

for trains to stop to take water, and the evidence shows that plaintiff's orders gave him a free track and that no signals were displayed by the front train, it is not error to refuse to instruct that, from the undisputed evidence, it was customary for trains to stop at the station where the accident occurred for the purpose of taking water, and that if plaintiff knew and disregarded such custom, and in so doing failed to exercise ordinary care, he could not recover, as such instruction is on the weight of the evidence.

9. It was not error to allow plaintiff to testify that he had his train under control.

10. Admission of the testimony of the plaintiff to explain the meaning of the phrase "having his train under control," as used in a rule of the company, was not erroneous, as the meaning thereof might not be understood by the jury.

11. Evidence of other engineers running over defendant's road as to where they shut off steam, applied the air, and slowed up on approaching the station where the accident occurred, is inadmissible to show where plaintiff should have commenced to slow up, as such fact should be established by evidence of the weight of the engine, number of cars, grade, speed, and other facts.

12. The caboose of the first section, with which plaintiff's train collided, was standing in total darkness on the main track, over 1,000 feet from the station, at a place where plaintiff did not expect it to be. Plaintiff was keeping a proper lookout. The plaintiff's orders gave him a clear track, and the train with which he collided was nearly an hour ahead of him, at a station 21 miles distant, and no signal lights were displayed. Plaintiff had his train under control. Held sufficient to sustain a judgment for plaintiff.

Appeal from district court, Harris county; Chas. E. Ashe, Judge.

Action by Chris. Mortensen against the Texas & New Orleans Railroad Company for personal injuries received by plaintiff while an engineer in the employ of defendant. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett, and A. L. Jackson, for appellant. Fisher, Sears & Sherwood, and J. R. Norton, for appellee.

GARRETT, C. J. This action was brought in the district court of Harris county by Chris. Mortensen, as plaintiff, against the Texas & New Orleans Railroad Company, as defendant, to recover damages for personal injuries received by the plaintiff in the collision of a freight train drawn by a locomotive operated by the plaintiff, as engineer, with the rear end of another freight train on defendant's track at Sour Lake station. The petition alleged that the collision and injuries were the result of the negligence of the defendant, in the failure of its employees in charge of the train in front to comply with certain rules of the defendant adopted for the operation of its trains. These rules were set out in the petition, and it was alleged that the violation of each of them caused or contributed towards the injuries of plaintiff. After general demurrer and general denial, contributory negligence was specially pleaded by the defendant, and that (1) plaintiff fell asleep, or through other inattention failed to keep a lookout for signal or other lights; (2) by the exercise of ordi-

nary care, he should have known that signals were displayed at Sour Lake station to slow up and stop his train, and that he disregarded such signals; (3) he disregarded rule 323, which was set out, requiring freight trains to approach and pass all stations carefully and under full control, expecting to find the main track inside of the yard-limit bounds occupied by trains doing work; and (4) he permitted his locomotive to enter the yard at Sour Lake without giving any signals, and without controlling or attempting to control the locomotive, although it had been customary for such trains to stop at the station for water, and plaintiff knew or ought to have known of such custom. There was a trial by jury, which resulted in a verdict and judgment in favor of the plaintiff for \$8,500.

The injuries complained of in the petition were received, as alleged, on December 10, 1890, about 3 o'clock a. m., in a collision between two freight trains on the defendant's railroad at Sour Lake station, and the plaintiff sustained damages to the amount for which he recovered judgment. The colliding trains were sections 1 and 2 of No. 246, and both were running east from Houston. Plaintiff was in the employment of the defendant as a locomotive engineer, and was in charge of and operating the engine drawing section 2. Section 1 left Houston about 7 o'clock p. m. December 9th, and section 2 left an hour later. There was no train between them. At Liberty, a station 21 miles west of Sour Lake, section 2 came in sight of section 1, but waited there until a helper engine pushed section 1 over a grade called "Ames' Hill," about 16 miles west from Sour Lake, and returned to Liberty to help plaintiff's train over, which put section 1 from 45 to 55 minutes ahead of section 2. At Sour Lake station was a water tank about 125 feet west of the depot building, and a cattle guard a little over 1,000 feet west of the water tank. There were sidings extending both east and west from the station. The track is straight west of Sour Lake for several miles. Plaintiff's orders gave him the right of way into Sour Lake station, and a free track to the station and for three-fourths of a mile beyond. He testified: "I kept a proper lookout all the time prior to the collision, and on the engine with me was the fireman of my locomotive, and also the head brakeman of our train, who was also on the engine. There was a curve about two and a half miles east of Devers, and when I turned the curve at Devers there was still no train in sight ahead of me. When I got to the mile board west of Sour Lake station I put my head out of the window to look for the station, and I told the fireman that I was going to stop at the station to get water. I had a heavy train, and I saw the red station light. The station light is a reversible light, and always shows red until reversed. There were no other lights display-

ed at the station, or indicating the presence of a train near the station, and if there had been I could have seen them. Just about that time the fireman was about to put in more coal into the fire box of our engine. He was a green hand, and he was unnecessarily using a great deal of coal. I turned around toward him and sought to attract his attention by motioning my hand in order to check him from putting in more coal. I was thus occupied for some five or six seconds, and then turned and put my hand on the throttle to shut off steam, when my engine struck the caboose or hindmost car of section No. 1." Section 1 was standing still on the main track, with its caboose just west of the cattle guard. Determining the conflict in the evidence by giving proper effect to the verdict of the jury, we find that plaintiff had his train under control, and was using due care in approaching the station, and that the collision occurred without fault or negligence on his part, but was the result of the negligence of the defendant's employes in charge of section 1, in failing to give the signals and setting the lights on the rear end of the caboose as required by the rules of the company. The following are the rules of the company the disobedience of which by its employes was alleged in the petition to have been negligence on the part of the defendant, from which plaintiff's injuries resulted. They were put in evidence by the plaintiff.

"(97) When a freight train is detained at any of its usual stops more than three minutes, where the rear of the train can be plainly seen from a train moving in the same direction at a distance of at least fifteen telegraph poles, the flagman must go back with danger signals not less than one pole, and as much further as may be necessary to protect his train; but if the rear of his train cannot be plainly seen at a distance of at least fifteen telegraph poles, or if it stops at any point that is not its usual stopping place, the flagman must go back far enough to be seen from a train moving in the same direction when it is at least fifteen telegraph poles from the rear of his own train, and if his train should be detained until within ten minutes of the time of a passenger train moving in the same direction he must be governed by rule 99."

"(34) Each train running after sunset, or when obscured by fog or other cause, must display the headlight in front, and two or more red lights in the rear. Yard engines must display two green lights, instead of red, except when provided with a headlight on both front and rear."

"(23) Conductors, enginemen, flagmen, brakemen, station agents, telegraph operators, switchmen, switch tenders, track foremen, road and bridge watchmen, and all other employes whose duties may require them to give signals, must provide themselves with the proper appliances, and keep them in good

order, and always ready for immediate use.

"(24) Flags of the proper color must be used by day, and lamps of the proper color by night, or whenever, from fog or other cause, the day signals cannot be clearly seen."

"(27) White signifies safety, and is a signal to go on."

"(78) All signals must be used strictly in accordance with the rules, and trainmen and enginemen must keep a constant lookout for signals."

The defendant put in evidence, among other rules, the following:

"(32) A flag or lamp swung across the track, a hat or any object waved violently by any person on the track, signifies danger, and is a signal to stop."

"(59) A lamp swung across the track is a signal to stop."

"(328) Freight trains and work extras must approach and pass all stations carefully, with train under full control, expecting to find main track inside of yard-limit boards occupied by trains doing work. Irregular trains and regular trains not on time will run carefully, and look out for switch engines inside of yard-limit post."

In submitting the case to the jury the court did not, in his charge, set out for them the acts of negligence pleaded, but instructed them that if the injuries were caused as the proximate result of any or either of the acts alleged by the plaintiff on the part of the defendant's servants or agents, and such acts constituted negligence, to find for the plaintiff. The court should have defined for the jury the issues made by the pleading and the evidence, and not referred them to the petition; but we do not think any injury resulted to the defendant from the omission to do so in this case, because the issues were clearly made by the pleadings and the evidence as a violation of the rules of the defendant by its employes in charge of train section 1, in failing to have out red lights on the rear end of the train, and in the failure of the rear brakeman to go back a telegraph pole and make the proper signal with a lantern, and the jury could not have been misled by the omission. Besides, in several of the instructions requested by the defendant reference was made to the allegations of the petition for the particulars of negligence. The court, also, in his charge to the jury, in presenting the defense, very clearly defined the issues; so no injury could have resulted to defendant,—certainly none of which it is in a position to complain. There is no evidence that the plaintiff was misled by the use of a white light, but, as above stated, the issues of negligence were otherwise clearly defined, and the defendant asked special instructions embodying the error complained of.

The second assignment of error is based upon the seventh paragraph of the court's main charge, which instructed the jury that

if the plaintiff violated a rule of the defendant, and his injuries were the result of such violation, he would not be debarred from recovering on account thereof if the jury should believe, under all the circumstances, a reasonably prudent person would have done as plaintiff did. As admitted by counsel in their brief, the doctrine of this charge, in the abstract, is correct, according to the decision of the supreme court in *Railroad Co. v. Adams*, 58 S. W. 832; but it is contended that there is no evidence to warrant the finding that a reasonably prudent person would have violated the rules of defendant alleged in its answer. We deem it unnecessary to set out the evidence here, but there was evidence to the effect that the plaintiff had the right of way and a free track to the end of the switch, three-quarters of a mile east of the station; that he left Liberty, 21 miles west, at least 45 minutes behind section 1; that it was his purpose to stop for water at the tank west of the station; that his train was under full control; and that there were no signal lights across the track, or upon the caboose of the train. Intending to stop, it was not necessary for him to sound the whistle. He was running carefully, and under his orders it was not necessary for him to be on the lookout for a switch engine inside the yard-limit boards, as specified in the rule. From what has already been said, it will be seen that the third assignment cannot be sustained.

The fourth assignment of error complains of the refusal of the court to give the defendant's special charge No. 2, which undertook to set out the special acts of negligence for which the defendant would be liable. It is contended that this should have been given, because as to some of the acts charged in the petition there was no evidence. Two acts of negligence were to be submitted to the jury by this instruction, to wit, the failure to flag or signal the approaching train, and the failure to have signal lights displayed on the caboose of the train in front. If the injuries resulted from either of these acts of negligence, the defendant would have been liable; yet the court was requested to instruct the jury that, unless they should find from the evidence the existence of each and all of the allegations enumerated, they would return a verdict in favor of the defendant. The requested instruction was erroneous, and should not have been given. The instructions requested as shown by the fifth and sixth assignments of error were fully covered in the main charge of the court, and it was unnecessary, if it would not have been improper, to repeat the matters embraced therein.

We think there was no error in refusing the special instruction copied in the seventh assignment of error. It informs the jury that it appeared from the undisputed evidence that it was customary for trains to stop at Sour Lake for the purpose of taking

water, and instructed them, if they believed from the evidence that the plaintiff knew of such custom, and ignored or disregarded the same, and in so doing failed to exercise ordinary care, and thereby contributed to his own injury, to return a verdict in favor of the defendant. This instruction is upon the weight of the evidence. The allegation of negligence on the part of the plaintiff contained in the answer was that of entering the yard without giving any signals or controlling or attempting to control his engine, although he knew or might have known of a custom for trains to stop at the tank to take water. Plaintiff's orders gave him a free track, and the testimony tended to show that no signals were displayed or given by the train in front; and to have given the requested instruction would not have been in response to the pleading, but would have singled out one fact among several upon the issue of negligence or not on the part of plaintiff in approaching the station.

There was no error in allowing the plaintiff to testify that he had his train under control, and to explain the meaning of "having the train under control." The rule was necessarily terse and technical, and, while it would be fully understood by railroad men operating a train, a jury would not, perhaps, have a clear idea of what was meant. Plaintiff was shown to be competent to testify as to the meaning of the expression. No injury, in any event, could have resulted from the admission of the evidence.

The proffered testimony of Field and French, engineers running locomotives over defendant's road, as to where they usually shut off steam, applied the air, and slowed up on approaching Sour Lake from the west, was properly excluded. If the defendant desired to show where the plaintiff should have commenced to slow up, it would have been proper to do so by showing a number of facts, such as the weight of the engine, the number of cars in the train, the grade, the speed of the train, and other facts,—certainly not by showing where these two witnesses generally commenced.

The tenth assignment of error is addressed to the facts of the case. If the plaintiff's testimony is true,—and it is so established by the verdict,—the caboose of the stationary train was standing in total darkness on the main track, over 1,000 feet from the station, at a place where he had no reason to expect it to be. He was keeping a proper lookout, consistent with the duties he owed to the operation of the engine; and in absence of the lights and signals which he had the right to expect, under the rules, he was not negligent in assuming that the track was clear, as shown by his orders. The fact that trains were in the habit of stopping at that station to take water, and that plaintiff knew of such custom, was only one fact out of a number of others bearing upon the question of negligence, and is overborne by the facts

that the plaintiff's orders gave him a clear track, that section 1 was nearly an hour ahead of him, that no lights were displayed, and that he had his train under control, and that the caboose which he ran into was over 1,000 feet, or about 45 car lengths, from the water tank.

As already stated, we find that the verdict of the jury is fully supported by the evidence, and, finding no error for which the judgment should be reversed, it will be affirmed. Affirmed.

**COLONIAL & U. S. MORTG. CO., Limited,
et al., v. THETFORD et al.¹**

(Court of Civil Appeals of Texas. Nov. 2,
1901.)

**COMMUNITY PROPERTY—DEED BY HUSBAND
—SURVIVORSHIP—HEIRS—ESTOPPEL.**

A husband conveyed a homestead, which was community property, by a warranty deed purporting to be by both husband and wife, but in which in fact the wife did not join. After the husband's death, the wife, after instituting an action to set aside the conveyance, died, leaving only adult children,—the daughters being married,—and the suit was revived by the children. Held, that the deed was only void as to the wife, and did not operate by way of estoppel against his heirs until the homestead ceased, which was on the wife's death, when her undivided interest vested eo instante in the heirs; and the husband's deed could not estop them from asserting title to their mother's interest, in the absence of evidence that they had received from their father's estate sufficient property to render them liable on his warranty.

Appeal from district court, Denton county;
D. E. Barrett, Judge.

Action by Sarah A. Thetford against the Colonial & United States Mortgage Company, Limited, and others. On the death of plaintiff, the action was revived in the name of John Thetford and others. Judgment for plaintiffs, and defendants appeal. Reversed in part, and judgment rendered.

The following is the statement by appellants, adopted by the court:

"(1) Action by Sarah A. Thetford, widow of J. B. Thetford, to set aside a deed by J. B. Thetford and wife to Brook Beall, and a deed of trust by Brook Beall to David Houghton, trustee for the Colonial & United States Mortgage Company, Limited. On the death of the plaintiff, John Thetford and others were substituted. There was a decree for the plaintiffs, and David Houghton and the mortgage company appealed. The decision on a former appeal is reported in 51 S. W. 263. (2) On December 27, 1888, J. B. Thetford conveyed eighty acres to Brook Beall. The deed purported to have been signed and acknowledged in due form by Sarah A. Thetford. On January 17, 1889, Brook Beall and wife executed the deed of trust to secure \$600 loaned to him by the mortgage company. On May 29, 1889, Brook Beall and wife reconveyed to Thetford. Thetford paid the interest due on November 1st in 1889, in

1890, and in 1891. He died in August, 1892. Mrs. Thetford paid the interest due November 1, 1892. In August, 1893, she commenced this suit. The land had been patented to J. B. Thetford. It was community property, and the homestead of the Thetfords. The petition alleges that Mrs. Thetford did not sign or acknowledge the deed to Brook Beall and that the mortgage company had notice that Brook Beall had no title, and that the land was the homestead of the Thetfords. The mortgage company answered by general denial, and by plea that it lent the money and took the deed of trust in good faith and without notice. It also filed a cross bill for foreclosure of the deed of trust. Mrs. Thetford died in 1896, leaving four adult children,—two sons and two daughters,—both of whom were married. The suit was revived in their names. (3) The charge of the court submitted but one question to the jury,—whether the deed to Brook Beall was a forgery, so far as Sarah A. Thetford was concerned. Adopting a form given them by the court, the jury returned the following verdict: 'We, the jury, find for the defendant the Colonial & United States Mortgage Company, Limited, against the defendant Brook Beall for the sum of \$1,235.19, but we find that said deed is a forgery as to Sarah A. Thetford.' (4) On this verdict the court entered judgment that the deed to Beall and the deed of trust were null and void, that plaintiffs be quieted in their title and possession, and that the mortgage company take nothing on its cross bill as against the plaintiffs."

Smith, Sullivan & Lobdel and Holloway & Holloway, for appellants. Owsley & Ragsdale, for appellees.

STEPHENS, J. The statement in the brief of appellants of the nature and result of the suit contains nothing superfluous and leaves nothing to be added, and we therefore adopt it.

The first complaint is that the evidence was not sufficient to warrant the verdict finding the deed from J. B. Thetford and wife to Brook Beall to be a forgery as to the wife. This deed purported to be duly executed by Thetford and wife in December, 1888, and was placed on record in January, 1889. Mrs. Thetford, testifying by deposition, positively denied the execution of the deed, so far as she was concerned; but the officer before whom the acknowledgment appears to have been taken, and who had no interest in the matter, testified by deposition quite as positively to the contrary, stating from memory the circumstances attending the execution of the deed, and showing a full compliance with the statute providing for the execution of deeds by married women. Numerous cases have been cited from other states and from the supreme court of the United States to sustain the

¹ Writ of error denied by supreme court.

proposition that the testimony of the wife, alone, denying the execution of her deed, is not sufficient to overcome the certificate of the officer showing its execution in due form. As said in 1 Cycl. Law & Proc. p. 625, "It is very generally held that the testimony of the grantor, unsupported and uncorroborated, is not sufficient to overcome a certificate regular on its face, especially where the certificate is supported by the testimony of the officer who took the acknowledgment, or by other competent evidence," in support of which numerous cases are there cited. A distinction, however, has been taken between the effect of a certificate of acknowledgment made where the wife appears before the officer, and one made where she does not. *Wheelock v. Cavitt*, 91 Tex. 679, 45 S. W. 796, 68 Am. St. Rep. 920. The rule above invoked would seem, therefore, to be inapplicable to this case, as the wife denied appearing before the officer.

Not finding it necessary to pass upon the sufficiency of the evidence, we proceed to consider the second assignment of error, reading: "The court erred in rendering judgment upon the verdict; the said verdict being insufficient to support the verdict, in this: the fact that Sarah A. Thetford did not join in the execution of the deed does not render the same void as to the plaintiffs, nor as to these defendants; it appearing that the land was community property, that both husband and wife had died, and that no constituent member of the family remained." The following authorities cited by appellants seem to sustain this assignment: *Marler v. Handy*, 88 Tex. 421, 31 S. W. 636; *Irion v. Mills*, 41 Tex. 310; *Shields v. Aultman, Miller & Co.* (Tex. Civ. App.) 50 S. W. 219. The appellees have not favored us with a brief, but they doubtless rely upon the opinion of our supreme court in *Stallings v. Hullum*, 89 Tex. 431, 35 S. W. 2, reversing the decision of this court (33 S. W. 1033). In that case, however, the person complaining of the judgment (the wife) still retained the homestead rights, which it was held, both by this court and the supreme court, could not be affected by the deed of the husband alone; but the judgment appealed from was reversed because it was held by the supreme court to interfere with the homestead rights of the wife, contrary to the view of this court that it did not. No such question is involved in this appeal; for, as indicated in the assignment, no vestige of homestead right survived. The object of the homestead exemption ceased upon the death of Mrs. Thetford, and with it the exemption itself. The case, therefore, seems analogous to *Marler v. Handy*, and that line of cases, in which the homestead had ceased to be, rather than to *Stallings v. Hullum*, in which it still remained. As to how the case would stand if the deed to Brook Beall was one made merely for the purpose, in connection with the deed of trust subsequently execut-

ed, of obtaining a loan by J. B. Thetford on the homestead, of which there was some evidence, we need not consider, since no relief was sought upon that ground; the allegations of the petition being confined to the issue of forgery.

Upon the ground stated in the second assignment of error, and on the undisputed facts, the judgment is reversed, and here rendered for appellants; giving to the mortgage company a foreclosure of its lien to secure the sums adjudged against Brook Beall, as to whom the judgment remains undisturbed.

On Motion for Rehearing.

(Jan. 11, 1902.)

In the written argument submitted by counsel for appellees with their motion for rehearing, the contention is earnestly, if not vehemently, made that the judgment of this court is wrong, because J. B. Thetford acted fraudulently towards his wife when he attempted to convey the land in controversy to Brook Beall; but the record fails to show that any such issue was distinctly tendered by the pleadings or tried in the court below. The most that appellees alleged was that Brook Beall procured the deed in question (forged, as it was alleged and found by the jury to have been, so far as Mrs. Thetford was concerned) to be recorded, and that he used it to obtain a loan on the land. Nowhere in the pleadings did appellees accuse their father, be it said to their credit, of any participation in the alleged forgery; and no such issue, if raised by the evidence, was submitted to the jury. Possibly their petition might admit of the construction that such charge was impliedly made against J. B. Thetford; and it may be, if forgery there was, as found by the jury, that the evidence tended to implicate him. If, therefore, the issue be a material one, and it was not fully developed in the pleadings and evidence, it would perhaps be our duty to remand the cause, instead of here rendering judgment against the appellees. It is insisted, on the assumption that the issue of Thetford's fraud was involved, that the cases cited by us as authority for the judgment we have rendered are only applicable where the husband acts in good faith towards the wife, and quotations from opinions in one or more of these cases are cited to sustain this view. But in using the language quoted the court had under consideration the effect upon the homestead rights of the wife of the husband's manner of exercising his superior right, as the head of the family, to abandon one homestead for another. There is the following difference, however, between this case and that of *Marler v. Handy*, 88 Tex. 421, 31 S. W. 636, the first cited as authority in our original opinion. Here the deed of the husband never became operative as a conveyance, by

estoppel or otherwise, during his life or the life of the wife, while in *Marler v. Handy*, on account of the abandonment of the homestead, it did. We may also add that but for the explanation offered by Chief Justice Gaines in *Stallings v. Hullum*, 89 Tex. 431, 35 S. W. 2, there would seem to be a conflict between the opinion in that case, holding the deed of the husband to the homestead to be absolutely void as to the wife where she does not join in its execution, and the opinion of Justice Brown in *Marler v. Handy*, holding, in accordance with what appears to have been the rulings in previous cases, such deed of the husband to be merely inoperative so long as the property remains the homestead, but to become effective as a conveyance, by way of estoppel, when it ceases to be the homestead. This seeming conflict was thus reconciled by Chief Justice Gaines: "In *Irlon v. Mills*, 41 Tex. 310, the husband alone had executed a deed to the homestead. Both he and his wife died, and administration was taken out on his estate. The administrator intervened in a suit between third parties for the property, and it was held that he was estopped by his intestate's deed. But there was no party to the suit who claimed in any manner under the wife. The decision in that case is in harmony with the very recent case of *Marler v. Handy*, 88 Tex. 421, 31 S. W. 636; *Id.* (Tex. Civ. App.) 32 S. W. 162,—in which it was held that the deed to the homestead executed by the husband alone operated by way of estoppel to pass the title to the grantee, upon the acquisition by the grantor of a new homestead for his family, provided such acquisition was not made with intent to defraud the wife of her interest in the former homestead. The wife having ceased to have any interest in the former homestead as such, no reason was seen to exist why the deed should not take effect. It is said in that case that the deed is not void; but it was not meant that it was valid as to the wife, or that it could in the slightest manner affect her rights before a new homestead was acquired. The fact that it was held in those cases that the deed was not so far void as to prevent it from operating by way of estoppel against the husband, when the wife's interest may cease, does not justify the conclusion that it was to have any operation whatever so long as her right of homestead in the property should continue to exist." We have concluded, upon closer examination of these opinions, and more thorough consideration of the question involved, that we should now hold that the deed of John B. Thetford, which, as before seen, the jury found to be a forgery as to the wife, was not only void as to her, but that it only became operative by way of estoppel against his heirs after the homestead ceased. This did not occur till Mrs. Thetford died, when, eo instante, an undivided half thereof (it being commun-

ity property) descended to her children, who would not be estopped by the warranty deed of their father from asserting a title derived by inheritance from their mother, in the absence of a finding that they had received from their father's estate enough property to render them liable on his warranty. If the homestead had been abandoned during the lives of Thetford and wife, he might then have conveyed the entire property, and the case of *Marler v. Handy* would seem to be authority for holding that a deed previously made by him should be given the same effect by way of estoppel. As was said by Justice Brown, in that case, of the decision in *Irlon v. Mills*, 41 Tex. 310, "The effect of the decision is to hold that the husband would have been estopped by his deed to assert title in the land after the time when he could have made a conveyance of it." Such cases seem analogous to those in which an after-acquired title is held to pass by estoppel to the grantee, his heirs or assigns. *Lindsay v. Freeman*, 83 Tex. 259, 18 S. W. 727, and cases cited,—particularly *Comstock v. Smith*, 13 Pick. 116, 23 Am. Dec. 670, by Judge Stayton, in *Wadkins v. Watson*, 86 Tex. 194, 24 S. W. 385, 22 L. R. A. 779. If J. B. Thetford had survived his wife, with or without the abandonment of their homestead, he could not then have conveyed her community interest in the property; and a deed previously made by him while the property was the homestead, and when he was consequently equally without power to convey, should not be given any greater effect. Inasmuch, then, as the homestead immunity prevented the deed of Thetford from operating a conveyance at the time it was made, and inasmuch as this status never changed till, upon the death of his wife, one-half the property descended to her heirs, no title or power of disposition over that half ever vested in him or his heirs, and there was at no time anything (to borrow an expression from appellants' brief) "to feed the estoppel," except the other half interest, which we hold passed to Brook Beall's assigns by estoppel. In this connection, see the late case of *Garner v. Black*, 65 S. W. 876, 3 Tex. Ct. Rep. 635. Clearly, as to the half interest which descended from J. B. Thetford to his children, they would not be heard to set up any fraud of his towards his wife or anybody else in avoidance of the estoppel created by his deed to Brook Beall. It follows, therefore, that the issue of fraud on the part of J. B. Thetford becomes immaterial, and that the recovery by appellees, who were plaintiffs below, should be limited to the one-half interest inherited from their mother, and that the foreclosure given the mortgage company should cover only the other half interest,—that is, on the assumption that the finding that the deed was a forgery as to Mrs. Thetford must be sustained; and we think, as intimated in the original opinion, it must.

In the last ground of the motion for rehearing, complaint is made that we erred in finding that no relief was sought on the ground that the deed to Brook Beall was but a pretended sale of the homestead for the purpose of obtaining a loan, and we are referred to the supplemental petition for allegations pleading that issue; but no such allegations are there to be found. Evidently counsel who prepared the motion mistook the contents of the supplemental pleading. That would be a different cause of action from the one pleaded, and would be barred by limitation. Hence the cause need not be remanded to have it pleaded.

The rehearing will be granted, and the judgment reformed so as to limit the recovery of appellees to an undivided half interest in the land sued for, but will be reversed, and here rendered, denying any further recovery, and granting to the mortgage company a foreclosure of its lien, with costs of its cross action, on the other half interest; but in other respects the judgment will stand affirmed, with costs of the appeal taxed against appellees.

HABERMANN v. HEIDRICH et al.¹

(Court of Civil Appeals of Texas. Jan. 15, 1902.)

PRINCIPAL AND SURETY—PAYMENT BY SURETY—SUBROGATION—ACTION FOR REIMBURSEMENT—LIMITATIONS—SUSPENSION—ABSENCE FROM STATE—RESIDENCE IN ANOTHER STATE.

Plaintiff went security on a note for defendant, who at that time lived in Texas. After maturity of the note, defendant went to another state, where he became a resident, and never returned to Texas. A judgment was subsequently recovered against plaintiff as surety on the note, which he paid, and about 12 years afterwards sued defendant for reimbursement. Held, that the statute of limitations was not suspended by defendant's absence from the state, since plaintiff was not subrogated to the rights of the payee of the note until he had paid it, and hence his cause of action against defendant did not arise until after defendant had become a resident of another state.

Error from district court, Comal county; H. Teichmueller, Judge.

Action by Jacob Heldrich and others against Rudolph H. Habermann. From a judgment in favor of plaintiffs, defendant brings error. Reversed.

M. E. Guinn, for plaintiff in error. F. J. Maier, for defendants in error.

KEY, J. Jacob Heldrich brought this suit against Rudolph H. Habermann, and obtained judgment on the following state of facts, as shown by the conclusions of fact filed by the trial judge: "On the 24th day of November, 1886, Rudolph H. Habermann and his wife, as principals, and Jacob Heldrich, as surety, made a promissory note for \$300 to one C. F. Blum, as aforesaid. (2) After maturity of said note, and before the filing

of suit thereon, Rudolph Habermann, who had always been a resident of the state of Texas, removed to another state, became a resident thereof, and has never returned to the state of Texas. (3) Some time in 1887, Blum, the payee of said note, brought a suit against Jacob Heldrich, who, though appearing as principal on said note, was in fact only surety, and recovered judgment against him. Heldrich, compromising the matter with Blum, discharged this judgment by the payment of \$224 some time in 1888. (4) Rudolph Habermann has never paid any part of said indebtedness, nor had he ever reimbursed Heldrich. (5) In February, A. D. 1900, Heldrich brought this suit against Rudolph Habermann, obtained personal service on him in the state of Michigan, but Habermann appeared by attorney and answered." The defendant pleaded the statutes of limitations, both of two and four years. The court below held that limitation was suspended because the defendant, Habermann, was a resident of this state at the time the note was executed, and thereafter left the state. This ruling is assigned as error, and we sustain the assignment. The plaintiff was not subrogated to the rights of the payee in the note, and could maintain no action upon that instrument. Habermann's liability to him rested upon an implied promise to reimburse the plaintiff the amount paid out by him in satisfaction of the note. *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528. The plaintiff's cause of action—that is to say, the right founded upon the implied promise referred to—did not exist until the year 1888, and before that time Habermann had become a resident of another state, where he has continued to reside ever since; and, this being the case, limitation was available as a defense, and the court should have rendered judgment for him. *Lynch v. Ortleib*, 87 Tex. 591, 30 S. W. 545. On this question there is no conflict in the testimony, and no dispute about the facts; hence the judgment of the court below will be reversed, and judgment here rendered in favor of the plaintiff in error, Habermann, who was defendant in the trial court.

Reversed and rendered.

CITY OF HOUSTON v. WALSH.¹

(Court of Civil Appeals of Texas. Nov. 25, 1901.)

TAXES—ILLEGAL TAX SALE—DAMAGES—JUDGMENTS—CONCLUSIVENESS—RES AD JUDICATA—INTEREST.

1. A judgment setting aside and canceling certain judgments forclosing a tax lien and vesting title in the city to real estate sold for such taxes, from which no appeal is taken, is conclusive, and the question whether the judgments were properly set aside cannot be raised in an action against the city by a taxpayer for damages re-

¹ Rehearing denied January 8, 1902, and writ of error denied by supreme court.

¹ For opinion on motion to rehear see 66 S. W. 795.

sulting to him from a sale of such property by the city to an innocent purchaser.

2. Where the taxpayer's property is sold to an innocent purchaser at a tax sale under judgments which are subsequently set aside, the taxpayer may recover from the city the value of the property so lost.

3. A judgment in an action against the city by a taxpayer to set aside certain judgments and tax sales by which the city acquired his property, in which the taxpayer does not seek to recover the value of a portion of such property sold by the city to an innocent purchaser, in whom the title is confirmed, is not an adjudication as to such damages, and will not prevent the taxpayer from maintaining a subsequent action against the city to recover the value of such property, though he could have asked for such relief in the former suit.

4. The plaintiff in such action is entitled to interest on the value of the property from the date of its sale by the city, though he continued in possession thereof for some time thereafter.

5. The fact that the purchaser from the city allowed plaintiff to remain on the lands for some time after the former acquired title from the city, does not entitle the city to offset the rental value of the premises for that period against the damages due plaintiff resulting from the wrongful sale.

6. The fact that the judgment includes interest for a month and a half longer than the plaintiff is entitled to does not authorize a reversal of a judgment in his favor, as the amount is too small to be considered.

Appeal from district court, Harris county; C. E. Ashe, Judge.

Action by John C. Walsh against the city of Houston for the value of property wrongfully acquired by the city under illegal tax proceedings, and sold to an innocent purchaser. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Stewart, Stewart & Lockett and Joe M. Sam, for appellant. Talliaferro & Wilson and Hutcheson, Campbell & Hutcheson, for appellee.

PLEASANTS, J. In December, 1878, appellee, with community funds, purchased lot 1 in block 252 of the city of Houston. In 1892 appellee's wife died, and her one-half interest in the property descended to and vested in the children of himself and deceased wife. The title to this property from 1892 to the 11th day of January, 1899, was vested one-half in appellee and one-half in the children of appellee by said marriage. On November 5, 1897, the city of Houston filed its original petition in cause No. 22,909 against John C. Walsh and wife for taxes alleged to be due and foreclosure of tax lien on lot 1 in block 252. On April 28, 1898, it filed its amended petition, and on June 30, 1898, obtained judgment for the taxes, including taxes for the year 1895, and foreclosure of the lien. Execution and order of sale were issued on this judgment, and the property bought in by the city of Houston, and a deed executed by the sheriff to it. On July 30, 1898, the city of Houston filed a suit of trespass to try title against John C. Walsh and wife to recover lot 1 in block 252, thus bought in by the city. This suit was

numbered 24,341. The defendant Walsh duly filed his answer to this petition. On January 11, 1899, the city of Houston took judgment for the title and possession of the land, and on the same day sold the land thus recovered to T. M. Scanlan. On March 16, 1899, appellee, joined by his children as co-plaintiffs, filed his original petition in cause No. 25,281 in the district court of Harris county, Tex. This petition was indorsed, "Bill of Review and Petition for Writ of Injunction," and the city of Houston, T. M. Scanlan, and A. R. Anderson, sheriff of Harris county, were made parties defendant. The purpose of this suit was to vacate and set aside the judgments in causes Nos. 22,209 and 24,341 in the district mentioned, and all proceedings had thereunder, to cancel the deed executed by the sheriff under the judgment in cause No. 22,209 and the deed executed by the city of Houston to T. M. Scanlan. Plaintiffs sought to set aside the judgment, execution, and sale in cause No. 22,209 for defects in service, want of notice, and irregularities in the sale, etc. They sought to set aside and vacate the judgment in cause No. 24,341 and deed to Scanlan for the reason that the city of Houston, acting through its attorney, John S. Stewart, had agreed with the defendant John C. Walsh in said cause No. 24,341 to hold up all action therein, and that it (the city of Houston) "would do nothing at all in said cause No. 24,341 without first notifying the said John C. Walsh, and would give him sufficient notice to allow him to file an amended answer in said cause," and that in violation of which said agreement the city of Houston took judgment in said cause without notifying him. On March 21, 1899, T. M. Scanlan filed his answer in this suit, No. 25,281, and on the same day the city of Houston filed its answer specifically denying the fact of the agreement alleged by plaintiffs. The defendant Scanlan pleaded purchase under judgments in causes Nos. 19,643 and 22,209. Cause No. 19,643 was a suit by the city of Houston, filed May 26, 1896, against John C. Walsh, for taxes for 1895, and foreclosure on said lot 1, block 252. Judgment was rendered in that cause for the city of Houston on July 10, 1897, and execution and order of sale issued thereon, and the property bought by the city of Houston. On May 9, 1899, the plaintiffs in cause No. 25,281 filed their supplemental petition in reply to the answers of the city of Houston and T. M. Scanlan, and attacked the judgment in cause No. 19,643 for want of service, notice of sheriff's sale, and other irregularities, and prayed that it and all proceedings under it be set aside and vacated. They also alleged and showed that in causes No. 22,909 and No. 19,643 the city of Houston had recovered judgment against the same land for taxes for the year 1895, and that it would be inequitable to compel them to pay the same taxes twice, but that, if the court should hold Scanlan

such an innocent purchaser as to be entitled to this double payment before a cancellation of his deed should be ordered, then that the plaintiffs should in equity recover from the city of Houston one-half of the amount so paid to Scanlan. On May 24, 1899, the city of Houston filed its replication in cause No. 25,281. Cause No. 25,281 was duly tried on May 24, 1899, and submitted to the jury on special issues, and verdict of the jury returned thereon on May 25, 1899, and on June 8, 1899, judgment was rendered on this verdict by the court. This judgment decreed that the children of John C. Walsh recover one-half of the land from Scanlan; that as between the city of Houston and John C. Walsh the judgment in cause No. 19,643, and sale and all deeds thereunder, be set aside, vacated, and canceled; that as between them the judgment, sale, and deeds in cause No. 22,909 be set aside, vacated, and canceled; that as between them the judgment in trespass to try title in cause No. 24,341 be set aside and vacated, but that Scanlan was an innocent purchaser thereunder, and as such entitled to protection, and that the setting aside of said judgment in cause No. 24,341 should not affect him, and accordingly decreed that he (Scanlan) should have and recover the title and possession of John C. Walsh's half interest in the land; and as to the relief prayed for from the double payment of taxes for 1895 decreed that the city of Houston go hence without day, and recover its costs. Motion for new trial in cause No. 25,281 was overruled June 10, 1899, and on the trial of the cause at bar it was admitted that the judgment in cause No. 25,281 had never been appealed from. On the 14th of September, 1899, the plaintiff (the appellee herein) John C. Walsh filed his original petition in this case, setting up the fact of suit No. 24,341 being filed against him, the fact of judgment thereunder being taken in violation of the agreement with the city attorney, and the fact of its subsequent reversal and vacation in cause No. 25,281; the sale by the city of Houston to Scanlan; the loss of plaintiff's title, valued at \$1,500; and praying for judgment for that sum, together with interest thereon from the time of the rendition of the judgment in cause No. 24,341 and the execution of the deed from the city of Houston to Scanlan. Appellee also pleaded that the fact of the agreement and of the rendition of the judgment in cause No. 24,341 and its subsequent reversal were conclusively established as between the city of Houston and appellee by reason of judgment in cause No. 25,281. On December 13, 1899, the city of Houston filed its first amended original answer in this cause, denying the agreement alleged between it and appellee, pleading its purchase under judgments in causes No. 19,643 and No. 22,909, and that the appellee, Walsh, was represented by attorneys in cause No. 24,341; and especially pleaded want of consideration for

the agreement between it and appellee, and want of authority in the city attorney to make the agreement. On the 13th of December, 1899, replying to this answer, appellee filed his supplemental petition setting up the fact of the reversal of the judgments in causes No. 19,643 and No. 22,909, and that the facts alleged by the defendant in its answer were conclusively established in favor of appellee and against appellant by reason of the judgment in cause No. 25,281; ratification of the agreement between the city of Houston and appellee; and, further, "that, independently of the said agreement, the city of Houston is liable to plaintiff in the sum of \$1,500 by reason of the fact that the judgments in causes Nos. 19,643, 24,341, and 22,909 were set aside and vacated in cause No. 25,281, as hereinbefore alleged, and plaintiff's property sold thereunder." This case was tried on the 26th of February, 1901, on which trial the court gave a peremptory charge to the jury to return a verdict for the appellee for the market value of his undivided half interest in lot 1, block 252, on the 11th of January, 1899, together with interest thereon, on which charge the jury returned a verdict in favor of appellee for \$1,500, with interest at the rate of 6 per cent. per annum for 2 years and 1½ months, making a total of \$1,691.25; on which verdict judgment was duly rendered for said amount, from which judgment this appeal is prosecuted.

The judgment in cause No. 25,281 setting aside and canceling the judgments theretofore rendered in favor of appellant foreclosing the tax lien upon appellee's property, and also the judgment vesting title to said property in appellant, being the judgment of a court of competent jurisdiction, and not having been appealed from, nor in any way reversed or set aside, is conclusive against the appellant, and the question as to whether said judgments were correctly set aside cannot be inquired into in this suit. This principle is so imbedded in our system of jurisprudence as to render the citation of authorities unnecessary. We think it equally well settled that upon the reversal of a judgment the defendant must be placed in the same position he occupied before the judgment was rendered. If he has lost property by reason of such judgment, the property must be returned to him, unless the rights of a third party have intervened, in which event he may recover from the party who obtains the judgment the value of the property so lost. *Cleveland v. Tufts*, 69 Tex. 584, 7 S. W. 72; *Peticolas v. Carpenter*, 53 Tex. 29; *Bank of U. S. v. Bank of Washington*, 6 Pet. 17, 8 L. Ed. 299; *Hays v. Griffith*, 85 Ky. 375, 3 S. W. 431, 11 S. W. 306; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449. Under this view of the law it only becomes necessary for us to consider two of the questions raised by appellant's various assignments of error. The first question is whether the judgment in cause No. 25,281 is not *res adjudicata*

of appellee's right to recover in this cause. Appellant contends that, the judgment in said cause No. 25,281 being against appellee on his claim for damages asserted therein, and the claim for damages asserted by appellee in this suit being essentially connected with the subject-matter of the former litigation, and therefore a matter which might have been litigated in said former suit, the judgment in said suit is *res adjudicata* as to such claim. This contention is not without force, but, after a careful consideration of the authorities, we are of opinion that it is not sound. It will be seen from the facts before stated that the damages sought, or rather the claim asserted by appellee against the appellant, in cause No. 25,281, was not damages claimed for the loss of his property, but only a claim for the recovery of taxes alleged to have been wrongfully collected from him by the city; and, conceding that in said cause appellee might have pleaded in the alternative that, in event he failed to recover his property from the defendants in said suit, he have judgment against the appellant for the value of same, the fact remains that he did not so plead, and no such claim was asserted by him in said cause. The doctrine of *res adjudicata* is thus stated by Mr. Justice Field in the case of *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 195: "In considering the operation of a judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar of estoppel against the prosecution of a second suit upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever. But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of

action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." The distinction here pointed out is clearly recognized in the decisions of our supreme court. It is well settled that upon a note secured by a lien suit may be brought and recovery had thereon, and if in such suit no foreclosure of the lien is sought, a second suit may be brought to foreclose the lien. *Kempner v. Comer*, 73 Tex. 202, 11 S. W. 194; *McAlpin v. Burnett*, 19 Tex. 500; *Ball v. Hill*, 48 Tex. 634; *Lumber Co. v. Hynes* (Tex. Civ. App.) 38 S. W. 372. It is believed that in all cases in which the rule is stated to be that a judgment is *res adjudicata* not only of all matters actually decided, but of all matters which might have been decided, in the suit in which said judgment was rendered, the facts will show that the matter held to have been adjudicated by the former suit was one which was put in issue by the pleadings in said suit. We think it is well settled that a judgment in a former suit is *res adjudicata* of the cause of action set up in a second suit only when the pleadings in the former suit put in issue said cause of action. *Teal v. Terrell*, 48 Tex. 491; *Converse v. Davis*, 90 Tex. 466, 39 S. W. 277; *Groesbeck v. Crow*, 91 Tex. 77, 40 S. W. 1028. It follows that the judgment in cause No. 25,281 is not *res adjudicata* of the claim asserted by appellee in this suit, and the trial court did not err in so holding. We are further of opinion that appellant, not having pleaded that the matter in controversy in this suit was *res adjudicata*, could not have availed itself of such defense, even if same had been shown by the evidence.

The only remaining question for our consideration is whether the trial court erred in instructing the jury to return a verdict for the appellee for the value of the property, with interest thereon from the 11th day of January, 1899, the day upon which same was sold by appellant to Scanlan. Appellant contends that appellee would only be entitled to recover interest from the date on which he was actually evicted. The evidence fails to show when appellee was put out of possession of his property, but does show—at least by fair implication—that he was in possession of the property for several months after the sale to Scanlan. We think the court properly instructed the jury to allow interest from the date of said sale. That was the date on which appellee's right of property in the land was converted, and appellee was entitled to recover interest on the value of the property so converted from the date of the conversion. The fact that Scanlan may have allowed the appellee to remain in possession of the property for some time after the sale to him would not entitle the appel-

lant to offset the rental value of such occupancy by appellee against the damages due appellee by appellant on account of its wrongful act. Appellant invokes the rule adopted in suits for breach of a warranty of title, which, we think, is not applicable to suits like the one at bar; but, measured by this rule, appellee would be entitled to recover interest for the two years next preceding the date of the filing of this suit, and this would entitle him to recover interest for all of the time allowed by the court except for 1½ months, the interest for which time being too small in amount to be considered.

We are of opinion that the judgment of the court below should be affirmed, and it is so ordered. **Affirmed.**

LENZ et al. v. SENS et al.¹

(Court of Civil Appeals of Texas. Dec. 13, 1901.)

WILLS—CONSTRUCTION—LAPSED LEGACY—INTENT—PAROL EVIDENCE.

1. A lapsed legacy goes to the residuary legatees unless it appears from a proper construction of the will that testator intended the residuary gift to have only a limited effect.

2. Parol evidence of the circumstances attending the testator and the objects of his bounty, and of the condition of his estate, is admissible to show the intent of the testator where ambiguously expressed in his will, but not to vary its terms, and the intention itself cannot be shown by parol.

3. Testatrix's will bequeathed "all moneys that I may have on deposit" in a certain bank to her niece. The following clause recited that two tracts of land (valued at some \$6,000) should be sold, and out of the proceeds a number of small legacies paid to her brother and nephew, and the relations of her deceased husband, etc., amounting in all to \$3,410. A subsequent clause gave special directions for the sale of testatrix's real estate to pay "my just debts and the bequests herein bequeathed." The residuary clause gave the residue of the estate, after payment of debts and of "the foregoing bequests," to the relatives of the deceased husband. The legacy to the niece lapsed by her death before testatrix. The amount on deposit in the bank at testatrix's death was \$21,380. Her whole estate aggregated about \$30,000. *Held*, that the residuary estate did not include the lapsed legacy, but such legacy went to the heirs, the residuary clause seeming to be restricted to proceeds of the real estate.

Appeal from district court, Harris county; Chas. E. Ashe, Judge.

Action by Adolph Lenz and others against Otto Sens, as executor of Justina Ruppertsberg, deceased, and others, in which the residuary legatees of the testatrix also became parties. Judgment for defendants, and plaintiffs appeal. Reversed.

R. M. Hall, Wm. H. Crank, Walter H. Scott, and E. P. & Otis K. Hamblen, for appellants. O. T. Holt, L. B. Moody, and Ross & Wood, for appellees.

GARRETT, C. J. This action was brought by Adolph Lenz and others, as the heirs at law of Justina Ruppertsberg, against Otto

Sens, the executor of the will of said Justina Ruppertsberg, and T. W. House, for the construction of said will, and to have paid to them, as the heirs of the deceased, a special bequest made therein, which had lapsed by reason of the death of the special legatee prior to the death of the testatrix. Others who were named in said will as legatees in the residuary clause also became parties to the suit. The case was tried by the court without a jury, and judgment was rendered in favor of the defendants, the court holding that the lapsed legacy fell into the residue of the state, and went to the residuary legatees, and not to the heirs. There is no statement of facts brought up in the record, but the trial judge filed conclusions of fact, from which the following statement is made: Justina Ruppertsberg died testate, June 30, 1899. Her will was duly probated in the county court, and the defendant Otto Sens qualified as executor. The will is dated March 30, 1897, and makes disposition of her estate as follows: "Item 1st. I desire and direct that my body be buried beside of the grave of my deceased husband, Wm. Ruppertsberg, and that a similar tombstone as his be erected, with the following inscription thereon: 'Here rests Justina, wife of Wm. Ruppertsberg, born Jan. 26th, 1828, died ———.' Item 2nd. I direct that all my just debts and funeral charges shall be paid out of my estate as soon after my decease as shall be found convenient. Item 3rd. I give and bequeath to my niece Anna Kalbfleisch, née Lenz, residing at Gelthausen, in Hesse Nassau, all moneys that I may have on deposit or to my credit in or with the bank of T. W. House at the time of my decease. Item 4th. It is my desire that my two properties, being one-half of each of lots numbers four and five, in block number eighty-three, and lot number twelve, in block number sixty-six, with improvements thereon, and situated on the south side of Buffalo Bayou, in the city of Houston, shall be sold by my executor, and out of the proceeds of sale thereof I give and bequeath as follows, viz.: to my nephew Adolph Lenz the sum of five hundred dollars, and to my brother John Boes the sum of ten dollars; and to the following named relations of my deceased husband, Wm. Ruppertsberg, namely, his niece Maria Schmitz the sum of five hundred dollars, and to his sister Gertrude Haschke two hundred dollars, and to each of the following named nieces and nephews, Laura Schneider, Lena Kaufhold, Justina Fricke, Lizzie Jentsch, Anna Welle, Wm. Haschke, Adolphina Wehrhahn, Ernestina Lender, and Adolph Wehrhahn, two hundred dollars, and to the Faith Home of Houston two hundred dollars, and to the St. Joseph Infirmary of Houston two hundred dollars. Item 5th. All my household and kitchen furniture, bedding, linen, and wearing apparel I give and bequeath to the person who may have nursed me during my last sickness and at the time

¹ Rehearing denied and writ of error denied by supreme court.

of my death. Item 6th. All the rest and residue of my estate remaining after the payment and satisfaction of my debts, funeral charges, and expenses of my estate and of the foregoing bequests I give and bequeath to the hereinabove named relations of my deceased husband, Wm. Ruppertsberg, to be equally divided between them, share and share alike. Item 7th. I nominate and appoint Andrew Sens to be independent executor of this will, and direct that no bond or security shall be required of him as such executor, and it is my will, and I so direct, that no other action shall be had in the court in the administration of my estate than to prove and record this will and to return an inventory and appraisement of my estate. And I authorize and empower my said executor to sell and dispose of my said real estate at public or private sale, and in the manner that may seem to him best for the purpose of paying my just debts, funeral charges, and expenses of estate, and the bequests herein bequeathed. The executor acting shall be entitled to receive and retain for his services five per cent. commission on all sums that he may actually receive in cash, and the same per cent. on all sums that he may pay away in cash in the course of administration of the estate, but such commission shall not be allowed for receiving any cash which was on hand at the time of my death, nor for paying out money to the legatees as such, and the executor shall also be allowed all reasonable expenses necessarily incurred by him in the preservation, safe-keeping, and management of the estate, and all reasonable attorney's fees that may be necessarily incurred by him in the course of the administration. Item 8th. In the event that the said Andrew Sens shall fail and refuse to accept and qualify as such executor, then I nominate and appoint in his place and stead his son, Otto Sens, as such independent executor, with like powers and authority. Item 9th. I admonish my said legatees against any litigation with regard to my estate."

The testatrix was the widow of Wm. Ruppertsberg, deceased. She died without leaving any children. Her sole heirs were the appellants, her brother John Martin Boes, her nephew Adolph Lenz, and her grand-nephew Ludwig Kalbfleisch, who is the son of the special legatee Anna Kalbfleisch. The relations of her deceased husband mentioned in the will, to whom special bequests were made in the fourth clause of the will, and to whom by the sixth clause the residue of the estate was bequeathed, are parties to this suit, except Anna Welle. Anna Kalbfleisch and Anna Welle both died before the death of the testatrix, and she knew of their death some time prior to her own, but declined to make any change in her will when the fact of their death was called to her attention. Anna Welle left surviving her, as her sole heirs, her husband, R. G. Welle, and the following children, to wit, Rudolph, Helena,

Freda, Otto, Walla, Julius, Gustave, and Alphonse Welle. Maria Schmitz nursed the deceased during her last sickness and at the time of her death. Justina Ruppertsberg had on deposit in the bank of T. W. House at the time of her decease the sum of \$21,380.25. The executor has received from cash the deceased had on hand at the time of her death, and money collected by him for rent and from the sale of real estate and interest on the same, the sum of \$6,547.55, as follows: Rent, \$74.55; cash on hand, \$113; sale of real estate and interest thereon, \$6,360. The executor is entitled to a credit at the date of the trial below for money paid out by him for the estate, including attorney's fees and commissions to himself of the aggregate sum of \$2,530.97. At the time of the trial there was a suit pending in the same court against the executor for the sum of \$2,500, and there was another in the court for the Fifty-Fifth district for about the same amount, in which there had been judgment in favor of the executor, but in which the time for writ of error had not elapsed. The deposit in the bank of T. W. House still remained in said bank at the time of the trial.

The rule of law controlling the disposition of the lapsed legacy to Anna Kalbfleisch is well settled. A lapsed legacy falls into the residue of the estate, and goes to the residuary legatee, unless it should appear from a proper construction of the will that the testator meant that the residuary gift should take only a limited effect. *Moss v. Helsley*, 60 Tex. 437; *Schouler, Wills*, § 519. The intention of the testator, as gathered from the will, must control in the construction of a will. Parol evidence of the circumstances attending the testator and the objects of his bounty, and of the condition and character of the estate, is admissible to throw light upon the will, so as to get at the intention of the testator ambiguously expressed, but not to vary the terms themselves of the will. The intention cannot be shown by parol evidence. *Hawes v. Foote*, 64 Tex. 22; *Cleveland v. Cleveland*, 89 Tex. 451, 35 S. W. 145; *Philleo v. Holliday*, 24 Tex. 38; *Howze v. Howze*, 19 Tex. 553. Justina Ruppertsberg died seised of an estate worth nearly \$30,000. It is not shown how much of this she had at the time the will was executed, but it is a fair inference that it was not much less, as the will was made only a little more than two years before her death. The amount of the deposit in the bank of T. W. House at that time is not shown, but it may also be inferred from the evidence, as to the character of the property on hand at her death and its correspondence with the property mentioned in the will, that it was practically the same; at least, a large amount. It appears that she died childless, but had blood relations,—a brother and a nephew, besides the child of her niece,—to whom she had given the deposit in the bank. It appears also that she

had no real estate except that mentioned in the will, and it may be inferred that all of her property as it existed at the time of her death was mentioned in the will. After giving to her niece the bulk of her estate, she desires that "my two properties" be sold, and out of the proceeds of the sale "I give and bequeath," and then follows a number of small legacies to her brother and nephew, and the relations of her deceased husband, and two charities named, amounting in all to \$3,410; and in clause 7 she gives special directions as to the manner of the sale of her real estate "for the purpose of paying my just debts, funeral charges, and expenses of estate, and the bequests herein bequeathed." So it is clear that the two properties were her real estate, and that she charged this real estate especially with the payment of all debts and expenses and of the "bequests herein bequeathed." The nature of the bequest to Anna Kalbfelsch was an exclusive appropriation from the assets of the estate of the deposit in the bank of T. W. House, and the manner of providing for the other bequests was restrictive of their payment out of the real estate. There was no other property to amount to anything, and the testatrix seems to have treated this property as the fund for the satisfaction of every other legacy and charge against the estate. And the residuary clause, giving all the rest and residue of the estate, after payment and satisfaction of the debts, funeral charges, and expenses of the estate, and of "the foregoing bequests," seems restricted to the proceeds of the real estate, especially since the expressions "foregoing bequests" and "bequests herein bequeathed" are of equal meaning, and in clause 7 "bequests herein bequeathed" could only refer to the bequests to be paid out of the real estate. It is clear that the testatrix, in the use of the words "foregoing bequests," had reference to the bequests referred to, and the payment of which were provided for as "bequests herein bequeathed" in clause 7 of the will, and that "the residue of the estate" remaining after the payment of the debts, funeral charges, and expenses of the estate and of the "foregoing bequests" should be confined to the real estate dealt with and the small amount of cash and rents, and could carry no more than the residue thereof. The particularity with which the bequests are made to the relations of the husband, their small amount, the particular nature and manner provided for their payment, and the probability of a small residue, together with the language used in the two clauses first providing the manner of the payment of the "bequests bequeathed," referring to the bequests in clause 4, and the disposition of the residue after paying the "foregoing bequests" in clause 6, as well as the careful provision in both of these clauses for the payment first out of the sale of the real estate of the debts, funeral charges, and expenses of ad-

ministration, lead to the inevitable conclusion that in the residue of her estate the testatrix did not mean to include, and did not include, the deposit in the bank of T. W. House. In view of the particular provision that the debts and funeral charges shall be paid out of the real estate, the meaning of the word "estate" in clause 4, where the testatrix directs these charges to be paid out of her estate, is made more apparent by reference to clause 3, where she directs that they shall be paid out of her estate. We are of the opinion, therefore, that the lapsed legacy in favor of Anna Kalbfelsch did not fall into the residue, and that it should be distributed to the heirs of the testatrix. The judgment of the court below is reversed, and judgment is here rendered in favor of the appellants.

Reversed and rendered.

BLAIR v. SLOSSON.¹

(Court of Civil Appeals of Texas. Dec. 19, 1901.)

REAL ESTATE BROKER—RIGHT TO COMMISSIONS—STIPULATED AMOUNT—REASONABLE VALUE—QUESTION FOR JURY—PAROL EVIDENCE.

1. Plaintiff, having been employed by defendant to effect an exchange of all or part of his land for other real estate, obtained an offer from a third person for the entire property, and a written agreement was made for the exchange. Thereafter an incumbrance was discovered on the third person's property, which he could not discharge; and he accordingly exchanged his property, subject to the incumbrance, for a part only of defendant's land. Held that, though the original contract had been modified, the exchange as made had been effected by plaintiff, and he was entitled to commissions.

2. In a suit to recover the reasonable value of services in effecting an exchange of real estate, where defendant set up that plaintiff had agreed to accept \$500 for his services, but there was evidence tending to show that, as an inducement for such agreement, defendant promised to pay plaintiff a further reasonable commission if he found the land satisfactory, and that he did find it satisfactory, it was proper to submit such issue to the jury.

3. A contract whereby an owner of real estate, in order to induce an agent to accept a stipulated sum for his services in effecting an exchange, agreed to pay him more if the deal proved satisfactory, could be established by parol evidence as an independent agreement, though the stipulation for the payment of the first sum was in writing.

Appeal from district court, Harris county; C. E. Ashe, Judge.

Action by W. B. Slosson against E. R. Blair. Judgment for plaintiff, and defendant appeals. Affirmed.

H. & A. R. Masterson, for appellant. Watkins & Jones, for appellee.

GARRETT, C. J. This action was brought by the appellee against the appellant for the recovery of \$1,000 upon quantum meruit, as an agent's commissions for the exchange of property owned by the appellant in the states of Kansas and Missouri for land situated in

¹ Rehearing denied.

Brazoria county, Tex., then owned by one D. W. Wood. The appellant was a nonresident, and an attachment was sued out and levied on the Texas land for which the exchange had been made. The defenses pleaded were (1) that the original contract for the exchange of said property had never been carried out; (2) that appellee had acted in a dual capacity between the appellant and Wood, attempting to serve both parties to the contract, which fact was unknown to the appellant, and had forfeited all right to commissions from appellant; and (3) that before the modification of the original contract the appellee had agreed to accept for his commissions a stipulated fee of \$500. The case was tried by jury, and resulted in a judgment in favor of the appellee for \$1,600.

The evidence was conflicting upon the issues made by the pleading, but, resolving the conflict in support of the verdict of the jury, the facts necessary to a decision of the case may be briefly stated as follows: The appellant employed the appellee to secure an exchange of certain real estate owned by him, situated in the states of Kansas and Missouri, for southern Texas land, and, in a letter addressed to the appellee, said: "If you can furnish me a trade that I will accept, you can rely upon pay for your services. * * * I would trade a portion or all." Appellee accepted the employment, and undertook to procure for the appellant the exchange of property as desired; and after an offer of a proposition of land owned by one Hahl had been declined by the appellant, the appellee at last secured a proposition from one D. W. Wood of 6,400 acres of land situated in Brazoria county, through the said Hahl, who was acting as agent for Wood, which the appellant was willing to accept. Appellant's property consisted of two parcels in Missouri and one in Kansas. When the exchange had been agreed on, Hahl, as the agent of Wood, went to meet the appellant in Sedalia, Mo., to close the exchange. It developed that there was a lien on Wood's property amounting to \$3,000, but this was finally arranged by the appellant's withholding one parcel of the property, known as the "Atchinson Property," he proposed to convey to Wood, and giving him 90 days in which to pay off the lien, when it would also be conveyed. Wood never discharged the lien, and the Atchinson property was not conveyed. In finally closing the deal the appellee agreed by letter to accept \$500 as his commissions if the appellant would send him a check for it when the deal was closed, and upon his agreement to pay more if the property showed up all right. When Blair saw the Texas land he was very much elated with the deal, and stated that the land was 50 per cent. better than he expected to find it. He failed to send the

check for \$500 as he had promised, and has never paid any part of the commissions. It was shown that \$1,600 was a reasonable compensation for the services in furnishing the trade.

Appellee's employment was to find a person who would exchange southern Texas land for all or a portion of the appellant's three parcels of property. He got a proposition from D. W. Wood to exchange 6,400 acres of land owned by him in Brazoria county for the three parcels, and a written contract was entered into for the exchange. So appellee got the owners together upon the proposition, but in closing the deal it developed that there was an incumbrance of \$3,000 on Wood's property, which he could not discharge. The parties, however, finally concluded an exchange of the Texas land, with the incumbrance, for two parcels of the appellant's property. The exchange of two parcels, a portion of the appellant's land, was thus effected through the agency of the appellee upon terms satisfactory to the appellant. The appellee brought the parties together, and thus earned his commissions. *Graves v. Bains*, 78 Tex. 92, 14 S. W. 236; *Harrell v. Zimbleman*, 66 Tex. 292, 17 S. W. 478; *Conkling v. Krakauer*, 70 Tex. 735, 11 S. W. 117. The charge complained of under the first assignment of error was a correct submission of the case upon the issue of quantum meruit, and the evidence was sufficient to authorize the submission. There was evidence tending to prove that, as an inducement for the appellee to agree to accept \$500 for his commissions, the appellant promised that he would pay a further reasonable commission if he found the land satisfactory, and that he found it so. It was proper to submit such an issue to the jury. In the first place, the agreement to accept the \$500 was not entirely in writing, as evidenced by the letters of the parties, but consisted also of the verbal representations made that appellant would pay more if the land showed up all right. In the second place, the agreement to pay more was an independent agreement, and, although an inducement to the one that was entered into, it could be established by parol evidence. *Downey v. Hatter* (Tex. Civ. App.) 48 S. W. 32. The charge which is said to conflict with this is one which correctly submits the issue of whether or not the appellee agreed to accept \$500 for his commissions, and to find for the appellant if he did so agree. As we have said, the finding of the jury upon the question of double agency is supported by the evidence, and, as it was correctly submitted to the jury in the charge of the court, the third assignment of error must be overruled.

No error having been shown, the judgment of the court below will be affirmed. Affirmed.

TEXAS & P. RY. CO. v. CROCKETT.¹
(Court of Civil Appeals of Texas. Dec. 7, 1901.)

CARRIERS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — JUMPING FROM MOVING TRAIN — EVIDENCE — SUFFICIENCY.

1. In an action for injuries sustained on jumping from a moving train, plaintiff having been aboard the train for the purpose of seating his wife and children, the evidence showed that the train did not stop a reasonable time, and that when plaintiff left the train it was dark, and the grounds not lighted, but that it was at a place where passengers got on and off, and, though the train was moving at a rate of from 6 to 12 miles an hour, plaintiff did not know of the speed owing to the darkness, and that two other men jumped from the train just ahead of plaintiff without injury. *Held*, that the evidence was sufficient to warrant a finding that plaintiff was not negligent in jumping off.

2. Where one jumping from a moving train was painfully injured, having his nose broken and some of his teeth knocked out, a verdict for \$330 was not excessive.

3. Where the petition alleged that plaintiff had been aboard the train in order to seat his wife and children, and that he jumped from the train while it was moving rapidly, in the dark, but that the train was still at the station where passengers got on and off, and that he believed it was moving slowly, and that no lights were placed whereby he could estimate the speed, the petition did not show contributory negligence as a matter of law.

4. It was competent for him to testify that the train was not going very fast, and he thought he could get off safely.

5. It was proper to permit witnesses to testify that a certain person was at the station just before the train started, and that he bought a ticket for the train, but that it pulled out and left him before he could get on, to show that the train did not stop for a reasonable length of time.

6. It was not error to admit evidence that other persons who had attended ladies on the train jumped off just before and in the presence of plaintiff, and that they were not injured, as tending to produce a conclusion in plaintiff's mind that he too might jump with safety.

7. It was not error to permit a witness to testify that he had attended his mother on the train that morning, and seated her at the same time plaintiff seated his wife, and that he had done the same thing before with other passengers, to show that such conduct was customary, and notice to the trainmen of such a custom.

8. It is not error to refuse special charges where the matter covered by them is sufficiently given in the main charge.

Appeal from Parker county court; D. M. Alexander, Judge.

Action by B. A. Crockett against the Texas & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

H. C. Shropshire, for appellant. Martin & Martin, for appellee.

HUNTER, J. This is a suit for damages for personal injuries alleged to have been received by the appellee, Crockett, in jumping from one of appellant's passenger trains at Weatherford, Tex., upon which he had

gone to procure seats for his wife and children, who were passengers. He alleged that the train arrived at Weatherford about an hour before daylight; that it was dark, and the depot grounds and places where passengers alighted from the train were not lighted; that he procured a ticket for his wife (his children, being aged three and five years, respectively, were not required to pay fare), and went aboard the train with them to procure seats for them; that about the time he found seats for them the train started, and he turned and hurriedly made his way to the platform, and believing that the train was moving slowly, and there being no lights outside to enable him to see how fast it was moving, he jumped off to the ground, and by reason of the rapid speed of the train he was thrown on his face and head, and was painfully injured, and his nose was broken, and some of his teeth were broken and knocked out. The defense was general demurrer, general denial, and contributory negligence in jumping from a rapidly moving train in the dark. The case was tried by a jury, and verdict and judgment went in plaintiff's favor for \$330, and from that judgment this appeal is taken.

The evidence was sufficient to establish that Crockett's wife and children went aboard the east-bound train as passengers, and that he went with them, carrying one of the children in his arms, to assist them in getting seats; that he failed to find seats for them in the first coach he entered, and continued back into the next one, and about the time he was passing over the platform from one coach to another the train started, but he went on into the second coach, and found a seat for his wife but none for the children, and, telling his wife she must find seats for the children as the train was moving out, he hurried to the platform behind two gentlemen who had gone aboard for similar purposes, and after they had jumped from the platform he jumped also. They were not injured, but Crockett was, as above stated. It was dark where and when he jumped, though it was at a place where passengers alight from and go aboard the trains when going westward. The evidence was conflicting as to whether the grounds were lighted there or not, but was sufficient to establish that they were not. The evidence was conflicting as to whether the train remained standing a reasonable length of time, — sufficient to enable passengers to alight and go aboard, and allow escorts of ladies and children to seat them and get off the train, — but was sufficient to authorize the jury to find that it did not. It was proved that the train at the time Crockett jumped was moving at from 6 to 12 miles an hour, but that it was dark where he jumped, and it was sufficient to establish that he did not know it was moving so fast at the time he jumped, but believed it was moving slowly, and that he might with safety jump therefrom. The

¹ Rehearing denied January 11, 1902.

evidence was sufficient to warrant the jury in concluding that a man of ordinary prudence and care, under the same or similar circumstances, would have jumped as Crockett did. The injury and suffering warranted the amount of the verdict.

Appellant's counsel urge that the general demurrer to plaintiff's petition ought to have been sustained, because the petition showed that the plaintiff was guilty of negligence in jumping from the train while it was rapidly moving in the dark, when he was unable to see how fast it was moving or where he would alight. But the answer to this is that he also alleges that the train was still at the station where passengers get on and off, and that he supposed and believed it was moving slowly, and no lights were placed there whereby he could estimate the speed thereof. We think this made it a question of fact to be tried by the jury, whether a man of ordinary prudence and care under such circumstances would have reasoned about it and concluded as he did. It did not allege such facts as a court could declare, as a matter of law, constituted negligence, and unless it did so it was not subject to demurrer. In *Railway Co. v. Dorrough*, 72 Tex. 111, 10 S. W. 711, Justice Gaines said, in a case where the plaintiff was injured in attempting to board a moving train: "Whether the attempt to board a train, under the circumstances disclosed by the evidence in this case, is negligent or not, is a matter of fact to be left to the jury. The general charge instructed the jury in this case that if the 'plaintiff attempted to board defendant's train while in motion, and when an ordinarily prudent man would not have made the attempt,' he could not recover. This clearly and sufficiently presented the issue of contributory negligence." 4 Elliott, R. R. § 1628. It was competent for the plaintiff to testify "that the train was not going very fast at the time he jumped off, and that he thought he could get off safely."

The third, fourth, and fifth assignments of error complain of the admission of the evidence of plaintiff and two other persons, who each testified that at the steps of the coach "the plaintiff kissed his wife and children, and told them good-bye, and asked his wife to write him"; the objection being that these acts and declarations were immaterial and irrelevant, unless done and spoken in the presence of appellant's agents having charge of the train,—that is, the conductor. The three witnesses who so testified also stated that this occurred in the presence of the conductor of the train. This latter statement was sharply contradicted by the conductor and brakeman and train porter, and perhaps also by circumstances. But conceding that the evidence was not material and relevant, unless the acts and declarations took place in the presence of the conductor, there was evidence tending to show that the conductor saw and heard it all, whatever might be the

legal consequence of such knowledge. The same witnesses were permitted to testify that a gentleman named Long was at the depot that morning, and bought a ticket for that train, and before he could get on it it pulled out and left him. This was a circumstance tending to prove, though very slight indeed, that the train did not stop for a reasonable length of time to allow passengers to get on.

There is no merit in the ninth assignment.

There was no error in admitting the evidence that other persons who had attended ladies on the train jumped off just before and in the presence of plaintiff. The evidence showed that they were not injured, and this fact tended to produce the conclusion in plaintiff's mind that the train was not moving rapidly, and that he too might jump with safety.

There was no error in permitting Mr. Moreland to testify that he had attended his mother on the train that morning and seated her at the same time plaintiff did, and that two or three times before he had done the same thing with other passengers. It tended to establish that such was customary at that depot, and to that extent tended to show notice to the agents in charge of the train of such a custom.

There is no merit in the fourteenth and fifteenth assignments.

The special charges referred to in the sixteenth and seventeenth assignments of error were sufficiently given in the main charge, and there was no error in refusing them.

The assignments complaining of the charge are all overruled. We find it a clear and fair and full statement of the law governing the case.

The motion for a new trial was properly overruled, and, finding no error in the judgment, it is affirmed.

SIEMERS v. HUNT et al.

(Court of Civil Appeals of Texas. Jan. 15, 1902.)

VENDOR AND VENDEE—RETAINING POSSESSION AFTER SALE—MEASURE OF LIABILITY—CROPS—REASONABLE RENTAL VALUE.

Where a vendor executes a deed conveying land to the vendee, but remains in possession, and does not deliver the deed until payment is made by the vendee, when he accepts the entire purchase price with interest from the date of the deed, the vendee's title relates back to the date of the deed, and the vendor is liable to him for the crops raised on the land during the time possession was retained, but not for what would be a reasonable rental value of the property.

On rehearing. Reversed.

For former opinion, see 65 S. W. 62.

FISHER, C. J. The liability of a vendor to account for the rents and profits, who remains in possession after the execution of the deed conveying the land, and thereafter receives the purchase price with interest, is

similar to that of a mortgagee rightfully in possession, whose debt, with interest, is subsequently paid. 2 Suth. Dam. 241. In the latter class of cases the mortgagee must exercise ordinary diligence to preserve the premises, and must exercise a like care in obtaining such rents and profits as may arise from a use of the premises to the purposes to which it is adapted. 15 Am. & Eng. Enc. Law (1st Ed.) 821; 2 Jones, Mortg. §§ 1116-1125. If such diligence has been exercised, and the mortgagee keeps correct account of the amounts received, his liability to account extends only to the rents and profits actually received, and not for what would be the reasonable rental value of the premises. Authorities supra. The mortgagee could not recover compensation for his personal services in managing the property, but would be entitled to the reasonable expenses of marketing the products produced upon the premises. The principles outlined as applicable in actions for an accounting between mortgagor and mortgagee by analogy apply in a case like the present, where the vendee seeks to hold the vendor in possession liable for the use of the premises. In this case the vendor executed a deed of conveyance to the vendee, which was not delivered until the purchase money was paid, and remained in possession until the vendee paid the purchase money, with interest. During this time a crop was raised upon the premises, which was, after allowing the tenant of the vendor his share, appropriated by the latter. In the original opinion handed down in this case (65 S. W. 62) we held the vendor liable for the reasonable rental value of the premises. To this extent we erred, and are now of the opinion that the liability of the vendor should be determined by the rules announced in this opinion, and for this purpose the judgment will be reversed.

We cannot agree with the contention of appellant, who is the vendor, that in no event, under the facts of this case, can he be held liable. The point is urged that, as the vendee declined to accept the deed and pay the purchase money when it became due, the vendor was entitled to the fruits and revenues thereafter arising from the use of the premises while the same was in his possession. We correctly held in the former opinion, to which conclusion we adhere, that as the vendor thereafter accepted the entire purchase price, with interest due from the date of the deed, he must account to the vendee for the profits received; this upon the theory that, upon the payment of purchase money and interest, the title of the vendee would relate back to the date of the execution of the conveyance, and, the vendor having received all of the interest to that date, it would be inequitable to permit him also to retain the profits arising from the use of the premises.

We are also of the opinion that the evi-

dence was sufficient to authorize the submission of the question to the jury whether or not the cistern was a fixture.

For the error indicated, the motion for rehearing is granted, and the entire judgment below reversed, and the cause remanded. Motion granted. Reversed and remanded. The conclusions reached are the views of KEY, J., and the writer of this opinion.

NOWLIN v. HALL,¹

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

SCHOOL LANDS — PURCHASE — APPLICATION — SETTLER — ADVERSE CLAIMANTS — WAIVER — ADDITIONAL LANDS.

1. In an act of trespass to try title between applicants to purchase school lands, the legal title being in the state, the burden is on plaintiff to show his right to the land, and hence it is error for the court to assume in the charge that plaintiff had not already purchased as much as four sections of school lands.

2. Where, on a contest between applicants to purchase school lands, the commissioner rejects the application of the actual settler, and awards the land to the other, who had not settled on the land, such award is void, and leaves the land subject to sale, without a forfeiture being declared, as prescribed by Batts' Ann. Civ. St. art. 4218L.

3. Where defendant, without settling thereon, applied to purchase school land, section 1 as his homestead and section 2 as additional thereto, but settled on section 1 before plaintiff settled on section 2 and applied to purchase it as his homestead and section 1 as additional land, and a contest, being instituted, is not tried for more than one year, if defendant had a superior right to section 1 because of his settlement he waived such right by failing to make a new application after his settlement occurred.

4. Where, under a statute providing that any actual owner of, and resident on, any lands contiguous to state school lands, may also buy any such lands, a settler on school lands applies for an additional tract at the same time he applies for his homestead, but acquires title to his home tract before his application for the additional tract is considered and the land awarded to him, the latter award is valid, and he is entitled to the land.

Appeal from district court, San Saba county; M. D. Slator, Judge.

Action by James M. Hall against Henry Nowlin. From a judgment for plaintiff, defendant appeals. Reversed.

Lauderdale & Opp, for appellant. Allison & Walters, for appellee.

KEY, J. This is an action of trespass to try title to recover two surveys of state school land. The suit was brought by the appellee, James M. Hall, against appellant, Henry Nowlin, W. A. Buchholz, C. D. Lang, and E. R. Bode. All of the defendants except Nowlin disclaimed. Nowlin answered by general denial, plea of not guilty, and a special plea, setting forth in detail the title asserted by him. There was a verdict and judgment in favor of the plaintiff, and the defendant Nowlin has appealed.

¹ For opinion on rehearing, see 66 S. W. 851.

Without stating all of the evidence, it is sufficient, for the purpose of this opinion, to say that the record shows that the defendant Buchholz made prior applications to purchase the land from the state, which applications, as well as those subsequently made by the plaintiff, were in due form, and accompanied by the partial payment of the purchase price and the obligation for the remainder, as required by law. However, the undisputed evidence clearly shows that at the time he made his applications to purchase he was not an actual settler on either survey. Thereafter the plaintiff, Hall, made his applications to purchase one of the surveys as an actual settler, and the other as additional land within a radius of five miles of his home tract, and testimony was submitted tending to show that he was an actual settler on the home tract at the time he made his applications to purchase. The land commissioner awarded both tracts to Buchholz on his prior applications to purchase, and rejected the plaintiff's applications because the lands had already been sold.

The sixth assignment of error complains of the court's charge because it assumed that prior to his applications to purchase the lands the plaintiff had not already purchased as much as four sections of school land from the state, and in not submitting that issue to the jury. In our judgment, this assignment must be sustained. If it be conceded, as we think the facts show, that the defendant had no title whatever to either tract of land, still, as the legal title to both tracts is yet in the state, and as the plaintiff's application to purchase had been rejected, the burden rested upon him, in order to recover the land, even from a trespasser, to show that he was entitled to purchase it from the state, and that his application to do so should not have been rejected. Now, the statute which authorizes the commissioner of the general land office to sell the school lands of the state prescribes the class of persons who may become purchasers thereof, and any one claiming the right to purchase thereunder must show that he comes within the class prescribed. The statute declares that such lands shall be subject to sale but to actual settlers only, except where otherwise provided by law, and in quantities not less than 80 acres or multiples thereof, nor more than four sections containing 640 acres more or less. The restriction in reference to the quantity of land which may be sold to one purchaser is of equal force with the requirement that such purchaser be an actual settler. Doubtless the legislative purpose was to promote the development of the territory in which the lands belonging to the state school fund are situated as well as to render that fund available for actual use, and it was supposed that this object would be best attained by selling the lands in limited quantities and to actual settlers only. But, whatever may have been the purpose intend-

ed, it is quite clear that the legislature had the power to limit the sale of these lands to a particular class, and that it has done so, and that no person belongs to that class, unless he has become an actual settler upon the land and has not already purchased four sections of such land from the state. Hence it is obvious, we think, that when the burden rests upon one to show that he belongs to the class referred to, it is quite as essential that he should show that he has not already purchased four sections as it is for him to show that he is an actual settler. This issue was not submitted to the jury, and neither the plaintiff nor any other witness testified in reference thereto.

The court instructed the jury that an actual settler in good faith "is one who prior to his application to purchase has, in good faith, actually settled upon the land for the purpose of making his home thereon." This is correct as far as it goes, and, without holding that reversible error was committed in this respect, we suggest that upon another trial this definition be enlarged by adding thereto that if the settlement upon the land or the application to purchase was made for the benefit of any other person or corporation, and not for the sole purpose of making a home for the plaintiff and his family, then he was not a settler in good faith at the time he applied to purchase.

The point is made that as the land had been previously awarded to Buchholz by the commissioner of the land office, and as appellant, Nowlin, had acquired Buchholz's title, it devolved upon the plaintiff to show that the commissioner of the land office had declared a forfeiture of Buchholz's title, as prescribed by article 4218L, Batts' Ann. Civ. St. In *O'Keefe v. McPherson* (Tex. Civ. App.) 61 S. W. 534, it was held that, when school land had been sold to an actual settler under the present law, there could be no forfeiture of the sale, by failure to occupy or otherwise, so as to place the land on the market again, until the commissioner of the land office had declared and indorsed the forfeiture in the manner prescribed by article 4218La, Batts' Ann. Civ. St. That decision may be correct, but the question there decided is not the one presented here. Forfeitures are not favored by law, and, if the statute has prescribed the mode of forfeiting contracts for the sale of public lands, the method thus prescribed must be pursued in order to produce that result. The question involved in this case is one of power. The statute authorizes the sale of school lands to a particular class of persons, and unless the purchaser belongs to that class the commissioner of the land office is without power to make the sale, and if he was without power to make the sale then his act in doing so was void and inoperative, and the land remained upon the market and subject to sale, the same as it was before the void contract was made. In *Eastin v. Ferguson*, 23 S. W. 918, the court

of civil appeals at Galveston, in a well-considered opinion, held that the action of the commissioner of the land office was not final in determining whether an applicant to purchase school land was an actual settler, and that one holding under a subsequent application had the right to show that the former applicant was not an actual settler upon the land, and therefore not entitled to purchase it; and a similar principle of law was announced and applied in *Gammage v. Powell*, 61 Tex. 629, and *McCarthy v. Gomez*, 85 Tex. 14, 19 S. W. 993. Hence we rule against appellant on this question.

The two tracts of land in controversy are designated sections Nos. 1 and 2, the former containing 640 acres, and the latter 370. Buchholz made application to purchase No. 1 as an actual settler, and No. 2 as additional school land within a radius of five miles of his home survey. His application to purchase No. 1 was made October 19, 1899, and his application to purchase No. 2 was made October 23, 1899. The plaintiff's applications to purchase the two surveys bear date March 15, 1900, and were filed in the land office March 19, 1900. While Buchholz was not an actual settler on either survey at the time he made his applications to purchase, there was evidence tending to show that he became an actual settler on section No. 1 before the plaintiff made his applications to purchase; and it is contended on behalf of Nowlin, who has succeeded to Buchholz's rights, that if at and prior to the time the plaintiff made application to purchase section 1 in addition to section 2, his home tract, Buchholz became an actual settler on No. 1, his right to purchase it for use as a home was superior to Hall's right to purchase it as additional land, and that Nowlin, as the assignee of Buchholz, would be entitled to a reasonable time to file an application and consummate a contract for the purchase of section 1. If the correctness of this proposition be conceded, —which, however, we do not decide,—we think Nowlin has waived whatever rights he had in that regard. The plaintiff's original petition was filed March 22, 1900, and the case was tried April 12, 1901. Nowlin purchased Buchholz's right to the land in February, 1900. So it appears that for more than a year before the case was tried Nowlin was apprised of the fact that his title was contested, and reasonable diligence would have disclosed the facts that the plaintiff had made subsequent applications to purchase the lands, and that Buchholz, at the time his applications to purchase were made, was not in fact an actual settler, yet it was not shown that either Buchholz or Nowlin had ever made any other application to purchase the lands. Certainly one year was more than ample time within which to make such application, and if the right to do so ever existed it was lost by a failure to exercise it within the time referred to.

One other point is all that we care to

discuss in this opinion. As before stated, Hall's applications to purchase were made at the same time and filed in the land office on the same day, and it is contended on behalf of Nowlin that Hall's purchase of section 1 is invalid because he was not then the owner of section 2, his home survey. The statute reads, "any actual, bona fide owner of and resident upon any other lands contiguous to said lands, or within a radius of five miles thereof, may also buy any of the aforesaid lands," etc. The testimony shows that section 2, Hall's home survey, was awarded to him first by the commissioner of the land office, and several days thereafter section 1 was awarded to him under the statute quoted. It may be true that he did not have the right to purchase section 1 at the time he made his application, because he was not then the owner of section 2, but at the time his application to purchase No. 1 was considered and approved he was the owner of, and an actual settler upon, No. 2, according to the verdict of the jury. So we are of the opinion that if he was an actual settler upon No. 2 at the time that No. 1 was awarded to him, and the rights of no third person had intervened, he was entitled to purchase both sections, and they were correctly awarded to him by the commissioner of the land office.

We rule against appellant on the other questions presented in his brief, except those complaining of the verdict. The case must be tried again, and we think the jury should pass upon the facts without any intimation from this or any other court as to how they should decide.

For the error pointed out, the judgment will be reversed and the cause remanded. Reversed and remanded.

GALLAGHER v. PUGH et al.

(Court of Civil Appeals of Texas. Jan. 15, 1902.)

GARNISHMENT—LIABILITY OF GARNISHEE—DEBTS CREATED AFTER SERVICE OF WRIT—ANSWER—TIME OF ANSWERING.

A garnishee, required by *Sayles' Ann. Civ. St. arts. 220, 222*, to state what, if anything, he is indebted to the defendant, and was when the writ was served, is liable for any indebtedness to the principal defendant created between the time of the service of the writ and the return day thereof, as well as for debts created before the service; and hence, where a garnishee answers before the return day, denying the indebtedness, it is error to refuse to require him to also answer on the return day.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Garnishment proceedings by J. N. Gallagher, as administrator of the estate of Daniel Baker, deceased, against W. A. Pugh & Co. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Prendergast & Sanford, for appellant. J. R. Downs and R. I. Munroe, for appellees.

FISHER, C. J. Gallagher, as administrator of the estate of Daniel Baker, deceased, sued J. K. and A. T. Rose, makers of a promissory note for \$1,000, dated September 24, 1899, due one year after date, payable to Gallagher, as administrator, and drawing interest at 8 per cent. per annum from date, and 10 per cent. attorney's fees. At the time of the institution of that suit the appellant sued out a writ of garnishment against the appellees, W. A. Pugh & Co., on the ground that the garnishees were indebted to the defendant J. K. Rose. The affidavit and bond were in the terms of the statute. On the same day (that is, April 15, 1901) the clerk of the court caused to be issued a writ of garnishment against the appellees in the terms of the statute, which was on the same day served upon the garnishees. The writ commanded the garnishees to be and appear before said court at the next term thereof, to be held at Waco, in said county, on the 1st day of July, 1901, then and there to answer upon oath what, if anything, they are indebted to the said J. K. Rose, or were when this writ was served upon them. On the 1st day of May, 1901, the garnishees filed their answer, to the effect that they were not indebted to the said J. K. Rose, and were not indebted to him when the writ of garnishment was served upon them. On July 2, 1901, the appearance day of the term of the district court, the appellant filed a motion requesting the court to strike out the pretended answer of the garnishees, and require them to at once answer, for the following reasons, and on the following grounds: (1) Because said pretended answer was sworn to and filed in this case prematurely, and not at a time when the law requires such answer to be made, sworn to, and filed. (2) Because the garnishees did not answer that they are indebted to the defendant J. K. Rose, and were on July 1, 1901, the time when they are commanded by the writ herein and the law to answer; and because they do not answer that they are indebted to the said defendant at the time from the date said writ was served upon them to July 1, 1901, the day on which court convened, and on which day they are required, by the terms of the writ served upon them and the law, to answer. (3) In said motion appellant also alleged that, between the time the garnishees swore to and filed said answer and the first day of the term of the court, they became indebted to said J. K. Rose for \$100, and said Rose, with intent to prevent appellant from holding them liable, thereupon induced and procured them to sign, swear to, and file said answer at the time it was done; and the said Rose and the garnishees, for the purpose and with the intent afore-

said, colluded, conspired, and confederated together, and the said garnishees so swore to and filed said pretended answer, and said Rose had them to do so, in order to defeat him and prevent his recovery of that much of said debt.

The case was tried July 13, 1901, upon the answer as filed by the garnishees; the court at the time overruling the above objections of appellant. We are inclined to the opinion that the court erred in refusing to require the garnishees to file their answer upon the date specified in the writ as the return day; that is, the first day of court at which they were required to appear and answer. It seems to be the settled doctrine in this state that from the date of the service of the writ to the filing of answer the garnishee can be held liable for any indebtedness created during that interval. *Gause v. Cone*, 73 Tex. 239, 11 S. W. 162.

The various provisions of the statute bearing upon the liability of the garnishee seem to require that his answer shall be so framed as to account for what he may be indebted to, or what effects he may have in his possession of, the defendant, up to the first day of the term of the court to which he is cited to appear and answer. That is to say, the statute requires that the writ of garnishment shall command the garnishee to appear before the court out of which the writ is issued on the first day of the ensuing term thereof, to answer upon oath what, if anything, he is indebted to the defendant, and was when said writ was served, and what effects, if any, he has in his possession, and had when such writ was served. Such is the effect of article 220, *Sayles' Ann. Civ. St.*; and the form of the writ, as required by article 222, keeps in view this requirement. There are other provisions of the statute bearing upon this subject, but we do not think they are inconsistent with the terms of the two articles of the statute just noticed. The purpose of these provisions of the statute evidently was to fix the liability of the garnishee up to the first day of the term of the court at which he was required to answer. The object was to hold him responsible not only to the date of the service of the writ, but for the interval of time between that time and the return day, upon which he was required to answer; and this view is in keeping with the principle decided in *Gause v. Cone*, supra. The failure to enforce these requirements of the statute might, and doubtless did, in this case, injuriously affect the interest of the plaintiff; and we see no reason in this particular instance, or in any other case where the question might be directly raised, why the requirements of the statute should be dispensed with, and the garnishee relieved of the duty of accounting for the effects in his possession, and the indebtedness he may be due the defendant up to the day on which he is required to answer under the terms of the

statute. We are of opinion that the court erred in the ruling complained of, and the garnishees should have been required to file their answer upon the first day of the term of the court at which they were required to appear.

As to whether or not the court should, upon another trial of this case, award attorney's fees, is a matter we do not decide; but we do not think that the amount allowed as attorney's fees was unreasonable.

For the errors indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

BRIDGES et al. v. WILLIAMS.¹

(Court of Civil Appeals of Texas. Jan. 15, 1902.)

NEW TRIAL—INABILITY TO PROCURE EXPECTED EVIDENCE—DISCOVERY DURING TRIAL—FAILURE TO ASK FOR CONTINUANCE—ACTION FOR CONVERSION—WRONGFUL TAKING—PERSONS ENTITLED TO POSSESSION—RIGHT TO SUE—SUFFICIENCY OF EVIDENCE.

1. Where defendants discovered during trial that certain account books material to their defense could not be procured, but failed to ask for a continuance in order to obtain them, they could not, after verdict, claim the right to a new trial because of the absence of such books.

2. While plaintiff's intestate was unconscious from the effects of poison, defendants went to his store, which was run under the name of the L. Co., which was not the intestate's name, and persuaded a clerk who worked in the store, but who had no authority to sell at wholesale, to deliver to them certain goods in settlement of a debt due them from the L. Co. The evidence showed that the intestate had run the business as the L. Co. for several years, and had always had complete possession and control thereof as if it were his own. The only evidence tending to show that the business was not his own were two letters introduced by defendants, found on his desk, one of which stated that the business did not belong to intestate, and the other that his total resources consisted of a small sum of money in the safe. Plaintiff's intestate never recovered consciousness, and never ratified the sale made by his clerk. *Held*, that the evidence was sufficient to show the property to have been assets of the estate, so as to support a verdict for plaintiff for possession or value of the goods.

3. Defendants had no title to goods nor right of possession, and hence were wrongdoers, as against whom the possession to which plaintiff was entitled as administrator was sufficient to give him the right to sue for the goods or their value.

Appeal from McLennan county court; G. B. Gerald, Judge.

Suit by Lud Williams, administrator, against Bridges & Early, to recover certain goods or their value, alleged to have been wrongfully taken from plaintiff's intestate by defendants. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Defendants set up that the Lewis Grocery Company was the owner of the merchandise, which owed them \$240.90, and that the goods taken by them from the company were in payment of that debt, and were substantially

the same goods sold by them to the company, the value of which was not more than sufficient to pay said debt. The goods were not found, and plaintiff had judgment for \$291.30, from which this appeal is prosecuted by defendants. The principal facts are clearly stated in the testimony of John Vivrett, as follows: "I knew A. B. Thomas in his lifetime. He died the 4th day of December, 1899. At the time of his death he was engaged in a grocery store on South Third street in Waco. I do not know who owned the business. It was known as the Lewis Grocery Company, a retail grocery company. Mr. Thomas employed me to work in the store. He gave me direction as to my duty. He managed the business. The stationery, bill heads, etc., bore the name of the Lewis Grocery Company. Mr. Thomas' name did not appear on any of the signs, paper, or bill heads. I do not know who composed the Lewis Grocery Company. Never did ask. The business was run under the name of the Lewis Grocery Company for five or six years prior to Mr. Thomas' death, and I never knew of anybody being connected with it. On the 4th day of December, 1899, about 6 o'clock in the morning, I found Mr. Thomas in the back end of the store in an unconscious state, and went out and called for help. We sent for Dr. Curtis, who arrived shortly afterwards, when he was taken to his boarding house, about four blocks away. I do not know whether he ever regained consciousness. If he did, I did not know it. He died that night about eleven or twelve o'clock. I was with him when he died. The Lewis Grocery Company owed Bridges & Early. During the day before Mr. Thomas died, Mr. Bridges came to me, and asked me to let him have the goods to the amount of their account. I was uncertain what to do, and put him off. We met several times during the day, and, finally, about seven o'clock, we met, and I told him that I would go to the store and get the goods. We (Mr. Bridges, and Mr. Penry, his attorney, and I) went to the store, and went in, and put up a wagon sheet to keep the curious passers-by from gathering about the front. Mr. Bridges knew of Mr. Thomas' illness and his likelihood to die, and that was discussed as one of the reasons he wanted his bill settled. Mr. Bridges collected such goods as had been bought from Bridges & Early, with a few exceptions. The prices were agreed on at cost or wholesale price, or, perhaps, a little more, and measured and counted and weighed, and all laid aside in a pile to themselves. We made no bill at the time. The amount of goods I let Bridges have about paid his debt. We got through about nine o'clock, and next morning came back, and I opened the store, and they took the goods out which had been delivered to them the evening before. The goods sold to Bridges, Early & Co. consisted of nearly all the staple goods in the store. The bill amounted to about the same sum due Bridges

¹ For opinion on rehearing, see 66 S. W. 484.

& Early by the Lewis Grocery Company. In discussing about selling them the goods, something was said about an attachment against the stock, and I thought I had better let them have the goods. I never settled any bills before. Mr. Thomas had never told me to do so. I did not keep the books, and did not know the state of the accounts with those from whom he purchased goods. I never sold such a bill before as this one to the defendants, or any one else. Mr. Thomas never told me to sell at wholesale. I did not sell any other goods during the day that Mr. Thomas was ill. I did not agree to let them have the goods until they threatened to attach the stock, which I was satisfied would be injurious to the business. Mr. Thomas never told me that the business was his, or who the Lewis Grocery Company was. My general duties were to sell goods, or take orders, etc., and I bought some goods. I took full control of the business in Mr. Thomas' absence. When Mr. Thomas was in jail on a charge of murder, the plaintiff, Mr. Williams, took charge of the business, and put me and a relative of his in charge. I don't know how he got the keys. I did not have any. This was in 1897, about two years before Mr. Thomas' death. The business was then on Eleventh and Webster streets, and after Mr. Thomas got out of jail he took charge again, and later on moved to South Third street. I always carried the keys to the Third street store. The morning I found Mr. Thomas, I also found two letters from him on his desk, one addressed to me and one addressed to Mr. W. E. Owens. (The witness was shown two letters addressed as stated, which he identified as the same letters, and said the same were written by A. B. Thomas, being the same letters introduced in evidence by defendants.) In talking about selling them the goods, something was said about running an attachment for the debt, and I thought I had better let them have the goods, and settle their bill. I never settled any bills before, unless Mr. Thomas told me to do so. I did not keep the books, and did not, therefore, know the state of the accounts with persons from whom he purchased goods. I never sold such a bill before to Bridges, Early & Co., or any one else. Mr. Thomas never told me to sell at wholesale. I did not sell any other goods during the day Mr. Thomas was ill." Thomas was unconscious from the effects of the poison he had taken—morphine and opium—at the time the goods were set aside for Bridges & Early, and was in that condition until he died. The testimony shows that he was in possession of the goods, and was carrying on the business in the name of the Lewis Grocery Company, and he had been doing business under that name for five or six years prior to his death. He knew nothing about the delivery of the goods taken by Bridges & Early, and was unconscious at the time the goods were taken by them. Bridges

& Early carried the goods away and appropriated them. Thomas was charged with murder in 1897, and he told his counsel that the little store was all he had in the world, and told the counsel that it belonged to him. This was about one year before he died. At Waco, December 3d, he wrote Mr. W. E. Owens the following letter: "W. E. Owens—Dear Bro.: What I am about to do, I will not attempt to justify, for to one who has not passed through what I have there could be no clear conception. The inhumanity of some of Waco's people is beyond belief, save to those who have borne its burdens. This is the last time I will be able to defend myself, so I wish to reiterate my evidence. I did not seek the difficulty with Penn & Stewart. It was forced on me. They were full of bad whisky (was there ever any good whisky?) That, coupled with their evil motives, made my appeals to reason unheeded. The fight was pushed on me. It was slay or be slain. I want you to see that I am buried. The business owes me (\$50.00) fifty dollars. It is all I have. It will buy a cheap coffin and pay for a coach. This business belongs to Dr. J. L. Goree, of Pine Bluff, Ark. I have no interest in it. I want John Vlivrett to have my personal belongings after I am buried. Forgive, oh, forgive, your Bro., A. B. Thomas." Also, under date of December 3d, the following letter: "Dear Old John: I cannot leave you without saying good-by, and thanking you for your faithfulness, and for the tender regard you always treated me with. Let us hope that there is a world beyond the cedars and the stars, when we may meet again, and find that peace so far removed in this. I have directed that you receive all my personal belongings. I would have done more for you, but it is impossible. I have exhausted all my means except fifty dollars, in the safe, to bury me. John, please look after the horse until he is disposed of. See that he gets proper attention. He, too, has been faithful. Again, there is the cat. If it is locked up in the store without food or drink for long, it, too, will suffer. If you have a few spare moments, please look after them for old time sake, and when you meet any one who stood by me in my hour of trouble thank them for me. I can't write them all. Now, farewell, and may your future be bright. Give my regards to your wife and boys. Your friend, A. B. Thomas. I have some money (\$2.50) in an envelope on the desk. It is for the druggist on Eighth street. You know him. Please see that he gets it." Both letters were read in evidence by defendants. Lud Williams qualified as administrator of Thomas' estate December 5th after Thomas died, and called on Bridges & Early for invoice of the goods taken by them out of the Thomas stock, and they gave it to him,—the same invoice upon which this suit is brought. He owed Bridges & Early \$240.96, and the value of the goods taken by them was about equal to the debt.

John G. Winter, for appellants.

COLLARD, J. (after stating the facts). Defendants moved for a continuance, which was refused, and they went to trial. After trial, they asked for a new trial, setting up the following as causes: "(1) That on the morning of said March 25th, and before announcing ready for trial in this cause, one of defendants' attorneys, to wit, the undersigned, John G. Winter, asked of the plaintiff, Lud Williams, Esq., where the books of account of the Lewis Grocery Company were, and Mr. Williams replied that they were at his office, and in response to further inquiry by said Winter said that said books could be obtained on adjournment of court. That said Winter relying thereon, and knowing that he would not reach the period in the trial of the case until the afternoon when such books would be needed to offer in evidence, the defendants went to trial, expecting and believing that said books could and would be then produced in court. That at the noon recess on said 25th of March of this court, L. C. Penry, Esq., one of the attorneys for defendants, at the instance of said Winter, went to plaintiff's office for said books, to obtain and use them in evidence for defendants at the afternoon session of court; but said Penry was then informed, as affiant is informed and believes, and so avers, by said Lud Williams (plaintiff) that he (plaintiff) was mistaken in thinking that said books were in his office, and that they were locked up in a certain safe, which was held by the Cooper Grocery Company. That thereafter, at the afternoon session of court, said plaintiff and M. A. Cooper, a witness on the trial of said cause, in open court stated that the combination of said safe had been lost or mislaid, and that it was impossible to open said safe until the combination could be obtained from the makers of said safe. That a day or two after said time, when it was definitely found that said safe could not otherwise be opened, defendants procured the said M. A. Cooper to write to the makers of said safe, to wit, the Mosler Safe Company, at Hamilton, Ohio, to send said combination; and these defendants remitted to said company one dollar and fifty cents, the fee charged therefor. That on or about the 6th day of April defendants learned that said Cooper had received said combination, and at once applied to said Cooper to open said safe, and allow defendants access to said books; but that said Cooper refused to do so except in the presence of plaintiff. That defendants were unable to secure a meeting with plaintiff at the place where said safe was, to have it opened until, to wit, the 10th day of April, at which time said safe was opened, and said books taken therefrom. That defendants immediately procured said books to be examined by a competent person, to wit, G. H. Bridges; and defendants are informed and believe, and upon said information and

belief aver and show to the court, that it appears from the entries in said books of account that the business of the Lewis Grocery Company belongs to two men, to wit, N. E. Lewis and J. L. Goree, and not to plaintiff's intestate, and defendants hereto attach the affidavit of said Bridges to that purport, and make the same a part hereof, and pray that it so be taken and allowed; and defendants show to the court that by reason of the premises it was impracticable for them to make said proof on the hearing of this cause." The court overruled the motion for new trial, and appellants assign this action as error.

There was no error as assigned. They should have asked for a continuance or a postponement of the trial which was in progress as soon as they learned that the books could not be produced. Instead of this, they proceeded with the trial without objection, taking chances on a verdict on testimony,—letters of Thomas disclaiming rights of property in the store,—and, after verdict, undertook to have it set aside, and a new trial granted. The court had the power—discretionary—to grant a continuance during progress of the trial. Failing to avail themselves of this privilege, they cannot, after verdict, claim the right to a new trial. The evidence was sufficient to support the verdict upon the ground that the goods taken were the property of deceased and assets of the estate, to the possession of which the administrator was entitled for purposes of administration.

2. Defendants had no title to the goods, or right of possession, and were wrongdoers in taking them without the consent of Thomas, who was in possession of them. It is the law that possession of personal property will support an action for its recovery against a wrongdoer. *Grooms v. Rust*, 27 Tex. 234. If the goods cannot be found, then an action will lie in favor of the person entitled to the possession for their conversion. Williams, as administrator, was entitled to the goods or their value, and it was his duty to creditors and the estate to recover them.

There was no error, and the judgment of the lower court is affirmed. Affirmed.

RAILROAD COMMISSION OF TEXAS v. WELD et al.¹

(Court of Civil Appeals of Texas. Jan. 15, 1902.)

CARRIERS—COMMERCE—REGULATION OF—RAILROAD COMMISSION—REGULATIONS OF—REVIEW—JUDGMENTS—FINALITY—APPEALS—JUDGMENT FOR COSTS.

1. A judgment in an action under *Sayles' Ann. Civ. St. art. 4565*, and *Batts' Ann. Civ. St. art. 4565*, by a person dissatisfied with the decision of the railroad commission as to any rate, classification, or regulation of the commission, which only finds that a certain regulation of freight rates by the commission, and its refusal to establish a different rate, are unjust and unreasonable, but which does not accord any relief

¹ Writ of error granted by supreme court.

to the plaintiff, is not a final judgment from which an appeal may be taken.

2. The fact that such judgment awards costs against the commission does not render the judgment final, in such a sense as to authorize an appeal.

3. The statute only authorizes the trial of a judicial controversy between the litigants, and does not confer upon the court an advisory power to pass on the rules and regulations of the commission.

Appeal from district court, Travis county; B. L. Penn, Judge.

Action, under Sayles' Ann. Civ. St. art. 4565, by Weld & Neville and others against the railroad commission of Texas, for the review of a regulation of freight rates of the commission. From a judgment in favor of the plaintiffs, the defendant appeals. Appeal dismissed.

This suit, instituted by appellees, was upon a cause of action stated in the original petition substantially as follows:

First. That the railroad commission of Texas had established rules and regulations for the transmission of cotton, providing for (1) the transportation of cotton in bales from interior points within the state of Texas to Galveston and Houston; (2) a differential of 6 cents per 100 pounds between Galveston and Houston; (3) a territory, no point of which is more than 100 miles from Houston, within which territory the rate is based approximately upon the length of the haul; (4) a "common territory" constituting the remainder of Texas, within which, without reference to distance, the rate is the same from all points; (5) the hundred-weight as the basis for the rate, no difference being made between car-load and less than car-load lots; (6) special rates from points affected by special conditions; (7) a reduction in the rate for increased density of the bale.

Second. That the regulation providing for reduction in rate for increased density of the bale recognized the benefit to the transporting company of compression beyond the density ordinarily attained at the gin, in the consequent saving in car space, and the decreased risk from fire and other causes of injury.

Third. That, in the accomplishment of these ends, (1) compression before shipment or in transit was authorized; (2) the compression is at the initial point of shipment, if a compress is located at such point; (3) if there is no compress at the initial point, compression is at the nearest compress on the line, and in the direction of shipment; (4) the charge for compression, to the extent of 10 cents per 100 pounds, is to be refunded by the transportation company; (5) compression must be to the density of 22½ pounds per cubic foot; (6) within territory between 70 miles and 100 miles from Houston towards the interior, compress charges are apportioned between the shipper and the transportation company; (7) within ter-

ritory not further than 70 miles from Houston, the transportation company is not required to bear the expense of compression.

Fourth. That the regulations provided by the commission are made with reference to the system of handling cotton which has been in vogue, and is still most generally used, and involving (1) compression at the gin into bales of from 54 to 55 inches in length, of from 28 to 36 inches in width, and of from 24 to 28 inches in thickness; (2) transportation from the gin to the nearest railroad station; (3) transportation to the nearest compress station in the original bale (flat cotton) in cars containing about 25 bales, or 12,500 pounds; (4) unloading, compression to a density of 22½ pounds per cubic foot, and reloading; (5) transportation of compressed cotton in cars containing about 50 bales, or 25,000 pounds, to the seaboard; (6) the cost of concentrating at compress points, and the cost of compression, ordinarily to be borne by the railroad company.

Fifth. That the expense of concentration and the compression is placed upon the railroad companies, because the cost to the railroad company of transportation is thereby reduced by decreasing the amount of rolling stock required for the last haul in an amount in excess of the charges required to be paid, and that the regulation is recognized and established by the commission as reasonable and proper.

Sixth. That the plaintiffs are interested in one of several improved and economical methods of handling cotton which have been put in successful operation within the state; that this system involves the use of the Lowry press, which has the following features: (1) The cotton lint goes directly from the gin stand to the press. (2) At the first and only compression it is pressed into cylindrical bales 32 inches in length and 18 inches in diameter. (3) The bale weighs about 250 pounds, and is of a density of more than 40 pounds per cubic foot. (4) The bale is (a) convenient in size and weight for handling; (b) impervious to water; (c) incombustible; (d) capable of being loaded in ordinary box cars to the number of 200, or 50,000 pounds; (e) capable of being loaded in a car to its rated capacity and the allowable excess; (f) capable of being carried on flat cars without injury from weather or danger from fire.

Seventh. That the cotton crop of Texas consists annually of about 3,000,000 bales of cotton, of 500 pounds each; that practically all of it has to be transported by the railroads of the state; that this cotton constitutes the most considerable article of transportation by the railroad companies; that practically all of said cotton is harvested and marketed within the last four months of each year, and that the transportation thereof is almost exclusively within that period; that the handling thereof involves the use of a large amount of rolling stock that cannot be used except during the cotton

season, and that there is no return freight for more than half the cars needed therefor; that disastrous car famines result from this great demand; that large investments of money in cars not at other times required are necessary; that long delays in transporting cotton are of frequent occurrence; that the absence of sufficient cars to properly handle the crop, under the conditions which have existed, has resulted in the use of flat cars therefor; that said flat cars are absolutely unfitted for the transportation of flat cotton and cotton compressed to a density not exceeding 22½ pounds to the cubic foot; that their use subjects such cotton to danger from fire and to damage from weather; that resulting therefrom are frequent claims for "country damage," and increase of insurance rates on all cotton transported within the territory in which flat cars are so used.

Elighth. That cotton compressed by the Lowry system has advantages as compared with other classes of freight, in that its shape and weight make it convenient to handle; that it is not breakable, is incombustible, and cannot be damaged by water or weather; that it may be loaded without damage to the car; that it may be loaded to the capacity of the car; that it may be safely carried on flat cars. That cotton so compressed has additional advantages over cotton compressed in the ordinary way, in saving the cost of concentration, which includes (1) expenses incident to short hauls; (2) to carrying of the original package pressed to a density of from 8 to 12 pounds per cubic foot; (3) the stopping of trains and the use of the road engine for switching; (4) the use of four cars for hauling weight which could be carried by one, the cost of empty return cars, and the cost of reloading. That the cost of transporting the Lowry bale from the initial point is about one-half the cost of hauling of ordinary compressed cotton from the compress point; this difference resulting from the fact that, the Lowry cotton being compressed to more than twice the density of the other compressed bale, it may be loaded to the rated capacity of the car, while the other may be loaded to not more than one-half the capacity of the car.

Ninth. That the elimination of cars used in concentration and the reduction of cars used in the second haul would result in the decrease of the number of cars required to about one-fourth, the releasing of cars for general traffic, and the prevention of car famines.

Tenth. That, notwithstanding the fact that cotton properly compressed is the most desirable class of freight from the standpoint of the transportation companies, the railroad companies secure for the transportation thereof higher compensation per car load than any other class of freight.

Eleventh. The plaintiffs then cited a series of shipments, showing that during the sea-

son of 1900-1901 the Gulf, Colorado & Santa Fé Railway Company had received for transportation of cotton (old style) \$140 per car, or 45.7 cents per car per mile; for Lowry, \$269.84 per car, or 80½ cents per car per mile; that the Missouri, Kansas & Texas Railway Company had received for cotton (old style) \$143.50 per car, or 41½ cents per car per mile; for Lowry, \$265.69 per car, or 98½ cents per car per mile. They alleged that the revenue derived from handling cotton compressed under the new method is greatly in excess of that derived from cotton handled in the old way, and that the cost under the new method is very much less, and that to establish the same rate for both classes of cotton is unjust and inequitable, and a discrimination against plaintiffs, who are alleged to be buyers, owners, and shippers of Lowry cotton, and that, under the regulations complained of, the railroad companies are given an extraordinary and unreasonable revenue and profit for transporting Lowry cotton.

Twelfth. The plaintiffs allege that prior to the institution of the suit they had made application to the railroad commission, asking that upon a proper hearing the rates established by the commission for the transportation of cotton be reduced upon cotton compressed at the gin to a density of 40 or more pounds per cubic foot, in accordance with the principles that had theretofore been established by said commission as to compression, and in consideration of the elimination of the cost of concentration; that the commission refused to grant a hearing upon the merits of the application, ascribing as a ground for such action that the making of the reduction asked would give the owners of improved presses "a practical monopoly of the business of compressing cotton," to the injury of owners of steam compresses; that plaintiffs thereafter made another application to the railroad commission for the relief for which they ask in this suit, and a hearing upon the application was refused,—the commission's action being predicated upon its apprehension of a trust, and its fears of injurious effects upon established industries.

Thirteenth. That in the last application to the railroad commission the plaintiffs had asked for the establishment of regulations as follows: "Cotton compressed at the gin to a density of forty or more pounds per cubic foot shall be transported from Texas common points at the flat rate of 34 cents per hundred pounds to Houston, and 40 cents per hundred pounds to Galveston. From points seventy miles from Houston, and not more than 100 miles therefrom, the rate shall be the established rate for uncompressed cotton, less ten cents per hundred pounds, and less the amount per hundred pounds under the established rules payable by the railroad companies as compress fees. From points within 70 miles of Houston, the rate shall be

ten cents per hundred pounds less than the rates established for uncompressed cotton. From all points with reference to which special rates are established, 10 cents per hundred pounds less than the established net rate."

Fourteenth. That the refusal to grant a hearing and the refusal to establish the regulations requested were unreasonable and unjust to plaintiffs, and that the regulations requested were reasonable and just to defendant, and they prayed that the regulations be established by the court.

Fifteenth. Plaintiffs further prayed that if, for any reason, there was a refusal to establish the regulations asked for, then that a judgment be entered (1) declaring that it is unreasonable that the same rates, rules, and regulations of transportation should be applied to cotton compressed to a density of 40 or more pounds per cubic foot and to cotton compressed to a density of only 22½ pounds per cubic foot; (2) that it is unreasonable that the same rates, rules, and regulations of transportation should be applied to cotton compressed at the gin and cotton that has been hauled by the railroad for purposes of concentration at compress points; (3) that it is unreasonable to fix the same rate for handling cotton compressed under the improved system, as hereinbefore set forth, as for cotton prepared for shipment under the old method; (4) directing said railroad commission to promulgate rates which recognize and make reductions for the savings effected to the transportation companies by the improved methods of handling and compressing cotton as hereinbefore set forth.

By first amended original answer, defendant:

First. Demurred generally.

Second. Specially excepted to plaintiffs' petition, presenting: (1) That the courts had no jurisdiction to review the action of the commission in fixing rates. (2) That in establishing rates the railroad commission were acting within the limits of their discretion, and that the exercise of the discretion was not reviewable by the courts. (3) That unjust discriminations are alone prohibited, and that what is unjust discrimination is within legislative discretion, and not subject to judicial review. (4) That the rates fixed are not complained of as unreasonable. The railroad companies could alone complain. (5) That plaintiffs are complaining and asking to have a discrimination in their favor.

Third. Specially excepted to the prayer of plaintiffs for specific regulations; asserting that the court could grant no other or further relief than to declare the regulations, rates, classifications, etc., complained of, unreasonable and unjust.

Fourth. Denied generally.

Fifth. Answered specially, saying: (a) That it appeared from the plaintiffs' petition that the Lowry system, even under established rates, has such advantages over the

established system of compressing cotton that to give the plaintiffs what they sought would result in the destruction of the business of those interested in the system for many years in use in the state; that there are in operation in the state 89 compresses, representing an investment of \$4,500,000, and giving employment to a large number of persons; that there are about 5,000 gins and cotton presses engaged in ginning and pressing ordinary square bales, in which are invested about \$10,000,000; that there are many people engaged in said business, many of them being of small means; that 95 per cent. of the entire cotton crop of the estate is ginned and baled by the square-bale process; that, if plaintiffs are given the advantage which would ensue by reason of the classifications and freight rates sought by plaintiffs, the consequence would be that all persons engaged in ginning and baling cotton by systems other than that used by plaintiffs would be driven out of business, and thereby a monopoly would be created, and the competition between those engaged in putting up cotton by the round-bale system and those putting it up by the square-bale system would be destroyed. (b) That the rates, classifications, etc., are not unreasonable, unfair, or unjust in themselves, and are absolutely necessary to be retained.

Sixth. Further answering specially, said: (a) That it is impracticable to make a freight rate based on density as compressed, further than has been already done, for the reason that, while the density required by the regulations complained of is 22 pounds to the cubic foot, of the 89 compresses in operation in this state no two of them compress cotton to the same density; the density varying from the required 22 pounds to the cubic foot to 28 pounds, and in some cases to 40 pounds to the cubic foot. (b) Plaintiffs by supplemental petition excepted to so much of defendant's answer as set up the character and amount of the investment in compresses, and of the number and character of the people engaged in the business, and the parts thereof, to the effect that the result of the granting of the rate asked would be the creation of a monopoly and the destruction of competition.

Independent of the ruling of the court on the question of demurrers, the judgment of the trial court is as follows: "And on the 13th day of June, 1901, the court, having fully considered the matters of law, as well as of fact, is of the opinion that the law and the facts are with the plaintiffs. It is therefore adjudged by the court that the present classifications and freight rates established by defendant, applicable to transportation of cotton, whereby the same rate of freight is required to be charged and paid for transportation on the various railroads in this state on cotton in round bales, eighteen inches in diameter, thirty-six inches in length, and weighing two hundred and forty

pounds or over per bale, and having a density of forty pounds or over to the cubic foot, and of cotton in bales of the ordinary form, compressed to a density of twenty-two and one-half pounds to the cubic foot, are, as to the plaintiffs Dorance, Cairns & Co. (a partnership composed of J. M. Dorance and A. C. Cairns), Hasler & Boyd (a partnership composed of S. O. Hasler and W. W. Boyd), D. M. Howard, T. G. Cole, Weld & Neville (a partnership composed of Stephen M. Weld, Chas W. Ide, George W. Neville, Alfred R. Weld, Edward M. Weld, and James F. McGowan), Hillsboro Gin Company, Peoria Gin Company, Clemma Gin Company, and Wharton Gin & Milling Company, unjust and unreasonable. It is further adjudged by the court that the refusal on December 17, 1900, by defendant to establish a different and lower rate of freight on cotton in such round bales, of the dimensions and density aforesaid, for transportation of the same on the various railroads in this state, than the rate established and required to be paid for such transportation on cotton in bales of ordinary form, compressed to a density of twenty-two and one-half pounds to the cubic foot, is and was, as to plaintiffs, unjust and unreasonable. It is further adjudged by the court that none of the reasons assigned by defendant in its refusal of December 17, 1900, to establish a different and lower freight rate on cotton in round bales, and of the dimensions and density aforesaid, than on cotton in bales of the ordinary form, compressed to a density of twenty-two and one-half pounds to the cubic foot, could properly be taken into consideration by defendant in determining the question of a proper classification of, and proper freight rate on, such round bales. It is further considered and ordered by the court that the plaintiffs, Dorance, Cairns & Co., Hasler & Boyd, D. M. Howard, T. G. Cole, Weld & Neville, Peoria Gin Company, Clemma Gin Company, Hillsboro Gin Company, and Wharton Gin & Milling Company, do have and recover of and from the railroad commission of Texas all the costs of this suit."

C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for appellant. Gregory & Batts and Hutcheson, Campbell & Hutcheson, for appellees.

FISHER, C. J. (after stating the facts). This action is predicated upon articles 4565, 4566, Sayles' Ann. Civ. St., and Batts' Ann. Civ. St., which are as follows:

"Art. 4565. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification or order, or to either or all of them,

in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: provided that if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice.

"Art. 4566. In all trials under the foregoing article, the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence, that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

In our opinion, the judgment appealed from is not final, in that it fails to dispose of the subject-matter of the suit, and fails to pronounce the sentence of the law upon the facts established by the judgment. The judgment of the court is a mere judicial declaration to the effect that the rules established by the commission for the transportation of cotton, and the refusal to make different rules applicable to cotton of the density compressed by appellees, are unjust and unreasonable to the appellees. No relief is accorded, nor is the sentence of the law pronounced upon the facts established by the judgment. A mere statement or declaration contained in the judgment that the complaining party is right, or that facts exist that would entitle him to relief, without pronouncing the sentence of the law upon the established facts to the extent of according some substantial relief, so as to make the remedy pursued effective, is not a final and effective disposition of the subject-matter of the controversy. The judgment should not only ascertain the facts, but the legal consequences that flow from them must be pronounced. In *Eastham v. Sallis*, 60 Tex. 580, it is said: "The entry originally made in the minutes of the district court of Washington county shows (1) that the court declared the default of Sallis, and that by reason thereof the plaintiff ought to recover his damages; (2) that the court ordered the clerk to assess the damages, and that this was done, and that the court directed, in language appropriate to a judgment, that execution issue against each party for the costs by them severally incurred. There is, however, no declaration in the record of the decision or sentence of the law pronounced by the court upon the matter contained in the record." In the absence of this, there was no final judgment. The assessment of the

damages by the clerk could have no greater effect than the verdict of a jury, which, however formal, is but the basis upon which a judgment may be rendered by the court. The entry in this cause claimed to be a final judgment contains no declaration that the plaintiff, in the opinion of the court, was entitled to recover from the defendant any sum of money. The mere fact that the clerk may have assessed the damage at a certain sum is not sufficient. In the cases of *Barnett v. Caruth*, 22 Tex. 174, 73 Am. Dec. 255, and *Dyer v. Sullivan*, 18 Tex. 770, the entries were very similar to that relied upon in this case, and they were held insufficient. As said in *Spiva v. Williams*, 20 Tex. 443: "The very object of a suit is to adjudicate and declare the respective rights of the parties in a shape so that the ministerial officers can with certainty carry into execution the judgment of the court without the ascertainment of additional facts. It is obvious that such is not the case here." See, also, *Stafford v. King*, 30 Tex. 277, 94 Am. Dec. 304. A judgment for costs which does not dispose of the subject-matter of the suit has been often held by this court not to be a final judgment. *Warren v. Shuman*, 5 Tex. 441; *Neyland v. White*, 25 Tex. 319; *Martin v. Wade*, 22 Tex. 224; *Fitzgerald v. Fitzgerald*, 21 Tex. 415." In *Hanks v. Thompson*, 5 Tex. 8, it is said: "A final judgment must mean, then, the awarding the judicial consequences which the law attaches to the facts, and determines the subject-matter of controversy between the parties." This definition was approved by the court in *West v. Bagby*, 12 Tex. 34, 2 Am. Dec. 512; *Linn v. Arambould*, 55 Tex. 617; and *Fitzgerald v. Evans*, 53 Tex. 462, where it is held that the tests of finality are a judicial ascertainment of the facts, with a recorded declaration of the court pronouncing the legal consequences of the facts; and, in the case noted, the judgment failed to provide that execution issue, and this was held sufficient to show a want of finality. Similar cases bearing upon this question are *Warren v. Shuman*, 5 Tex. 449; *Green v. Banks*, 24 Tex. 525; *Neyland v. White*, 25 Tex. 319; and *Figures v. Dunklin*, 68 Tex. 644, 5 S. W. 503. The defect in the judgment pointed out cannot be aided by that part of it which awards costs, because it is distinctly held in the cases heretofore cited that a judgment for costs, merely, is not a final judgment. In nearly all of the cases noted, the appeals were dismissed.

The court, in this case, if right (a question which we do not decide) in establishing by the judgment the facts found, should have extended some relief in the nature of abrogating the rules of the commission in so far as they affected the interests of the plaintiffs, and enjoining their enforcement if they were unfair and unjust to the plaintiffs. We do not mean to intimate that the court was or was not correct in the conclusion reached

upon this subject, but we are simply indicating how far the judgment should go in order to make it final when the court does reach a conclusion upon the facts indicated. Nor do we pass upon the sufficiency of the prayer of the petition to accord this relief. Nor do we intimate any opinion as to the power or want of power of the trial court to establish rules and regulations, or to require the commission to do so, relating to the questions urged by the plaintiffs in their petition; for, as to all of these matters, we are not in a position to express any opinion, as we are wanting in jurisdiction on account of the judgment not being final. We cannot by intendment supply the matters necessary to make a final judgment; for, as said in *Hancock v. Metz*, 7 Tex. 177, the judgment, in "substance, must show intrinsically and distinctly, and not inferentially, that the matters in the record had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated." In *Loan Co. v. Winter* (Tex. Sup.) 57 S. W. 41, it is said: "It is not enough to make a final judgment that we can see that the court ought to have rendered one. What the court did must have amounted to a final determination of the rights of the parties, resulting from the ruling made."

The statute upon which this action is predicated evidently intended to apply to a controversy in the nature of a case or cause of action cognizable within the meaning of the provisions of the constitution conferring jurisdiction upon the trial and appellate courts,—a case within the meaning of which must be a judicial controversy between litigants, in which all of the consequences may be established necessary to accomplish the final judicial purpose of taking hold of and enforcing a remedy. And it would be a violent construction of the terms of the statute to say that its purpose was to overturn the settled principles of jurisdiction as exercised by the courts, and that the purpose was to confer upon these courts mere advisory power concerning the conduct of the other departments of the government. The judgment here is a mere judicial expression of the court, of an advisory nature, to the members of the commission,—that, in its opinion, they were wrong,—which, so far as anything to the contrary is determined by the judgment, they may heed or not, as they see fit. If the purpose of the statute was to merely confer upon the court authority to this extent, or to decide abstract questions of law that do not arise in a case or cause of action pending before the court, a serious objection could be urged to the statute, in that it would be in violation of those provisions of the constitution conferring jurisdiction upon the courts.

The judgment not being final, the appeal will be dismissed at the costs of appellant. Appeal dismissed.

HILDEBRANDT v. AMES et al.¹

(Court of Civil Appeals of Texas. Dec. 6, 1901.)

LIFE INSURANCE—DEATH OF BENEFICIARY AND INSURED—SUIT BY ADMINISTRATOR—BURDEN OF PROOF.

1. Insured and the beneficiary, who was the wife of insured, both perished in a flood which swept over a city; and, in a suit by the administrator of the assured, he sought to show that his decedent had survived the beneficiary. It appeared that on the day of the storm insured had started out in a wagon, saying that he was going home to get his wife; and about 4 o'clock, while the storm was raging, a witness saw the wagon going along a street in which the water was running as high as the horse's belly, the horse moving as though he were being driven; but witness could not see whether there was any one in the wagon. The house where the beneficiary lived was not blown down or washed away until about 7:30. *Held*, that the evidence was insufficient to raise an issue as to the survivorship.

2. Where a life policy provided that it should be payable to a certain beneficiary, if living, otherwise to the executors of the insured, in a suit by the administrator of the insured against the insurance company and the administrator of the beneficiary to recover the proceeds of the policy the burden was on administrator of beneficiary to show that his decedent had survived the insured.

Appeal from district court, Galveston county; Robt. M. Franklin, Judge.

Suit by W. H. Ames, as administrator of the estate of Frank Doll, deceased, against E. E. Hildebrandt, as administrator of the estate of Minnie Doll, deceased, and another. From a judgment in favor of plaintiff, defendant Hildebrandt appeals. Affirmed.

Wm. F. Koch and Maco & Clegg Stewart, for appellant. Harris & Harris, for appellees.

PLEASANTS, J. This suit comes as aftermath of the ever-memorable storm of September 8, 1900, which devastated a large portion of the city of Galveston, and caused the untimely death of a great number of the residents of said city. The only issue involved in the suit is the proper disposition of the proceeds of a life insurance policy in the sum of \$2,500 taken out by Frank Doll in the Mutual Life Insurance Company of New York, and payable to his wife, Minnie Doll, "if living; if not living, to the insured's executors, administrators, or assigns." Frank and Minnie Doll both resided in the city of Galveston on the 8th of September, 1900, and neither have been seen since said fateful day. The appellant, E. E. Hildebrandt, is the administrator of the estate of Minnie Doll; and the appellee W. H. Ames, of the estate of Frank Doll; both said administrators having duly qualified as such under legal appointment. The suit was instituted by appellee, as administrator of the estate of Frank Doll, against the insurance company and appellant, as administrator of the estate of Minnie Doll, to recover the amount due upon the

policy. The insurance company answered, acknowledging its liability upon the policy, and paid the money into the registry of the court, to be disposed of as the court might adjudge as between the appellant and the appellee. The appellant answered, and claimed the fund as an asset of the estate of Minnie Doll. The case was tried by the court below without the intervention of a jury, and judgment was rendered in favor of the plaintiff for the entire amount of the proceeds of said policy, and against the appellant for all costs of suit, except a fee of \$150 allowed the attorney for the insurance company, which fee was ordered paid out of the proceeds of said policy. It was further decreed that "this judgment, however, shall not prejudice the rights of the heirs of Minnie Doll, or the administrator of Minnie Doll's estate, to assert in the administration of the estate of Frank M. Doll, deceased, any interest in said fund as the community estate of Frank and Minnie Doll, deceased."

The facts in the case are few and undisputed. The material parts of the policy sued on are as follows: "In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office, in the city of New York, unto Minnie Doll, wife of Frank M. Doll, of Flatonia, county of Fayette, state of Texas, if living,—if not living, to the insured's executors, administrators, or assigns,—twenty-five hundred dollars, upon acceptance of satisfactory proofs at its home office of the death of said Frank M. Doll during the continuance of this policy, upon the following conditions, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof: The annual premium, fifty-two dollars and fifty cents, shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office, in the city of New York, on the fourteenth day of April in every year during the continuance of this contract." Frank M. Doll and Minnie Doll, his wife, both perished in the storm on Galveston Island September 8, 1900. They lived at Thirty-Ninth and T, in the western part of the city of Galveston. He left B. G. Tartt's grocery store in a wagon, on the cover of which was painted, "B. G. Tartt, Grocer;" it being the only wagon of Tartt's going to that part of the city on said date. Doll stated that he was going home to get his wife at his residence on Thirty-Ninth and T. This was about 1 o'clock p. m. on September 8, 1900. The horse and wagon were never seen after the storm. About 4 o'clock in the evening of September 8, 1900, Mr. Jennings was at Thirty-Eighth and Avenue S½, while the storm was raging; and he saw this wagon coming north, towards the city proper, on Thirty-Ninth street, between S and S½, about a block nearer the portion of the city than

¹ Rehearing denied January 9, 1902, and writ of error denied by supreme court.

was Doll's residence. The horse drawing the wagon was belly deep in water, and moving as though he were being driven and guided. The reins and harness on the horse moved up and down as though they were being handled by some one in the wagon, but witness could not see and did not know whether there actually was any person or persons in said wagon. He could not see because of the cover on the wagon. There was a heavy southeast current on Avenue S at the time. The houses at Thirty-Ninth and T were not blown down or washed away until about 7:30 p. m. Witness did not know Frank M. Doll or his wife.

This is all of the evidence in the case, and we think it is insufficient to raise the issue of the survivorship of either Frank or Minnie Doll; and until the sea gives up her dead, for aught that these facts disclose, we may not know whether one survived the other, or, having in life together faced the overpowering fury of the mad waves which engulfed and destroyed the homes and lives of a great number of the inhabitants of the fated city of Galveston, they were not divided in death by the space of even a moment's time. The common law, which is at once the product and conservator of that rugged independence and sturdy self-reliance which has ever characterized the English-speaking people, disdaining to borrow from the more ancient Code of Rome, which has formed the foundation of the system of jurisprudence of many of the most enlightened nations of the world, refused to indulge in any presumption either of survivorship or of the simultaneous death of persons who perish in a common disaster, and applied to this class of cases the general rule that courts will not change the existing status or possession of property except upon adequate proof of facts authorizing such change. According to the Roman law, the presumptions were never in favor of a simultaneous death. If a parent and son perished in the same battle or shipwreck, the son above the age of 15 was presumed to have survived his father; under that age, to have predeceased him. If persons perishing in the same disaster were all under 15 years of age, the presumption was that the elder survived; if over 60, the younger was presumed to have survived; and, if husband and wife perished in a common disaster, the wife, being the weaker, was supposed to have died first. In this connection it is interesting to note the law on this subject which prevails in other nations of the world. In Holland, Prussia, and Austria, the presumption is that those who perish in a common disaster die together, and no one receives or transmits succession. The law of India is to the same effect. The Code Napoleon contains the following provisions:

"Art. 720. If several individuals respectively entitled to inheritance from one another should die by the same event without any one being able to ascertain which died first,

the presumption of survivorship is determined by the circumstances of the fact; but, these being wanting, by the conditions of age and of sex.

"Art. 721. If those who thus died were under fifteen years of age, the eldest will be presumed to have survived; if all were above sixty the youngest will be so presumed; if some were under fifteen and some were above sixty the former will be so presumed.

"Art. 722. If those who thus died were between fifteen and sixty years of age, the presumption of survivorship is with the male as against the female if the difference of age between them does not exceed a year. If those who thus died were of the same sex the presumption of survivorship follows the order of nature and the younger must be presumed to have outlived the elder."

Italy and Spain have followed the French Code, with slight modifications. In all of the states of the American Union, with the exception of Louisiana and California, the common-law rule prevails, and no presumptions are indulged. The jurisprudence of the two states just named being largely derived from the French and Spanish, they have adopted the rule of the Roman law, as modified by the French and Spanish Codes. In this state it is well settled that the common-law rules prevail, and no presumptions are indulged. *Paden v. Briscoe*, 81 Tex. 563, 17 S. W. 42; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385.

There being no presumption either of survivorship or of simultaneous death, and no evidence in the case to sustain a finding of either of these facts, it is manifest that the party upon whom lay the burden to establish such survivorship or simultaneous death has failed to make out his case, and the only question for us to determine is upon which of the parties to this suit such burden was imposed. The determination of this question is not affected by the position of the parties as plaintiff or defendant in the court below. Of course, the burden was on the plaintiff to make out a *prima facie* case; and the question is, did he do this by showing the issuance of the policy to his decedent, payable as before stated, and the death of both the insured and the beneficiary in a common disaster, or do such facts show a *prima facie* right to the proceeds of the policy in the representative of the beneficiary, and require plaintiff, to entitle him to recovery, to further show that his decedent survived his wife, or that both perished at the same time? The question is one of much difficulty, and, so far as we have been able to ascertain, has never been directly decided in this state. The case of *Paden v. Briscoe*, *supra*, which is recited and relied on by both appellant and appellees, was a suit upon a benefit certificate issued by the Supreme Lodge Knights and Ladies of Honor to John F. Briscoe. The suit was brought by Paden, as administrator of

the estate of Louella Briscoe, against the lodge and the administrator of John F. Briscoe. Louella was the wife of John F. Briscoe, and was the beneficiary named in the certificate. The mother and sister of John F. Briscoe intervened in the suit, and claimed the proceeds of the certificate as heirs of said Briscoe, and dependent upon him for support. The by-laws of the lodge provided that, in event the named beneficiary should die before the member to whom the certificate was issued, the proceeds of the certificate should be paid to the heirs of such deceased member who were dependent upon him for support. John and Louella Briscoe perished in a fire which consumed the hotel in which they were stopping. The interveners obtained judgment in the court below, which was affirmed on appeal. The trial court filed conclusions of fact and law, and one of the conclusions of fact found was that John and Louella Briscoe died at the same instant of time. The record before the supreme court contained no statement of facts. The court, in affirming the case, held that there was no presumption of survivorship or of simultaneous death of persons who perish in a common disaster, but that, the trial court having found as a fact that both husband and wife died at the same instant of time, in the absence of a statement of facts it would be presumed by the supreme court that there was evidence in the case sufficient to sustain the findings of fact of the lower court, and therefore the judgment should be affirmed. In discussing the case, Judge Fisher, who, as a member of the commission of appeals, wrote the opinion in the case, which was adopted by the supreme court, says: "In order to divert the fund from the direction named by the husband, it devolved upon the interveners to establish by evidence the existence of the contingency that would accomplish such purpose. The court below finds that the wife, the beneficiary named by the husband, did not die before her husband, but died at the same instant. The result of this finding is that the beneficiary named at the time the policy was earned by the death of the husband did not survive him, and was incapable of taking the proceeds of the policies. The purpose of this contract of insurance entered into by the husband and the association was to provide a fund for his wife, payable at his death; and, in the event she was incapable of taking by reason of her death, then those heirs of the husband dependent upon him should take. These are plain provisions of the rules and by-laws of the association that enter into and form a part of the contract of insurance. The use of the words 'die before' in the contract of insurance was evidently intended to mean that the beneficiary named must be dead and incapable of taking at the time the policy was earned by reason of the death of the husband. The instantaneous death of both

husband and wife successfully accomplished the inability of the wife to take, as if she had died before. The court below finds that the interveners are the heirs of John F. Briscoe, and were dependent upon him at his death. The contingency having occurred that would vest the property in the heirs dependent upon him, the court correctly rendered judgment in favor of appellees." If it be conceded, as contended by appellant, that in the language above quoted the supreme court intended to announce the doctrine that the representative of the beneficiary named in an insurance policy who perished with the insured in a common disaster had a prima facie right to the proceeds of the policy, and that it devolved upon the heir or representative of the insured claiming such proceeds to show that the named beneficiary predeceased or died simultaneous with the insured, such holding was not necessary in the decision of the case before the court, and is therefore not authority binding upon this court. We are, however, not inclined to agree with appellant's interpretation of the decision. The interveners in that case were the heirs of John Briscoe, but they did not recover, nor did they seek to recover, simply as heirs at law, but as the second named beneficiaries in event the beneficiary first named should not be entitled to the proceeds of the policy; and suing in such capacity, and asserting a right to the proceeds which was contingent upon the failure of the first beneficiary to take, the burden was clearly upon them to show that the facts existed which would entitle them to recover. We do not think the holding that as between two beneficiaries named in an insurance policy, in which the second is to take only in event the first shall die before the insured, it is necessary for the second beneficiary, in order to be entitled to the proceeds of the policy, to show that the first-named beneficiary predeceased the insured, is equivalent to a holding that, as between the representative of the insured and the representative of the sole beneficiary in an insurance policy, the insured and the beneficiary having perished in a common disaster, the prima facie right to the proceeds is in the representative of the wife, and the burden is upon the representative of the insured to show the prior death of the beneficiary, or the simultaneous death of the insured and the beneficiary. But be this as it may, as before stated we do not regard the opinion in *Paden v. Briscoe* as controlling authority upon the question involved in this case. We think the question can be properly determined by a consideration of the nature of the contract of insurance, the character of the interest which the beneficiary has in such contract, and the intention of the parties as evidenced by the language of the contract, and the object sought to be obtained by its creation. We think the contract, in its nature, is analogous to that of

an express trust. The insured is the grantor or creator of the trust, the insurance company the trustee, and the beneficiary the cestui que trust. While the trust fund out of which the beneficiary is to receive the amount named in the policy cannot, strictly speaking, be said to have been created by the insured, by the terms of the contract he secures an interest in a fund provided by the insurance company equal to the amount named in the policy, payable at his death; and under this contract, which he obtains and keeps alive by the payment at stated times during his life of certain specified amounts to the insurance company, the amount named in the policy is held by the insurance company in trust for the beneficiary. If we consider the policy of insurance of partaking of the nature of a trust, rather than a chose in action, it is at once seen that the interest of the beneficiary is not a "vested" interest, in the broadest sense of that term, and the trustee cannot be compelled to execute the trust until the contingency happens which entitles the cestui que trust to its execution. It follows that the burden is upon the beneficiary to show that such contingency has happened, and all the conditions which are necessary to vest the title to the fund in him have been complied with, and unless the beneficiary's right to the fund be shown there is a failure of the trust, and the fund reverts to the insured or his representatives. In the case of *Ryan v. Rothweller*, 50 Ohio St. 595, 35 N. E. 679, the supreme court of Ohio, in discussing this question, say: "The theory of a failure of trust comes with more force and stronger reasons than the doctrine of choses in action. We regard the doctrine of choses in action as not fully applicable, because it conflicts in many cases with the controlling doctrine of insurable interest. The question is not as to change of beneficiary, but as to reverter of the policy to the assured by reason of the death of all the beneficiaries. On principle, and aside from any statute on the subject, we think that in this case the policy reverted to Mr. Helwig, and at his death became a part of his estate. It seems to us that this was the manifest intention and understanding of all parties interested, and that the result is just and equitable. While there may have been a vested interest, it was an interest not in possession, but in expectancy, liable to be divested by the death of the beneficiary before the death of the assured." The authorities are conflicting upon the question, but we think the better doctrine is as above stated. *Johnson v. Van Epps*, 110 Ill. 551; *Fuller v. Linzee*, 135 Mass. 468.

This view of the law, we think, harmonizes with the primary object and purpose of life insurance, and with the manifest intention and understanding of the insured in entering into the contract. Life insurance has for its primary object the protection of those

who would be peculiarly damaged by the death of the insured, and to permit those who would not be so damaged to receive the benefit of the policy would be to defeat the purpose and intent of the contract; and especially is this true when the insured, as in this case before us, provides in the contract that the policy shall only be payable to the beneficiary in event she is living at the time of his death. Under the terms of the policy in question, we are of opinion that Mrs. Doll's interest in the proceeds was a contingent interest, not transmissible to her heirs, and that it devolved upon her representative to show that the contingency had happened which would entitle her to receive the proceeds of the policy. The appellant having failed to make this proof, the policy reverted to the estate of Frank Doll, and the trial court properly rendered judgment in favor of the administrator of his estate. The case of *Cowman v. Rogers*, 73 Md. 406, 21 Atl. 64, 10 L. R. A. 550, is directly in point, and fully sustains the contention of appellant; but the opinion in that case is based upon the theory that the interest of the beneficiary in the insurance policy was a vested interest, in the absolute sense of that term, and, as before shown, we do not consider this theory sound. In the case of *Faul v. Hulick* the court of appeals of the District of Columbia, in an able and learned opinion by Justice Shepard, holds that the representative of the beneficiary named in a will, who, under the terms of the will, would only take in event he survived the testator, and who perished with the testator in a common disaster, had a prima facie right to the property bequeathed by the will, and that in a suit by the heirs of the testator for said property it devolved upon them to show that the beneficiary did not survive. It is clear that this decision also rests upon the doctrine of vested interest, and, under our conception of the nature of the contract of insurance, and of the character of the interest of the beneficiary in said contract, is not applicable to the case we are considering. We refrain from a further discussion of the authorities bearing upon the very interesting question.

In our opinion, the judgment of the court below should be affirmed, and it is so ordered. Affirmed.

AMERICAN MUT. BLDG. & SAV. ASS'N v. DAUGHERTY et ux.¹

(Court of Civil Appeals of Texas. Dec. 19,
1901.)

USURY—BUILDING LOAN—MONTHLY DUES
AND INTEREST—APPLICATION—PEN-
ALTY—DOUBLE RECOVERY.

1. Evidence examined, and held that certain transactions, including a subscription for stock in a building association, an application for a loan, and the execution of a note therefor, and deed of trust to secure the same, etc., were all one entire transaction, and that a provision for

¹ Rehearing denied, and writ of error denied by supreme court.

monthly payments on the stock, together with interest on the loan, etc., was a mere scheme to cover usurious interest.

2. Where it is shown that the execution of a building contract giving a mechanic's lien, and bearing legal interest, and its assignment by the contractor to a building association, are part of a transaction for procuring a loan from the association, and adopted only as one form of security for the loan, which itself is usurious, the building association, as such assignee, is not entitled to recover on such contract.

3. Attorney's fees provided for in a building contract executed by a husband and wife for the improvement of the homestead cannot be adjudged a lien on the homestead, though the contract gives a mechanic's and material man's lien thereon for the payment of the money due the contractor.

4. Where a loan of money is made at usurious interest, all payments of interest will be credited on the principal of the debt.

5. Where it is shown that a subscription for stock in a building association, and the exaction of monthly payments thereon, is part of a scheme to cover usury in a loan of money by the association, the full amount of such money payments will be credited on the principal of the loan, and not their withdrawal value merely.

6. Rev. St. art. 3106, provides that, if usurious interest is collected, the person paying the same may recover double the amount thereof. *Held*, that where the first payments of interest on a loan are not of themselves usurious, but the contract as an entirety is a contract for usurious interest, the taint of usury will run through all the interest paid, and a double recovery for the whole will be allowed.

Error from district court, Harris county; John G. Tod, Judge.

Action by J. K. Daugherty against the American Mutual Building & Savings Association and another, in which defendant association filed a plea in reconvention, joining L. M. Daugherty, wife of the plaintiff, as a party defendant to the plea. Judgment for defendant on its plea in reconvention, but granting insufficient relief, and it brings error. Reversed, and judgment rendered in favor of plaintiff on his cross error.

Watkins & Jones, for plaintiff in error. C. L. Bradley, for defendants in error.

GARRETT, O. J. J. K. Daugherty brought suit against the American Mutual Building & Savings Association and W. J. Alder to cancel certain liens against his homestead, which were created by himself and wife in order to borrow \$600 from the association with which to build the dwelling house thereon. The petition set out the note executed for the money, and a deed of trust executed by the plaintiff and his wife upon the property to W. J. Alder, as trustee, to secure the note, and a contract for a mechanic's lien for said sum, which had been executed by the plaintiff and his wife with one A. W. Underwood, and for which the note had been executed, and which had been assigned to the association. It alleged usury in the transaction, and the payment thereon of certain sums of money in accordance with the terms of the contract, as principal and interest, amounting to more than the principal of the note, and asked that double the amount of all

sums paid as interest be applied to the principal, and for the cancellation of the deed of trust and mechanic's lien, and for judgment over against the association for an excess to which he averred he was entitled. The defendant association, after answering generally, pleaded over in reconvention, and elected to recover upon the mechanic's lien which it averred had been assigned to it, and admitting the payment of \$120 as interest, and that Daugherty owned 14 shares of stock of the association, of the value of \$348.40, for which credit was conceded, prayed for judgment and foreclosure of lien for the balance. L. M. Daugherty, the wife of the plaintiff, was joined with her husband as defendant to the plea in reconvention. The cause was tried without a jury, and the court found that the transaction was usurious, and after crediting all payments upon the principal of the debt, but refusing credit for double the interest paid, rendered judgment in favor of the association upon its cross action against Daugherty for the sum of \$124.74, as the balance of principal of the debt, including attorney's fees, with 6 per cent. interest on that amount from date of judgment, with decree of foreclosure against said Daugherty and his wife upon the lots described in the pleadings and the several instruments set out.

The American Mutual Building & Savings Association is a foreign corporation,—its domicile being in Chattanooga, Tenn.,—with a permit to do business in the state of Texas. W. J. Alder is the secretary of said association, and W. Walker its agent in Houston, Tex. A short time prior to June 23, 1896, Walker, the agent of the association, approached Daugherty, and offered, in behalf of the association, to lend him the money to build a home on the lots described in the petition, if he desired to do so. Plaintiff agreed to borrow \$600 at 6 per cent. interest, with security on the lots, to be repaid in monthly installments, and made an application for the loan, dated June 23, 1896. Walker told him that in order to get the money he would have to enter into a contract for the building with a person who would transfer the contract to the association, and suggested A. W. Underwood as an acceptable contractor. On July 21, 1896, the plaintiff, joined by his wife, entered into a contract with Underwood for the erection of the house on lot 8, to be completed by August 15, 1896, for which he agreed to pay him the sum of \$600, with interest at the rate of 10 per cent. per annum from the date of the completion of the improvements, with 10 per cent. attorney's fees in case of suit to enforce the payment, and a mechanic's and material man's lien was given upon the lot, in favor of Underwood, to secure the payment of the money. There were other stipulations in the contract, requiring Daugherty to keep the property insured for the benefit of Underwood, and to pay all taxes and other charges until the debt should be paid. The money

for the payment of this contract was to be furnished by the association, and was to be repaid in monthly payments, with 6 per cent. interest. The house was built in accordance with the contract, and the contractor was paid by the association by three checks, dated October 27, 1896, in favor of A. W. Underwood, drawn on the Citizens' & Trust Company of Chattanooga, Tenn., and stamped "Paid" November 4th and November 5th. And on October 31, 1896, Underwood assigned the building contract to the association. Plaintiff testified that the agent, Walker, told him that the loan would draw interest at 6 per cent., payable in monthly installments of \$3, and that the loan itself was payable in monthly installments of \$8.40. The witness did not understand that he was a stockholder. He testified that he and his wife signed a number of papers, all at the direction of the agent, for the single purpose of securing a loan for \$600, which he understood that he was to have the privilege of paying in monthly installments, as above stated. The application for the loan was made to the association. In it the plaintiff stated that, as a stockholder and member of the association, holding 12 shares of stock, he desired to obtain a loan of \$600, payable only when the series of stock matured, and agreed to furnish security on lot 8 of the lots described; and he guaranteed that he would build thereon certain improvements set forth, for which purpose the loan was applied for. For said loan he agreed to sell and assign his shares of stock, to become the absolute property of the association at maturity thereof, and which, when matured, should be in full satisfaction of said loan. He agreed to pay 6 per cent. interest on the sum borrowed, and monthly dues on the shares of stock sold to the association, as well as on two other shares, which were called "free shares," until they had matured in accordance with the by-laws, rules and regulations of the association, and waived the right of withdrawal before maturity of his two free shares; and, in case of default in the payment of interest and dues, the free shares were also assigned, and the officers of the association were authorized to apply the amount due on them to the payment of interest on the money borrowed, and to the payment of dues and fines on the stock sold and assigned to the association. He also agreed to execute a deed of trust upon the property improved. The application was granted by the association, and on November 7, 1896, the note and deed of trust were executed. The deed of trust conveyed the property to the defendant W. J. Alder, as trustee, in trust for the security of the loan, but recited that the original promissory note and mechanic's lien on the property were continued in full force and effect, and the holder of the note set out in the deed of trust might, at his option, enforce either or both of them. The note executed by the plaintiff and his wife is as follows: "Note.

Texas Form. \$600.00. Houston, Texas. On maturity of the shares of stock herein mentioned, for value received, I, we, or either of us, promise to pay to the American Mutual Building and Savings Association, of Chattanooga, in the state of Tennessee, in U. S. gold coin of present standard, six hundred dollars, with interest at the rate of six per cent. per annum from date, payable monthly on the last Saturday of each and every month, commencing on the last Saturday of Nov., 1896; and, if this note is collected by suit, we agree to pay an additional ten per cent. on the cash amount to be collected, for attorney's fees, and which ten per cent. shall also be secured by deed of trust executed to secure this note. This note is for money borrowed on land, and is secured by a deed of trust of even date herewith, made, executed, and delivered by us to W. J. Alder, trustee, conveying certain real estate situated in the county of Harris, in the state of Texas, in trust to secure its punctual payment, and providing for the sale of said real estate in case of default. Furthermore, in order to provide for the final settlement of this note, we have this day sold to said association 12 shares of stock of the 59th series of said association, in consideration of the final satisfaction of this note at maturity; but we agree, in consideration of this contract, to continue the regular monthly payments on said shares of stock until they become fully paid up, and of the value of \$100.00 per share. We also agree to continue the payments on the two free shares which we hold until they mature. Now, if we pay promptly the interest on said sum of \$600.00, and the monthly installments on all of said shares of stock, amounting in all to \$11.40 per month, and any fines assessed under the rules of said association, and the taxes accruing on the said real estate described in the deed of trust securing this obligation, and the premium necessary to keep said property insured in such sum as said association may require (not exceeding \$600.00), and shall keep the buildings on said lot in good repair, and the policy of insurance in such company as said association may require, and duly assigned to said association, until the stock becomes fully paid in, and of the value of \$100.00 per share, then it is understood that this note shall be deemed fully paid and canceled, and the association will pay in cash to said J. K. Daugherty, for the surrender of the 2 free shares of stock, the par value thereof, which is \$200.00. But if we fail to pay promptly, when due and payable, said taxes and insurance premiums, or make default in the payment of said monthly interest, fines, and monthly payments of said stock for a period of six months after the same are due, or any installment thereof is due, or fail to keep the building in good repair, or in any way shall violate the terms of the agreement, then, at the option of the said association, the whole indebtedness evidenced by this

obligation, including any taxes and insurance premiums due or paid by said association, shall at once become due and collectible, and a sale under said deed of trust, in the manner therein provided, or a foreclosure thereof, may be had. It is further understood that this obligation is not payable, in whole or in part, until the final maturity of said shares; and, in consideration of such an agreement on the part of the maker hereof, the American Mutual Building and Savings Association binds and obligates itself not to collect or demand in excess of 96 monthly payments of dues and of interest on said loan. It is further understood and agreed, however, that if repayment before maturity is necessary, from foreclosure or causes originating from action of said borrower, that the by-laws of said association that may be in force at that time shall define the method of procedure and the amount to be paid. It is further distinctly understood that the 12 shares of stock sold and transferred by virtue of this contract become the absolute property of the said association, and in no case shall the said J. K. Daugherty have any right, in law or equity, to repurchase said stock, or any part thereof, and the said J. K. Daugherty does hereby waive all claim to the same. Furthermore, if we fail to pay the interest on said loan, and the dues specified on the stock sold to said association, then we hereby authorize said association to apply the money paid on our free shares to the payment of the loan as far as it will go. Witness our hands this 7th day of November, 1896. [Signed] J. K. Daugherty. L. M. Daugherty. Witness: Norman G. Kittrell, Jr." On the same date that the note and deed of trust were executed the plaintiff and his wife also joined in the execution of an instrument confirming the mechanic's lien, and correcting it so as to show that it was intended to include both lots 7 and 8, and that omission of lot 7 therefrom was a mistake. A certificate of stock was put in evidence by the association, dated July 1, 1896, for 14 shares of stock in class A, monthly payment \$8.40, reciting that J. K. Daugherty was a member of the association, and the owner and holder of 14 shares of installment stock therein, and containing a provision that the stock was issued and accepted upon the express terms and conditions contained in the laws of the association. On the back thereof there was a written assignment of the stock, signed by Daugherty and his wife, dated November 7, 1896, by which, as recited therein, it was sold, transferred, and assigned to the association for value received. Daugherty testified that he never saw the certificate for stock until it was shown to him on the trial. He admitted his signature to the assignment, but said he had never had possession or control of the paper before, except when he signed his name on the back of it, and then only saw that side of it. Article 7, § 1, of the by-laws of the as-

sociation, reads as follows: "Class A. Loan and Investment Shares. The monthly payments on each share of stock in class A shall be sixty cents per share for each and every month for 96 months, unless the stock sooner matures, commencing on the date of application. At the expiration of 96 months no further payments shall be required, and the holders of investment stock in class A shall be entitled to a settlement at the full value of the stock as shown by the books of the association. Loans of the association may be made on this class of stock." Other by-laws put in evidence by the defendant are not deemed material. The plaintiff had a pass book, as prescribed by the by-laws, which was given to him by the agent, Walker, and in which all payments made by him had been credited. This book showed payments commencing July 1, 1896, and ending April 28, 1900, to the amount of \$117 interest, and \$396.60 as monthly payments. W. J. Alder, the secretary of the association, testified that the withdrawal value of the stock at the time of the trial was \$348.42.

The trial court found that all of the transactions, including the subscription for the stock, the application for the loan, the execution of the note and deed of trust, assignment of the shares, and the execution of the contract for building, by which the mechanic's and material man's lien was given, was one entire transaction for the procuring and securing the loan, and that the provision for monthly payments on stock and the entire scheme of payment was a scheme to cover usurious interest exacted by the association for the use of the money loaned. The evidence supports this conclusion of the trial court, and it is approved and adopted by this court. Although 14 shares of stock were nominally subscribed for, and there was a guaranty, that they should mature with 96 payments, there was an absolute transfer of the stock, and a stipulation that the loan should be canceled only by the maturity thereof. There was no probability that the stock would be matured short of the 96 payments, for that was only about 57 per cent. of the face value, with eight years for accumulation; but it will be observed that the sum of the installments would amount to \$806.40, and subtracting the \$200 for the two free shares would leave \$606.40; for which sum, paid in monthly installments from the inception of the transaction, and four months prior to the actual advance of the money, the principal sum,—upon which 6 per cent. interest had been paid from the date of the note, the note would be canceled. Ordinarily, in loan associations of this character, the loan is for the face value of the stock, to be canceled by the matured stock; but in this transaction it was for only half the face value of the stock, to be canceled only by the matured stock. When it is shown to have been a loan of money, and not a subscription for the stock of the association, and

the monthly payments are credited upon the principal of the loan, as they should be, the transaction becomes clearly usurious. Payment of interest on the full sum of \$600 at the rate of 6 per cent. per annum becomes more than 10 per cent., and usurious, after \$240 of the monthly installments have been paid. If payment had been completed, as contracted for, in eight years, the association would have received for the loan of the \$600 the principal, with 6 per cent. interest on the entire amount, while it was receiving the principal continuously in monthly installments of \$8.40, and reaping the benefits of all accumulations thereon. A balder proposition disclosing usury could hardly be stated. The appellant, in effect, admits that the transaction is indefensible, as usurious, but claims that it was made for the purpose of extending and securing payment of the mechanic's and material man's lien, which had been assigned to it, and bears legal interest, and that it should be allowed to recover upon the Underwood contract. If this contention were true as to the fact, it would be correct in law. *Krause v. Pope*, 78 Tex. 484, 14 S. W. 616; *Cousins v. Grey*, 60 Tex. 846; *Nesbit v. Goodrich* (Tex. Civ. App.) 60 S. W. 1017. But since the mechanic's lien was only a part of one entire transaction, and was adopted only as one form of security for the same debt, the principle invoked is not applicable. The attorney's fees should not have been adjudged a lien upon the homestead. *Harn v. Association*, 65 S. W. 176, 3 Tex. Ct. Rep. 334. The evidence showed that Walker was the agent of the association for the purpose of negotiating and making the loan, as well as its general agent for the transaction of its business in Houston; and it will be bound by his representations,—especially so since it appears from the transaction, as committed to writing, that the association made the contract as he represented it to be, although it was attempted to be concealed by giving a specious appearance of a loan upon stock subscribed for and issued in good faith. Usury having been shown in the contract, Daugherty was entitled to have all payments of interest credited upon the principal of the debt. He was also entitled to have the full amount of the monthly payments credited, and not the withdrawal value thereof only. As the transaction has been shown to be a scheme to cover usury in a loan of money, and not a bona fide subscription for stock, the payments are monthly payments upon the principal, and not stock dues, and appellee had no stock, to have a withdrawal value; and the court, having found the transaction to be as stated, was correct in applying the full amount of the monthly payments to the principal of the loan. Appellant's fourth assignment of error, and the propositions thereunder, are made upon the assumption, as a fact, that the payments were made upon bona fide stock subscriptions.

Appellee, by a cross assignment of error,

complains of the action of the court below in refusing to allow him credit upon his note for double the amount of the interest paid by him, as the penalty fixed by statute for usurious interest. Rev. St. art. 3106. Usury must be actually paid before a cause of action can be maintained for its recovery. *Webb, Usury*, § 466; *Stout v. Bank*, 69 Tex. 389, 390, 8 S. W. 808. Some of the authorities hold that the penalty applies only to the excess above legal interest, but these are usually upon the construction of the statute giving the penalty. The statute of this state has been construed in the case of *Smith v. Chilton*, 90 Tex. 447, 39 S. W. 287, and it was held that the person paying usurious interest might recover double the amount of the entire interest. In the case now under consideration the first payments of interest were not themselves usurious, but, the contract as an entirety being a contract for usurious interest, the taint of usury will run to all the interest, and a double recovery should be allowed for all interest actually paid. A part of the interest was paid more than two years before the suit was filed, but limitation to a double recovery was not pleaded. It has also been held, where the statute gives a remedy for the penalty, that it should be strictly followed, from which it would appear that a separate action should be brought therefor, and it could not be set off against the debt. *Webb, Usury*, supra; also section 523. Under the statute of this state as it existed before 1892, which is the present law, only the amount of usurious interest actually paid was recoverable; but it was the penalty for taking usury, and the courts uniformly held that all interest, when usury was shown, should be applied as credits upon the principal. *Bank v. Smith*, 9 Tex. Civ. App. 540, 30 S. W. 678, which see for citation of authorities. The appellee, having brought his suit to have the contract declared usurious, and to cancel the instruments forming it, was entitled to recover the penalty given by the statute, and have it applied to his debt; and it appearing that, if double the sum of \$117 had been so applied, the debt would have been extinguished, leaving a balance in his favor of \$2.60, the judgment of the court below will be reversed on his cross appeal, and judgment here rendered in his favor for said amount and all costs, and the cancellation of the note, deed of trust, and mechanic's and material man's lien, as prayed for in his petition.

Reversed and rendered.

COLE et al. v. PARKER et ux.

(Court of Civil Appeals of Texas. Dec. 21, 1901.)

WRONGFUL DEATH—LIABILITY OF EMPLOYER
—MEASURE OF DAMAGES—REVISION BY COURT.

1. Under Rev. St. 1895, art. 3017, giving a cause of action for death "when the death is

caused by the wrongful act, negligence, unskillfulness, or default of another," a person is not liable for the acts or omissions of his agents or employes, causing death, but death must result from his own immediate act.

2. Where plaintiff alleges negligence on the part of defendant and its employes, and the court charged that defendant would be liable if it was negligent in operating its electric plant, a refusal to charge that the jury should find for defendant if the death of plaintiff was caused by the negligence of the employes in charge of the plant was prejudicial error.

3. Persons dealing with electricity are bound to exercise proper care to see that their plant is properly constructed, before operating the same; and where negligent in this respect, and death results, they are liable, even without actual knowledge of the defect, though the plant is operated by their employes.

4. Parents suing for the wrongful death of their son may recover the pecuniary value of his services during minority, less the expense of his maintenance during such period, and, in addition, whatever pecuniary aid they had a reasonable expectation of receiving from the son after his majority.

5. Under Rev. St. 1895, art. 3027, providing that in actions for death "the jury may give such damages as they think proportioned to the injury," the amount of damages is within the discretion of the jury, subject to revision by the court in case such discretion is abused.

Appeal from district court, Fannin county; Ben H. Denton, Judge.

Action by J. F. Parker and wife against Cole & Blocker and another. Judgment for plaintiffs against Cole & Blocker, and in favor of the other defendant, and Cole & Blocker appeal. Reversed.

Taylor & McGrady, for appellants. Gross & Gross and Hale & Hale, for appellees.

RAINEY, C. J. Appellees sued to recover damages for the death of their son, which was alleged to have occurred from the negligent construction and operation of an electric light plant operated by appellants and their agents in the town of Honey Grove. Defendants answered by general denial, and specially pleaded contributory negligence. The testimony is that the town of Honey Grove put in an electric light plant for lighting its streets, and to furnish lights to its inhabitants for hire, and operated it for two or three years, and on September 1, 1899, leased it to appellants, to be operated by them for five years for a stipulated consideration. At the northwest corner of plaintiffs' residence lot in said city, at the intersection of two streets, there was placed an arc light for lighting the streets, which hung 20 feet above the ground, suspended from a cable wire which ran from the top of a post 25 feet high, in the edge of street, at the northwest corner of plaintiffs' lot, diagonally across the streets, in a northwestern direction, to the top of a like post near the corner of the opposite lot. These posts were braced by means of guy wires and slug posts. At the northwest corner of plaintiffs' lot one guy ran from near the top of the post down to the south, and was tied to the top of a slug set in the ground in the edge

of street, about 6 feet from ground; and a like guy ran from near top of this post down and east to the top of a slug set in the ground just outside the sidewalk, and near plaintiffs' front yard gate. It was on this guy wire that deceased was killed by a charge of electricity. On January 21, 1900, just after dark, deceased, a boy 17 years old, with other boys, was playing in the street under this light. He took hold of said guy wire to shake or scare a bird out of the hood of said light, and received an electric shock, killing him instantly. The electric wires were extended over the city at the tops of tall poles set in the streets, near the side, in the usual way. The wires around the guy post were in easy reach of those traveling along the sidewalk. Cole, one of the appellants, testified that he knew the height of the guy post where the accident occurred; he "knew of Jim La Master coming in contact with one of the guy wires in another part of the town, and that he had sued and recovered judgment for such injury sustained." Blocker testified that he had heard of the La Master incident. Appellants were unskilled in the construction and operation of electric light plants. The operation of the plant had been intrusted to employes whom they supposed were competent. They testified that they did not know of any defect in the construction of the plant, or of any negligence of their employes in failing to keep it in repair; that the plant had been constructed by the city under the supervision of one whom they believed to be competent.

Appellants requested the court to charge the jury, "If you believe from the evidence that the real and direct cause of the death of deceased was some negligent act or omission on the part of the persons whom Cole & Blocker had placed in charge of said plant to operate it, then find for defendants." In view of the allegations of plaintiffs' petition and the charge of the court, this special charge should have been given. The petition alleged negligence on the part of the defendants and their employes. The court charged the jury, in effect, that the defendants would be liable if they were negligent in operating the plant and keeping it in repair. No charge was given relative to the nonliability of defendants for the acts of their employes. The court's charge, failing to mention the effect of the negligence of the employes, was calculated to lead the jury to believe that, if there was negligence on the part of the employes, defendants were responsible therefor. Actions for injuries resulting in death caused from wrongful act or omission exist only by virtue of the statute. The statute (article 3017, Rev. St. 1895) gives a cause of action in cases like this "when the death of any person is caused by the wrongful act, negligence, unskillfulness or default of another." Under this provision a party is not liable for the act or omission of his agents, causing death, but death must

result from his own immediate act or omission, etc. *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749; *Hargrave v. Vaughn*, 82 Tex. 247, 18 S. W. 695. It appears from the testimony of Ote Hale, appellants' employé whose duty it was to keep the lines in repair, that the injury resulted from a defective construction, in failing to have the guy wire properly insulated. His evidence on this point was not contradicted. This being true, the issue, then, was whether or not appellants were negligent in not discovering the defect and having it remedied. The authorities hold that in the construction and operation of an electric light plant the highest degree of care should be used to protect persons and property from injury. *Giraudi v. Improvement Co.*, 107 Cal. 120, 40 Pac. 103, 28 L. R. A. 596, 48 Am. St. Rep. 114; *McLaughlin v. Light Co.* (Ky.) 37 S. W. 851, 34 L. R. A. 812, and authorities therein cited. Appellants were dealing with a dangerous force, and it was their duty to exercise proper care to see that the plant was properly constructed before having the plant operated. Whether they used proper care in this respect is a question for the jury to determine from the evidence adduced on the trial of the cause. If appellants were negligent in this respect, then the injury would be the result of their "immediate act," or, rather, their omission, though the plant was operated by their employés. Where the owner causes defective machinery to be put in operation, knowing, or by the use of proper diligence might have known, of its defective condition, and death results to another by reason of such defect, he will be held liable therefor. That he was unskilled in its use, and did not know of the defect, will not be sufficient excuse for him. The law imposes upon him the duty of exercising proper care in regard to its condition, and, failing to use such care, he is responsible for the consequences. Unskillfulness is a ground for recovery, under the statute, where death results therefrom. Rev. St. 1895, art. 3017.

Appellants complain of the court's charge on the measure of damages, and the refusing to give special charges requested on the same subject. The court's charge was: "If you find a verdict for plaintiffs, it could only be for actual damages. Then I instruct you that the plaintiffs would be entitled to recover the pecuniary value of their son's services until he had arrived at the age of twenty-one years, less the cost and expense of his care, support, and maintenance during the period of his minority; and if you further believe that plaintiffs had a reasonable expectation of receiving from said Charley Parker, had he lived, considering his position and ability, contributions to their wants and necessities after he reached his majority, then plaintiffs are entitled to recover whatever pecuniary aid they had a reasonable expectation of so receiving, if any." The requested charge was, in effect, that the jury should allow

them only such amount of damages as will, as a "present cash payment, fairly compensate them for the actual pecuniary loss they sustain by the death of their son." The court properly charged the measure of damages, and there was no error in refusing the special charge.

The statute (Rev. St. 1895, art. 3027) provides that "the jury may give such damages as they think proportioned to the injury resulting from such death." This leaves the question of damages to the discretion of the jury, subject, however, to revision by the court in the event such discretion is abused. *Railway Co. v. Kindred*, 57 Tex. 491. There was no evidence introduced relative to what the "present cash" value of the damages was, upon which the jury could base a finding, and there is no statute fixing such a basis to govern the jury in their finding.

The judgment is reversed, and the cause remanded, as to Cole & Blocker, and affirmed as to Hill. Reversed and remanded.

TEXAS & P. RY. CO. v. TARKINGTON.¹
(Court of Civil Appeals of Texas. Nov. 16, 1901.)

CARRIERS—CONDUCT OF CONDUCTOR TOWARD PASSENGER—USE OF HARSH AND INSULTING LANGUAGE—INSTRUCTION.

1. A verdict on conflicting evidence will not be disturbed.

2. A railroad conductor, in a loud and insulting manner, addressed a passenger, in the hearing of her children and other passengers: "The idea of a woman trying to board a train with her child without a ticket! You can go on this time, but don't undertake such a thing again." Held, that a charge of dishonesty, in that she was attempting to have her child transported without paying fare, could reasonably be inferred, and his language was actionable.

3. It was immaterial that the conductor did not intend to charge her with dishonesty.

4. Even if it did not imply dishonesty, the language was insulting and calculating to humiliate and mortify.

5. The evidence raising no issue as to the passenger's temperament, an instruction that, if the language was not reasonably calculated to cause a person of ordinary prudence and temper to be so humiliated under like circumstances, she could not recover, was properly refused.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Action by Hugh Tarkington against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. T. Armistead, for appellant. Smelser & Mahaffey, for appellee.

RAINEY, C. J. Suit by appellee to recover damages of appellant for the alleged humiliation of his wife by language used to her by the conductor in charge of appellant's train upon which she was a passenger. The

¹ Rehearing denied December 14, 1901, and writ of error denied by supreme court January 16, 1902.

testimony shows that Mrs. Tarkington was traveling with her 15 year old daughter and 8 year old son. At Denison she bought tickets for herself and daughter over appellant's road to Texarkana. When attempting to board the train at Denison, her son was in advance of her, and he was stopped by the conductor, who asked her if she had a ticket for the boy. Upon being told "No," he told her to get one for him, which she did. The conductor spoke in a loud tone, and his manner was rude. She entered the coach with her children, and when the conductor came around to collect tickets, and after receiving her ticket, he, in a loud, harsh, and insulting tone of voice and manner, in the hearing of her children and other passengers, said to her: "The idea of a woman trying to board a train with her child without a ticket! You can go on this time, but don't undertake such a thing again,"—which language and manner of the conductor humiliated, mortified, and insulted her. The foregoing is the substance of Mrs. Tarkington's testimony, which is corroborated in part by her daughter. That part of her testimony as to the manner and language of the conductor is contradicted by several witnesses, and it is insisted by appellant that the verdict and judgment are contrary to the evidence. It was the province of the jury to weigh the evidence and pass upon the credibility of the witnesses. Having done so, the verdict will not be disturbed, as the evidence is sufficient to support it.

The appellant requested the court to charge the jury, in effect, that the language used by the conductor was not actionable, and same did not import dishonesty, nor could it be reasonably inferred therefrom. This was refused, and error is here assigned thereon. The petition alleged that the manner and language were humiliating and insulting, and by innuendo charged her with dishonesty. If the testimony of Mrs. Tarkington be true, —and the jury must have so found,—the manner and language of the conductor were insulting and calculated to humiliate; and from the language a charge of dishonesty could readily be inferred. It is meaningless, if he did not intend to upbraid her for attempting to have her child transported without paying fare.

The court refused a requested charge to the effect that, if the conductor did not intend to accuse her of dishonesty, to find for the defendant. The court did not err in this particular. Whether the conductor intended to charge her with dishonesty is immaterial. The language is susceptible of such a construction. But if it were conceded that the language did not imply dishonesty, when taken in connection with the manner in which it was used and the circumstances under which it was used, it was insulting and calculated to humiliate and mortify. When the conductor caused plaintiff's wife to procure a ticket for her son, he did all that

was incumbent upon him in the protection of the rights of the company, and there was no occasion for him to assume the role of censor and proceed to lecture her upon her conduct. Such action was calculated to insult any lady, and, if his "accomplishments and natural endowments" were not sufficient for him to appreciate the proper respect due to a lady passenger, the company should fill his place with one possessed of such accomplishments and natural endowments, for it is its duty to see that passengers receive the proper respect from its employees.

The appellant complains of the refusal of the court to give a requested instruction to the effect that, if the language was not reasonably calculated to cause a person of ordinary prudence and temper to be so humiliated under like circumstances and conditions as those surrounding plaintiff's wife at the time and place, he could not recover. The evidence raises no issue as to the temperament of plaintiff's wife,—whether oversensitive or otherwise. In the absence of such an issue, the presumption arises that she was of ordinary prudence and temper, and the court did not err in refusing to give the instruction. The court properly charged the jury, and no error was committed in refusing the various special charges requested.

The judgment is affirmed.

HUTCHINS et al. v. CANTU et al.

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

BANKRUPTCY—EXECUTION SALE—VALIDITY—PARTIES ENTITLED TO AVOID.

Under Bankr. Act 1898, § 67f, providing that all levies against an insolvent within four months prior to the filing of a petition in bankruptcy against him shall be void in case he is adjudged a bankrupt, a sale of realty under execution issued less than four months prior to the time when the execution defendant was declared a bankrupt will not be avoided at the suit of a former grantee of the same property; only the trustee in bankruptcy being entitled to plead the nullity of the execution.

Appeal from district court, Duval county; Stanley Welch, Judge.

Action by Juan Cantu and others against Hutchins, Sealy & Co. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

J. B. Wells, J. O. Luby, and McCampbells & Stayton, for appellants. S. J. Lancaster, for appellees.

FLY, J. This action was instituted by appellees against appellants to remove a cloud from their title to certain lands, alleged to exist by reason of a certain execution sale under which appellants had purchased the land. The trial court instructed the jury to return a verdict in favor of appellees.

It appears from the statement of facts that

appellants claim the land through an execution sale made on July 4, 1890. The execution was issued by virtue of a judgment against Tomas Cantu which was obtained by appellants in the district court of Duval county on January 3, 1890. On the 23d day of June, 1890, Tomas Cantu was declared a bankrupt. The execution was levied on the land on June 9, 1890. Appellees claimed the land through a deed executed to them by Tomas and Maria Anita Cantu on December 10, 1898. There was a plea of fraud in the execution of the deed from Tomas Cantu and his wife to appellees, and there was testimony to the effect that the grantors in the deed were in debt, and were the parents of appellees, and other circumstances that presented the issue of fraud in the execution of the deed; and the action of the court can be justified only on the ground that the levy and sale of the land by virtue of the execution were null and void as to appellees because the levy was made within four months of the time at which Tomas Cantu was declared a bankrupt. In section 67f of the bankrupt act of 1898 it is declared "that all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same." The judgment, not having been shown to have been registered as required by statute, did not create a lien upon the property of Tomas Cantu; and, the execution not having been levied until about two weeks before he was declared a bankrupt, the only questions presented arise in connection with the levy of the execution. If, under the terms of the section quoted, any one could plead the nullity of the execution, the judgment of the lower court is right; but, if the trustee in bankruptcy alone can plead such nullity, the judgment must be reversed, and the cause remanded, to be tried on the issue of fraud alone. Upon the authority of a recent Massachusetts case, we hold that the action of the court in instructing a verdict for appellees was erroneous. *Frazee v. Nelson*, 61 N. E. 40. In that case, in discussing the section of the bankrupt act above quoted, it was said: "This is not an action between the demandants and the trustee in bankruptcy of Dixon, or any one claiming under the trustee, and the evidence that was offered of Dixon's insolvency at the time of the levy, and of his subsequent adjudication as a bankrupt within four months thereafter, was immaterial. The effect of section 67f of the United States bankruptcy act of July 1, 1898, is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under him, so that the property may

pass to and be distributed by him among the creditors of the bankrupt."

The judgment is reversed, and the cause remanded.

ST. LOUIS & S. W. RY. CO. OF TEXAS v. MILLER et al.¹

(Court of Civil Appeals of Texas. Nov. 2, 1901.)

RAILROADS—FIRING PROPERTY—SPARK ARRESTERS—ACTIONS—PARTIES—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. A joint petition by an owner of property, destroyed by fire, and by a fire insurance company which had paid a loss thereon, against a railroad company, for causing the fire, states a single cause of action.

2. An owner of property destroyed by fire, and a fire insurance company which has paid a loss thereon and taken a pro rata assignment of the claim for damages, may join as plaintiffs in an action against a railroad company for causing the fire.

3. In an action against a railroad company for firing property, where defendant's controverted evidence showed that its engines were equipped with the best appliances to prevent the escape of fire, and there was no attempt by plaintiff to show that there were any other such appliances which had the approval of scientific authority, but were not in general use, a charge requiring the company to use "the best approved appliances," though not critically correct, was not prejudicial to the company.

4. Where plaintiff showed that the fire was caused by sparks from defendant's engine, and defendant showed the use of proper spark arresters, but did not show their condition, or that the engine was properly handled, it had not rebutted plaintiff's prima facie case; and failure to charge that defendant was bound only to use ordinary care to keep its spark arrester in good condition was therefore harmless.

5. A railroad company is liable for the negligence of employees operating its engines, though it has exercised due care in appointing them.

6. Where plaintiff showed that the fire was caused by sparks from defendant's engines, and defendant showed the use of a proper spark arrester, but did not rebut plaintiff's prima facie case by showing the condition of the arrester, or that the engine was properly handled, a charge that the burden was on plaintiff to prove that his property was fired by fire escaping from defendant's engine, and that such fire originated from its negligence, was properly refused, as tending to mislead the jury as to where the burden rested.

7. An owner of a lot is not negligent in building a house thereon and storing goods in the house, though it will be close to a railroad.

8. In an action against a railroad company for firing property, testimony of a foreman in charge of its inspectors of engines that the record of inspections kept by him showed that the spark arrester of the particular engine was in good condition was properly excluded, where it appeared that he made the entry from a report handed him by a boiler maker, and it was not shown where the latter got it, or who made the inspection, or that the foreman ever saw the engine, and no reason for the nonproduction of the record itself was given.

Appeal from district court, Henderson county; John Young Gooch, Judge.

Action by P. E. Miller against the St. Louis

¹ Rehearing denied, and writ of error denied by supreme court January 9, 1902.

& Southwestern Railway Company of Texas, in which the Home Insurance Company intervened, and afterwards joined with plaintiff in an amended petition. Judgment for plaintiffs, and defendant appeals. Affirmed.

Frost, Neblett & Blanding, for appellant. Richardson & Watkins, for appellees.

TEMPLETON, J. P. E. Miller owned a house which was situated on a lot adjacent to the cotton platform of appellant at its depot at Athens. On November 7, 1898, sparks escaped from one of appellant's engines and set fire to cotton on the platform, and the fire spread to and consumed Miller's house and a stock of goods belonging to him, and contained in the house. The greater part of the property destroyed was insured by the Home Insurance Company, and on January 30, 1899, the insurance company adjusted the loss with Miller, paying him on account thereof the sum of \$705.28; and Miller assigned to the insurance company his claim against appellant growing out of the destruction of his property through the alleged negligence of appellant, to the extent of the sum so paid to him by the insurance company. On August 23, 1899, Miller sued appellant for the damages occasioned by the fire, placing the amount of his damages at the value of the property destroyed. On May 17, 1900, the insurance company intervened in the suit, and asserted an interest in the damages which might be recovered, to the extent of the sum it had paid to Miller. On September 6, 1900, Miller and the insurance company joined in an amended petition, and together sought judgment against appellant for the value of the destroyed property; the interest of the insurance company in the alleged cause of action being stated as claimed by it in its plea of intervention. They obtained judgment for \$2,198, of which sum \$705.28 was awarded to the insurance company, and the remainder to Miller.

The demurrer of appellant to the effect that the petition showed a misjoinder of parties plaintiff and causes of action was properly overruled. A single cause of action was sued on, namely, that arising out of the destruction by fire, through the alleged negligence of appellant, of the property in question. An interest in the entire cause of action appears to have been assigned to the insurance company, and it was entitled to sue thereon. *Houston Direct Nav. Co. v. Insurance Co. of North America* (Tex. Civ. App.) 31 S. W. 560. Surely appellant cannot complain because Miller and the insurance company, owning, as they did, the entire cause of action, joined in a suit thereon, and did not subject it to the unnecessary expense and trouble of double litigation. The insurance company undoubtedly had the right to make itself a party to the suit and set up its interest in the subject-matter thereof.

Appellant complains of a paragraph of the court's charge which reads thus: "If you believe from the evidence that at the time of the fire the engines were properly constructed and provided with the best approved appliances for preventing the escape of fire, and that the same were, in regard to preventing the escape of fire, all in good condition and repair, and that the engines were handled and operated with ordinary care, as regarded the escape of fire therefrom, then you will find for defendant." The complaint is that the charge incorrectly states the duty required of appellant in respect to the matters presented in the charge; its true duty being, according to appellant's contention, to use ordinary care to select and keep in repair the best approved known appliances for preventing the escape of fire. In *Railway Co. v. Bartlett*, 81 Tex. 42, 16 S. W. 638, in discussing a charge containing the expression "most approved spark arresters," the supreme court said: "We think that such a charge is less exacting than one that requires evidence of the use of the 'best engines and best appliances,' because the last-named qualifications are more a matter of speculation and opinion than the former, and may be much more difficult of ascertainment and proof. The charge would have been more satisfactory if it had limited the requirement to the use of the 'most approved' fire arresters to those that were shown to be such by their use, or if it had read, the 'most approved in use.'" The expression used in the charge there considered was not otherwise condemned or approved, and the case appears to have been decided on another ground. In 2 Wood, Ry. Law, 1343, we find the duty of the railway company in this relation announced in these terms: "A railway company, being authorized to use steam in the operation of its trains, is only bound to use ordinary care against fires, and is not liable for a purely accidental fire, caused by fire escaping from its engines. But it is bound to employ the best appliances in known use, in the form of fire boxes, spark protectors, etc., and any failure in this respect is a want of ordinary care and prudence. In most of the states, if the spark protectors, etc., are shown to be of the most approved pattern in use, and in proper repair, it is a full defense to an action for fires set by the company, unless some negligence in other respect is shown. This rule does not require the company to use any appliances which have not been tested, although approved by the highest scientific authority, but requires only the use of those which have been tested and put into general use." Under these authorities, the expression "best approved appliances," occurring in the charge given in this case, is not critically correct, but it does not follow that its use was materially erroneous. Appellant proved by uncontroverted testimony that its engine was equipped with the best appliances in use,

and there was no attempt on the part of appellees to show that there were other appliances which had the approval of scientific authority. Such being the evidence on this issue, the jury could not have interpreted the expression "best approved appliances" as requiring the use of some experimental apparatus which was not generally known, or had not come into general use. The failure of the trial court to employ the technically exact term in defining appellant's duty with reference to such appliances could not have injured appellant, and is not reversible error.

The contention of appellant that it was bound to use only ordinary care to keep its spark arresters in good repair, and was not bound absolutely to maintain them in such condition, is sound, but it does not seem that any injury could have resulted to it from the failure of the court to so instruct the jury. In *Railway Co. v. Timmermann*, 61 Tex. 663, it was held that, where the plaintiff showed that his property had been set on fire by sparks escaping from the company's engine, the burden was on the company to show that there was in fact no negligence on its part in causing the fire. This could be done by proof that the engine was equipped with the most approved arresters in general use, and that the same were in good repair, and that the engine was properly handled. In this case the appellees proved that the fire was caused by sparks escaping from one of appellant's engines, and appellant proved that the engine was equipped with a proper arrester, but did not offer any legal testimony as to the condition of the arrester at the time of the fire, or to show that the engine was carefully handled. Having failed in this respect, the prima facie case of appellees was un rebutted, and the error in the charge was immaterial.

Appellant also complains of the refusal of a special charge on this issue. We find no error in this action of the court. It is not a correct statement of the law, as announced in the requested charge, that appellant was bound only to use ordinary care in selecting competent servants to operate the engine. It was liable for the negligence of such operatives, even though it had exercised due care in appointing them. Again, the requested charge was calculated to confuse the jury on the issue as to the burden of proof. It was stated in the special charge that the burden of proof was on plaintiffs to show that the property was fired by fire which originated from the company's engine, and that such fire originated through its negligence. Strictly speaking, this proposition is correct; but, upon the plaintiffs proving that the fire escaped from the company's engine and set fire to the property, a prima facie case was made, and the burden was shifted to the company to show that its engine was properly constructed and operated. *Timmermann's Case*, supra. In view of the evidence in this case,

which has been stated above, the charge, if it had been given, was calculated to mislead the jury as to where the burden of proof rested.

It was not negligence on Miller's part to build the house on his own lot, and put his goods in the house, although the same was in close proximity to appellant's road, where engines were constantly passing. In determining whether or not it was prudent for him to do so, he had a right to assume, as stated in the court's charge, that the company would exercise ordinary care to avoid firing his property; and, if it was fired through the negligence of the company, he was entitled to recover. *Clark v. Dyer*, 81 Tex. 343, 16 S. W. 1061; *Rutherford v. Railway Co.* (Tex. Civ. App.) 61 S. W. 422.

Appellant offered to prove by R. A. Miller, its foreman at Waco, who had charge of the inspectors of engines on the Athens division, that the record of inspections in his office showed that the spark arrester of the engine in question was in good condition at the time of the fire. The record itself was not produced. It was shown that the entry was made by the witness Miller from a report handed him by a boiler maker. It was not shown where the latter got it, or who made the inspection, or that the foreman, Miller, ever saw the engine. No reason for the non-production of better evidence appears. The testimony was properly excluded.

There is no necessity for discussing the other assignments, which are without merit. The judgment is affirmed. Affirmed.

DIAMOND et al. v. SMITH.¹

(Court of Civil Appeals of Texas. Nov. 2, 1901.)

TRESPASS — SEWER — DESTRUCTION — PLEADING — SUFFICIENCY OF PETITION — JOINT TORT FEASORS — AGENCY — DISCLAIMER — DISMISSAL — SUFFICIENCY OF EVIDENCE — EXEMPLARY DAMAGES — DEDICATION TO CITY — RIGHT TO SUE — PEACEFUL POSSESSION — CITY'S CONTROL OF STREETS.

1. A petition in a damage suit, which alleged that plaintiff built and connected with his residence, and also with tenement houses erected by him, a sanitary sewer, and that, while such sewer was being used by him and his tenants, defendants, in total disregard of plaintiff's rights, unlawfully and maliciously destroyed such sewer without plaintiff's consent, stated a good cause of action.

2. Where, in a damage suit against two joint tort feasors, a temporary injunction was granted against the first, and it was decreed that the second go hence upon his answer of disclaimer, and the commencement of plaintiff's petition afterwards filed used the word "defendant" instead of "defendants," but the caption set out the names of both defendants as parties defendant, and in the body thereof recovery was sought against them both, the contention that the second defendant had been dismissed from the cause was without merit.

3. The use of the word "defendant" instead of "defendants" was immaterial, the petition charging both defendants with the trespass therein complained of.

4. In an action against joint tort feasors, an

¹ Writ of error denied by supreme court.

answer by one that he acted as agent for the other in committing the tort is insufficient.

5. A private corporation caused land owned by it to be platted in lots, blocks, and streets, and filed the plat for record. It thereafter constructed a sewer along one of these streets, with the intention of making it a part of the sewer system of the city so laid out when it should be incorporated. Subsequently a hotel company, which had bought land from the land company, failed, and the land so purchased was bought in by a college. The land company then made an assignment, and after payment of its debts its property was transferred to an assignee, who authorized plaintiff to connect his private sewer with the land company sewer. Subsequently the defendant sewer company was authorized by the city, which was chartered prior to plaintiff's connection with the land company sewer, to construct and operate a city sewer system, and to collect fees from the citizens for connection therewith, and the college which had bought the hotel property conveyed the land company sewer to defendant. Plaintiff refused to pay for his connection, whereupon defendant caused plaintiff's connection to be cut off. *Held*, that upon an issue of exemplary damages the evidence was sufficient to support a finding that defendant's act was willful and oppressive.

6. Subsequently to the institution of plaintiff's suit the city asserted title to the land company sewer for the first time, and leased it to defendant company. The assignee of the land company had asserted title to the sewer after the conveyance by the college to defendant company, and it had been kept in repair by those using it under his permission. *Held*, that the evidence was insufficient to show a dedication to the city, and hence defendant company acquired no right to control the sewer by its lease from the city.

7. An instruction that the title to the old sewer was in the assignee of the land company was harmless, since the evidence showed that plaintiff's connection therewith was made with the consent of the party claiming title thereto, and that this connection was peaceful and undisturbed until it was broken by defendants, who had failed to show any title in themselves.

Appeal from district court, Dallas county; T. F. Nash, Judge.

Action by Ben W. Smith against W. L. Diamond and the Oak Cliff Sewerage Company. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

In granting a temporary injunction against the defendant sewerage company it was decreed that defendant W. L. Diamond "go hence upon his answer of disclaimer filed herein."

This was a suit instituted by Ben W. Smith in the district court of Dallas county against the Oak Cliff Sewerage Company and W. L. Diamond to recover damages. The petition alleged, in substance, that in 1896 plaintiff erected his residence and home on lots 1 and 2, block 106, in Oak Cliff, Tex., which, since said date, had been occupied by himself and family as his home, and that afterward plaintiff erected three tenement houses, which are now used and occupied as such; that in 1896 plaintiff built and connected with his home a sanitary sewer, and also, as completed, connected his said tenant houses with said sewer, which was being used by plaintiff and his said tenants; that on the 5th day of Octo-

ber, 1900, defendants, in total disregard of plaintiff's rights, unlawfully and maliciously dug up, broke, and destroyed plaintiff's sewer, without the consent of plaintiff; that plaintiff was thereby annoyed, and the health of his family jeopardized, and that defendants were influenced by a desire to injure, harass, and annoy plaintiff, and in an oppressive and arbitrary way override his rights; that plaintiff was compelled to repair his sewer at an expense of \$10, for which he prays judgment as actual damages, and by reason of the oppressive, willful, and malicious conduct of the defendants plaintiff is entitled to exemplary damages, which he places at \$5,000, and prays judgment. Defendants answered by general and special exceptions, and further specially pleaded that there is a main sewer in the city of Oak Cliff running from what is now known as the "Oak Cliff Female College" across to and down the south side of Jefferson street to block 63 in said city, thence across said block to and down Greenwood street to the north boundary of said city, and terminating in the bottom of the Trinity river; that said sewer was constructed in 1890 by the Oak Cliff Hotel Company for the use of said hotel and the citizens of said city; that the same was an easement, and belonging to said hotel company; that in 1892 the Oak Cliff College was incorporated, and became the owner, for valuable consideration, of said hotel property and the sewer connected therewith; that in 1891 the city of Oak Cliff was incorporated under the general laws of the state of Texas, and in 1894 adopted a penal ordinance (article 122) prohibiting excavations of its streets and alleys; that in 1897 the Oak Cliff Sewerage Company was incorporated, and purchased from said Oak Cliff College said line of sewer; that in July, 1899, the city of Oak Cliff granted to defendants a franchise over the streets and alleys to construct and maintain a sewerage system for the benefit of the inhabitants of said city, and fixing the rate of charges for connections therewith permitted to be charged in order to maintain and extend said sewer system, and said ordinances further providing and authorizing said sewerage company to cut off and disconnect all persons refusing to pay said rates so fixed; that the said plaintiff had connected with said sewer, in violation of said ordinances, and without permit from said city or said sewerage company; and that plaintiff had had constructed an unlawful sewer, and connected the same with the defendants' main line of sewer, and willfully refused to comply with the ordinances of said city, and refused to pay the reasonable charges fixed by said city council and charged by defendants, and had been so using same since 1896, with four residences. Defendant Oak Cliff Sewerage Company further pleaded that, if they were not the true owners of said sewer main line, then the same is the property of the city of

Oak Cliff, or that it has the right to control same, and that same has been in possession of defendant, by permission and franchise granted by said city, since 1897; and it pleads the statute of limitation of two years and the rights of the city since 1890. That defendant further pleads a lease to it by said city, of date April 26, 1901, when said city declared that it was necessary for said city to take charge of, regulate, and control same for sanitary purposes, and leased same to defendant for five years, with exclusive right to control the same under regulations of the city; that the charges due from plaintiff January 1, 1901, was the sum of \$96, which plaintiff refuses to pay, and for which defendant prays judgment by its cross bill and plea in reconvention, and for general relief, and dissolution of the restraining order of the court, and for costs. A trial resulted in a verdict and judgment for plaintiff against both defendants for \$2.50 actual and \$25 exemplary damages. From this judgment, defendants prosecuted an appeal.

Morris & Crow and O. F. Cohron, for appellants. Wharton & Young and Cockrell & Gray, for appellee.

BOOKHOUT, J. (after stating the facts).

1. The petition stated a good cause of action, and there was no error in overruling defendants' exceptions. The contention that W. L. Diamond had been dismissed from the suit is not tenable. The last pleading filed by the plaintiff, Smith, set out in the caption the names of both defendants as parties defendant. The body of the pleadings charged both of the defendants with the trespass, and sought to recover against both of them. The fact that in the commencement of the petition the word "defendant" was used instead of "defendants" is immaterial. The petition clearly charges each of the defendants with a trespass, and sets forth a good cause of action against each of them. It was not a sufficient answer for one of the defendants to say that he acted as the agent of the other, where a joint trespass was charged.

2. It is contended by appellants in their fourth, fifth, sixth, seventh, and eighth assignments of error, which are grouped, that the evidence was insufficient to support a judgment for exemplary damages, and that it was error for the court to refuse to give its special charge No. 3, in effect instructing the jury that they could not, under the evidence, find exemplary damages. The evidence shows that the Dallas Land & Loan Company, a private corporation, owned certain property west of the Trinity river, and adjoining the city of Dallas, upon which said company proposed to build a town. It caused the land to be platted in lots and blocks and streets, and filed said plat with the county clerk for record. Thereafter, in 1890, said company built and constructed a

sewer in Jefferson and Greenwood streets, as shown by said plat, running from Park street to about Fifth street, and thence to Greenwood street, and down same to the Trinity river bottom. This sewer was built with the intention of making it a part of the sewer system of the city of Oak Cliff, which the city would take as a corporation. In June, 1890, the Dallas Land & Loan Company conveyed to the Oak Cliff Hotel Company four lots out of block 112 in Oak Cliff, according to the plat thereof. The Oak Cliff Hotel Company executed to J. T. Dargan, trustee, a deed of trust on the same lots to secure the Dallas Land & Loan Company in the payment of the purchase-money notes. Default having been made in the payment of the notes, this trust deed was foreclosed, and the property bought in by the Oak Cliff College, and conveyed to said company by the trustee. In 1891 the Dallas Land & Loan Company made an assignment, and after its debts were settled the residue of its property was transferred to T. L. Marsalis, who authorized the people who were building that as many as wanted to might connect with the sewer. In 1896 the plaintiff's residence was erected and connected by a four-inch sewer with the old sewer in Jefferson street. Dr. Patton, who had been given authority in 1890 to connect with the old sewer, looked after the erection of plaintiff's residence, and, acting under the authority given him in 1890, caused it to be connected with the main sewer in Jefferson street. Plaintiff moved into his residence in 1896, and has lived there since. He erected three other houses on the same lot for the purpose of renting same, and these houses are connected with the four-inch sewer extending from his residence to the main sewer. In 1897 the Oak Cliff Sewerage Company was chartered for the purpose of constructing, maintaining, and operating sewers in and along the streets and alleys of Oak Cliff, and the city council granted the sewerage company a franchise authorizing it to construct and operate sewerage pipes along and through its streets and alleys, and fixed a schedule of fees and charges which the company was permitted to charge those who connected therewith. In the same year the Oak Cliff College executed to the sewerage company a conveyance of the old sewer in Jefferson and Greenwood streets. This deed was recorded. Acting under this conveyance, the sewerage company assumed the right to control the old sewer, and with it as a basis began to extend the same with the view of constructing a sewerage system for the city. Many citizens took stock in this company for the purpose of having the sewerage system extended. The plaintiff, Smith, was solicited to take stock in the company, and refused, whereupon the company made out a bill for sewerage fees and charges for two years in accordance with the rate authorized by the ordinance of the city, and presented

same to Smith. He refused to pay, claiming that the company did not have title to the old sewer. Thereupon, in October, 1900, the defendant Diamond, acting under instructions from the sewerage company, caused the sewer pipe connecting Smith's residence and other houses with the old sewer to be broken, thereby causing the same to be disconnected from said old sewer. This was done on Saturday, in the absence of Smith. When he learned of it, he was considerably annoyed. Upon his return in the evening he caused the same to be repaired. The reasonable cost of repairing the break was from \$2 to \$2.50. The evidence in the record shows that defendants failed to show title to the sewer. The deed from the Oak Cliff College to the sewerage company did not convey title, and for this reason it was excluded by the court as evidence of title, but admitted upon the issue of exemplary damages. The action of the defendants in breaking plaintiff's sewer connection was wrongful. They had full knowledge of all the facts and of plaintiff's rights. The jury found, and, in deference to their verdict, we conclude, that the act was willful and oppressive. In April, 1901, the city of Oak Cliff asserted title of the old sewer and the right to control the same, and for the purpose of securing a complete sewerage system for the city leased the same to the sewerage company for a term ending January 1, 1905. The city was to receive a portion of the net profits derived by the sewerage company from charges and fees collected by it for the use of the sewer. It is contended in the argument of the appellants that the old sewer was dedicated to the city by its owner at the time the streets were dedicated in which the sewer was constructed; and, further, if this is not so, it was abandoned by the owner, and the city, by virtue of its control over the streets, had the right to take charge of the sewer and lease the same. This lease was not made until after this suit was instituted. The contention can only become important in considering the correctness of that part of the judgment perpetuating the injunction. Marsalls, who bought the assets of the Dallas Land & Loan Company, was absent from the state from 1891 until several years afterward. The evidence is silent as to any action by him, or any one representing him, in reference to the control of the sewer during such absence. It seems to have been kept in repair by those using it. The city does not seem to have claimed title or control of the sewer until it leased the same to the sewerage company. Marsalls asserted title and control of the sewer after the conveyance by the Oak Cliff College to the sewerage company. The evidence contained in the record is insufficient to show a dedication to the city. The sewerage company did not acquire the right to control the sewer by its lease from the city.

3. The proposition presented by appellants under their eleventh, twelfth, and thirteenth assignments of error does not arise in this case. The right of the city to control its streets and sewers is not questioned on this appeal.

4. The complaint is made in appellants' seventeenth assignment of error that the court erred in instructing the jury that the title of the sewer was in T. L. Marsalls. In view of the fact that the evidence does not show title in the sewerage company or W. L. Diamond, the charge, if error, is harmless. The evidence shows that when plaintiff's residence was first connected with the sewer it was done with the consent of the party claiming to have control of the sewer, and that his connection had been peaceable and undisturbed up to the time it was broken by the defendants.

We have carefully examined each of the assignments of error contained in the brief of appellants, and do not find any reversible error. The judgment is therefore affirmed.

STATE v. McNAIR.

(Supreme Court of Arkansas. Jan. 4, 1902.)

PROSECUTING ATTORNEY—DEPUTY—FEES.

Acts 1883, p. 301, § 2 ("Blind Tiger Act"), providing for deputy prosecuting attorneys, gave them power only to assist in enforcing that act. Mansf. Dig. § 3233, gave prosecuting attorneys fees "when present and prosecuting cases." Acts 1893 (Sand. & H. Dig. §§ 6010, 6011) gave the deputy power to attend all trials before magistrates where the offense was a misdemeanor, or on the examination of a felony, etc. Act 1895, amending Sand. & H. Dig. §§ 6010, 6011, provided that the deputy should have the power to file informations before any justice of his county for carrying weapons unlawfully, unlawful sales of liquor, violations of the "Blind Tiger Act," or gambling, and, where any person was arrested therefor, should prosecute the case, and in case of a conviction be allowed the same fee as in the circuit court, etc. *Held*, that the prosecuting attorney could claim a fee in justice's court only where present in person or where present by deputy in the cases mentioned in the act of 1895, and could not claim a fee where present by deputy in an assault and battery case.

Appeal from circuit court, Pope county; Wm. L. Morse, Judge.

James McNair was charged with assault and battery on an information filed before a justice, and pleaded guilty. From a judgment of the circuit court reversing the justice's judgment allowing a fee to the deputy prosecuting attorney, the state appeals. Affirmed.

G. W. Murphy, Atty. Gen., for the State.
Tom D. Brooks, for appellee.

HUGHES, J. The appellee was charged with assault and battery, on an information made by a prosecuting attorney, which was filed before a justice of the peace by the deputy prosecuting attorney. He appeared before the justice, and entered a plea of guilty,

and at the time the deputy prosecuting attorney was present, and claimed a fee of \$10, which was allowed by the justice. From this allowance he appealed to the circuit court. The circuit court held that the prosecuting attorney could claim a fee in justice's court only when present in person or by deputy in pistol, whisky, and gambling cases. The state appealed to this court.

Does the judgment reflect the law? It appears that the position or office of deputy prosecuting attorney was first provided for in this state by act of 1883 (page 301, § 2) known as the "Blind Tiger Act," and was given power alone to assist in enforcing said act. This act appears as section 1928 of Mansfield's Digest. The act of March 13, 1893, enlarged the powers of deputy prosecuting attorneys in justices' courts, as appears in sections 6010, 6011, Sand. & H. Dig. Up to the passage of this act of 1893, prosecuting attorneys, "when present and prosecuting cases," were allowed fees by section 3233 of Mansfield's Digest. But the legislature of 1895 (Acts 1895, pp. 106, 107) amended sections 6010 and 6011 by providing in section 1 of said act "that the prosecuting attorneys in the several judicial circuits of this state may appoint one deputy in each of the several counties composing their circuit," etc. Section 2 of said act of 1895 provides "that section 6011 of Sandels & Hill's Digest of the Statutes of Arkansas, be and the same is hereby amended to read as follows: 'Section 6011. The deputy prosecuting attorney provided for in section 1 of this act, shall have authority to file with any justice of the peace in his county, information charging any person with carrying weapons unlawfully, unlawful sale of or being interested in the sale of liquors, violation of Blind Tiger act, or gambling, whereupon it shall be the duty of the justice of the peace to issue a warrant for the arrest of the offender, in such case no bond shall be required for costs of prosecution.'" Section 3: "That whenever any person shall have been arrested under a warrant issued in accordance with the preceding section, and shall plead not guilty and demand a trial on the charge therein, it shall be the duty of the deputy prosecuting attorney to attend and prosecute such charge on behalf of the state, and in the event of a conviction he shall be allowed the same fees as are now allowed in similar cases in the circuit court." Section 4: In any criminal action pending before any justice's court, where the defendant is charged with any offense mentioned in section 2 of this act, by affidavit or otherwise, and shall plead not guilty, and shall secure the services of an attorney to represent him on the trial, it shall be the duty of the justice to cause the prosecuting attorney or deputy for said county to be notified of the nature of the charge and the time and place of the trial, and such prosecuting attorney shall attend and prosecute in behalf of the state, and in case of con-

viction shall be allowed the same fee as is now allowed for similar cases in the circuit court, and that no prosecuting attorney or his deputy shall receive any fee unless he personally appears and prosecutes in the case, nor shall any court tax any fee where such officer does not appear and personally prosecute. Section 5 repeals all acts in conflict. So it appears that the judgment of the circuit court is correct. The deputy prosecuting attorney can prosecute only in cases of violations of the law against the unlawful sale of whisky, carrying weapons unlawfully, violation of the Blind Tiger act, or gambling, and the prosecuting attorney is entitled to a fee only when he is present and prosecutes in person.

The judgment is affirmed.

PITCHCOCK et al. v. DONNAHOO.

(Supreme Court of Arkansas. Jan. 4, 1902.)

STALLIONS—FEE FOR SERVICE—INSURANCE CONTRACT.

Where a contract for service of a stallion insured conception, but provided that the fee should become due when the mare foaled or was traded, the fee was due and collectible when the mare was sold during the period of gestation, though it was known that she was not with foal.

Appeal from circuit court, Saline county; Alexander M. Duffie, Judge.

Action by J. N. Donnahoo against Wm. Pitchcock and another. Judgment for plaintiff. Defendants appeal. Affirmed.

This suit was brought to enforce a lien on a mare for the service of a stallion. The right to recover and to a lien was denied; it being alleged that the services were by insurance contract, and that the mare was not with foal. The plaintiff showed the service and its value, and stated that the service was rendered under a notice, which was "all the contract there ever was." The notice contained this clause: "Fee insurance, \$3.00. The usual lien for services will be reserved on mares, and fees due when mares are foaled or traded." The plaintiff testified that he did not consent for the mare to be sold. The defendant acknowledged the service and the price to be paid therefor, but testified that there was to be no charge unless the mare was in foal. He also testified that the fee was due when the colt came or the mare was traded, and that appellee consented to the sale. The mare was sold about eight months after the service, and she was not with foal when sold. The appellants asked the court to declare the law as follows: "Where the fee for the services of the horse is by insurance, the owner of the mare may sell her after it is ascertained that she is not with foal, and in such case the mare is not liable for the fee, and the plaintiff cannot recover." This was refused, and the court declared the law as follows: "When a

mare is put to a horse under a contract that the fee is due when the colt comes or the mare is traded, although it is a contract by insurance, the fee becomes due, and can be enforced against the mare, if the mare is traded before the time for the colt to come."

Murphy & Mehaffy, for appellants. J. H. Carmichael, for appellee.

WOOD, J. (after stating the facts). The court, sitting as a jury, was justified in finding and declaring the contract one of insurance upon condition. The service was rendered with the assurance that there should be no charge unless there was a foal, provided the owner of the mare did not sell or trade her during the period of gestation. The statute provides a lien from the time of service, which shall not be lost by reason of any sale, exchange, removal, or other disposition of the animal served, without the consent of the owner of the lien. But upon such disposition of the animal the lien may be immediately enforced. Section 4811, Pasch. Dig. The court was warranted in finding no waiver of the lien, or of the time for its enforcement, under the statute. The proof makes a case similar to that of *Cummins v. Peed*, 109 Ind. 71, 9 N. E. 603.

Affirm.

FITZHUGH v. HACKLEY.

(Supreme Court of Arkansas. Jan. 4, 1902.)

SHERIFFS—ATTACHMENT—RELEASE OF PROPERTY—BOND—OFFICER'S LIABILITY.

Under Sand. & H. Dig. §§ 406, 407, that a claimant of property attached must give bond to the sheriff conditioned that the claimant will interplead, and, if unsuccessful, will redeliver the property, and that such bond shall have the force and effect of a judgment, a sheriff who released attached property on a bond defective in form, not having the force and effect of a judgment, and not obligating the claimant to return the property nor pay the value, was liable.

Appeal from circuit court, Hot Spring county; Alexander M. Duffie, Judge.

Proceedings by E. F. Hackley against B. C. Fitzhugh, ex-sheriff. From a judgment for plaintiff, defendant appeals. Affirmed.

M. M. Duffie and E. H. Vance, for appellant.

BUNN, C. J. In response to an order of the Hot Spring circuit court, B. C. Fitzhugh, ex-sheriff of said county, showed that on December 4, 1893, the property involved was released from the attachment by him to J. M. Grubs, interpleader in the suit, on said interpleader's making the proper affidavit and giving bond, and made said bond an exhibit and part of said response. To this response the plaintiff demurred, and the case was tried on its merits, by the circuit judge sitting as a jury, along with the demurrer, and judgment was given against the sheriff

on the insufficiency of his response, and he appealed to this court.

The bond exhibited with the response, which was the testimony in behalf of the sheriff, does not show a compliance with the law on the part of the sheriff. In such cases the statute provides that the person—not a party to the writ of attachment—must make oath to the property, and the same will be delivered to him on his giving bond in favor of the plaintiff, with security to be approved by the sheriff, in a sum double the value of the property attached, which value shall be ascertained by the oaths of two citizens of the county wherein the writ is levied, to be chosen by the sheriff. Section 406, Sand. & H. Dig. Section 407 provides that "such [bond] shall be conditioned that the said claimant will interplead at the term of the court to which said writ shall be returnable; that he will prosecute such interpleader to judgment without delay, and if, on the trial of such interpleader, the said property shall be found to be the property of the defendant in the writ, and the plaintiff shall recover judgment against said defendant, the property shall be delivered to said sheriff or his successor in office, whenever demanded by such sheriff after execution upon such judgment comes to his hands to be levied thereon. In case the property so levied upon shall not be demanded as aforesaid, said bond shall have the force and effect of a judgment for the amount of the appraised value of such property and the costs of the interplea," etc. The respondent does not show that he took the bond from the interpleader required by statute, and, as orders of attachment are given the same force and effect as executions levied or to be levied, and are treated in the same way for all practical purposes as far as may be, the order of the court to sell attached property is a sufficient foundation to hold the sheriff for noncompliance with the statute in the matter of deposition of the property in the first instance. Section 372 of the digest, or the "intervening statute," as it is sometimes called, does not properly apply to a case like this, for it does not authorize the release of the property; and section 343 applies only to persons in possession of the attached property. In taking the bond from the interpleader the sheriff failed to take such bond as is provided for by statute, and, that being so, he had no right to release the property. The statute (sections 406, 407, Sand. & H. Dig.) contemplates that the bond be given to and acted upon by the sheriff, not the court, and this appears to have been the procedure in this case. The court made no order as to the delivery of the property, if, indeed, it could have done so. The bond was apparently given to the sheriff, as it should have been under the interpleader statute. But it was defective in form. It did not have the force and effect of judgment. It did not obligate the interpleader to return

the property, or pay the value thereof to the plaintiff or defendant, whichever might be entitled by the final judgment of the court. No valuation of the property seems to have been made, and for other defects was it insufficient under the statute.

It appears that said interplea was never tried on its merits, but was dismissed, and no appeal appears to have been taken from said order of dismissal. It further appearing that final judgment was rendered in favor of the plaintiff, the judgment of the circuit court in the matter of the response of the sheriff to the order thereof must be affirmed, and it is so ordered.

GOODMAN et al. v. PAREIRA et al.

(Supreme Court of Arkansas. Dec. 21, 1901.)

MORTGAGES—FORECLOSURE—LIMITATIONS—EXECUTION OF NOTES—PROOF.

1. Where a trust deed contained a full description of the notes secured thereby, and was duly acknowledged and filed for record, the execution of the notes will be deemed sufficiently proved, though the maker signed by his mark, which was not witnessed as required.

2. Where a trust deed was executed in 1876, when an action to foreclose would only be barred by adverse possession for seven years, notwithstanding the bar of the note, and was kept alive by payments up to 1885, an action to foreclose the deed, brought within a year after the passage of the act of March 25, 1889, providing that in existing mortgages, where the debt or liability would be barred by the terms of the act, the creditor should be allowed one year from the date of the act to bring his action, was not barred; the act of 1887 prescribing that, when a debt secured by a mortgage is barred, an action to foreclose the mortgage shall also be barred, not applying to mortgages existing at the time of its passage.

3. Payments on the mortgage debt made by the widow of the mortgagor, though possibly not preventing the running of the statute of limitations, operated to prevent the possession of the mortgagee from becoming adverse; being an acknowledgment of the holding under the mortgage.

Appeal from Pulaski chancery court; Thomas B. Martin, Chancellor.

Suit by Isaac Pareira, trustee, and another, against Elizabeth Goodman and others. From a decree in favor of the complainants, the defendants appeal. Affirmed.

On the 18th day of August, 1876, Isaac Swanigan executed and delivered to A. Kempner four promissory notes, for \$198.75 each, payable on January 1, 1877, 1878, 1879, and 1880, respectively, bearing interest at the rate of 10 per cent. per annum from January 1, 1877. On the same day, to secure the payment of said notes, Swanigan and his wife, Isabella, executed to I. Pareira, trustee, a deed of trust conveying the S. E. $\frac{1}{4}$ of the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 10, township 2 N., range 13 W., in Pulaski county. The deed was duly acknowledged on the same day, and filed for record on the 25th of the same month. The notes are set out in the transcript. Swanigan paid \$139.20 on

the first note on January 24, 1880. Swanigan died in 1881. After his death, Kempner says, no payments were made, except small amounts of \$10 at one time and \$5 at another. Swanigan's widow, on the other hand, claims that she paid 10 bales of cotton on the mortgage debt after her husband's death, delivering to Kempner 3 bales in 1882, 4 in 1883, 1 in 1884, and 2 in 1885. On the 10th day of September, 1889, Pareira, the trustee, filed a complaint in the Pulaski chancery court to foreclose the trust deed, making the widow and children of Swanigan parties defendant. Afterwards the plaintiff filed an amendment to the complaint, alleging that there had been a mistake in describing the land in the trust deed, and that the land intended to be conveyed was the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 10, township 2 N., range 13 W., and praying that the trust deed be reformed so as to describe the land intended to be conveyed, and for foreclosure, etc. The adult defendants answered, pleading (1) seven years' adverse possession; (2) that the notes were barred by limitation; (3) that the cause is barred by plaintiff's laches; (4) that the debt was paid by Swanigan in his lifetime. A guardian ad litem was appointed for all minor defendants. The case came on for trial on January 9, 1897, and the decree of the chancellor was as follows: "On this day comes the plaintiff, by W. S. McCain and David B. Samuels, his solicitors, and come the defendants, Isabella Goodman, now Isabella Young, and Matilda Phillips, by W. J. Terry, solicitor, and comes T. M. Seawell as guardian ad litem of Amos Swanigan, Robert Swanigan, and Army Swanigan, infant defendants herein. And it appearing to the court that due service of process of summons against said defendants for the time and in the manner prescribed by law, issued on the complaint, has been made in this cause, and this action, being reached upon the call of the calendar, is submitted to the court, for its consideration and judgment, upon the complaint, with its exhibits, and amendment to complaint, and the answer and amended answer of the defendants Isabella Young, Matilda Phillips, and upon the answer of T. M. Seawell as guardian ad litem for said infant defendants, the deposition of L. S. Dunscomb, A. Kempner, and A. Kempner's second deposition, and upon the original notes and deed of trust, and upon the depositions of Isabella Goodman and Matilda Phillips. And it appearing to the court that on August 18, 1876, Abraham Kempner sold and intended to convey to one Isaac Swanigan the following land in Pulaski county, Arkansas, to wit: The northeast quarter of the southeast quarter of section ten (10), township two (2) north, of range thirteen (13) west, containing forty (40) acres, but by mistake of the draftsman said forty acres of land was improperly described, and that said Isaac Swanigan gave for said land to said Abraham Kempner four promissory notes, which he

still holds, and on which the sum of six hundred (600) dollars is now due, with interest from this date at the rate of ten per cent. per annum; and, in order to secure the payment of said notes for purchase money, the said Isaac Swanigan executed and delivered to the plaintiff, Isaac Pareira, as trustee for said Kempner, a mortgage, which was intended to describe and convey said land, but by mistake of the draftsman, only a part of said land was described: Now, therefore, it is ordered, adjudged, and decreed that said mortgage be reformed so as to describe said northeast quarter of the southeast quarter of section ten (10), township two (2) north, range thirteen (13) west, in Pulaski county, Arkansas; and it further appearing that said Isaac Swanigan is dead, and the defendant Isabella Goodman is his widow, and the other defendants are his only heirs, it is further ordered, adjudged, and decreed that the equity of redemption of the defendants, and each of them, in said land, be, and the same is hereby, barred and foreclosed, and that said land be sold for the satisfaction of said sum of six hundred (600) dollars so due the said Kempner as aforesaid, and the costs."

Blackwood & Williams, for appellants. J. H. Harrod and D. B. Samuels, for appellees.

HUGHES, J. (after stating the facts). The notes which the trust deed was given to secure were executed by Swanigan, the mortgagor, by making his mark, which was not witnessed as required by law, wherefore the appellants contend that the evidence of their execution is not sufficient. But the deed of trust contained a full description of the notes, and it was duly acknowledged and filed for record. This was sufficient proof of the execution of the notes.

Was the deed of trust barred? When it was executed the law was that, to bar a proceeding to foreclose a mortgage, there must have been an adverse holding for such a period as would bar an action of ejectment, which was seven years. The fact that the statute bar had attached to the debt secured by the mortgage would not affect a proceeding to foreclose. *Birnie v. Main*, 29 Ark. 591. The act of March 31, 1887, provides, that when a debt secured by a mortgage is barred, an action to foreclose the mortgage shall be also barred. But this act was only prospective in its operation, and did not apply to mortgages existing at the time of its passage. *Duke v. State*, 56 Ark. 485, 20 S. W. 600. "No mortgage to which it applies would be barred in a shorter time after its passage than the period of limitation prescribed for the debt secured, unless barred sooner by adverse possession." *Id.* The second section of the act of March 25, 1889, provides "that in all cases, in existing mortgages, where the debt or liability would be barred by the terms of this act, or where the debt or li-

ability exists would be barred in less than one year, from the date of this act, the party in whose favor said debt or liability exists shall be allowed one year from the date of this act to bring an action to enforce the same." Acts 1889, p. 74. This suit was instituted 15th of September, 1889, within less than one year from the date of the passage of the act, which was March 25, 1889. The mortgage existed when the act of 1887 was passed, on the 31st of March, 1887. It was not barred then, and would not have been until five years thereafter, and in 1889 the act above quoted allowed one year after its passage within which to bring the action to foreclose. Therefore, as the suit was brought within the year after the passage of the act of 1889, it was in time, and was not barred.

The answer to the claim of adverse possession for seven years is that the appellant Mrs. Goodman made payments on the debts secured by the mortgage in 1882, 1883, 1884, and 1885. Though these payments by Mrs. Goodman might not have the effect to prevent the running of the statute, yet they were an acknowledgment, in effect, of holding under the mortgage, and that there was no intention to claim adverse possession. They continued to within four years of the bringing of the suit to foreclose. To constitute adverse holding against a mortgagee by the mortgagor, there must be open and notorious denial of the mortgagee's title. *Birnie v. Main*, 29 Ark. 591. This holds not only to the mortgagor, but to privies and grantees with notice. *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *Ringo v. Woodruff*, 43 Ark. 469. The suit was not barred.

The decree is affirmed, with directions to proceed to foreclose the mortgage.

EARL et al. v. WESTFALL COMMISSION CO.

(Supreme Court of Arkansas. Jan. 4, 1902.)

SALES—CONDITION OF GOODS—INSPECTION BY BUYER—ACCEPTANCE—UNAUTHORIZED SHIPMENT CHARGE—REIMBURSEMENT.

1. Where plaintiff ordered cabbages, and examined the shipment on its arrival, and, finding them badly heated and not of the kind ordered, refused to accept them, but afterwards took them at a reduced price, he purchased at his own risk, and was without recourse on the seller.

2. Where plaintiff ordered cabbages from defendant to be shipped in a ventilated fruit car, not iced, and the evidence showed that when the car left the place of shipment it was not iced, according to instructions, and that, if iced, it was done in transit without the knowledge or authority of defendant, and plaintiff paid the railroad company's charges for icing the car, he was not entitled to reimbursement from defendant for such payment.

Appeal from circuit court, Sebastian county, Ft. Smith district; Styles T. Rowe, Judge. Action by the Westfall Commission Company against Earl Bros. From a judgment

in the circuit court, affirming a justice's judgment for plaintiff, defendants appeal. Reversed.

Ira D. Oglesby, for appellants.

BATTLE, J. On the 5th of October, 1896, Westfall Commission Company commenced an action against Earl Bros., before a justice of the peace, upon the following claim:

"Earl Bros. bought of Westfall Commission Co. car cabbage. Ordered ventilated car, no ice. Received in ice car, rotten condition, damaged. Ordered Holland, received Flat Dutch; 10 ton, difference in variety, \$2.00 a ton, \$20.00. Ordered without ice; came iced, charges \$21.75. \$83.00. Credit by rebate \$15.00. Balance, \$68.00."

And it recovered judgment, and the defendants appealed to the circuit court.

The undisputed facts, as shown by the evidence adduced in the trial had in the circuit court, in the language of appellant's brief, are as follows:

"The Westfall Commission Company, through Blakemore, a broker, ordered a car load of cabbage from appellants as per following telegram:

"Ship Westfall ten tons Holland seed cabbage, well trimmed, ventilated fruit car; not iced."

"Upon the arrival of the cabbage at Ft. Smith, September 29th, Westfall, of the firm of the Westfall Commission Company, went into the car, examined the cabbage, and ascertained the kind and condition of same, and that the cabbage were heated and partly rotted, and that all were not Holland seed, but part Holland and another variety.

"He at once wrote appellants that the cabbage had just arrived; that, instead of it being fresh Holland cabbage, found the back ends in both compartments loaded with good fresh goods, and at the doors of both compartments found that the cabbage was 'old stock and not Holland,' and further complained that the cabbage were not shipped in ventilated fruit car without ice as ordered.

"He then (and it seems after writing this letter, as he makes no allusion to having wired) telegraphed Earl Bros., as follows:

"'Cabbage just arrived, heated and rotted. Can't pay draft, unless protected. Wire instructions.' Thereupon Earl Bros. wired Blakemore, the broker: 'Examine Westfall car cabbage. They wired heated and rotted. Report quick.'

"On the receipt of this telegram, which Blakemore showed Westfall, they went together to examine the cabbage (this being Westfall's second examination), opened the car, went in, and examined same as fully as they desired. At this time Westfall called the attention of Blakemore to the fact that it was a car of mixed cabbage, and badly heated and rotted. Westfall examined same as thoroughly as he wished, and admits that he had the opportunity and privilege of ex-

amining same all day, had he desired to do so, before accepting same.

"He then proposed to take the cabbage, if deduction of \$25 was made, and had Blakemore wire: 'Cabbage arrived in very bad condition; not ventilated car as ordered. Westfall will accept \$25 rebate.' In answer to this Earl Bros. wired: 'This your order bank deduct \$15 Westfall draft. Answer.'

"This offer was reported to and accepted by Westfall, who saw all the telegrams, and the trade was then closed, whereupon Blakemore wired Earl Bros.: 'Westfall accepts reduction. Will write fully by mail.'

"Westfall then paid draft, accepted the car of cabbage, and removed them to his place of business and sold them out in the ordinary course of trade. All this occurred on September 29th, and on the next day Westfall wrote appellants, as follows:

"'Your broker ordered for me a car of Holland seed cabbage. At the same time I could have bought at 50 cents a ton less; but I knew you meant to do right, and would see I got a square deal, so preferred to deal with you. Well, the car arrived yesterday. There is not one thousand pounds Holland seed in the car, and the balance is large Drum Head, and so badly rotted that we leave over one-fourth in the car. I called for a rebate, and got \$15. I paid draft less \$15, and thought I could get out; but since I got into the car I feel sure I will never get freight out of the whole car. If you can spare the time, please look at the wire ordering the car. It reads, "Ship in ventilated fruit car, no ice." Instead it came in an old-fashioned center-iced refrigerator, right against instructions. I know your business is so great you cannot attend to details; but, if you will trace this matter up for a friend and brother, you will find wherein I have been wronged and made a victim of misplaced confidence. Fifty or sixty dollars is not much to you, scarcely worth your time in reading this; but it is big money to me at present, after my potato disaster last season. I should have refused the car flatly, but thought I might work out even, and protect a friend; but my intentions got me left. We received wire stating, was shipped the 24th. The bill reads 26th, showing it stayed on track two days before being moved, making it six days in the sweat box. If you think me worthy of reply, I should be pleased to hear from you.'

"The shipment was made with bill of lading attached, being consigned to shipper's order.

"Plaintiff Westfall further claimed that he could not have ascertained the true condition of the cabbage without unloading, but admits that he went to the center of the car, and could have thrown back as much of the cabbage, and could have gone as deep into the car, as he wished, and that there was nothing to prevent him from examining them all day, if he wished. He also testified, over objections of defendants, that he told Blake-

more 'that if the car run all through as that indicated on top, that \$15 or \$25 would cover it.'

"The testimony in regard to icing the car is as follows: 'Westfall admitted that he could have ascertained, when he first examined the car, if it was iced, and could have found out all about it. Blakemore also testified that it was a car which used ice, and that plaintiff could easily have told if it was iced when he first examined it. But plaintiff admits that he did know the car was iced before he unloaded it, and before he paid the freight and charges for icing to the railroad company. The charge for freight and icing were charges made by the railroad company, were not paid to appellants, who knew nothing of it, and were in no way connected with it.'

"The testimony on behalf of appellants in regard to icing the car, and which is not contradicted, was:

"That, if the car was iced, it was done by the railroad company, without their orders. William Jaeger, who loaded the car, testified it was loaded without ice, and no instructions given to ice it. If the railroad company iced the car, it was without the knowledge or authority of Earl Bros. Charles J. Pettybone, who superintended the loading and shipping of the car, testified that there was no ice in the car when it left South Evanston, where loaded, and from which shipment was made, and further testified that he gave instructions to have car forwarded without ice, and, if it was iced, it was done without instructions from or authority of Earl Bros., or anyone connected with them. None of this testimony is disputed or contradicted.'

"The plaintiff recovered a judgment for \$36.75, and the defendant appealed."

Was plaintiff entitled to recover any sum?

When Westfall Commission Company refused to accept the car load of cabbages upon their arrival at Ft. Smith, the cabbages were in the condition they would have been had they never been sold, and were subject to resale. Westfall Commission Company repurchased them, agreeing to pay therefor \$15 less than it first stipulated to pay. Earl Bros. made no warranty. Westfall Commission Company, upon its examination and judgment, purchased. There was no fraud in the last sale. It purchased at its own risk, and must suffer the consequences, without recourse on account of the quality and damaged condition of the cabbages. *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *James v. Bocage*, 45 Ark. 284; 2 Mech. Sales, §§ 1311, 1312, and cases cited.

As to the item of the account for icing, Earl Bros. were not liable. The evidence showed that when the car was loaded with the cabbages it was not iced; that when it left the place of shipment it was not iced; that instructions were given for it not to be iced, and, if iced, it was done by the railroad

company, in transit, without the knowledge or authority of Earl Bros. The commission company knew that it was ordered to be shipped without ice, and paid the railroad company's charges for the same when no one was in duty bound to do so, and are not entitled to reimbursement on that account.

The judgment of the circuit court is therefore reversed; and, it appearing that appellee has collected, on the judgment recovered against the appellant in the justice's court, out of the funds paid by the garnishees in this action in court, the sum of \$68, judgment is rendered here in favor of the appellants against the appellee for the sum of \$68, and 6 per cent. per annum interest thereon from the 18th of January, 1897, the date of payment.

RIDDICK, J., absent.

STATE v. CALDWELL.

(Supreme Court of Arkansas. Jan. 4, 1902.)
CRIMINAL LAW — PLEADING — DEMURRER —
ABANDONMENT — QUESTION FOR JURY
— COLLUSIVE TRIAL.

1. Where the prosecution, after the overruling of its demurrer to a defendant's plea of former acquittal, joins issue on the plea and goes to trial on the merits, the ground of demurrer is thereby abandoned.

2. Where, in a prosecution in the circuit court for carrying a pistol, in which former acquittal by a justice is pleaded, there is evidence that the former prosecution was instituted to elude prosecution in the circuit court, it is a question for the jury whether or not such was the object.

3. Where a prosecution of a defendant before a justice was begun, and a purported trial had, under circumstances showing collusion, or intention merely to elude prosecution by the state, an acquittal of defendant is no bar to an indictment for the same offense.

4. In a prosecution in the circuit court for carrying a pistol, it is not error to refuse to charge that, if the jury found that an affidavit charging defendant with the same offense had been filed with a justice, at the instance of defendant's attorney, and that trial thereon was had before the time stated in the notice to the prosecuting attorney, an acquittal was no defense to the subsequent prosecution, though such facts might be considered in determining whether there was a collusive prosecution before the justice.

5. Though an affidavit before a justice and the second count of an indictment do not show a defendant was charged with the same offense, where the proof on the trial under the indictment tended to show that it was the same offense, and that defendant was seeking prosecution in the justice court to escape the same in the circuit court, it was not error to refuse to instruct the jury that the trial and acquittal by the justice was not a bar to the prosecution as to such second count.

Appeal from circuit court, Independence county; Frederick D. Fulkerson, Judge.

Lee Caldwell was acquitted of carrying a pistol as a weapon, and the state appeals. Reversed.

Appellee was indicted for carrying a pistol as a weapon. The first count charged that

on the 1st of October, 1899, he did unlawfully carry a pistol as a weapon; the pistol not being such as is used in the army and navy of the United States. The second count charged that on the 1st of October, 1899, he did unlawfully carry a pistol as a weapon; said pistol being such as is used in the army and navy of the United States, but was not carried in his hand or uncovered. Appellee pleaded former acquittal, setting up that on the 15th of October, before the indictment, he was regularly tried before a justice of the peace for the same offense. With the plea was exhibited a copy of the justice docket, showing the affidavit of J. E. Daniels, which states that Lee Caldwell, on the 14th of October, 1899, did carry a pistol as a weapon; said pistol not being such as is used in the army and navy of the United States. The copy of the justice docket further showed the issuance and return of the warrant of arrest; the setting of the case for trial on the 17th of October, at 10 o'clock in the forenoon; the trial of the case at half past 7 a. m. on the 17th of October, 1899; that Daniels consented to the trial, and testified that appellee did not at any time carry a pistol concealed, but carried one such as is used in the army and navy of the United States; and further showed the judgment of acquittal. The state demurred to the plea, alleging—First, "it did not state facts sufficient to constitute a defense;" second, "it did not state facts to show that defendant had been tried on the charge contained in the second count of the indictment." The demurrer was overruled. Appellant excepted and joined issue on the plea. The case was tried before a jury.

As the court directed a verdict for appellee on the evidence, we set it out, substantially as follows: W. C. Ashley testified: "I am a justice of the peace of White River township. This is my criminal docket. There is a charge in it against Lee Caldwell for carrying a pistol. I did not try him on any other case. I tried him on the 17th of October. I was before the grand jury on this charge. I was called there to testify about this same case. I told Mr. Campbell the trial was set for 10 o'clock, and asked him to come down; but he said he was too busy in court. It was tried at half past 7 o'clock a. m. Mr. Wright, Caldwell's attorney, came there Monday night, said he wanted to get back to court, and asked if we wouldn't try it earlier in the morning. I told him I had spoken to you about it. He said you were busy and couldn't come. We saw the prosecuting witness, and he agreed to have the trial next morning early. The next morning we were there, including Mr. Daniels. I asked if they were ready to proceed to trial, and they said they were. We went ahead to try it. I suppose I entered up the judgment in 10 days. I always do. The prosecuting attorney did not appear there that day. I had no opportunity to tell

anybody but Mr. Wright and Mr. Daniels that the trial would be at 7:30." J. E. Daniels testified: "I am acquainted with the defendant. I was a witness against him before Esquire Ashley last October. I testified in the case. The circuit court of the county was then in session. About a week after I testified in the case against Caldwell before Ashley, I appeared before the grand jury and testified there about it. I testified before the justice of the peace about defendant having a pistol. I saw him with it one night in October, on the road from the depot down town, on the road home. I testified to that. I did not know anything about his having a pistol at any other time. That was the same matter I testified to before the grand jury. I testified before the justice of the peace about Lee Caldwell firing a pistol. He had it stuck down about half way in his pants. I understood the justice was going to have the trial at 7:30 a. m. on account of Mr. Wright. I swore out the warrant. I don't know whether I had any authority to represent the state or not. I am no lawyer. I made the affidavit about Caldwell carrying the pistol this one time. I testified about seeing him in the presence of the railroad agent at Sulphur Rock. I have known Caldwell about three years. I believe I saw him down town with the pistol that night. We were together, and having a pretty good time. The only day in October, 1899, I saw Caldwell with a pistol, I saw him with it at two different times. The first time was at the store of Door Mercantile Company in Sulphur Rock. I saw him pull it out, and fire it, and reload it, and fire again. I was with him during most of the day. We were intimate friends. At the request of W. S. Wright, who was the attorney of the defendant in the justice of the peace court, I made an affidavit before Esquire Ashley charging Caldwell with carrying a pistol as a weapon. All this occurred in Independence county."

The state's attorney asked the following: "(1) You are instructed that under the evidence and the record in this cause the purported trial and acquittal of the defendant by the justice of the peace, Ashley, is not a bar to the prosecution as to the second count of the indictment. (2) You are instructed that if you find that an affidavit charging Caldwell with carrying a pistol as a weapon was made and filed with Ashley, a justice of the peace, by Daniels, at the instance or procurement of Wright as an attorney for defendant, and that the prosecuting attorney was notified by said justice of the peace of the time and place of trial, but that said justice held said trial before the time of which said prosecuting attorney had been notified, an acquittal of defendant by said justice before said time is no bar to this prosecution. (3) You are instructed that if the prosecution of the defendant before the justice of the peace was begun, and th

purported trial before him had, under circumstances showing collusion, or under circumstances showing intention merely to elude prosecution by the state, an acquittal of defendant under such circumstances would be no bar to an indictment for the same offense." The court refused these requests, and directed a verdict for the appellee.

Geo. W. Murphy, Atty. Gen., for the State.

WOOD, J. (after stating the facts). The state, having joined issue on the plea and gone to trial on the merits, abandoned its ground of demurrer. *Tabor v. Bank*, 48 Ark. 454, 3 S. W. 805, 3 Am. St. Rep. 241; *Langley v. Langley*, 45 Ark. 392; *Jones v. Terry*, 43 Ark. 230.

The court erred in directing a verdict for appellee. There was evidence tending to show that the prosecution before the justice was instituted for the purpose of eluding prosecution for the same offense in the circuit court. It was, at least, for the jury to say under the circumstances, whether or not such was the object of the proceedings before the justice.

The third request for instruction on behalf of the state should have been granted. *Richardson v. State*, 56 Ark. 367, 19 S. W. 1052. Bishop says: "If one procures himself to be prosecuted for an offense which he has committed, thinking to get off with a slight punishment, and to bar any future prosecution carried on in good faith, if the proceeding is really managed by himself, either directly or through the agency of another, he is, while thus holding his fate in his own hands, in no jeopardy. The plaintiff state is no party in fact, but only such in name. The judge is imposed upon, indeed, yet in point of law adjudicates nothing. * * * The judgment is therefore a nullity, and is no bar to a real prosecution." 1 Bish. Cr. Law, § 1010; *McFarland v. State*, 68 Wis. 400, 32 N. W. 226, 60 Am. Rep. 867; *Watkins v. State*, 68 Ind. 427, 34 Am. Rep. 273, and numerous authorities there cited.

The matters set forth in the second request were proper for the jury to consider in determining whether there was a collusive prosecution before the justice; but the court did not err in refusing to tell the jury that these things, if found, constituted no defense.

The court did not err in refusing the first request. While the affidavit before the justice and the charge in the second count of the indictment do not show that the appellee was charged with the same offense, the proof on the trial, introduced without objection, tended to show that it was the same offense, and that appellee as we have said, was seeking prosecution in the one court in order to escape it in the other.

For the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

SEWER DIST. NO. 1 OF FT. SMITH v. SCHOOL DIST. OF FT. SMITH.

(Supreme Court of Arkansas. Jan. 4, 1902.)

SHERIFF—FEES—SERVICE OF PROCESS—JOINER OF ACTIONS.

A statute relating to the sale of real estate for delinquent assessments for improvements provided that the lands of two or more owners could be joined in one proceeding, and that the owner should be made a defendant, if known, and summons served on him. *Held*, that where 66 tracts of land owned by one party were joined in the same proceeding, and 66 copies of the complaint were served on the owner, the sheriff was entitled to but one fee therefor, service of one copy only being necessary in such case.

Appeal from circuit court, Sebastian county, Ft. Smith district, in chancery; Styles T. Rowe, Judge.

Proceeding to sell land for a delinquent sewer assessment by sewer district No. 1 of Ft. Smith against school district of Ft. Smith. From a judgment for plaintiff, but disallowing fees for serving summons, it appeals. Affirmed.

Hill & Brizzolara, for appellant. Chas. E. Warner, for appellee.

BATTLE, J. The board of improvement of sewer district No. 1 of Ft. Smith, Ark., filed a complaint in equity in the Sebastian circuit court for the Ft. Smith district for the condemnation and sale of certain real estate to pay a special assessment levied upon it for the purpose of constructing sewers, of which 65 lots or parcels were the property of the school district of Ft. Smith, the same having been returned delinquent on account of the nonpayment of the assessment. The school district was made a defendant. A summons was issued, and in the names of the owners and defendants therein commanded to be summoned the name of the school district appeared 66 times, and it was served by the delivery to the school district of 66 copies of the same.

Was the sheriff entitled to 66 fees for serving the summons by the delivery of the 66 copies? This is the only question in the case. The circuit court held that he was entitled to only one fee.

The statutes of this state provide that, if any assessment upon real property, made for the purpose of constructing a local improvement, shall not be paid within the time prescribed by law, the collector shall add thereto a penalty of 20 per centum, and return a list of such property to the board of improvement as delinquent, which shall straightway cause a complaint in equity to be filed for the condemnation and sale of the same for the payment of such assessment, penalty, and costs of suit; that it shall be no objection to any suit brought for said purpose that the lands of two or more owners are joined in the same proceeding, and such suit may be brought against one or more owners; that the owner of the property assessed shall be made a defendant, if known;

and that summons shall be issued, and the defendant shall be required to appear and respond within five days after service. Under these statutes all the property assessed of the same owner may be joined in one proceeding, may be made the subject-matter of the same action. When this is done, there is but one action, and the owner is but one defendant. The fact that 66 tracts of his land are joined in the same proceeding does not constitute 66 actions, or make him 66 defendants. The object of the statute in requiring him to be made a defendant, and that he be summoned to answer the complaint, is to give him notice of the pendency of the proceeding against his property, and the opportunity of setting up his defenses, if he has any. To accomplish this purpose it is not necessary to make him 66 defendants and to serve him with 66 copies. One is sufficient. The service of the summons by 66 copies is only one service and only one fee therefor is due.

Judgment affirmed.

MCGINLEY v. ALLIANCE TRUST CO.¹

(Supreme Court of Missouri, Division No. 1.
Dec. 17, 1901.)

LANDLORDS — APARTMENT BUILDINGS — DEFECTIVE STAIRWAY—LIABILITY TO TENANT —IMPROPER USER—JURY QUESTIONS.

1. Plaintiff and her sisters were sitting on the stairway used in common by their father and other tenants renting flats in defendant's apartment building, when their mother came up the stairway, and plaintiff, in order to let her pass, leaned against the stairway railing, which, being rotten, broke, and plaintiff was injured. The stairways were not leased by the tenants, but were used as necessary appurtenances to their flats, and there was no express reservation of control over them by defendant. *Held*, that the question of defendant's negligence in allowing the stairway to be out of repair was for the jury.

2. Whether plaintiff's use of the stairway was within the scope of the purpose for which it was intended and ought to have been used, was a question for the jury.

Appeal from circuit court, Jackson county; Edw. P. Gates, Judge.

Action by Kathleen McGinley against the Alliance Trust Company. From a judgment of nonsuit entered at close of plaintiff's evidence, she appeals. Reversed.

Action for damages by a member of a tenant's family against a landlord for personal injuries suffered by reason of alleged negligent construction and negligent failure to repair a stairway in the landlord's possession. The statements in the petition are to the effect: That defendant was the owner of certain tenement houses in Kansas City, divided off into flats or apartments, which were rented to tenants, each tenant renting and occupying exclusively a flat or suite of rooms, and using in common the back porches or galleries and stairways appurtenant for

ingress and egress, the rooms or apartments alone being rented to and in the exclusive use of the respective tenants, while the porches or galleries and stairways were in the possession and control of the landlord, were not exclusively appurtenant to the apartments of any one tenant, but were designed and used by all the tenants in common for ingress and egress to and from their apartments respectively. That plaintiff's father rented one of these flats or suites of rooms, and lived in it with his family, of which the plaintiff was a member. Several months after the family had been living there, on a hot evening,—June 14, 1896,—the plaintiff and her two sisters were sitting on the steps of one of these stairways, eating a luncheon, when their mother, aiming to come into the house by means of this stairway, ascended the steps, and, there not being room enough for her to pass while the three sisters were sitting as they were, the plaintiff arose to make room for her mother to pass, and in doing so leaned against the railing of the stairway, which broke loose or gave way, and she fell to the ground below, about 16 feet, and suffered a serious injury. That the accident resulted from the fact that the railing was negligently constructed, in that it was not braced as it should have been, and was fastened with nails that were too small for the purpose, and which had been exposed to the weather for three or four years, and the nail holes had become rotten; and the railing was negligently suffered to remain thus out of repair, the defendant knowing, or by ordinary care would have known, its condition, and the plaintiff did not know it. There was an answer of denial and contributory negligence. Upon the trial the testimony on the part of the plaintiff tended to prove the facts as above mentioned. There was no evidence that the defendant, in its contract with plaintiff's father, expressly reserved possession and control of the porches and stairways, but the circumstances tend to justify that inference. The express contract was only for a renting by the month of the suite of rooms. The porches and stairways were necessary appurtenances, but as such belonged as well to apartments rented to and occupied by other tenants as to the suite of rooms rented to and occupied by plaintiff's father. In the contract there was nothing said on the subject of repairs, or of the condition as to safety of the premises. At the conclusion of the plaintiff's evidence the defendant offered an instruction to the effect that the plaintiff was not entitled to recover, which instruction was given, a judgment of nonsuit followed, and the plaintiff appeals.

Wash Adams, Thos. F. Gatts, and N. F. Heltman, for appellant. Cook & Gossett, for respondent.

VALLIANT, J. (after stating the facts).

1. The question for our determination is whether a landlord is liable in damages to a

¹ Rehearing denied January 12, 1902.

member of his tenant's family under the circumstances above indicated. A member of a tenant's family in such case stands in the same relation to the landlord as the tenant himself. The question may therefore be more briefly stated thus: Is a landlord liable in damages to his tenant under such circumstances? A landlord is under no obligation to make repairs on the leased premises during the term unless he has contracted to do so, and therefore he is not liable for consequences that may result from a failure to so make repairs. But a statement of that familiar proposition does not answer the question before us. These porches and galleries were not a part of the premises rented to the plaintiff's father. He had only a use of them in common with all the other tenants similarly situated. His right to use them is implied from the situation. He could make no use of the apartments he had rented without them. Ordinarily, when repairs are needed on a house in the possession of a lessee, he may make them; but no one else can enter the house to make repairs without his permission, not even the landlord. 18 Am. Eng. Enc. Law (2d Ed.) 226. Right and duty go together in such case, except where the right rests on permission or concession. If one has the right, by virtue of his own estate in the premises, to make repairs, and safety requires them, it is his duty to do so; if he has no such right, he has no such duty. Who had the right to repair those stairways? If either one of the tenants who were using them in common had such right, then any one of them had. If either had such right by virtue of his estate in the premises, then it was his duty to have made the repairs, and, failing to do so, he would be liable to the plaintiff for her injuries. There can be no doubt that the landlord had the right to enter upon those porches and galleries and stairways and make needed repairs, and no one tenant, nor all of them, could forbid him. Yet it was not stipulated in his contract that he might do so. He had a right to so enter by virtue of his estate; and it is equally clear that no one else had such a right, and, if any one had attempted to make repairs, the landlord could have forbidden him to do so. To the general proposition stated above that a landlord is not bound to make repairs unless he binds himself by contract to do so, it may be added that he is not bound to make repairs on the leased premises where the lease covers only a part of the building. This was said in the opinion in *Ward v. Fagin*, 101 Mo. 609, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650, and it is the generally accepted doctrine. 18 Am. & Eng. Enc. Law (2d Ed.) 220. But the addition to the proposition above stated does not answer the question in this case. The plaintiff does not complain of the failure of the landlord to repair that part of the premises which he had leased to her father, but the com-

plaint is of negligent construction and failure to repair the part of the building in the possession and under the control of the landlord which it was necessary for her father's family to use in common with all the other tenants to render the premises her father did lease available for the purposes for which the lease was made. The law on this subject has been discussed in nearly all the courts of England and America, as is shown by the great array of authorities which the learning and research of counsel have enabled them to present in their briefs. Whilst the decisions are not uniform, yet we are satisfied that the summary made by the law writer in 18 Am. & Eng. Enc. Law (2d Ed.) 220, is correct as to the weight of the authorities and right in principle. We quote what the learned author says: "The rule laid down by the weight of authority is that when the landlord leases separate portions of the same building to different tenants, and reserves under his control those parts of the building or premises used in common by all the tenants, he is under an implied obligation to use reasonable diligence to keep in a safe condition the parts over which he so reserves control." Then, after citing in a note a long list of cases decided supporting that doctrine, the author proceeds: "Thus it is held by the weight of authority that an implied duty is imposed upon the landlord to keep in repair common passageways and approaches retained under his control and used by the several tenants as the means of access to the portion of the premises demised to them, and that the landlord is liable for injuries received by a tenant because of the landlord's negligence in performing this duty. But there are a few cases holding the contrary rule. The character of the liability has been said to be the same as that of any owner of real estate who holds out invitations or inducements to others to use his property to exercise reasonable care and skill to render the premises reasonably fit for use for the uses which he has invited or induced others to make of them." In the notes to this text are given references to many decisions, English and American, in which the subject is discussed, and which, we think, clearly support the conclusion of the text writer upon them. This subject is also ably discussed in a note to *Dollard v. Roberts* (N. Y.) 14 L. R. A. 238 (a. c. 29 N. E. 104), and the same conclusion is reached as that above quoted. The authorities cited by those two law writers will afford the inquirer on this subject all the information he will desire. An attempt is made in some of the cases to draw a distinction between tenement or apartment buildings having common hallways, stairways, etc., in which the landlord employs janitors to attend to them, and buildings of the same kind where no janitors are employed, and also between such buildings in which there are elevators operated by the

landlord and those in which there are none. 2 Wood, Landl. & Ten. (2d Ed.) p. 870. But we are unable to appreciate any such distinction or principle. As a matter of evidence it is easier to prove that the landlord has retained control of the common passages when he has janitors and elevator operators in his employ, but their absence would not affect the principle if the fact of the landlord's control can be established by other evidence, or be reasonably inferred from all the circumstances. In determining the question as to his control, we start out with the proposition that the landlord's estate in the land makes him the controller of the premises until he parts with that right. The evidence in this case tended to show that the landlord had exclusive control for the purposes of construction and repairs of the porches, galleries, and stairways in question, and, that being so, the law attaches to him liability for a failure to perform his duty in those respects, and the court should not have sustained the demurrer to the evidence on the ground that he was not liable under such circumstances.

2. It is said, however, that the plaintiff and her sisters were not using the stairway for ingress and egress when the accident occurred, and that the landlord, if liable at all, is only so when the stairway fails to serve that purpose. Whether the use then being made of the stairway was such as the landlord, when he rented the rooms to plaintiff's father, and when he thereby impliedly invited them to make use of it, had a right to anticipate would naturally be made of it, is a question that appeals for its answer to the common sense of the triers of the fact in the light of the evidence and of the ordinary experience of mankind. There was sufficient in this case to have left that question to the jury.

3. After the plaintiff had rested, and the demurrer to the evidence was under advisement with the court, the plaintiff offered other evidence, which, on objection, the court excluded, and then sustained the demurrer. Much of the evidence offered was only cumulative of what had already been introduced, and as the court, by its ruling, showed that it did not consider the landlord liable under the conditions shown, it doubtless excluded it for that reason. Some of the evidence so rejected was not exactly cumulative, and objection to it may rest on different grounds; but the case will now be retried by the court from a different legal standpoint, and the questions as to the admissibility of this evidence will be viewed in a different light, and the original judgment of the trial court should be exercised in regard to it before it is a proper subject for review on appeal. The court erred in sustaining the demurrer to the evidence, and therefore the judgment is reversed, and the cause remanded to be retried according to the law as herein expressed. All concur.

ROBERTS v. MISSOURI & K. TEL. CO.¹

(Supreme Court of Missouri, Division No. 1.
Dec. 17, 1901.)

TELEPHONE COMPANIES—DEFECTIVE APPLIANCES—CROSS-ARMS—LINEMAN—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—NEW TRIALS—RULING OF TRIAL COURT—RULE IN APPELLATE COURT—EXCEPTION.

1. A telephone lineman, charged by his employment with the duty of inspecting and repairing his employer's line, assumes by his contract of employment the risk arising from a defective cross-bar which breaks and causes his injury while he is repairing it.

2. Plaintiff, an experienced telephone lineman, charged with the duty of inspecting the lines, climbed out on a rotten cross-arm, which broke, causing his fall. He made no previous test of the cross-arm, though familiar with the ways of doing so, and though the condition of the arm was concealed by paint. He did not have a safety belt, though linemen furnished their own appliances, and his fellow workman had one. He knew that cross-arms rot in from six months to ten years, and that none could tell how long a particular one would last, and he had worked on this cross-arm several months before. *Held*, that he was guilty of contributory negligence as a matter of law.

3. The evidence showed that plaintiff had assumed the risk.

4. No verdict in favor of the plaintiff could be allowed to stand, and hence the case constitutes an exception to the rule that the appellate court will not reverse the ruling of the trial court in granting one new trial.

Appeal from circuit court, Buchanan county; W. K. James, Judge.

Action by Thomas Roberts against the Missouri & Kansas Telephone Company. From an order setting aside a nonsuit suffered by plaintiff, defendant appeals. Reversed.

Action for \$11,000 damages for personal injuries received by the plaintiff on September 22, 1898, while in the employ of the defendant as a lineman. Upon a trial in the circuit court of Buchanan county the plaintiff suffered a nonsuit with leave, which that court afterwards set aside, and from which ruling the defendant appealed.

The petition alleges that the defendant, as a part of its plant, has a lead or line of wires in the city of St. Joseph running from the south part of Eleventh street to and through South Park; that such wires are suspended by cross-arms attached to poles about 30 feet high, and placed at intervals of about 100 feet; that the cross-arms are made of wood, about 2½ inches wide, about 4 inches deep, and about 8 feet long, and are fastened to the poles about 20 feet above the ground; "that this plaintiff was employed by the defendant on said 22d day of September, 1898, to fix and securely fasten the wires of said lead to the cross-arms above described, and to tighten the wires on the cross-arms above defendant's where they sagged down upon those of defendant; that in pursuance of his duties on said day he was negligently ordered to get upon one of said poles and cross-arms on said above-de-

¹ Rehearing denied January 13, 1902.

scribed line or lead in South Park, a suburb of the city of St. Joseph, as aforesaid, by defendant, acting through its foreman and manager in charge of this plaintiff and other men working with plaintiff on this line or lead on said day; that, in order to do the act and perform the work required by defendant, plaintiff ascended to the top of said pole, and was compelled to stand upon the cross-arm above described of said pole; that said cross-arm of wood had negligently been placed upon said pole in a rotten, unsafe condition, and remained there two years or more, and was or had negligently been allowed to become rotten, dangerous, and unsafe, which was well known to defendant, or might have been discovered and known to defendant by the exercise of ordinary care and diligence on its part, but was not known by plaintiff; that this plaintiff, while standing upon the cross-arm, as above stated, at the direction of defendant, and in the performance of his duty, was violently thrown and precipitated to the ground by reason of the said rotten cross-arm breaking, and by reason of the negligence of defendant as aforesaid, thereby crushing, mashing, and breaking this plaintiff's leg at the ankle." The answer admits the incorporation of the defendant, and that the plaintiff was in its employ as a lineman at the time he was injured; denies generally the allegations of the petition; and pleads affirmatively—First, that the injury was occasioned by one of the hazards or perils ordinarily incident to the employment of a lineman in the defendant's service; and, second, contributory negligence. The reply is a general denial.

The evidence showed the following facts: Plaintiff was 34 years old at the time of the accident, and for 8 years prior thereto had been working as a lineman for the Western Union Telegraph Company, the Missouri Electric Light Company of St. Louis, and at different times for the defendant. He was perfectly familiar with the duties of a lineman and of the risks incident to that work. He knew how to test a pole or cross-arm before going upon it to ascertain whether it was rotten or sound, safe or dangerous. He knew that the life of a cross-arm or a pin in a cross-arm was from six months to six, or even ten, years; and that they are liable to dry rot, and that no one can tell how long one will last. He had worked on this same line and upon this same pole and cross-arm, and had put this same peg or pin in this same cross-arm, and strung a wire to it, during the summer immediately preceding the accident. He knew that the tests for ascertaining whether a cross-arm was sound or rotten were to strike it with a hand axe or with the pliers, or to dig into it with a screw driver, or to drive a screw into it. He admits he made no test whatever of the cross-arm. He says it was painted, and appeared to be all right, but because it was painted its condition could only be ascer-

tained by applying one of the tests mentioned. The pole was owned by the city, and had only two cross-arms. The top one was short, and carried the electric light wires; the lower one was a 10-pin cross-arm, about 10 or 12 feet long, and was owned by the defendant. It was mortised and bolted into the pole, and projected about 5 or 6 feet on each side of the pole. It was made of pine, and was 3 $\frac{3}{4}$ inches in perpendicular dimensions, by 1 $\frac{1}{4}$ inches in width. The pins or pegs are made of oak or ash, and are set in holes bored through the cross-arm. The wire the defendant had on the pole was called the "police circuit." Several days before the accident the line was reported to be in bad working order, and the plaintiff and J. W. Gates, another experienced lineman, were sent out from the defendant's office, to run over the line, repair it, and fix it up so that it would give better service. The plaintiff and all linemen in the defendant's service, and generally in all similar services, were required to supply themselves with the necessary tools to be used as linemen, which usually consisted of a pair of pliers, a screw driver, climbers, clamps, and a safety belt. The safety belt is worn by all linemen, and consisted of a belt or strap which went round the waist and the pole and fastened with "snaps," and was intended to prevent the lineman from falling while at work on the pole or cross-arm, and to enable him to work with both hands. It is from 3 to 6 feet long. Gates had all of the above-mentioned tools, including the safety belt. The plaintiff had all except a safety belt. The plaintiff and Gates started to repair and fix up the line. No foreman or superior officer went with them. They worked a day or two before the accident tightening wires, and doing whatever they found or deemed necessary to put the line in working order. Among other defects they found before they reached the pole and cross-arm in question were three or four cross-arms on other poles that were rotten and dangerous, and these they took out, and replaced them with new ones, which they got from the supply the defendant kept on hand for the purpose. They also tightened up the wires wherever they sagged, as they also did the electric wires wherever they sagged down upon the telephone wires and interfered with the latter wires. When they reached the pole where the accident happened, about 11 o'clock in the morning, the plaintiff climbed the pole first, and got above the lower cross-arm,—the defendant's,—on the north side of the pole, and Gates climbed up the south side of the pole, and stopped with his waist at the cross-arm. They found that the electric wire on the top cross-arm sagged down so as to come in contact with the telephone wire on the lower cross-arm. They worked about an hour tightening the wires, and during that time the plaintiff stood upon the defendant's cross-arm, but close up to the pole. Gates got out on his side of the

cross-arm, and tied a wire, and the cross-arm bore his weight, but he was a lighter man than the plaintiff, who was over 5 feet 9 inches in height and weighed over 150 pounds. During the time they were at work, the peg or pin to which defendant's wire on the north side of the pole, where the plaintiff was working, broke, because of the strain of the wire upon it, which was greater because the wires ran from that pole at an angle. The plaintiff noticed the broken peg, and examined it, and found that it was rotten. When they had finished tightening the wires, the plaintiff unfastened the wire from the broken peg, and stepped out on the cross-arm about two feet from the pole for the purpose of tying the wire to the next peg further out on the cross-arm. When he did so, the cross-arm broke, he was thrown to the ground, and his leg broken. Afterwards it was discovered that the cross-arm was defective, having been affected with the dry rot. At the close of the plaintiff's case the defendant demurred to the evidence. The demurrer was sustained, and the plaintiff took a nonsuit, with leave, which the court afterwards set aside, and the defendant appealed.

C. A. Mosman and Warner, Dean, McLeod & Holden, for appellant. A. H. Harrison and John Geo. Parkinson, for respondent.

MARSHALL, J. (after stating the facts). 1. It is not denied in this case, for the law is too well settled to admit of discussion, that it is the duty of the master to furnish to the servant a reasonably safe place and reasonably safe appliances on which and with which to do the work required of the servant, and, conversely, it is equally well settled that it is the duty of the servant to "take ordinary care to learn the dangers which are likely to beset him in the service. * * * He must not go blindly or heedlessly to his work, when there is danger. He must inform himself. * * * The servant is held, by his contract of hiring, to assume the risk of injury from the ordinary dangers of the employment; that is to say, from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part. He has therefore no right of action, in general, against his master for an injury befalling him from such a cause. His right to recover will often depend upon his knowledge or ignorance of the danger. If he knew of it, or was under a legal obligation to know of it, it was part of his contract, and he cannot, in general, recover. *Price v. Railroad Co.*, 77 Mo. 508; *Thomas v. Railway Co.*, 109 Mo. 199, 18 S. W. 980; *Steinhauser v. Spraul*, 127 Mo. 562, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441. "The servant, when he enters the employment of his master, assumes not only the risks incident to his employment, but all dangers which are apparent and obvious as a result thereof. The master is no insurer against all accidents

that may overtake or befall the servant in his employ." *Nugent v. Milling Co.*, 131 Mo. 245, 33 S. W. 429. "If the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover, that the building, premises, machine, appliance, or fellow servant in connection with which or with whom he is to labor is unsafe or unfit in any particular, and if, notwithstanding such knowledge, or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him." 2 *Thomp. Neg.* 1008. In *Steinhauser v. Spraul*, 127 Mo., loc. cit. 562, 28 S. W. 626, 27 L. R. A. 446, it was said: "Again, no principle is more frequently enunciated or more often applied in the adjudicated cases than that which holds that an employé, in engaging in the service of another, assumes the risks incident to such employment; and this is especially true of seen dangers and patent defects. Where ordinary inspection and carefulness will enable the employé to avoid the danger, there he will be required to use such inspection and carefulness. 'But it is held that, wherever the employé's means of information are equal to or greater than those of his employer, the employer will not be liable in case of injury from a defect of that sort. But this is perhaps little more than to say that the servant, as well as the master, is bound to ordinary care. For patent dangers or defects, the master, as a rule, is not liable, and in many cases it has been held that they need not be pointed out, even to minor employées, if the latter be capable of discerning them.' *Beach, Contrib. Neg.* (2d Ed.) § 359." In *Junior v. Power Co.*, 127 Mo., loc. cit. 562, 28 S. W. 988, it was said: "The facts in this case bring it within the familiar principle that if a servant, capable of contracting for himself, and with full notice of the risk he may run, voluntarily undertakes a hazardous employment, or to place himself in a hazardous position, or to work with defective tools or appliances, the master is not liable for injuries received from these known risks." The case of *Flood v. Telegraph Co.*, 131 N. Y. 603, 30 N. E. 196, is peculiarly apposite to the case at bar in its essential features. In that case the New York court of appeals, speaking through Earl, C. J., said: "The plaintiff seeks to enforce liability upon the defendant for the death of the intestate because of its negligence as to the cross-arm which broke under his weight. We have carefully read and weighed the evidence contained in this record, and are unable to find any showing of culpable negligence adequate to sustain this judgment. The defendant did not insure the safety of its employées. It was

bound only to use reasonable and ordinary care to provide for them a safe place to do their work, and they assumed the ordinary risks of the employment in which they were engaged. The cross-arms on telegraph poles, manifestly from their usual size and strength, are not intended to bear the whole weight of any person; and yet the evidence shows that persons engaged in fixing them, and placing wires upon them, do sometimes rest their weight upon them. It must always be a hazardous venture for a man to sit on the outer end of one of these cross-arms, engaged in pounding near the end with a hammer. When the arm is new and perfect, this may be done with safety; but it must always be attended with great danger, and it is unnecessary, as the work can be done without resting the whole weight upon the arm. There was no negligence in furnishing and putting up this arm originally. It was of the material and of the size and apparent strength and safety then in use by all telegraph companies. And, so far as appears, such arms have been found adequate for every purpose. For some time before the accident the defendant had been using larger and stronger arms to carry heavier wires, and only for that purpose. There was a system of inspection for the arms when purchased, and it does not appear that there was anything in the external appearance of this arm, when new, which indicated any defect or weakness, or that there was any defect therein discernible by any ordinary inspection. This arm had been in use for about six years, and during all that time had perfectly answered its purpose. There was no proof showing how long such an arm ought to last or be used. The defendant had a system of inspection which appears to have been all that was practicable. Its inspectors went along the line of telegraph poles and wires, and carefully looked at them, and tried the poles to see if they were still strong and adequate. They were provided with arms, so that, if they discovered any that were insufficient, they could replace them. They were not expected to climb up every pole and examine the arms thereon. Such an inspection would be manifestly impracticable and unnecessary. The linemen all discharge their duties in the daytime. They have frequent occasion to climb the poles, and work about the arms, and obviously they are the persons who are expected to see the condition of the arms, and, if they find them insufficient, to replace them, or to report the fact. It is the obvious duty of every lineman, before going upon one of these arms many feet above the earth, to inspect it for his own safety." The case of *Bergin v. Telephone Co.*, 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192, is also very similar to the case at bar. In that case it was said: "Delaney was an experienced lineman, acquainted with the duties and dangers of his employment. As against the telephone company, his negligent failure to perform one of

the duties of his employment must defeat a recovery for an injury caused by such failure. The relation of Delaney to the electric railroad company was different. As he was not their employé, he was under no contract duty to test their wires or circuit breakers. Under different circumstances he might have assumed that the electric company was performing its duty, and using safe and suitable appliances to prevent the escape of electricity from the main or trolley wire to the guy wires. But when the accident happened he knew, as an experienced lineman, that such was not the fact, and that it was unsafe to act upon such a belief. He had been expressly warned of the danger of a contact with wires of this kind. Two instances upon this same work of damages caused by the escape of electricity to the telephone wires by reason of defective circuit breakers had been called to his attention; and a fellow workman, but a day or two before this accident, pointed out to him this particular guy wire as one from which he had himself just received a shock. With such knowledge, and after such warning, Delaney heedlessly pulled the wire which he was coiling from the arm of the telephone pole in such a manner that it would obviously fall, as it did, upon the guy wire, and when, as the court finds, it would have been easy for him to have thrown the wire from the pole so as to avoid contact with the dangerous guy wire. The defendant electric railroad company can be only liable in this action for an injury caused by its negligence to one who was himself in the exercise of ordinary care. Its negligence did not excuse Delaney from exercising such care to avoid an injury. Applying that test to the conduct of Delaney, namely, the care which a person of ordinary prudence and judgment should have exercised under similar circumstances,—and we have no reason to think any different standard was applied,—the trial court has found that he was not in the exercise of due care alleged in the complaint, and that his negligence essentially contributed to cause his injury. This conclusion of the court is final."

There is not a particle of evidence in this record to sustain the allegation of the petition that the work was being done under the direction of defendant's foreman, or of any superior officer. The plaintiff and Gates were alone, and were sent to repair the line and fix it up. They were left free to adopt what measures they saw fit to accomplish the purpose. Neither is there any evidence to support the contention of the plaintiff that his duties as a lineman did not require him to examine or inspect the cross-arms to see if they were safe before he rested his weight on them. On the contrary, whether such duties ordinarily attach to the business of a lineman or not, the plaintiff, in the performance of the work of repairing and fixing up the line, was expected to and did inspect and repair the whole line,—the poles, cross-arms,

and pins, as well as the wires,—and his testimony shows that he so understood it; for he says that he and Gates had discovered three or four cross-arms that were rotten or dangerous, and had taken them out and replaced them with new cross-arms, which they obtained from the stock the defendant kept on hand for that purpose. The plaintiff therefore was not only acting as a lineman, but was also an inspector as to this work. He was engaged in the work of repairing the line. It was his duty to look for defects, and to remedy them. He had no right to assume that the defendant had previously and properly inspected the line, for, if it had, it would have known of the defects, and have directed the plaintiff and Gates what defects existed, and what they should repair. This case is clearly distinguishable from the cases cited and relied on by the plaintiff, in this: That in those cases the servant injured was not charged with the duty of ascertaining and repairing the defects in the appliances, but was using appliances furnished him by the master for use in the ordinary course of his employment, while in this case the plaintiff was charged with the duty and engaged in the work of inspecting and repairing the master's appliances. The plaintiff therefore assumed, by his contract of employment, all the risks incident to the performances of the work upon which he was engaged. The accident was caused by one of those risks. The plaintiff therefore has no claim against the defendant.

In addition, the plaintiff was a skilled lineman of over eight years' experience. He knew that cross-arms rot in from six months to ten years, and that no man can foretell how long any particular cross-arm will last. He knew all the tests—which were very simple—for ascertaining whether a cross-arm was sound and safe or not. Yet he did not apply a single test to this cross-arm before putting his weight upon it. He knew it was painted, and that any defect in it could not be discovered by the eye, but could only be ascertained by one of the usual tests. Yet he did nothing to find out its condition before he went out on it. He knew that all linemen wear a safety belt, which they furnish themselves, and which the company did not furnish; and yet he had none, and used none. He knew the purpose of a safety belt was partly to prevent a fall if the cross-arm broke, and yet he used none. He seeks to excuse this neglect of his own safety by saying he could not have used it when he went out on the cross-arm. But he is manifestly mistaken in this regard, for he says the safety belt was five feet long, and he only went out two feet onto the cross-arm. He was put to notice of the condition of the cross-arm before he went out on it, for he saw that the pin, which was made of oak or ash,—a hard wood,—was broken and rotten; and he knew that if the pin was rotten the probability was that the cross-arm, which was

made of pine, a soft wood, was also rotten. Yet he took absolutely no precautions for his own safety. His knowledge and means of knowing the condition of the cross-arm was not only equal, but superior, to the knowledge and means of knowledge of its condition by the master. He was on the spot; the master was in town in the office. Upon this showing it is plain that the risk was assumed by the plaintiff, and also beyond dispute that the plaintiff's own negligence contributed directly to the happening of the injury, and that he is not entitled to a judgment against the defendant. Ordinarily, the question of contributory negligence is one for the jury, but where the plaintiff's own case clearly establishes contributory negligence there is no disputed fact for the jury to pass upon, and the matter is one of law. *Hudson v. Railway Co.*, 101 Mo. 13, 14 S. W. 15; *Milburn v. Railroad Co.*, 86 Mo. 104; *Schlereth v. Railway Co.*, 98 Mo. 509, 10 S. W. 66; *Stone v. Hunt*, 94 Mo. 475, 7 S. W. 431; *Buesching v. Gaslight Co.*, 78 Mo. 219, 39 Am. Rep. 503; *Evans & Howard Fire Brick Co. v. St. Louis & S. F. Ry. Co.*, 21 Mo. App. 648; *Warmingtton v. Railway Co.*, 46 Mo. App. 159.

In *Haven v. Railroad Co.*, 155 Mo. 216, 55 S. W. 1035, it was held that this court will not reverse the ruling of a trial court in granting one new trial unless no verdict in favor of the party at whose instance the new trial was granted could be allowed to stand. *Haven v. Railroad Co.*, 155 Mo., loc. cit. 229, 55 S. W. 1035. This case falls within the exception to the rule stated.

For those reasons the judgment of the circuit court setting aside the nonsuit is reversed, and the cause remanded to that court, with directions to overrule the motion to set aside the nonsuit. All concur.

CRAWFORD v. DIXON et al.³

(Supreme Court of Missouri, Division No. 2.

Dec. 17, 1901.)

COURT OF APPEALS—INCREASED JURISDICTION—EFFECT ON PENDING CAUSES.

Under Act March 20, 1901, increasing the jurisdiction of the courts of appeal to cases where the amount involved does not exceed \$4,500, and providing that all cases pending in the supreme court which have not been submitted, and which come within such increased jurisdiction, shall be certified to such courts, a case pending in the supreme court which involves an amount not exceeding \$4,500, and which is not submitted until the October, 1901, term, will be certified to the proper court of appeals, where there is no other ground on which the supreme court can take jurisdiction.

Appeal from circuit court, Cedar county; D. P. Stratton, Judge.

Bill by Mollie Crawford against Delphia Dixon and others. Judgment for plaintiff, and defendants appealed to the supreme

³ Motion to set aside order of transfer denied January 17, 1902.

court, which certified the case to the Kansas City court of appeals.

J. P. Veerkamp, J. E. Stephens, and Rechow & Pufahl, for appellants. W. W. Younger and Cole & Burnett, for respondent.

GANTT, J. This is a bill in equity by plaintiff to set aside certain allowances against the estate of Zimri Dixon, and to perpetually enjoin the defendants, and each of them, from selling or offering to sell, or taking any further steps to sell, the lands of which said Zimri Dixon died seised to satisfy said allowances. The bill charges the said allowances were based upon false and fictitious claims, and were fraudulently obtained. Judgment went for plaintiff in the circuit court, and defendants appealed to this court. The bill charges a conspiracy, and that the allowances aggregated \$3,795, which constitute the amount involved.

When this appeal was taken it was properly returnable to this court, but as the act of March 20, 1901, increasing the jurisdiction of the courts of appeal to cases where the amount in dispute, exclusive of costs, shall not exceed \$4,500, provided that all cases now pending in the supreme court which had not been submitted, and which, by the terms of said act, came within the jurisdiction of the courts of appeal, should be certified and transferred to the proper court of appeals, and whereas this case was not submitted until this October term, 1901, of this court, and the amount involved does not exceed \$4,500, and there being no other ground upon which this court can assert jurisdiction over this appeal, it is ordered to be certified and transferred to the Kansas City court of appeals. All concur.

McNEAR v. WILLIAMSON et al.¹
(Supreme Court of Missouri, Division No. 1.
Dec. 17, 1901.)

EJECTMENT — EQUITABLE AND LEGAL DEFENSES — TRIAL — ADMISSIONS — DEEDS — DELIVERY — INFANTS — APPEAL — CONFLICTING EVIDENCE — PARTIES.

1. In ejectment by one claiming by deed from defendant, defendant alleged as an equitable defense that, being indebted to a certain bank for \$3,000, plaintiff, her son-in-law, had fraudulently represented to her that the indebtedness amounted to \$5,000, and that the bank was about to attach the land and force a sale, whereon she executed the alleged deed to plaintiff and her son for an inadequate consideration. The evidence did not show why she should have relied on plaintiff's statements, but showed she was in as good position to know the facts as was plaintiff. *Held* that, the burden of proof being on her, she was not entitled, under the evidence, to equitable relief.

2. Defendant, having also alleged that the deed was never delivered, was not entitled to equitable relief on the pleadings, nondelivery constituting a defense at law.

3. The equitable defense was an admission of delivery only so far as the trial of the equity

issues were concerned, and when defendant failed to make out the equitable defense she was entitled to have the other issues tried at law.

4. The delivery of a deed to a minor is not ineffectual by reason of minority alone.

5. Plaintiff in ejectment claimed under a deed from the defendant, and the defense was that its execution was obtained by fraud, and also that it was never delivered. There was evidence that, defendant being indebted to a bank for \$3,000, plaintiff, her son-in-law, represented to her that the debt amounted to \$5,000, and that the bank was about to attach the land and force a sale, whereon she executed a deed to him and to her minor son for a consideration of \$900, though the annual rental value was over \$500. The deed was handed to her son, who took it to defendant's home, and put it in her possession. Nine days later she paid plaintiff \$650, which she claimed was in part a return of the consideration, but which he claimed was paid to him as a gift. There was a finding for plaintiff, but it did not appear from the record whether it was based on failure of the equitable defense of fraud or on the question of delivery. *Held* that, though the court would not ordinarily set aside a finding on such conflicting evidence, though it considered the finding against the weight of evidence, yet, it not appearing that the issue of delivery had been clearly presented, the finding should be set aside.

6. Where plaintiff in ejectment claimed under a deed alleged to have been executed to himself and to another, under which he claimed an undivided half interest, the other grantee, having refused to become a party plaintiff, was not a necessary party defendant under Rev. St. 1890, § 544, providing that parties united in interest with the plaintiff and refusing to join in the suit may be made defendants, since plaintiff's right of recovery was not dependent on the other grantee.

Appeal from circuit court, Charlton county; W. W. Rucker, Judge.

Ejectment by Robert H. McNear against Mary E. Williamson and others. From a judgment for plaintiff, defendants appeal. Reversed.

This is an action in ejectment for land in Boone county. The real parties in interest are the plaintiff, McNear, and the defendant Mary E. Williamson. The two other defendants are the husband of Mrs. Williamson and her son, Arthur Jennings, who, at the commencement of this suit, was a minor, and who, the petition avers, is equally interested with the plaintiff in the subject sued for, but refuses to become plaintiff, and is therefore made defendant, under section 1994, Rev. St. 1890; section 544, Rev. St. 1890. Mrs. Williamson was the owner of a life estate in the land, the remainder in fee vesting in her two children,—a daughter, who is the wife of the plaintiff, and the son above mentioned. The case turns on the question as to the validity of a document alleged to be a deed executed by Mrs. Williamson February 14, 1898, purporting to convey her life estate to her son and the plaintiff, her son-in-law. In her answer Mrs. Williamson says that the deed was never delivered, and for an equitable defense she says that the plaintiff and his father falsely and fraudulently represented to her that she was indebted to the Centralia Bank in the sum of \$5,000, when

¹ Rehearing denied January 15, 1902.

in fact she did not owe that bank more than \$3,000, and that the bank was going to institute a suit by attachment against her, and that by that means they induced her to believe that, in order to save her property from attachment and forced sale, she ought to convey it to the plaintiff and her son; and that, being at the time in bad health and nervous, and confiding in the representations so made, she yielded to the suggestion and signed and acknowledged the deed, but never delivered it; that she afterwards discovered that the representations were false, and she made a satisfactory adjustment of her affairs with the bank, and still retains the deed in her possession; that there was no consideration for the deed, the son, Arthur Jennings, makes no claim under it. The evidence is conflicting on some points presently noted, but the following facts appear without dispute: In December, 1897, the defendant who is now Mrs. Williamson was a widow, Mrs. Jennings, and owned a life estate in the land in suit, the fee in remainder being owned by her daughter and son; the son, Arthur Jennings, being then a minor, and a student at the university at Columbia. On December 28, 1897, the plaintiff, McNear, married the daughter of Mrs. Jennings, and made his home in her house. In February, 1898, Mrs. Jennings was indebted to the Centralia Bank in a considerable sum, the exact amount of which she seemed not to know, but apprehended it might be as much as \$5,000, and also apprehended that the bank would press a settlement, which would be disastrous to her. In that state of mind, on February 14, 1898, she signed and acknowledged the document in controversy, which purports to be a quitclaim deed of her life estate to her son, Arthur, and her son-in-law, McNear, for the consideration of \$900. This deed (we will call it a deed for convenience) was drawn in a lawyer's office in Centralia, and while it was being written the plaintiff, McNear, and his father, and Arthur Jennings went to the bank, and executed their joint note for \$900, for which the bank gave them a note for \$256, which it held, on which Mrs. Jennings was liable, and \$644 in money. They then returned to the lawyer's office, and gave the note and money to Mrs. Jennings, and she signed and acknowledged the deed, and handed it to her son, Arthur, who took it to her home, and put it in her bureau drawer, and she has had it in her possession ever since. As soon as the transaction just mentioned was concluded, Mrs. Jennings went from the lawyer's office to the Centralia Bank, and then discovered that she only owed the bank about \$3,000, and she then made a satisfactory adjustment of the indebtedness with the cashier. Nine days afterwards—February 23d—she returned to the plaintiff the \$644 that had been given to her at the lawyer's office, and he at once took it to the bank, and paid it on the \$900 note above mentioned, and Mrs. Jennings short-

ly afterwards paid the bank the balance of that note. On March 8, 1898, Mrs. Jennings married her present husband, Williamson, and shortly after that event the plaintiff and his wife moved away from her house. The property sued for consists of a farm in Boone county, and a house in Centralia. The rental value of the farm is \$500 a year and of the house is \$7 per month. The points on which the testimony is conflicting relate chiefly to the question of delivery of the deed and to the character of the act of returning the \$644 to the plaintiff; that is, whether it was handed to him to pay on the note in bank, or was a mere gift to him of so much money. The testimony on the part of the plaintiff tended to show that when she handed the deed to her son, Arthur, she told him to take it and put it on record. That on the part of the defendant tended to show, when she handed the deed to him, she told him to take it home for her, as she had no pocket to put it in, and was going to the dress-maker's to try on a dress before going home. Arthur himself testified that he was unwilling to have the deed made to the plaintiff and himself; that he told his mother, if she was going to make a deed, it should be made to his sister and himself. As to the return of the \$644, the plaintiff's testimony was to the effect that Mrs. Jennings gave it to him as a present without any direction what to do with it. Her testimony was that she told him to take it to the bank, and pay it on the note, and in the same connection told him that she was not going to deliver the deed to him. There was also some conflict in the evidence as to representations alleged to have been made by the plaintiff to Mrs. Jennings in regard to the amount of her indebtedness to the bank, and what the bank was going to do about it; but, in the view we take of the case, it will not be necessary to go into that evidence. There was a finding and judgment for the plaintiff for the possession of an undivided half of the land sued for, \$100 damages, and \$25 a month rents and profits. Defendants appeal.

Fry & Clay and H. S. Booth, for appellants.
C. B. Sebastian and J. H. Cupp, for respondent.

VALLIANT, J. (after stating the facts).

1. We are not favorably impressed with the equity side of the defendant's case. It is very clear from her own testimony—in fact from her answer—that her purpose in making the deed in question was to put the property out of reach of her creditor. She may not, as her learned counsel say, have been in pari delicto with the plaintiff, but she is not so free from blame as to make her an object of special care to a court of equity. Courts of equity are rather disposed to leave parties to suffer the inconvenience that their own wrongdoing has occasioned; and although it will sometimes grant relief where the par-

ties, though both in the wrong, are not equally so, as in *Poston v. Balch*, 69 Mo. 115, cited by the learned counsel, yet it only interferes in such a case to prevent a greater wrong. If the chancellor decided this case on the allegations in the answer of fraudulent representations, we think his finding as to the fact was right. The burden of proof on that issue was on the defendant. There was no such preponderance of evidence in her favor as would have justified the chancellor in setting aside the deed on that ground. There is no reason shown why she should have relied on information given her by the plaintiff as to the amount of her indebtedness to the bank. She was in as good position to know that fact as the plaintiff. And as to what the bank was likely to do about it, there is nothing to show that the plaintiff pretended to have any special information on the subject. But, taking the answer for true, it does not make out a case for equitable relief, because it shows that the defendant has an adequate defense at law; that is, that the deed was never delivered. If it was not delivered, it was no deed, and therefore there was nothing for a court of equity to act upon. We do not say that there might not be circumstances surrounding an undelivered document which would call for the aid of a court of equity to assist the defense at law, but this is not such a case. We therefore conclude that neither on the pleadings nor proof is the defendant entitled to equitable relief. It does not very clearly appear from the record upon what theory the case was decided. The argument is made for respondent that appellants' contention that the equitable defense converted the entire suit into a suit in equity carried with it the admission that the deed was duly delivered. That would have been the result if the answer had made out a case for equitable relief. But if this case went off on that theory, it left untried the main issue in the law suit. The answer expressly denies the delivery of the deed, and therefore if the fact of delivery was assumed or treated as admitted and the judgment for the plaintiff was rendered solely on the ground that the defendant's evidence failed to sustain her equitable defense, it was error. When the court trying the equity branch of the case reached the conclusion (if it did so) that the evidence did not support the allegations of the defendant as to fraud, it should have so announced, and then have proceeded to try the issues at law (*Miller v. Railroad Co.* [Mo.] 63 S. W. 85); or, if objection had been made in time, the court would have ruled that the answer fell short of making a case for equitable relief, and then there would have been left only the issues at law to be tried.

2. The crucial question in this case is, was the deed delivered? and that is purely an issue at law. There was testimony tending to show a delivery, and, if that question had been clearly presented to the trier of fact, we

would not, in the exercise of our appellate jurisdiction, feel justified in setting aside the finding solely on the ground that we thought the weight of the evidence was the other way. But in the state of this record it appears to us as not unlikely that that question got lost in the other issues, or, at all events, that it was not tried as it should have been. Delivery of a deed is the consummation of the act, the completion of the contract, and in order to its accomplishment there must be a meeting of the minds of the parties on the purpose. "In order to ascertain whether there has been a delivery of that deed or not, the intention of the parties in the entire transaction must be considered in connection with what they said and did." *Miller v. Lullman*, 81 Mo. 311. The act must have been with the intent on the part of the grantor to divest himself of title, and it must have been accepted by the grantee with the intent to take the title as indicated in the deed. These two acts are essential to the complete delivery of the deed. *Miller v. Lullman*, supra. *Tyler v. Hall*, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337; *Hall v. Hall*, 107 Mo. 101, 17 S. W. 811; *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 328; 9 Am. & Eng. Enc. Law (2d Ed.) 153, 161. Although Arthur was a minor, yet, if the deed was delivered with the intention of all the parties to the transaction to pass the title as indicated in the deed, it was as valid a delivery as if it had been so delivered to the plaintiff. It is almost indisputable from the evidence that the moving purpose of Mrs. Jennings was to put the property out of reach of the bank. Independent of that purpose, there would have been no sale. She had no purpose, as a mere matter of bargain and sale, to make that disposition of the property. It was bringing her in an annual rental of \$584; hence there was no business motive to sell for \$900. If she had intended to divest herself of the title, and pass it to her son-in-law and her son, if she had intended to make a complete delivery of the deed, why did she hand it to the boy, instead of the man? And if the plaintiff had understood it to have been a straight purchase on his part, why did he not interpose, and see that the deed was put on record? He knew that it was so managed as that it did not come into his hands, and that it was taken to the home of Mrs. Jennings, not recorded, and put into her bureau drawer, and retained in her possession. If, as the plaintiff says, Mrs. Jennings, when she handed the deed to Arthur Jennings, told him to put it on record, why did he suffer Arthur to take it to his mother's house, and not put it on record? Arthur's conduct and the plaintiff's conduct were not consistent with the instructions given him if those instructions were as the plaintiff says they were. On the other hand, if Mrs. Jennings' statement is true that she handed the

paper to Arthur, and told him to take it home for her, as she had no pocket in which to put it, the conduct of all the parties was entirely consistent with that direction. Again, to accomplish the fact of delivery, it was not sufficient that Mrs. Jennings should have delivered it with the intention of passing the title to the grantees, but it was also necessary that Arthur should have received it with that intention. The testimony on that point is meager; yet as far as it goes it is to the effect that he was not willing to accept it in that way. If such a deed was to be made, he wanted it made to his sister and himself. He was a minor, and it is argued for respondent that, the deed being for his benefit, his acceptance will be presumed. *Standiford v. Standiford*, 97 Mo. 231, 10 S. W. 836, 3 L. R. A. 290. We cannot, as a matter of law, say that this deed was unquestionably for his benefit. By its terms his mother conveys to the plaintiff an undivided half of the chief part of her estate for an apparently inadequate consideration, while he is a minor, and dependent on her. But, even if it were unquestionably for his benefit, the presumption of acceptance by him is only *prima facie*, and the evidence, as far as it goes, tends to overcome that presumption. Within a few days after she had settled with the bank, Mrs. Jennings returned to the plaintiff the very \$644 he had given her, and he received it knowing then that she still had possession of the deed, and that it had not been recorded. He testified that he understood that to have been a present from his mother-in-law to him, but her testimony was that she gave it to him to pay on that \$900 note, and in fact he did so apply it, and she paid the balance of the note in a short while, and he knew it. Of course, the repayment of the money to him under those circumstances would not have the effect to annul the sale or retransfer the title to Mrs. Jennings if there had been a sale and delivery of the deed, nor would it estop the plaintiff to assert any title he might have acquired, but it is a circumstance to be taken into consideration in arriving at the intention of the parties in this transaction. It is not claimed that there was any delivery of the premises to the plaintiff on the execution of the deed, or that any was demanded then or immediately thereafter. The conduct of the parties in that respect, also, was inconsistent with the idea that there had been a real sale. For the reasons above given, we think there should be a new trial of the cause.

3. Arthur Jennings was not a necessary party to this suit, and it was therefore improper to have made him a defendant. Section 544, Rev. St. 1890, providing that parties united in interest with the plaintiff, and refusing to join in the suit, may be made defendants, does not apply to a case in which the plaintiff may sue for and recover his interest independent of another party who has a like interest. If the plaintiff is entitled to an

undivided half of this land, he is not dependent on Arthur Jennings for his right to sue and recover it.

The judgment is reversed, and the cause remanded to the circuit court of Chariton county to be retried according to the law as herein expressed. All concur.

HEMAN v. SCHULTE et al.¹

(Supreme Court of Missouri, Division No. 1.
Dec. 17, 1901.)

TAXATION—TAX BILL—SPECIAL ASSESSMENT—SEWER DISTRICTS—MUNICIPAL CORPORATIONS—CONCLUSIVENESS OF ACTS—PLEADING—LEGAL CONCLUSION—CONSTITUTIONAL LAW—EMINENT DOMAIN.

1. In an action on a special tax bill issued for the construction of a sewer, it is no defense that defendant's lot could not be benefited by the sewer, as the action of the common council is conclusive in a collateral attack.

2. The acts of a municipal body under a power vested in it are conclusive on the courts, unless they are so unreasonable, oppressive, and subversive of the rights of the citizen, in the general purpose declared, as to clearly indicate an attempted abuse, rather than a legitimate use, of the power.

3. An allegation in defense of an action on a tax bill that the tax levied against the property of defendant is an attempt to take private property for an alleged public use, in violation of Const. Mo. art. 2, § 20, and to deprive defendant of his property without due process of law, in violation of Const. Mo. art. 2, § 30, and of Const. U. S. Amend. 14, is a mere statement of a legal conclusion, and not one of facts on which the court is asked to apply its conclusion of law.

4. Const. art. 2, § 20, providing that no private property shall be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law, refers to and is intended to regulate the right of eminent domain, and it has no application to special assessments for local improvements.

Appeal from St. Louis circuit court; P. R. Flitcraft, Judge.

Action by August Heman against Fredericka D. Schulte and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. B. & Ford W. Thompson, for appellants. Hickman P. Rodgers, for respondent.

ROBINSON, J. This is an action by plaintiff, as original contractor, brought to enforce the payment of special taxes assessed against defendants' property for benefits arising from the construction of a sewer in what is known as "Warren Avenue Sewer District, No. 6," constructed in pursuance of Ordinances Nos. 17,811 and 17,812 of the city of St. Louis. The special tax bill was issued by the president and board of public improvements on the 5th of November, 1895, to the plaintiff, under his contract with the city authorities, and is assessed against part

¹ Rehearing denied January 13, 1902.

of a lot owned by defendants, having a front of 120 feet on the north line of St. Louis avenue, extending southwardly 160 feet, bounded as follows: On the north by St. Louis avenue, on the east by Lambdin avenue, on the south by property owned by one Max Judd, and on the west by the property of one Cutter. The original lot of which defendants own a part has been so divided that they own the north 160 feet, and Max Judd the south part thereof, extending to the alley through which the sewer in question has been constructed. To plaintiff's petition defendants filed the following answer: "Now come defendants in the above-entitled cause, and, for amended answer to plaintiff's petition, state that they deny each and every allegation of said petition. Wherefore defendants, having fully answered, pray to be dismissed hence with their costs. And for further answer and defense to plaintiff's petition, defendants state that they are the owners of part of lot No. 1 of city block No. 3690, having an aggregate front of one hundred and twenty feet on St. Louis avenue, by a depth of one hundred and sixty feet to private property of one Max Judd. They deny that the city of St. Louis by its charter was empowered to pass Ordinances Nos. 17,811, 17,812, referred to in plaintiff's petition, and say that said ordinances, so far as they establish Warren avenue sewer district, No. 6, including the property of defendants herein, are illegal and void, in this, to wit: that the said city of St. Louis had no authority under its charter to pass or approve of an ordinance including the property of defendants herein in a sewer district, unless the sewer to be constructed in the said district was along public streets, alleys, or places, or was along, upon, or adjacent to property of the city of St. Louis condemned for the use of public streets, alleys, or public places, or for the uses of said sewer; and defendants aver that the said sewer district described in the said ordinances and so established did not abut or adjoin the property of the defendants herein; and defendants say that the said sewer district so established was along property owned by one Max Judd, which abutted and adjoined the property of the defendants herein, so that the defendants herein could not connect with or have the use of said sewer, or any portion or part of said sewer district so established by the said ordinances. Therefore defendants say that the said ordinances are void, and the tax levied and assessed under the said ordinances against the property of the defendants herein is an attempt to take the private property of defendants herein for an alleged public use, in violation of section 20 of article 2 of the constitution of this state, and to deprive the defendants herein of their property without due process of law, in violation of section 30 of article 2 of the constitution of the state of Missouri, and of

article 14 of the amendment of the constitution of the United States. And defendants further aver that the tax bill issued under and in pursuance of the said ordinances is void and of no effect, because the said sewer so constructed under the said tax bill and contract, and by virtue of said ordinances, did not adjoin, abut, or connect with the property of defendants herein, nor could the defendants herein connect with or enjoy the said sewer, or any of the rights or privileges therein, in any manner whatsoever; and the ordinances creating the said district, so far as the same permitted any tax to be levied against these defendants or their property for the construction of said sewer, is in violation of the said sections 20 and 30 of article 2 of the constitution of the state of Missouri, and of article 14 of the amendments of the constitution of the United States." Thereupon plaintiff moved the court to strike out all that part of defendants' answer beginning with and following the words: "They deny that the city of St. Louis by its charter was empowered to pass ordinances," etc. Defendants' answer being stricken out by the court, they declined to plead further, but renewed their objection at the trial to any testimony being offered, and afterwards, in their motion for a new trial, made the point that the action of the court in striking out this answer was erroneous. Judgment was rendered in favor of plaintiff, and defendants appeal. So that the only question present for determination on this appeal by the defendants now is whether their answer, to the effect that though their property lies within the sewer district described, but not so as to be directly connected with the sewer, by reason of the intervening strip of private property, owned by another, cutting off entirely defendants' connection with the alley through which the sewer is constructed, constitutes a valid defense to plaintiff's cause of action, founded upon the special tax bill charging that property with its proportionate part of the cost of constructing the sewer in that district.

While parts of the answer stricken out are somewhat loosely drawn, and charge that the city has no power to do many things therein enumerated, it does not charge that those things were done or attempted to be done by the city, except that it erroneously assessed this property, situated so as to receive no benefit from the sewer as constructed. It does not allege that the sewer is laid out on or under private property or through a private alley, or that defendant's property is without the sewer district for which the assessment was made, or that, on account of topographical conditions, it would be impossible or impracticable to use the sewer. Nor is it alleged in the answer, nor is it contended for now by defendants on this appeal, that the city was wanting in authority to impose a special tax upon pri-

vate property for the construction of the sewer, and to determine who of these specially benefited shall bear the expense thereof, and in what proportion, or that the tax assessed was apportioned according to an unjust rule, but only that said Ordinances Nos. 17,811 and 17,812, referred to in plaintiff's petition, in so far as they established Warren avenue sewer district, No. 6, including their property, situated as it is and was, with an intervening strip of private property between it and the alley along which the sewer was constructed, are illegal and void. Reduced to its last analysis, appellants' proposition and contention are simply this: That as their property is not specially benefited by the construction of the district sewer in question, on account of their inability to connect with it except through intervening private property, and over which they have no rights or control, it is not subject to the special assessment levied to pay for the construction of same; or, to use the language of appellants' argument, "assessments for local improvements can be levied only for special benefits conferred." Stated in the abstract, this may be the assertion of a correct proposition, but, when considered in the concrete, many difficulties must arise to render it of little or no practical avail. While all taxation—general as well as special, for that matter—is presumed to be for the benefit, directly or indirectly, of the taxpayer or his property to be affected, and is predicated upon the sole idea of benefits conferred for the tax exacted or the assessment imposed, we all must know that individual hardships will be entailed in the working out of this, as any universal system of governmental policy, that no amount of legislative wisdom or forethought can prevent, or judicial action defend against; yet because of that fact the system is not to be repudiated or condemned, or the result of its operation arrested or annulled, by judicial decree.

The only case cited from this state by appellants as supporting their contention "that only those who can actually use a district sewer established can be assessed for its construction" is *Johnson v. Duer*, 115 Mo. 336, 21 S. W. 800; and of that case it is only claimed it does so inferentially. That case was a bill in equity by several property owners of a sewer district established in Kansas City, on behalf of themselves and all others of the district who may be interested, against the contractor who constructed the sewer, and a trust company of Kansas City, who was holding the tax bill issued to the contractor, as collateral security, to have declared void the ordinances establishing the sewer district, and the tax bills in virtue thereof, and that the cloud upon the real estate of plaintiffs created thereby may be removed. One among the several reasons alleged in the petition of plaintiffs in the case why the tax bill was void was "that the topography of the district is such that a large

portion of the land and lots thereon cannot be drained by said sewer, and the owners of such property cannot make use of, or have any benefit from, said sewer and its laterals." The writer of the opinion disposed of that contention in these few words:

"It is insisted that the topography of the district is such that a portion of the land and the lots therein cannot be drained by the sewer, and the owners of such property cannot make use of it. A sufficient answer to this complaint is that these plaintiffs do not charge that their property cannot be drained by the sewer, and they have no concern with the property of others."

From the simple statement, "A sufficient answer to this complaint is that these plaintiffs do not charge that their property cannot be drained by the sewer, and they have no concern with the property of others," made by way of an easy disposition of an erroneous assertion of the plaintiffs in the case, the appellants here would have the court in that case declaring as a rule of law (by implication, it is true, they say) that if a plaintiff alleges and shows, in an action to defeat a tax bill, that his property could not be drained by the sewer as constructed, or that the sewer was of no use to him, the court would hold the tax bill issued in payment of same void; and upon that so-called declaration by implication counsel have made a most pleasing argument upon the question of the requirements of local assessments, and of the underlying and foundation principles upon which they rest, and upon which their authority is predicated,—“corresponding benefits for burdens imposed.” It would seem that the closing sentence in the very paragraph of the opinion cited by appellants states an all-sufficient reason why the judgment in this case must be affirmed, and why their answer filed is unavailing against the tax bill in suit, regardless of the inference drawn from the preceding part thereof by them, to the effect that the city had no right to levy an assessment against property so situated in the sewer district that it cannot use the sewer. That paragraph closes as follows: “Besides, the matter of establishing sewer districts is intrusted by the legislature to the common council, and its action is conclusive in a collateral attack.” Thus it must be seen that if we agree that appellants' property, because of its situation, should not have been included in the sewer district in question, or assessed to pay for the sewer, on account of their inability to connect with the sewer as constructed, and that the city authorities might for that reason have exempted it from the assessment levied to pay for said improvements, these facts would be unavailing to appellants in this character of an action, under the rule above announced,—that, where “the matter of establishing sewer districts is intrusted by the legislature to the common council, its action is conclusive in a collateral attack.”

Not only is it the rule in this state, as asserted above, "that, when the matter of establishing sewer districts is intrusted by the legislature to the common council, its action in the premises is conclusive in a collateral attack," but the rule generally stated is that, where a municipal body vested with the exercise of a power acts, its acts under that power, in the absence of fraud, are conclusive upon the courts, whether the attack made thereon is collateral or direct, and the fraud that will authorize the court's interference in the matter of municipal action is not that the power exercised or the ordinance passed has resulted in an individual hardship in its execution, or that in the working out of the general scheme designed by an ordinance an individual burden is imposed, without a corresponding benefit conferred (a necessary incident to any system of general taxation or special assessment yet devised for governmental maintenance and support), but only in those cases when the acts of the municipal body are so unreasonable, oppressive, and subversive of the rights of the citizen in the general purpose declared as to clearly indicate and leave but one inference,—that of an attempted abuse, rather than the legitimate use, of a power enjoyed; and of this qualified and limited assertion of right in the courts to interfere with municipal legislation much doubt is felt.

If, however, the court's right to interfere and grant relief, upon a proper showing of facts, against the arbitrary exercise of a discretionary power by the legislative body of a municipality, be conceded, as an unquestioned proposition, that would be of no credit to these defendants in the present action upon the tax bills in suit, for two reasons: First, because it is not charged in defendants' answer that the city authorities, in the exercise of their power of designating the boundaries of the sewer district in question, including the property of defendants therein, acted arbitrarily, corruptly, or in a manner to indicate an attempted abuse of power on their part; and, in the second place, its action could not be questioned in a collateral attack, had the charge of fraud and arbitrary action been made against the city authorities in the matter of including this property in the sewer district in question, and in the issuance of the tax bill in suit to pay for the sewer as constructed. However considered, defendants were not aggrieved by the action of the trial court in striking out the answer filed.

To that part of defendants' answer stricken out wherein it is alleged that "the tax levied and assessed under the said ordinances against the property of the defendants herein is an attempt to take the private property of defendants for an alleged public use, in violation of section 20 of article 2 of the constitution of this state, and to deprive the defendants of their property without due process of law, in violation of section 30 of

article 2 of the constitution of the state of Missouri, and of article 14 of the amendments of the constitution of the United States," all that need be said at this time is that it is the mere statement of a legal conclusion by the pleader, and not one of facts upon which the court is asked to apply its conclusion of the law. But independent of that consideration, it is difficult to see how the provisions of section 20 of article 2 of the constitution of this state, which provides "that no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that wherever an attempt is made to take private property for a use alleged to be public the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined without regard to any legislative assertion that the use is public,"—could in any way have been violated in the levy and assessment of the taxes in question, or of what application it could have to the proceedings. That provision of the constitution clearly refers to and is intended to regulate the right of eminent domain, whereas special assessments for local improvements, such as we are now called upon to consider, are referable to and sustained under the taxing power, solely. Wherein defendants have been denied due process of law, or wherein they have failed to receive the prescribed notice of the assessment in question, defendants' brief is as wanting of a definite suggestion as their answer is of a definite allegation. So we will presume that they have abandoned all claim of wrong on that account.

From what has here been said it follows that the trial court committed no error in striking out that part of defendants' answer above set out, and in rendering judgment for plaintiff upon the tax bill, and its judgment is therefore affirmed. All concur.

SMITH v. BAER.¹

(Supreme Court of Missouri, Division No. 1.
Dec. 17, 1901.)

REFEREES—FINDING—REVIEW—BILL OF EXCEPTIONS—APPEAL—ABSTRACT—TRIAL—SEPARATION OF ISSUES—DISCRETION.

1. Where an order of reference was entered on November 9, 1893, during the October term, and no bill of exceptions was filed during that term, nor until the April term, 1898, the recital of facts in such bill was unavailing to save exceptions to the order of reference. The appellant should have filed a bill at the October term, and embodied that bill in his final bill of exceptions.

2. The motion for a trial by jury on certain counts of the petition, being no part of the record, was not made a part by a bill of excep-

¹ Motion to transfer to court in banc denied January 12, 1902.

tions filed at the next term after the motion was overruled, and such action will not be considered on appeal.

3. A motion for trial by jury on certain counts of the petition and certain counterclaims came too late after the case had been referred.

4. Under Rev. St. 1890, § 694, giving the court power to try separately some of the counts of a petition, the matter is one of discretion, the exercise of which will not be reviewed except for abuse.

5. The conclusion of a reference is not to be considered in reviewing the court's action in deciding on the necessity for reference.

6. Where an appellant desires the supreme court to decide whether there was any substantial evidence to support a finding by a referee, his abstract of the evidence must be sufficient to enable the court to decide the contention, and he cannot compel the appellee to present the evidence.

7. The first count of a petition was on a note for \$1,200. The second was for the recovery of one-half the losses incurred by the parties in joint mining speculations. Defendant pleaded as a counterclaim that he executed two notes for \$1,000 each, the proceeds of which went into the mining speculations; that he afterwards executed a note for \$5,000, to be used to pay off the two \$1,000 notes; that plaintiff sold the \$5,000 note, but applied only \$500 to the two notes, and that defendant was compelled to pay the balance on them. *Held*, that the supreme court would not consider the evidence on a contention that there was no support for a finding by the referee that there were no directions by the defendant to the plaintiff to apply any of the proceeds of the \$5,000 to payment of the "\$1,200 note," or on an open account, as there was no such issue raised by the pleadings.

8. The practice of reviewing the findings on conflicting evidence in equity cases will not be extended to cases tried by referees, though the reference was compulsory.

9. Under the constitution the supreme court has the right to review the facts as well as the law in any case, however it may have been tried.

Robinson, J., dissenting in part.

Appeal from circuit court, Jackson county; Edw. P. Gates, Judge.

Action by W. W. Smith against George J. Baer. From a judgment for plaintiff, defendant appeals. Affirmed.

For a clearer understanding of this case, the issues and findings of the referee and the material proceedings in the case will be stated in their relation to each other.

The first count of the petition is based on a note for \$1,200, executed by the defendant to the plaintiff on September 28, 1889, with 10 per cent. interest. The answer admits the execution of the note and pleads payment. The referee found that it was not paid, and recommended a judgment for the plaintiff thereon. The second count of the petition seeks to recover \$5,710, being one-half of the losses incurred and paid by the plaintiff in a mining speculation in Arizona, in which the parties, with one Boaz, were interested. The answer admits the mining speculation, but denies that the defendant owes the plaintiff anything on account thereof, and, on the contrary, says the plaintiff expended money for the incorporated company that owned the mines, and not for the defendant personally; and avers that the de-

fendant put in \$2,772.34 for the company, and charges that the plaintiff sold \$7,500 worth of ore belonging to the company, and never accounted for it; and therefore says, if he is liable to the plaintiff for any part of the losses paid by him, he (defendant) is entitled to credit for one-half of the \$7,500 and for the \$2,772.24. The plaintiff claimed that he and the defendant verbally agreed to share the losses equally, because Boaz was unable to pay anything, and that this agreement was reduced to writing and signed by the parties on November 8, 1890. The defendant claimed that he only agreed to be liable for one-third of the losses (the plaintiff and Boaz to stand the other two-thirds) prior to the execution of the written agreement of November 8, 1890, and that agreement was intended to operate only prospectively. The referee found in favor of the defendant on this count, and both parties acquiesced in the finding; so that it is not before this court on its merits, but only as it bears upon the question hereinafter to be discussed as to the propriety of the reference of the case. The parties were formerly partners in other business in Kansas City, and upon its termination the defendant owed the plaintiff \$875.58. The third count of the petition seeks to recover that sum. The answer admits that the defendant owed plaintiff that sum when the partnership was dissolved, but denies that he owes him anything at this time, "as the plaintiff is indebted to him in an amount greatly in excess of the amount of said balance so found to be due." Whether the debt had been wiped out depended upon the application of the proceeds of a note for \$5,000 made by defendant to the plaintiff, which will be hereinafter referred to. The referee found that the balance was still due the plaintiff, and recommended a judgment for that amount.

The defendant pleaded three counterclaims, as follows:

First. That he executed two notes for \$1,000 each to the National Bank of Commerce, the proceeds of which went into the mining speculation; that he afterwards executed to the plaintiff a note for \$5,000, secured by deed of trust, which was to be used to pay off said two notes; that the plaintiff sold the note for \$5,000, but applied only \$500 on one of the \$1,000 notes, and that the defendant was obliged subsequently to pay the balance of said notes, amounting to \$1,611.90, and he asked judgment against the plaintiff for that amount. Upon the trial it appeared, and the referee found the facts to be, that one of the \$1,000 notes was the joint note of the defendant, the plaintiff, and Boaz, while the other \$1,000 note was the defendant's own note, which the plaintiff and Boaz had indorsed as an accommodation for the defendant, and that the defendant had received the proceeds thereof; and, further, that when the \$5,000 note was executed the defendant directed the plaintiff to pay the

joint note out of the proceeds of the \$5,000, but that the plaintiff had only paid \$500 on the \$1,000 joint note, and therefore the referee gave the defendant judgment on this counterclaim for \$611.90. The defendant further claimed on the trial that when he executed the \$5,000 note he directed the plaintiff, after paying the two \$1,000 notes, to apply the balance to the payment of the \$1,200 note sued on in the first count of the petition, and of the \$875.88 sued for in the third count of the petition, and to send him (the defendant) the remainder of \$500 to \$1,000; and that, instead of doing so, the plaintiff only paid \$500 on the joint note for \$1,000, and that he kept the difference. The fact appeared, however, that the plaintiff expended the balance in the mining venture, and gave the defendant credit therefor in his statement attached to the second count of the petition. The referee found that there were no specific directions given by the defendant to the plaintiff to apply any part of the proceeds of the \$5,000 note to any note or indebtedness except to the \$1,000 joint note, but that the balance of the \$5,000 note was to be used in the payment of expenses incurred and to be incurred in the mining business; that, while the defendant expected the plaintiff to remit him some part of the said proceeds, there was no definite agreement of any particular amount; and that the plaintiff properly applied said proceeds, except as to the \$611.90 balance due on the \$1,000 note, for which he recommended that the defendant have judgment.

Second. The defendant claimed in his second counterclaim that he contracted to sell the plaintiff 5,500 shares of his stock in the mining company for \$1.50 a share, aggregating \$8,250; that 2,500 of said shares, of the value of \$3,750, were delivered to the defendant, and 3,000 shares, of the value of \$4,500, were attached to the two notes of \$1,000 each, above referred to, which the plaintiff was to pay and take up the collateral; that afterwards the defendant agreed to sell said shares to one Bristow, for \$1.50 a share (here the sequence ends); and judgment is asked against the plaintiff for \$8,250. There was no substantial evidence to support this claim, and the referee found that no such contract was ever made by the defendant with the plaintiff.

Third. The third counterclaim alleges that Boaz made his note for \$6,885.42, to the order of the plaintiff and the defendant, and secured it by 5,000 shares of the mining company, of the value of \$7,500, belonging to Boaz, and by Boaz's interest in 2,500 shares of said company that stood in the name of A. J. Rupert, alleged to be worth \$1,000, and by Boaz's interest in 6,000 shares of said company that stood in the name of plaintiff as trustee, alleged to be worth \$3,000, and by 50 shares of the Western Land & Live Stock Company, alleged to be worth \$5,000; and that plaintiff indorsed said note for \$6,885.42

to himself, and appropriated all of the collaterals to his own use, and recovered a judgment in his own name on the note against Boaz for \$9,926.47; and the defendant asked judgment against the plaintiff on this count for \$8,250. The reply admitted the note and the judgment thereon, and denied that the plaintiff had ever received anything thereon, because of Boaz's insolvency; and further averred that the defendant had indorsed the note and collaterals to the plaintiff as security for what the defendant owed the plaintiff, and offered to assign a half interest in the judgment and the collaterals to the defendant upon the payment by defendant of the said indebtedness. At the trial the defendant admitted that he indorsed the note and collaterals to the plaintiff, and that Boaz was insolvent. The referee found that the plaintiff had never realized a cent on the note or judgment or collaterals, and had not used the collaterals in any manner so as to render himself liable therefor, and recommended a judgment for the plaintiff on the third counterclaim.

The referee therefore recommended a judgment for the plaintiff on the first count for \$1,200, and upon the third count for \$875.88, and a judgment for the defendant upon the first counterclaim for \$611.90, which, deducted from the judgment for the plaintiff, left a balance due the plaintiff of \$1,463.98. The circuit court confirmed the referee's report, and entered the judgment recommended, on the 24th of July, 1897. This appeal was taken on the 7th of January, 1898, and time granted for filing a bill of exceptions, which was properly extended from time to time, and the bill of exceptions was filed on the 7th of July, 1898. The bill of exceptions recites that the defendant objected to the reference of the cause and excepted to that action of the court. That order was made November 9, 1895, and this bill of exceptions was filed July 7, 1898. There was no bill of exceptions filed during the term at which the order of reference was made. Upon the coming in of the referee's report during the April term, 1897, the defendant filed a motion to submit the first and third counts of the petition and the second and third counterclaims to a jury. This motion was overruled at the April term, 1897, and this bill of exceptions recites that the defendant excepted, but no term bill of exceptions was filed during the April term, 1897, preserving said motion or any exception. On the same day the judgment was entered on the referee's report, and within four days thereafter the defendant filed a motion for a new trial. This motion was overruled on the 23d of October, 1897, which was during the October term of the court.

Brown, Hadley & Swift, for appellant.
Ashley, Gilbert & Dunn, for respondent.

MARSHALL, J. 1. The principal error alleged is the action of the court in sending

the case to a referee. It is contended that this was not a proper case for a reference under section 698, Rev. St. 1899, and hence the court had no power to refer it, and that the parties never consented in writing to the reference as allowed by section 697. This question is not open to review in this case, for the reason that the order of reference was entered on November 9, 1895, during the October term, 1895, and no bill of exceptions was filed during that term saving any exception to the action of the court. The recital of the facts in the only bill of exceptions that was ever filed in the case, to wit, on July 7, 1898, during the April term, 1898, is wholly unavailing to save the point. If the defendant desired to have that action reviewed, he should have filed a bill of exceptions to that ruling at the October term, 1895, and have embodied that term bill of exceptions in his final bill of exceptions filed after final judgment at the April term, 1897. This he failed to do, and there is therefore nothing before this court showing that any exception was taken or saved to the ruling of the circuit court in this regard. *State v. Johnson*, 132 Mo. 110, 33 S. W. 781; *Paving Co. v. Ullman*, 137 Mo., loc. cit. 564, 38 S. W. 458; *Vette v. Gelst*, 155 Mo., loc. cit. 35, 55 S. W. 871.

2. Error in denying the defendant a trial by jury upon the first and third counts of the petition and upon the second and third counterclaims is next assigned. The final bill of exceptions embodies the motion and the overruling of the same, and recites that the defendant excepted. The motion was not a part of the record proper, and could only be made so by a bill of exceptions. It appears from statements in the final bill of exceptions to have been filed at the April term, 1897, and to have been overruled at the same term, and no term bill of exceptions was filed preserving the motion, the ruling, or the exception. What is said in paragraph 1, *supra*, applies equally here. But, even if the question was open to review, there is no merit in the claim. The motion came too late. The right should have been asserted before the case was referred. A party cannot take chances of winning before a referee, and, when he fails, demand a jury trial in the circuit court after the referee's report is filed. *Young v. Powell*, 87 Mo., loc. cit. 130. It is urged, however, that there were three counts of the petition and three counterclaims, and that, while it might be said that a reference was proper as to some of the issues, there was no necessity for a reference as to the others, and that as to them the defendant was entitled to a trial by jury; and counsel cite some New York cases that hold such a practice proper. But section 694, Rev. St. 1899, regulates such matters in this state. The power to try several counts in a petition (or several counterclaims) separately is given to the trial court, but it is a matter of discretion with the

court, and that discretion will not be reviewed unless it was clearly abused. *Hunt v. Railroad Co.*, 14 Mo. App. 160; *Needles v. Burk*, 98 Mo. 474, 11 S. W. 1008; *McFarland v. Railway Co.*, 125 Mo., loc. cit. 275, 28 S. W. 590; *Young v. Powell*, 87 Mo., loc. cit. 130. It is further contended that, as the referee found for the defendant on the second count of the petition, and as this was the only count of the petition under which it could possibly be contended that a reference was proper, defendant was entitled to a jury trial on the remaining counts of the petition and upon the counterclaims. This is wholly untenable. As plaintiff's counsel designate it, this is an *ex post facto* method of determining the propriety of the order of reference. It might be termed a post-mortem held upon the necessity for a reference.

3. It is finally contended that, as this was a compulsory reference, the defendant is entitled to have this court review the finding of facts, as in equity cases, and it is insisted that the finding of the referee is not only against the weight of the evidence, but that there is no evidence to support it. In *Tobacco Co. v. Walker*, 123 Mo., loc. cit. 671, 27 S. W. 639, it was said that the law is settled in this state that in cases of compulsory references the trial court had a right to review the finding of fact by a referee. It was also said that, assuming that this court has the power to review the ruling of the trial court in this regard, it could not be done in the state of the record in that case. This remark applies with full force to the case at bar. The appellant's abstract of the record states that, as he admits there was sufficient evidence to support the findings of fact by the referee as to the second and third counts of the petition and as to the second and third counterclaims, he omits the evidence bearing on these matters, and that the evidence bearing upon the question of whether the defendant directed that any part of the \$5,000 note should be applied upon the payment of the \$1,200 note sued on in the first count of the petition was as he states it. He then gives one question and one answer, covering six lines of the plaintiff's testimony, which relates solely to the credits the plaintiff gave the defendant in his exhibit to the second count of the petition (on which count the referee found for the defendant, and both parties acquiesced), and not a word of which bears upon the application of the proceeds of the \$5,000 note, and then he gives seven pages of the testimony of the defendant, among which the defendant testified that the \$1,200 note was to be paid out of the proceeds of the \$5,000 note; and, in addition, he embodies two letters from the defendant to the plaintiff, in neither of which is anything said by the defendant about the \$1,200 note or the application of the proceeds of the \$5,000 note. On the other hand, the plaintiff's counsels have presented a counter abstract of th

record, covering 30 pages, and covering the testimony of both parties, and eight letters from the defendant to the plaintiff (in addition to the two contained in the defendant's abstract), and thereupon contend that the evidence and the letters furnish sufficient evidence to support the plaintiff's contention and the referee's finding that there were no directions by the defendant to the plaintiff to apply any of the proceeds of the \$5,000 note to the payment of the \$1,200 note, or the \$875.88 open account, or to any other note except the \$1,000 joint note made by the plaintiff and defendant and Boaz, and referred to in the first counterclaim, upon which the referee gave a judgment for the defendant. The abstract furnished by the defendant is not sufficient to inform the court whether the contention of the defendant that there is no evidence to support the referee's finding upon the first count of the petition is well taken or not. If the defendant desired to have this court determine whether there was any substantial evidence to support the finding of the referee, he should have made a reasonably fair and full abstract of the record, so that the court could decide for itself whether there was any evidence or not. The rules require that abstracts must "set forth so much of the record as is necessary to a full and complete understanding of all questions presented to this court for decision." The appellant cannot shift this duty upon the respondent. *Brand v. Cannon*, 118 Mo. 595, 24 S. W. 434. But, though the trial court has power and should review the finding of fact by a referee, it does not follow that this court will do so. *Utley v. Hill*, 155 Mo., loc. cit. 277, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569. But we are not content to rest the decision of this contention upon this principle, or upon the failure to comply with the rules. There is much more cogent reason for refusing to consider the evidence upon this contention, and that is, no such issue was raised by the pleadings in the case. On the contrary, the only averment in the answer with reference to the application of the proceeds of the \$5,000 note is in the fifth paragraph of the answer (which was the first counterclaim), and in that it is only averred that the two \$1,000 notes were to be paid out of the discount of the \$5,000 note. There is no allegation in any of the pleadings that any part of the proceeds of the \$5,000 note was to be applied towards the payment of the \$1,200 note or the open account for \$875.88. The plaintiff was not required, therefore, to controvert anything the defendant said in his testimony about the \$5,000 note, except as to the two \$1,000 notes; and this he did controvert successfully as to the one on which he and Boaz were accommodation indorsers for the plaintiff, and unsuccessfully as to the other joint note. But, aside from all this, the evidence discloses that the plaintiff did not appropriate

all of the proceeds of the \$5,000 note, except \$500, to his own use, as the defendant inferentially charges, but, on the contrary, he used it in the prosecution of the mining business, for the defendant's benefit, and gave the defendant credit for the whole of the \$5,000 in his statement of account in respect to that business; and the defendant admits that prior to November 8, 1890, he had agreed to stand one-third of the losses on that business, and one-half after that date; and the evidence shows that, even after being credited with the \$5,000 note, the defendant was still indebted to the plaintiff on a basis of one-third. The only apparent reason why the referee decided against the plaintiff on his second count, which related to the mining business, was because the plaintiff declared on an express contract to stand one-half of the losses, and failed to prove the contract as alleged, although the defendant admitted that he had agreed to stand one-third of the losses. The evidence as a whole, however, including the defendant's letters as late as May, 1892, long after the \$5,000 note had been discounted, and the proceeds used in the mining venture, afford ample basis for the finding of the referee on the question of the application of the proceeds of the \$5,000 note. It must not be understood, however, that it is intended by anything that is said herein that this court will weigh conflicting evidence in a case of compulsory reference any more than it would in a reference by consent. *Utley v. Hill*, 155 Mo., loc. cit. 277, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569. If the court had the power to refer the case,—that is, if it was a proper case for a reference,—there is no difference in principle between the effect of a finding of fact in such case and in any other case at law. Under the constitution this court has a right to review the facts as well as the law in any case, however it might have been tried; but it has not been its practice to do so, except in extreme cases, in actions at law, for the reason that experience has shown that it was not necessary to do so to insure a proper administration of justice. The reason for a different practice in equity cases has ceased to exist ordinarily, because equity cases are tried on oral testimony now, instead of on written testimony, as formerly; but the practice still obtains without any sufficient reason therefor. There is no more reason why this court should review the findings of a chancellor in an equity case where all the testimony was given by living witnesses orally, than there is why it should review the verdict of a jury rendered under like conditions in a case at law. Certainly the trained legal mind of the chancellor is as capable of reaching as correct a conclusion as to the facts as the untrained minds of the ordinary jurors; still the practice obtains in equity cases. But no good reason appears for extending the practice to

cases tried by referees, even though the reference was compulsory; and it will not be done. This court always looks into the record, when requested, and the point is properly made in the lower court, far enough to see whether there is any substantial evidence to support a finding of fact, by whomsoever that finding is made; and this is as far as experience shows that it is necessary, ordinarily, to go.

The judgment of the circuit court was for the right party, and, finding no reversible error, that judgment is affirmed.

BRACE, P. J., and VALLIANT, J., concur. ROBINSON, J., concurs in result and in opinion except in so far as it states the right of this court to review the facts as well as the law in any case.

VALLIANT, J. Whilst concurring in the able opinion above, I desire to add that I see no reason for making any difference in appellate practice in reviewing the findings of facts by a referee in an equity case and his findings in a law suit. It may be, as pointed out above by the learned author of the opinion, that the chief reason upon which the action of appellate courts in reviewing the findings of facts by the chancellor in equity cases has ceased since the original evidence in such cases no longer consists in documents and depositions alone as it did of old; yet, if such is the case, the practice of appellate courts in that respect has not ceased with the reason. This court does weigh the evidence in equity cases, and makes its own findings of facts. I can see why there should be a difference observed in this respect between the findings of facts by a chancellor and the verdict of a jury. The difference in the modes of trial suggest a difference in the modes of review. And especially since a verdict of the jury, before it reaches the appellate court, is reviewed by the trial judge, who, having seen and heard the witnesses, and observed the conduct of all the parties at the trial, is better able than the appellate court to judge of the correctness of the verdict. The findings of a chancellor, however, are not subjected to that test before they come up for review on appeal. The motion for new trial or rehearing is heard by the same chancellor, and he passes judgment on his own previous rulings. But whatever may be said of the propriety of reviewing the findings of a chancellor, those of a referee stand on a different footing. In trials before a referee there is no difference in mode in an equity case and a law case. It will not be disputed that it is the duty of a trial court to review the evidence, and set aside the findings of the referee, if, in the opinion of the trial judge, they are against the decided weight of the evidence. This he must do in an equity as well as in a law suit. Yet the trial judge in that respect is not in any better position

to weigh the evidence than is the appellate court. He has seen none of the witnesses, and has only what the appellate court has; that is, the record of the testimony as returned by the referee. Therefore I maintain that, as long as we adhere to the practice of reviewing the findings of fact by a referee in equity cases, and setting those findings aside and substituting our own when we are of the opinion that the evidence so requires, we should treat his findings of facts in a law suit in the same way.

FRY v. PIERSOL et al.¹

(Supreme Court of Missouri, Division No. 1
Dec. 17, 1901.)

INJUNCTION—FORECLOSURE OF TRUST DEED
—PETITION—SUFFICIENCY—OFFER TO DO
EQUITY—EVIDENCE—BURDEN OF PROOF—
SUFFICIENCY.

1. A petition to cancel a trust deed given to secure a chattel mortgage debt fails to state a cause of action where plaintiff does not make a tender of the amount admitted to be due, or excuse for such failure.

2. A petition to cancel a mortgage because made by duress will not lie where it is not alleged that the mortgage was executed to secure a debt which petitioner did not owe.

3. The plaintiff has the burden of showing by a preponderance of the evidence that he executed the deed to escape the criminal prosecution.

4. Plaintiff, who was intelligent and shrewd, testified that he was unable to read or write, and that he was threatened with prosecution, which was denied by the defendant. Plaintiff and the justice of the peace who took the acknowledgment of the deed of trust testified that it was not read to plaintiff, but the latter testified that he knew its contents. The trustee advertised the property for sale under the trust deed, and plaintiff asked for further indulgence, which was granted on his paying \$100 and costs. Held insufficient to authorize an injunction restraining sale under the trust deed on a future default of plaintiff.

Appeal from circuit court, Morgan county; D. W. Shackelford, Judge.

Injunction by Randolph Fry against John C. Piersol and others to restrain a sale of real estate under a trust deed. From a decree dissolving the injunction, the plaintiff appeals. Affirmed.

This is a suit in equity to enjoin a sale of land under a deed of trust on the ground that the deed was executed under duress. The substantial averments of the petition are to the effect that in February, 1893, the plaintiff executed two notes to defendant Piersol, —one for \$600, and the other for \$1,600,—due, respectively, August 1, 1893, and July 1, 1894, and at the same time executed a chattel mortgage on certain cattle on his farm in Morgan county to secure the same; that the understanding between the parties was that when the plaintiff paid the \$600 note the principal part of the cattle should be released from the mortgage, and the plaintiff be free to sell the same, but by mistake or fraudulent design of the defendant Piersol

¹ Rehearing denied January 12, 1902.

the stipulation in the mortgage provided for the release of a small part of the mortgaged property, the plaintiff being unable to read, and not knowing that the mortgage was so written; that plaintiff paid the \$600 note when it came due, and after that sold nearly all the mortgaged cattle; that in February, 1895, defendant Piersol told the plaintiff that he had committed a criminal act in selling the cattle, and that, unless he gave him a deed of trust on the land in question, he would prosecute him, and send him to the penitentiary; that plaintiff, though knowing that he was not guilty of the crime charged, was intimidated by the threat of defendant, and executed the deed of trust in question, which is a second mortgage on the land; that at the date of filing this suit the trustee named in the deed had advertised the land for sale under the deed of trust, the sale to occur March 7, 1898; that defendant was insolvent, and plaintiff was without remedy at law, therefore prayed an injunction to prevent a sale of the land according to the terms of the deed. On the filing of the petition a temporary injunction issued by order of the judge in vacation. Defendants answered, denying the allegations of fraud and duress, and filed a motion to dissolve the injunction. The motion came on for hearing at the April term, 1898, upon the pleadings and evidence adduced, and after due deliberation the court sustained the motion, and the injunction was dissolved. The plaintiff appeals from that judgment.

Wm. Forman, for appellant. J. H. Whitecotton and Samuel Daniels, for respondents.

VALLIANT, J. (after stating the facts). 1. The plaintiff was not entitled to a temporary injunction on the face of his petition. The petition shows that the plaintiff owes the debt to secure which the deed of trust was given, yet makes no offer to pay it, and shows no reason or excuse for not doing so. He asks a court of equity to relieve him from what he claims to be an unlawful burden, but shows no disposition to do what right and equity requires that he should do. *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505, and *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912, are no authority for the proposition that a court of equity will aid a man under such circumstances to avoid the payment of an honest debt. This court has never so held, nor do any of the authorities in the long list cited in the brief of the learned counsel for appellant give countenance to such doctrine. Those authorities hold, in the main, that a plea of duress under the circumstances set out in the petition is a good defense in a suit at law on such an obligation; and that where a wife or relative, who is not the debtor, is induced by such threats to mortgage her property to save her husband or relation from criminal prosecution, equity will interfere; and, of

course, also if a man is forced to execute a note or mortgage for a pretended debt he does not owe, equity will come to his relief. But the plaintiff's petition does not bring his case in either of those categories.

2. Upon the trial the plaintiff's proof failed to sustain any of the disputed allegations of his petition. The statement that the chattel mortgage was given to secure the payment of two notes, \$600 and \$1,600, with the understanding that, when less than one-third of the debt was paid, the mortgage as to more than one-half the property was to be released, was the statement of a very unusual transaction from a business standpoint, and would require strong proof to sustain. The burden was also on the plaintiff to show by a preponderance of evidence that he executed the deed of trust to escape criminal prosecution. On the witness stand he testified that he could not read, but it was clear from his testimony that he was a man of intelligence, and shrewd in business affairs. The transactions in evidence showed that he knew what he was about, and was perfectly able to take care of himself. Whilst he testified that he was threatened with prosecution, no one else so testified, and his testimony on that point was borne down by that on the part of defendants. He testified, and so did the justice of the peace who took the acknowledgment, that when the deed of trust was executed it was not read over to him and his wife; but he also testified that he knew what the deed contained. It also appeared from the evidence that in 1895 or 1896, the debt being due, and the conditions of the deed being broken on the plaintiff's part, the trustee advertised the property for sale under the terms of the deed, and that then the plaintiff asked further indulgence, and, in order to obtain it, made a payment to defendants of \$100 on the note, and paid the costs of advertising, and the sale was stopped. Nothing more was paid, but the defendants waited until February, 1898, and again advertised the property for sale, when the proceedings were arrested by the injunction in this suit.

The testimony fully justified the chancellor in finding the issues for the defendants and dissolving the injunction. The judgment is therefore affirmed. All concur.

WOOD v. CARPENTER et al.¹

(Supreme Court of Missouri, Division No. 1.
Dec. 17, 1901.)

WILLS—UNDUE INFLUENCE—MENTAL CAPACITY—CONTEST TRIAL—PLEADINGS—EVIDENCE—ADMISSIBILITY—ADMISSIONS—CONSPIRACY OF LEGATEES—TESTATOR'S MISTAKE—EFFECT.

1. Evidence in a suit by testator's daughter to set aside his will leaving the bulk of his property to his wife and other children, examined, and held insufficient to show the exercise

¹ Rehearing denied January 13, 1902.

of undue influence by the wife so as to sustain a judgment avoiding the will.

2. Evidence of physical infirmity and lapse of memory in an action to set aside a will examined, and held insufficient to show want of mental capacity so as to sustain a judgment avoiding the will.

3. Evidence of difficulties between plaintiff and testator's wife, occurring more than three years after the execution of the will, and of the failure of the wife to invite plaintiff to testator's funeral was inadmissible.

4. Where the petition in a will contest case does not allege that the will was signed by testator's wife, and not by him, evidence to show such fact is inadmissible.

5. The admissions of one of several legatees named in a will are inadmissible in a will contest case on behalf of the contestant, as such admissions are not binding on the other legatees, and the will cannot be set aside as to a part thereof.

6. Where there is no evidence in a will contest case of a conspiracy between certain legatees, evidence of an admission made by one legatee is not rendered admissible on behalf of the contestant by reason of an allegation of such a conspiracy.

7. A will cannot be set aside because the testator made an error in a calculation resulting in the statement in the will that the bequest made to a certain child, considered in connection with certain advancements, renders the share of such child equivalent to that of the other children.

8. The financial condition of the contesting heir cannot be considered in a will contest case.

Appeal from circuit court, Jackson county; Edw. P. Gates, Judge.

Suit by Georgia A. Wood against Lamira A. Carpenter and others to set aside a will. From a judgment in favor of plaintiff, the defendants appeal. Reversed.

This is a suit to contest the will of James C. Carpenter. The plaintiff is the daughter of the testator, and the defendants are her mother (the widow of the deceased) and her brothers Oscar A. and James A. Carpenter, and the children of said James A., and the children of her deceased brother, Luther A. Carpenter. The testator was born in 1812. The will was made on the 3d of March 1893, when the testator was 81 years of age. He died on the 15th of May, 1898. The will is as follows: "I, James C. Carpenter, of Cass county, state of Missouri, being of sound mind and memory, do make and publish this, my last will and testament in manner and form following; that is to say: (1) It is my will that my funeral shall be conducted without ostentation, and that the expenses thereof, together with all my just debts, be fully paid. (2) I give, devise, and bequeath to my beloved wife, Lamira A. Carpenter, all my real and personal effects, also all the household furniture and other items not particularly named and otherwise disposed of in my will, to dispose of any of the real or personal effects when, in her judgment, it is best; and that at the death of my said wife, all the property hereby devised or bequeathed to her as aforesaid, or so much thereof as may then remain unexpended, I give unto my son O. A. Carpenter at the death of my wife one thousand dol-

lars less than one-third of all my real and personal effects, the said property to be divided at her death between O. A. Carpenter, Luther A. Carpenter, and James A. Carpenter and his children, namely, Grover Cleveland Carpenter, Fanny Hill Carpenter, and James C. Carpenter; also I give to my daughter Georgia A. Wood, in addition to what I have already given her, the sum of one hundred dollars, this amount making her equal with the balance of my children. And last, I hereby constitute and appoint my said wife, Lamira A. Carpenter, and my son O. A. Carpenter to be the executrix and executor of this, my last will, without requiring bond, revoking and annulling all former wills by me made, and ratifying and confirming this, and no other, to be my last will and testament. In witness whereof I have hereunto set my hand this 3rd day of March, 1893. [Signed] J. C. Carpenter. [Seal.] Witnesses: A. G. Endicott. [Seal.] J. L. Harrison. [Seal.] J. G. Lyon. [Seal.]" The grounds set out in the petition for contesting the will are: "Plaintiffs say that said paper writing is not in fact and in truth the last will and testament of the said James C. Carpenter; that the said James C. Carpenter was not, at the date of the alleged execution of the said paper, of sound and disposing mind and memory, but that he was feeble in mind and memory, and was incapable of executing a last will and testament; that at the date of the alleged execution of the said paper he was old, and infirm in both mind and body, and was easily controlled and influenced, in his then said condition, by others; and that the said paper was in fact procured by the importunities, persuasions, and undue influence exercised over his mind by the defendant Lamira A. Carpenter and his son Oscar A. Carpenter, and that he was induced to execute the said paper contrary to his true desire and wishes, and that the same does not in fact and in truth express his true desires and wishes at the time with reference to the disposition of his property by will." The case was tried in Jackson county, and resulted in a verdict for the plaintiff setting aside the will. The defendants appealed.

John A. Sea and R. T. Ralley, for appellants. Wallace, Wallace & Culbertson, I. N. Watson, and J. D. Shewalter, for respondents.

MARSHALL, J. (after stating the facts). Two grounds are alleged in the petition for setting aside the will, to wit: First, undue influence of the widow, Lamira A. Carpenter, and of the son Oscar A. Carpenter; and, second, the incompetency of the testator. These will be considered in the order stated, and the evidence bearing upon each issue will be referred to separately in the decision of each ground of contest.

1. Undue Influence. There is not a word of evidence that Oscar had the slightest undue

influence over the testator, much less that he exercised any influence of any kind over the testator in the making of the will. In fact, this charge in the petition was abandoned in the lower court by the plaintiff, and is not insisted upon here. Upon the evidence contained in the record of 685 printed pages there is nothing to support the charge of any undue influence of Mrs. Carpenter. There is nothing in the record that rises to the dignity of evidence that can be said to give even color to the charge, much less that can afford a basis to support a verdict upon. The essence of the testimony bearing upon this charge is that when Mr. Goodman went to see the testator, about 1885, about buying some cattle, and when he again went to see him, about 1890, about paying his proportion of the cost of sweeping the street in front of his house, and when Mr. Redman went to see him, in the fall of 1892, about renewing the policy of insurance on his house, the testator referred to his wife, and she transacted the business; and the testimony of the plaintiff to the following effect: (1) That Mrs. Carpenter always "treated the testator kindly, but whatever she said for him to do he did it without refusing. (2) Q. Just state what you saw when they were there at your place? A. Well, whenever she thought it was time for him to go to bed she said: 'J. C., you had better go up to bed now;' or if it was to eat his supper she would say, 'J. C., come, and eat your supper,' or 'You would better not go out in the sun; you had better sit down on the porch;' and he would mind her, and do whatever she told him to do." The testator and his wife stayed at the plaintiff's house during the summers of 1893, 1894, 1895, 1896, and 1897. The will was made in March, 1893. So that all this relates to matters occurring after the will was executed. (3) That shortly after her brother Luther died—which was in 1897, four years after the will was executed—the testator and his wife went to see Mr. W. S. Flournoy, an attorney, about some trouble they had with a tenant, and, after talking over the matter, the testator said he wanted Mr. Flournoy to write his will, and asked him how much he would charge for it, and that Mrs. Carpenter said, "You already have a will." (4) That Mrs. Carpenter and testator had separate bank accounts, and that sometimes Mrs. Carpenter signed testator's name, with his consent, to checks, and they were paid. It also appeared that the plaintiff sometimes did the same thing, and that she also signed her mother's name to checks—or at least to one check for \$4,740 in favor of plaintiff's husband—that were drawn on Mrs. Carpenter's bank account. On the other hand, it appeared from the testimony of the plaintiff's husband that in April, 1887, he sold an 80-acre farm for the testator under a contract with testator that he should have, as commissions, all it sold for in excess of \$1,000 an acre; that he sold it for \$35,000, of which \$20,000

was paid in cash, and the remainder evidenced by notes secured by a deed of trust on the land sold; that he (plaintiff's husband) wanted his \$5,000 commissions paid out of the \$20,000 cash; that Mrs. Carpenter objected, and that the testator overruled her, and had it paid,—that is, the \$4,740. The \$20,000 had been paid to the testator. He gave it to his wife. She turned it over to plaintiff's husband to deposit for her, which he did, and the plaintiff drew the check for \$4,740 against this deposit in favor of her husband, and signed the mother's name, and the plaintiff's husband says he would never have gotten it if it had not been for the testator. It also appeared from the plaintiff's testimony that in 1897—over four years after the will was executed—the testator and his wife had been spending the summer with the plaintiff (they spent part of their time with each of their children), and when he started to leave to visit his son James he cried, and told plaintiff he did not want to leave. "A. My father told me— My father said— When they got in the buggy he said: 'I don't want to go, Georgia, over there. It is against my will to go,' he says. And I says, 'Pa, I wouldn't go then;' and he says, 'I have got to go, because your mother says for me to go.'" These matters all appeared from the testimony adduced by the plaintiff. The testimony adduced by the defendants showed that the testator was a well-read man, had a strong will, was very affectionate to his wife and to all of his children, and that neither his wife or any one else attempted to or did influence him in the making of the will in question. It also appeared that the testator made two wills prior to this one,—the first in 1886, and the second in 1888; both of which were found after his death, in his trunk, with the will in contest,—and that both of them gave his wife substantially the same that is given by the will in contest, and the will of 1886 gave Oscar one-fourth after his mother's death, and the will of 1888 gave him one-third, whereas the will in contest gave him \$1,000 less than one-fourth. In order, as the evidence shows, to charge him with a balance of that amount that Oscar owed the testator on a note for \$2,100; and the will of 1886 gave the plaintiff one-fourth after her mother's death, "less \$3,000, advanced to her by me during my lifetime in money"; and the will of 1888 gave plaintiff only \$500 cash, without any explanation. The will was executed in Cass county in March, 1893, when the testator was visiting his son Oscar. Neither the plaintiff nor any of her witnesses were there when the will was executed, and do not pretend to know what took place, nor to testify to any undue influence being exerted at that time. The only persons who were present when the will was prepared and executed were the testator and A. G. Endicott, J. L. Harrison, and J. G. Lyon, the attesting witnesses, and Judge J. T. Parker, who drew the will, and Mrs. Car-

penter. Oscar Carpenter was in the house, and came into the room while it was being written, but stayed only a few moments, and neither did or said anything about the will. Judge Parker says that he wrote the caption, and then the testator dictated the will, and he wrote it word for word as the testator dictated it; that when he came to make provision for his son James the testator said, "I hardly know how to fix it," as Jim was disposed to squander his money, and he wanted to fix it in such manner that Jim could not squander it,—so that it would do his children some good. Then Mrs. Carpenter said that he was fond of gambling, or some words to that effect; that he had a mania for gambling; and that, if he got anything, he would likely squander it, or words to that effect. Q. Is that all that she said in regard to the making of that will? A. That is all that I remember of; yes, sir." The will gave one-third to James and his children. Upon such evidence, if the verdict in this case can stand, then no man can make a will in favor of his wife that will stand, unless it appeared that he did the unnatural thing of mistreating, misusing, and ignoring his wife during his lifetime, and then left her his property when he died. Nearly all the testimony for the plaintiff relates to matters that transpired after the will was executed; most of them in 1897, which was four years thereafter. None of them have even any tendency to prove that Mrs. Carpenter used undue influence over her husband to procure the will. In fact, there appears no good reason why she should have done so, especially in view of the fact that the will of 1888 gave her fully as much as the will in contest. All the witnesses agree that Mrs. Carpenter was an exemplary wife and mother, and that she was devoted and kind and faithful to the testator, and had helped him to make and save what he had. What could be more just or reasonable than that he should leave her at least a life interest in his property, as all their children were grown and self-supporting? And what could be more unjust than to permit the verdict in this case to take away from her what her devotion deserved, and what her husband gave her, upon evidence of this character? The evidence does not fill the measure of the rule as to undue influence that is now firmly settled by a long line of decisions. *McFadin v. Catron*, 138 Mo. 218, 38 S. W. 932, 39 S. W. 771; *Carl v. Gabel*, 120 Mo. 296, 25 S. W. 214; *Defoe v. Defoe*, 144 Mo. 464, 46 S. W. 433; *Sehr v. Lindemann*, 153 Mo. 289, 54 S. W. 537; *Tibbe v. Kamp*, 154 Mo. 579, 54 S. W. 879, 55 S. W. 440; *Schlierbaum v. Schemme*, 157 Mo. 22, 57 S. W. 526, 80 Am. St. Rep. 604; *Campbell v. Carlisle* (Mo.) 63 S. W. 704. The trial court erred in submitting this charge to the jury, and should have withdrawn it from their consideration.

2. Incompetency. The second charge in the petition is that the testator was incom-

petent to make a will at the time he made the will in contest in March, 1898. Summarized, the reasons given by the various witnesses for the plaintiff for believing that he was incompetent are: (1) That in 1832 he had an attack of dysentery, which left him subject to bowel troubles. (2) That for years he had suffered more or less with rheumatism. (3) That for years he had kidney trouble, and took Cuticura and patent medicines for it. (4) That on March 27, 1893, he suffered from retention of urine. (5) That at times he had irritation of the bladder. (6) That like many old men he had enlargement of the prostate gland. (7) That in July and September, 1893, after the execution of the will, he had fainting spells, as some of the witnesses call them; fits, as some called them; and epileptic fits, as the medical experts pronounced them from the descriptions given by the witnesses, for no doctor saw him while one was upon him,—which rendered him rigid and unconscious for 15 or 20 minutes, and which then gradually passed off, and left him limp and pale and weak. The plaintiff and her husband are the only witnesses who testified that he had ever had any such spells before the will was executed, and she said he had been subject to them ever since she was a mere child, which was 26 or 28 years before the trial; and he said he had them ever since he married into the family. (8) That he did not talk much, especially to strangers. (9) That he did not recollect the names of his friends, and on one occasion asked who the hired man on the place was. (10) That some of the witnesses thought he was not competent to attend to any business for 10 years before his death, although not one of them who expressed such an opinion had any business with him, or heard him speaking of business matters, during that time, or could state a word, a conversation, an act, or a deed that was spoken or done by him during that time upon which they based their opinion. (11) That in 1892 he had an attack of cholera morbus, which prostrated him, and made him very weak while it lasted. On the other hand, it appeared: (1) From the testimony of the physician who attended him after 1892 until his death, that he had no organic trouble, and that, while he had enlargement of the prostate gland, it was only a natural consequence of old age, and was not unusually severe for a man of his age (he was 86 years old when he died), and that his mental condition was as good as any old person of his age, and that he was mentally able to transact any business transaction. (2) That he had been a sailor and a carpenter, and during the last 10 years of his life he made what was needed around the place in a carpenter's way, including some barrels for vinegar that his wife had made; and that he said if it was not for the rheumatism he could still do a day's work. (3) That he read a good deal, and kept up with the times, and

discussed politics with his neighbors, and went to picnics and fish fries. (4) That he loaned money to his neighbors and friends. (5) That he kept accounts with two different banks during the last 10 years of his life, and drew out over \$6,000 from one, and none of the bankers ever had any doubt of his ability to transact business. (6) That he dictated the will in controversy, and remembered that he had advanced Oscar \$2,100, of which there was \$1,000 still due him, and hence he made Oscar's share \$1,000 less than one-third of his estate. (7) That he remembered that he had given his daughter, the plaintiff, 16 acres of land in 1885, which she sold in 1886 for \$5,900; and that there had been paid the plaintiff's husband \$4,740 as commissions for the sale of his 80 acres of land in 1887; and that these sums, with the \$100 left his daughter in the will, would equalize her share with the shares of his other children. (8) That he knew his son James was likely to squander his portion, and so he provided in his will that his one-third of the estate should vest in him and his (James') children. (9) That all the people who knew him and associated with him at the time the will was made, including every one who was present when it was executed, testify that he was perfectly capable of making a will, and that after it was made he went downstairs, and they all dined together. The will was made in March, 1893. At that time and for four years afterwards, until after the death of Luther, there was no trouble in the family; in fact, the testator and his wife spent the summers of 1893, 1894, 1895, 1896, and 1897, at the plaintiff's house. When the 80 acres were sold in 1887, the plaintiff's husband claimed \$5,000 commissions under his contract that he was to have all over \$1,000 an acre it sold for, and the purchase price was \$85,000. Only \$20,000, however, was paid in cash, and Mrs. Carpenter did not think—and properly so—that he was entitled to his whole commission out of the \$20,000, but was only entitled to a proportionate part thereof. The testator, however, required it all to be paid. This incident was improperly permitted to play a most important part in the trial of the will contest. That, together with the fact that after 1897 the plaintiff and her mother did not speak, and that when the testator died she was not invited to the funeral, were dwelt upon as important factors at the trial. These two matters last referred to occurred more than four years after the will was executed, and for that reason could have no bearing upon the issues, and were improperly admitted in evidence. After the death of the testator, the plaintiff's husband sued for the board of Mr. and Mrs. Carpenter while they were visiting their daughter, the plaintiff. The administrator of the estate also brought suit against Mrs. Carpenter to recover the \$20,000, the cash payment received from the sale of the 80-acre farm. In

that case Mrs. Carpenter's deposition was taken, and upon the trial of this case the plaintiff, over the defendant's objection, was permitted to read that deposition as an admission of Mrs. Carpenter. It is not clear from a careful reading of that deposition what admission of Mrs. Carpenter is supposed to be contained in that deposition, but counsel now argue that Mrs. Carpenter practically admits that she signed the testator's name to the will, and hence there is no will at all; and plaintiff was permitted to introduce expert testimony that the signature to the will was written by Mrs. Carpenter. It is enough to say that the petition raised no such issue, and such testimony was therefore wholly inadmissible, and that no such contention is allowable. Over the objection of the defendants, the plaintiff was also permitted, as an admission of Mrs. Carpenter, to show that she said she was afraid that her husband was going to die, and that she did not want him to die, as she did not have matters in the shape she desired; also that she said she took testator to Mr. Flournoy to have him make another will, but she could not make him understand; also that she said the plaintiff should not have anything from her father's estate; also that she said the testator was incapable of transacting business. All of these matters were inadmissible. *Schierbaum v. Schemme*, 157 Mo. 12, 57 S. W. 526, 80 Am. St. Rep. 604. Mrs. Carpenter's admissions could not bind the other legatees under the will. They could not be admitted as against her, and not as to them, for the simple reason that, if they had the effect to set aside the will as to her, it would set aside the will as to the other legatees also. In this respect a will contest is unlike an ordinary suit where separate judgments may be entered as to each defendant, and the admission of one defendant can, therefore, be limited to himself without injuriously affecting the other defendants. Counsel, however, argue that it is charged that Oscar and Mrs. Carpenter conspired to procure the will, and that in conspiracy cases the admission of one conspirator binds the other. But there is an absolute failure of proof of any conspiracy in this case, and of any improper act or influence of Oscar. So that, even if this was a conspiracy case, the foundation for the admission, to wit, the proof of a conspiracy, has not been laid. But counsel overlook the fact that James and his children and Luther's children are legatees under this will, and there is no allegation of conspiracy as to them, and hence there is no room for claiming that Mrs. Carpenter's admissions could affect them. The testator said that the \$100 devised to the plaintiff, added to the advancements made by him to her, would make her share equal to the share of the other children. He may have been mistaken in his calculations, but that is no ground for setting aside his will. It may be that the

plaintiff's financial condition, as compared to that of the other legatees, was such that she needed more help than they did; but that is no ground for substituting our judgment, or allowing the jury to substitute their opinion, for the will of the testator; and for this reason the fourth instruction given for the plaintiff, that told the jury that they could consider the financial condition in life of the heirs, was erroneous. The testator had a right to give it all to any one, without regard to whether he needed it or not, or whether some one else needed it more than he did.

To revert, then, to the question of the competency of the testator, it is plain that the fact that the testator had dysentery in 1832, or that he had rheumatism, or that he had bladder or kidney trouble, or that he had enlargement of the prostate gland, or that in 1892 he had an attack of cholera morbus, is not, separately or in combination, any evidence that in March, 1893, he was incompetent to make the will in question. The fact that he had fainting spells in July and September, 1893 (after the will was executed), or fits, or epilepsy, after the will was executed, however frequently during the six years he lived after he made the will, is likewise no evidence of incompetency at the time he made the will. And the evidence shows that those spells never rendered him unconscious longer than 20 minutes, and that, while he was weak afterwards, his reason again assumed sway. The plaintiff and her husband are the only witnesses who swear to any such spells before the will was executed. She says her father had had them ever since she was a small child,—for over 26 years,—and her husband says he had had them ever since he had been in the family. If this is true, then it is passing strange how she could claim he was competent to make the deed to the 16 acres to her, or the contract with her husband for the \$5,000 commissions; and equally strange how her husband could think him competent to overrule his wife's objections, and force her to pay him \$4,740 out of the \$20,000, or how he could think him competent to make a deed to the 80 acres of land. For there is no evidence that he had any such spells between the time he transacted that business for the plaintiff and her husband and the time he made the will in contest that could have made him competent at the one time to transact business and incompetent at the other to make a will. Aside from this there remains only the opinions of the plaintiff's witnesses that for 10 years before his death the testator was incompetent to transact business. Those opinions are utterly valueless, and do not constitute any substantial evidence in the light of the admissions of those witnesses that they had no business—no conversation—with him, and heard no one else talk business to him, and that they neither knew

nor ever heard of his doing or saying a foolish or improper thing, or that he ever lost a cent in any of his business transactions. In addition to this, such opinions become as nothing in the light of the facts shown by the direct testimony of the persons who did business with and for him during those 10 years that he kept a bank account, drew out thousands of dollars on his own checks, loaned money to others, and remembered how much he had advanced to his children. But, above all, such opinions become worthless in the light of the direct, positive, and uncontradicted testimony of Judge Parker that he wrote the will in contest in the exact language that the testator dictated. No one who reads that will could believe for a moment that one who dictated it was incapable of making a will; especially if he was a carpenter, as the testator was, and not a lawyer. The will shows that the testator knew what he was doing, what property he had, and who were the objects and subjects of his bounty. In short, the verdict of the jury is wholly without any substantial evidence to support it, and can only be accounted for on the assumption that the jury accepted and acted on the theory of one of the plaintiff's witnesses who said the testator was incompetent to make a will because no man over 80 years old was competent to make a will.

The trial court should have directed a verdict for the defendants, and the judgment will be reversed, and the cause remanded, with directions to enter a judgment establishing the will. All concur.

SOUTH COVINGTON & C. ST. RY. CO. v. STROH.¹

(Court of Appeals of Kentucky. Jan. 21, 1902.)

DAMAGES—PHYSICAL EXAMINATION BY PHYSICIANS APPOINTED BY COURT—EXAMINATION AFTER WITHDRAWAL OF MOTION THEREFOR—EVIDENCE AS TO ACTS OF NEGLIGENCE NOT ALLEGED.

1. Where the court, upon motion of defendant, in an action to recover damages for personal injuries appointed two physicians to examine plaintiff, but defendant, before any examination had been made, withdrew its motion therefor, it was error to permit the physicians thus appointed, who were introduced by the court on its own motion, to testify, over defendant's protest, as to an examination made by them after the motion was withdrawn.

2. The jury should have been confined by the instructions to the consideration of such acts of negligence as were specifically alleged in the petition.

Appeal from circuit court, Kenton county. "Not to be officially reported."

Action by Carrie Stroh against the South Covington & Cincinnati Street Railway Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Simrall & Galvin and Ernst, Cassatt & McDougall, for appellant. B. F. Graziani, for appellee.

DU RELLE, J. The appellee alleged in her petition that she was a passenger on one of appellant's cars, and signaled the conductor at the corner where she wished to alight, and that he, "standing on the rear platform of said car, placed his hand upon the arm of the plaintiff, and, while pressing plaintiff forward down the steps from said car to the street, signaled her to alight, and while she was attempting to do so the car gave a sudden jerk or pitch, and, by the aid and acts of the defendant's conductor, employé, and agents and the acts of said car, the plaintiff was thrown violently to the street," whereby she was injured; "and because of said wrongful acts" she had been permanently injured, has suffered great pain, and incurred expenses for medical treatment, to her damage in the sum of \$15,000. By an amended petition she averred "that as she attempted to alight from said car the same was negligently moved, jerked, or ran forward by said defendant, its agents and employées, which caused the plaintiff to fall; and that said acts of said agents and employées were negligent and careless." The appellant denied the affirmative averments, pleaded contributory negligence, and the trial resulted in a verdict and judgment for \$4,000.

Various grounds for reversal are relied on. It will be necessary to consider only two of them. On the day the case was set for trial, the company moved to require appellee to submit to an examination by two physicians, named in the motion, for the purpose of ascertaining the character and extent of the injuries to her, and in order that said physicians might testify with reference thereto upon the trial of the case. This motion, on objection by appellee, was overruled, but the court offered to require the plaintiff to submit to an examination by two doctors to be appointed by the court, and the defendant filed a motion to that effect. The court named Dr. Allen and Dr. Walters to make the examination. The parties thereupon went into trial. After the plaintiff herself had been examined and one other witness, the record shows that "the motion of defendant for the appointment of two physicians by the court to make an examination of the plaintiff is withdrawn." The plaintiff then continued the examination of her witnesses in chief, rested, and the defendant introduced its testimony in chief, with the exception of one witness, who was not present, and as to whom it asked the privilege of introducing him later in the trial. On the following day the court called Dr.

Walters. The defense objected. Both plaintiff and defendant declined to examine him, and the court examined him, asking him a number of questions, after which counsel for the plaintiff continued the examination. The court then called Dr. Allen, the other doctor who had been appointed to make an examination of the plaintiff, over the objection of the defense, and required the parties to examine the witness, over the objection of both parties. Counsel for plaintiff then examined this witness. From the testimony of the two doctors it appeared that they had examined the plaintiff about half past 5 on the previous evening, and therefore after the motion to require an examination by physicians appointed by the court had been withdrawn. As the plaintiff claimed to be suffering from prolapsus uteri as a result of her fall, and of a blow and bruise upon the abdomen from her umbrella handle, upon which she fell, the testimony of the two physicians, which showed the organ to be misplaced, and that such displacement might be the result of a fall or blow, tended to support plaintiff's theory of the case, at least to some extent, and could not but have been prejudicial to the defense, for the reason that these physicians were appointed by the court, and introduced by the court against the objections of the defense. They were presumably disinterested, and the fact of their introduction by the court against the earnest protest of the defense tended to give undue weight and prominence to their testimony, in so far as it supported plaintiff's contention. It is not necessary to decide what might have been done had the examination been made before the withdrawal of the motion. That examination having been made after the withdrawal of the motion, we think it was clearly erroneous to introduce them as witnesses in the manner in which it was done. See *Boite v. Railroad Co.* (Sup.) 56 N. Y. Supp. 1038; *Moses v. Railway Co.*, 91 Hun, 278, 86 N. Y. Supp. 149.

The instructions objected to seem to correctly state the law applicable to the case, with the exception that they do not confine the jury to the consideration of the acts of negligence specifically alleged in the petition as amended. As said by Judge O'Rear in the opinion in *Coal Co. v. Caudill* (Ky.) 60 S. W. 180, "The jury should be confined to the consideration of such facts of alleged negligence as were the basis of plaintiff's complaint." See, also, *Railway Co. v. Gunter* (Ky.) 56 S. W. 527. Instruction No. 4 was not prejudicial to appellant, and is not complained of by appellee.

For the reasons given, the judgment is reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

GOODWIN et al. v. SMITH.¹

(Court of Appeals of Kentucky. Jan. 21, 1902.)

PARTNERSHIP—DISSOLUTION BY ORGANIZATION OF CORPORATION—LIABILITY FOR INJURY TO SERVANT.

1. The fact that partners organized a corporation to engage in the same business in which the partnership had been engaged is not evidence of a dissolution of the partnership and of the assumption of its business by the corporation, and therefore a servant of the partnership, who continued, after the corporation was organized, to work as before, without being discharged or re-employed, continued to be a servant of the partnership, and may look to the partners for damages for injuries thereafter received by him through the gross negligence of the foreman.

2. An instruction permitting a recovery for compensatory damages only for injuries resulting from the gross negligence of the foreman, plaintiff's superior, was more favorable to defendants than they were entitled to have.

Appeal from circuit court, Hart county.

"Not to be officially reported."

Action by Henry Smith against Goodwin, Kimball, Mantle & Co. to recover damages for personal injuries. Judgment for plaintiff, and defendants appeal. Affirmed.

D. A. McCandless, H. C. Martin, and J. P. O'Meara, for appellants. Watkins & Carden, for appellee.

WHITE, J. This action for damages for personal injuries received by appellee, Smith, while engaged in quarrying stone, was brought in the circuit court of Hart county against the appellants as composing the firm of Goodwin, Kimball, Mantle & Co., and also the Louisville & Nashville Railroad Company. The case was dismissed as to the railroad company, but prosecuted to judgment against appellants. The allegations are that while employed by appellants in quarrying the appellee was injured by the carelessness and negligence of the foreman in charge of the work in the explosion of dynamite used in blasting. The defense presented is a denial that appellee was in the employ of appellants personally or as a firm or partnership, but pleading that he was in the employ of a corporation of the name of appellant; a denial of negligence, and plea of contributory negligence. It is pleaded that the injury occurred in the afternoon of May 15, 1900, which was Tuesday, and that the articles of incorporation had theretofore been signed and acknowledged, and by the articles business was to commence May 15, 1900,—the very day the accident happened. For reply appellee denied he was ever in the employ of the corporation, or knew of its existence, if it did in fact exist, but said that he had been employed by the firm since about May 1st, and had worked continuously up till the injury without notice of any change in the business and no change in the persons engaged. The same persons signed the articles of in-

corporation that composed the partnership. There was a denial of contributory negligence. Upon trial of the issues presented there was a verdict and judgment for \$500, to reverse which this appeal is prosecuted.

The reasons urged for a reversal by counsel in brief are: The general demurrer to the petition should have been sustained, the peremptory instruction should have been given to find for defendant, judgment should have been rendered for defendant notwithstanding the verdict, and errors in instructions. We are of opinion that the petition states a cause of action, and the general demurrer was therefore properly overruled. Upon the issue of negligence and contributory negligence it is not seriously insisted by counsel that a peremptory instruction should have been given, or that a judgment notwithstanding the verdict should have been rendered. But counsel does insist that appellants were entitled to prevail on both motions on the question of employment,—whether by the corporation or by partnership. The proof is clear that the articles were written and signed Saturday, May 12th, and acknowledged Monday, May 14th, when the word "incorporated" was added to the firm sign, the corporation having the same name as did the partnership. The corporation was to begin business May 15, 1900. These articles were recorded in the county clerk's office of Hardin county May 14, 1900, and filed in the office of the secretary of state May 15, 1900, and the tax paid and certificate issued. Counsel for appellee presents the question as to the validity of the corporation, as the articles were never recorded in the office of secretary of state,—simply filed there. He also presents other objections. But, in our view of the case, these are all immaterial, and unnecessary to a decision. It seems to be admitted that the business had been in operation for several days by the firm or members as copartners. Appellee had been engaged for several days at work. He worked Monday, May 14, 1900, before the corporate existence began. There was no change, so far as observance went, on Tuesday, May 15th, from that on the previous days. True, at the storehouse the word "incorporated" was there on Tuesday that was not there previous. No actual notice was given to the employees or appellee that the firm had ceased to exist, and a corporation of the same name had taken its place. Indeed, there is no showing that the firm had ceased to exist. There is nothing to show that the partnership business was settled, or that an inventory was taken of the property of the corporation, or even that the stock of the corporation had been paid for. According to the proof, the most that can be said in favor of the corporate proposition is that the partners had determined to merge the firm, with its assets and liabilities and the partners' holdings, into a corporation, with the same relative positions among themselves. But it is not pretended that any

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

knowledge or information of this change was actually given to appellee or to other employes. Under the proof the court would not be authorized to say as a matter of law that appellee was employed by a corporation of whose existence he had not learned. There was no contract of employment entered into on May 15, 1900. The old contract simply continued, and appellee went to work as usual. He had been engaged by the partnership, and had neither been discharged or re-employed. Appellee was therefore in the employment of the partnership, and not the corporation. In the absence of proof of a dissolution of the partnership and an assumption of that business by the corporation, the court was not authorized to say that the organization of a corporation in Hardin county, by the partners, to engage in the same business as the partnership, would operate as a dissolution of the partnership existing in Hart county or anywhere. The peremptory instruction and motion for judgment notwithstanding the verdict were properly denied. The instruction given fairly presents the law of the case, except that it permits a recovery for compensatory damages only, for the gross negligence of the foreman, appellee's superior. This was more favorable to appellants than they were entitled to, and the error was not prejudicial to their rights. The amount of the verdict is in no sense excessive.

Finding no error to appellants' prejudice, the judgment appealed from is affirmed, with damages.

SPICER et al. v. HOLBROOK.¹

(Court of Appeals of Kentucky. Jan. 21, 1902.)

INCOMPETENT PERSONS — ACTION TO SET ASIDE DEED OF — STATUTE OF LIMITATIONS — INFANTS — ACTION BY NEXT FRIEND — FAILURE TO FILE AFFIDAVIT SHOWING RIGHT TO SUE — BOND FOR COSTS.

1. The deed of a person of unsound mind being void, the 10-years statute of limitations applicable to actions for relief from fraud does not apply to an action to set aside such a deed; and it seems that nothing short of adverse possession sufficient to give the grantee title to the land, if that could ever be, can bar such an action.

2. Where the grantee in a deed agreed by separate writing to convey to another upon his payment of certain sums of money, the deed constituted a mortgage, and the grantee held the legal title as trustee for such person.

3. A deed executed to the trustee by the beneficiary being void because the beneficiary was of unsound mind, the trustee continued to hold the title under the original contract, and no lapse of time can give him title as against the beneficiary or his heirs.

4. Orders of the court refusing to require bond for costs or affidavit from the appellant suing as next friend are not subject to cross appeal.

5. Upon the failure of plaintiff, suing as next friend, to file affidavit showing his right to sue in that capacity, and to execute bond for costs, objection being made by defendant on that account, the court should have sustained a mo-

tion to dismiss as to the infants; but, as they are necessary parties, they should, upon dismissal, be made defendants, and a guardian ad litem should be appointed for them, upon proper showing.

Appeal from circuit court, Owen county.

"Not to be officially reported."

Action by Bettie Spicer and others against Jesse Holbrook to cancel a deed and to recover land. Judgment for defendant, and plaintiffs appeal. Reversed.

H. K. Bourne and J. R. Fears, for appellants. Lindsay & Botts, for appellee.

WHITE, J. The appellants are the heirs at law of F. A. Quisenberry, deceased, and brought this action seeking to have canceled and declared void a deed purporting to have been executed by F. A. Quisenberry on the 30th day of January, 1883, to the defendant, Holbrook, and for the recovery of the land therein described. The grounds upon which it is sought to have the deed canceled and declared void are that it was procured by fraud, and that at the date of its execution, in January, 1883, the said F. A. Quisenberry was non compos mentis, and had so remained till her death in 1893. A demurrer to the petition was overruled, and appellee answered, presenting a counterclaim in addition to his pleas. The answer pleads the statute of 10-years limitation as a bar to a cancellation of the deed, pleads adverse possession, and by way of counterclaim pleads that in 1873 the decedent, F. A. Quisenberry, finding herself unable to pay for a tract of land purchased and held by title bond from D. S. Adams, contracted with appellee that the bond should be assigned to him for the land, and appellee would pay the balance due Adams of the purchase money, and that appellee would execute to decedent, Quisenberry, a writing giving a right of redemption of the land, and a covenant to reconvey upon the payment to him of \$1,100, it being alleged that this sum was due appellee for the sum paid Adams and for a balance of merchandise account; that the deed was executed by Adams to appellee; and that upon the execution of the deed of 1883—the one sought to be canceled—the bond from appellee was canceled, and the debt of \$1,100 satisfied. Appellee denied that at the date of the execution of the deed in 1883 F. A. Quisenberry was of unsound mind, or that she was overreached or defrauded, but pleaded by way of counterclaim the debt for \$1,100, evidenced by the writing surrendered in January, 1883, in case the court should adjudge the deed of 1883 void. To this answer a reply was filed, pleading that the debt due appellee had been paid by decedent long before her death, and denying there existed any claim in favor of appellee; admitting, however, the facts pleaded as to the purchase from Adams by Quisenberry, the deed to the land to appellee, with the execution of the writing by appellee alleging that the balance of purchase money

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

paid by appellee to Adams for decedent, Quisenberry, was \$506.60, and that that sum had been paid, and that the balance of the \$1,100 was for merchandise account due by the husband of F. A. Quisenberry, and that also had been paid. An amended petition was subsequently filed, pleading all these facts, and asking again a cancellation of the deeds to Holbrook, and for recovery of the land; all based on the alleged fact that F. A. Quisenberry was non compos mentis at the date of the execution thereof. An answer to the amended petition was filed, which but pleaded in detail the facts set out in the original answer and pleaded limitation. To this answer appellants filed general demurrer to each paragraph, and also filed reply denying that the action was barred by limitation. There was no decision on the demurrers to the answer, but a demurrer to the reply was sustained, and the petition dismissed upon failure to plead further, and from that judgment this appeal is prosecuted.

The question presented is, does the statute of limitation pleaded bar a recovery? While the action of the court below was on a demurrer to the reply, it should have been on the demurrer to the answer, as the reply is but a repetition of the plea of the petition that F. A. Quisenberry was of unsound mind and a married woman at the date of the execution of the deed in 1883, and remained so till her death. We are of opinion that the cause of action stated is not barred by the limitation pleaded, or in fact by any limitation short of adverse possession sufficient to give appellee title to the land, if that could ever be under the facts shown. This is not the ordinary equitable action brought to set aside a deed for fraud. This is an action to cancel and declare void a deed executed by a person of unsound mind. While it is a fraud, of course, to obtain a deed from an infant or a person non compos mentis, the deed of such party being void for the want of capacity to bind them, no length of time will give effect to that deed without a subsequent ratification, either actual or constructive, when the disability is removed. In this case the cause alleged on which cancellation is sought is the insanity of the grantor, F. A. Quisenberry, which, as is alleged, was never removed. If that be true, the deed is void, and no rights accrued to appellee thereunder. The facts pleaded as to the contract of 1873 by which deed was made by Adams to appellee, Holbrook, and a contract or obligation given to decedent, Quisenberry, to convey to her upon payment of certain sums to appellee, constituted a mortgage to appellee, and his legal title was as trustee for the decedent, Quisenberry. If the transaction of 1883, when the obligation was surrendered and deed of that date executed, be void because of mental incapacity in F. A. Quisenberry to execute same, then appellee, Holbrook, would yet hold the title to the land in trust under the contract of 1873, and

no period of time would give him title under that deed as against the beneficiaries claiming through F. A. Quisenberry. For the reasons stated, the demurrer to the reply to the plea of limitation should have been overruled.

Appellee attempts to present by cross appeal certain actions of the court in refusing to require bond or affidavit from the appellant Hardin, suing as next friend. These orders of the court are not subject to appeal or cross appeal, and the cross appeal will be dismissed; but, as the case must be reversed for the reasons above given, we deem it not improper to notice the action complained of by appellee. Mattie and Robert Hardin are infant plaintiffs, and sue by next friend, Jas. J. Hardin, who is also a plaintiff in his own right. The necessary affidavit disclosing a right to sue by next friend is not filed, nor was a bond for costs given for these two infants, although objection was made thereto in due time. The provisions of Code, § 37, seem to leave no discretion with the court. The motion to dismiss as to these two infants should have prevailed upon failure to file affidavit and execute bond for costs. However, they are necessary parties to the action, and upon dismissal should be made parties defendant, and upon proper showing a guardian ad litem appointed to represent their interest. Upon return of the case and a renewal of the motion to dismiss the court will require plaintiffs to comply with the provisions of the Code as to affidavit and bond, and permit them to be made parties defendant.

For the reasons indicated, the judgment is reversed, and cause remanded, with directions to overrule the demurrer to the reply, and for further proceedings consistent herewith.

BLAND v. SMITH.¹

(Court of Appeals of Kentucky. Jan. 17, 1902.)

PRIVATE PASSWAY—OBSTRUCTION BY ERECTION OF GATE.

Plaintiff was not entitled to a mandatory injunction to compel defendant to remove a gate across a private passway owned by plaintiff over the lands of defendant, the presumption being that the gate was at a public highway, and therefore not an unreasonable obstruction, in the absence of an averment to the contrary.

Appeal from circuit court, Hardin county.
"Not to be officially reported."

Action by H. W. Bland against E. A. Smith for a mandatory injunction. Judgment for defendant, and plaintiff appeals. Affirmed.

J. P. O'Meara, for appellant. W. H. Marriott, for appellee.

WHITE, J. The appellant, Bland, brought this action in equity seeking a mandatory

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

injunction to compel appellee to remove a gate across a private passway owned by appellant over the lands of appellee. A demurrer was sustained to the petition, and, failing to amend, his petition was dismissed, and he appeals.

The allegations of the petition, which, on demurrer, are taken as true, are that appellant is the owner by deed of a right of passway 12½ feet wide over certain described lands, and has so owned and enjoyed the passway for more than 20 years; that within 1 year before filing the petition the defendant "had forcibly and without right erected and maintained and still maintains across said passway a gate, and refuses to remove same; and that said gate greatly and unreasonably obstructs plaintiff's passway, and impairs the use of same, and impairs the value of his land." There is an entire absence of averment as to the place where this gate is erected and kept, as well as the conditions existing there, and the pleader concludes it unreasonably obstructs the use of the passway, but states no facts showing that it is unreasonable, or from which the court will necessarily conclude it to be an unreasonable obstruction. The deed filed with the petition grants an easement,—a right to use the 12½ feet of ground for a passway. The fee is not conveyed. Appellant is entitled to the free use of the way; but it has been often held by this court that the owner of the fee might erect a gate across a passway at the intersection of the way with a public highway, and that this would not be an unreasonable obstruction of the enjoyment of the easement. For aught the petition shows, this gate of which complaint is made may be at the public highway. Taking the pleading most strongly against the pleader, the court was authorized to conclude that the gate was at the public highway, and therefore not an unreasonable obstruction. The demurrer to the petition was, in our opinion, properly sustained.

Judgment affirmed.

FELTON v. ANDERSON.¹

(Court of Appeals of Kentucky. Jan. 17, 1902.)

RAILROADS—KILLING OF HORSES BY TRAIN—PRESUMPTION OF NEGLIGENCE OVERCOME.

In an action to recover damages for the negligent killing of horses struck by a train, it appearing from the uncontradicted and unimpeached testimony of defendant's servants in charge of the train that the presence of the horses on the track was not discovered, and could not by the exercise of ordinary care have been discovered, in time to prevent the injury, defendant was entitled to a peremptory instruction; the presumption of negligence being overcome.

Appeal from circuit court, Lincoln county.
"Not to be officially reported."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Action by Hall Anderson against S. M. Felton, receiver, to recover damages for the negligent killing of live stock, and for negligently setting fire to fencing and grass by sparks from locomotives. Judgment for plaintiff, and defendant appeals. Reversed.

Simrall & Galvin and J. W. Alcorn, for appellant. W. G. Welch and Hill & McRoberts, for appellee.

O'REAR, J. This action was for the negligent killing of two horses by the railway trains operated by appellant, and for damages for negligently setting fire to fencing and grass by sparks from appellant's locomotives. The evidence upon the question of damages for the destruction of the fencing and grass is conflicting, and that question seems to have been fairly submitted to the jury. But in the matter of the damages claimed for the killing of the horses the evidence of the engineers and trainmen in charge, whose duty it was to be, and who were, on the lookout, shows that the stock was struck by passenger trains running at a high rate of speed in the nighttime; trains making, possibly, 60 miles or more an hour, and being heavy passenger trains, of some eight or nine cars. These witnesses further testified that it was impossible, although the train was thoroughly equipped with proper appliances, to have stopped the train within the distance when the horses could first have been seen, or were seen, before they were struck. Upon this point their testimony was not contradicted. The jury was not authorized to disbelieve these witnesses, without their being contradicted or impeached. Their testimony was sufficient to overcome the prima facie case of negligence made under the statute by the fact of the killing of the horses; and upon that state of the record the motion of appellant for a peremptory instruction as to the claim for the horses should have been sustained, and that much of the case withdrawn from the jury.

For this error, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

MARSHALL et al. v. BARBER ASPHALT PAV. CO.¹

(Court of Appeals of Kentucky. Jan. 17, 1902.)

STREET ASSESSMENTS—APPORTIONMENT OF COST OF CURBING.

Where no sidewalk had ever been constructed, and there was not sufficient space abutting on the street belonging to the city to allow the construction of a sidewalk, the curbing was a part of the street, and should be apportioned to the number of square feet owned by the lot owners in the fourth of a square contiguous to the improvement, and not according to the front feet.

"Not to be officially reported."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

² For extended opinion, see 66 S. W. 734.

Petition for rehearing. Granted.
For former report, see 52 S. W. 1117.

DU RELLE, J. The second paragraph of appellants' answer, to which a demurrer was sustained, presents the question that no sidewalk had ever been constructed, and that there was not sufficient space abutting on the street, belonging to the city, to allow the construction of a sidewalk; that the curbing was therefore a part of the street, and should be apportioned to the number of square feet owned by the lot owners in the fourth of a square contiguous to the improvement, and not according to the front feet fronting the improvement.

According to the opinion in *City of Louisville v. Tyler* (delivered Nov. 20, 1901) 65 S. W. 125, this presents a case for a reapportionment of the cost of the curbing; and the judgment is reversed, with directions to overrule the demurrer to the second paragraph of the answer, and for further proceedings in conformity with the opinion in that case. In other respects the petition for rehearing is overruled.

COLLIER v. DEERING CAMP GROUND ASS'N.¹

(Court of Appeals of Kentucky. Jan. 17, 1902.)

CORPORATIONS—RIGHT OF STOCKHOLDER TO SUE.

A stockholder was not entitled to specific performance of a contract between defendant and the corporation by which the corporation was to convey to defendant certain land, as plaintiff could not convey, and did not tender a deed of conveyance; nor was plaintiff entitled to rents, as he was not the owner of the land, or entitled to possession, the right of action, if any, being in the corporation.

Appeal from circuit court, Nicholas county.
"Not to be officially reported."

Action by James M. Collier against the Deering Camp Ground Association to compel defendant to issue and deliver to plaintiff certain shares of stock in defendant corporation, and, in the alternative, to recover rents. Judgment for defendant, and plaintiff appeals. Affirmed.

Thomas Owens, for appellant. Kennedy & Williamson and I. B. Ross, for appellee.

WHITE, J. The appellant, Collier, brought this action to compel appellee to issue and deliver to him 25 shares of stock in appellee corporation, and, if that could not be had, to recover rents for a certain parcel of ground used and occupied by appellee for four years. A demurrer to the petition was sustained, and again sustained to the petition as amended. Appellant at last declining to plead further, his petition was dismissed, and he appeals.

The facts upon which the action is based appear by the last amendment to be that appellant and one McClure owned one-half the shares of stock in a corporation known as the Washington Mining & Manufacturing Company. The other one-half of the shares were owned by the same stockholders who compose the appellee corporation. The Washington Mining & Manufacturing Company owned a mill and 47 acres of land. The stockholders of appellee sold their one-half the stock in the Washington Company, reserving their right to share in the land, which seems not to have been necessary for the business of the Washington Company. The appellant and McClure then bargained with appellee or the stockholders to sell one-half interest in the 47 acres of land owned by the Washington Company at an agreed price, and to be paid for in stock of appellee company, it being contemplated that the 47 acres of land would then become a part of the assets of the appellee company. A deed from appellant and McClure was drawn, signed, and acknowledged to a one-half interest in the land, but was never delivered or accepted by appellee. The land was taken into the possession of appellee association, and used for four years. The title all the time was in the Washington Company, but seems to have been considered by all the original stockholders of the Washington Company as apart from its business, and the separate property of the stockholders, distinct from the corporation. It was, in fact, purchased by the Washington Company, which executed its notes for some deferred payments, and in the agreement between appellant and McClure with appellee association these notes were to be assumed and paid by the appellee. These facts are pleaded, and specific performance sought, or, if that cannot be had, appellant seeks to recover rents for his share of the 47 acres. The court below held that no cause of action was presented. In that conclusion and judgment there was, in our opinion, no error. The pleadings admit that the title to the land was in the Washington Mining & Manufacturing Company, and never in appellant. The interest of appellant in the land was only that of a stockholder in the corporation. He had no right or title to the land that he could sell or convey, nor was he entitled to rents for its use. Under the facts stated, recovery for rents would be by the Washington Company; and if that company, after proper demand, refuses to sue, appellant might maintain an action for the benefit of the corporation. But in his own right he has shown no cause of action. He was not entitled to specific performance, for he could not convey, and did not tender a deed of conveyance. He was not entitled to rents because he was not the owner of the land, nor was he entitled to possession of same, or any part thereof. That right was in the corporation, of which he was a shareholder.

Judgment affirmed. Digitized by Google

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ISON v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Jan. 17, 1902.)

CRIMINAL LAW—FAILURE OF BILL OF EXCEPTIONS TO SHOW READING OF INDICTMENT TO JURY—ERROR NOT ASSIGNED AS GROUND FOR NEW TRIAL—INSTRUCTIONS TO JURY.

1. The failure of a bill of exceptions to state that the indictment was read to the jury does not authorize the assumption that it was not read, though the bill states that it contains a record of all of the proceedings had on the trial.

2. There can be no reversal for a failure to read the indictment to the jury, unless it is assigned as a ground for new trial.

3. There can be no reversal on the evidence in a criminal case if there is any evidence tending to show guilt.

4. It is error, in instructing the jury in a criminal case, not to require them to believe "beyond a reasonable doubt" the existence of the facts necessary to constitute guilt.

Appeal from circuit court, Letcher county.
"Not to be officially reported."

Eli Ison was convicted of the offense of discharging a deadly weapon at random upon the public highway, and he appeals. Reversed.

D. D. Fuld & Son, for appellant. Morrison Breckinridge and R. J. Breckinridge, for the Commonwealth.

GUFFY, O. J. The appellant was indicted in the circuit court of Letcher county, charged with the offense of discharging a deadly weapon at random upon the public highway. The trial resulted in a verdict and judgment against appellant in the sum of \$100, and, his motion for a new trial having been overruled, he prosecutes this appeal. The grounds relied upon for a new trial are, in substance, as follows: (1) Error of the court as to the admission of evidence; (2) because the verdict is not supported by the evidence; (3) error of the court in failing to properly instruct the jury, and error by misinstructing the jury upon the law.

The appellant, in his brief, assumes that the indictment was not read to the trial jury, nor the plea of defendant announced by any one, and insists upon a reversal for that reason; citing in support of his contention the case of *Farris v. Com.* (Ky.) 63 S. W. 616. It is true that the opinion in the case supra decides that such failure is ground for a reversal, but we apprehend that the error complained of in that case was objected to at the time of trial, and relied upon as one of the grounds for a new trial. Nothing of that kind appears in the bill of exceptions in the case at bar. It is true that toward the close of the bill of exceptions this language is used: "This being all that was done, or all the proceedings had, on said trial or concerning same." We are not authorized to assume from this statement that the indictment in fact was not read to the jury, and, besides, the failure to so read was not relied upon or

referred to in any manner in the motion for a new trial. Even if it be conceded that the bill of exceptions should be construed to show that the indictment was not read, the failure of appellant to make the same one of the grounds for a new trial precludes him from relying upon such omission as ground for a reversal. It is a well-settled rule of this court that appellant should state in his reasons for a new trial the ground upon which he thinks the prejudicial error was committed. If the attention of the trial court had been called to this error, if such error in fact occurred, doubtless the circuit judge would have granted a new trial.

We think the evidence was sufficient to support the verdict and judgment. The Code of Practice provides that, if there be any evidence tending to show the guilt of the defendant, this court has no power to reverse on account of the weight of evidence; nor do we think the court erred as to the admission of evidence.

The instruction given by the court was accepted to at the time of trial, and made one of the grounds upon which a new trial was asked. It is assailed in the argument upon the assumption that it was not substantially in the words of the statute creating the offense. We do not think such objection tenable, but the instruction, as copied in the bill of exceptions, fails to require the jury to believe the defendant guilty beyond a reasonable doubt, the instruction on that point being as follows: "The court then instructed the jury that, if they believed from the evidence that the defendant, Eli Ison, in this county, and within less than twelve months before the finding of the indictment in this case, discharged a deadly weapon at random," etc. It will be seen that the jury was not required to believe the defendant guilty beyond a reasonable doubt, and for this, and this alone, the judgment is reversed, and cause remanded for a new trial and proceedings consistent herewith.

HOWE v. MILLER.¹

(Court of Appeals of Kentucky. Jan. 17, 1902.)

REAL ESTATE BROKERS—COMMISSIONS FOR MAKING SALE—RATIFICATION.

In an action by a broker to recover commissions for making a sale, defendant's acquiescence in plaintiff's statement that plaintiff had secured a loan for the prospective purchasers did not fairly justify the conclusion that defendant ratified the agency claimed by plaintiff, as no claim of agency was suggested by plaintiff's statement.

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 65 S. W. 353.

DU RELLE, J. The petition for rehearing is directed to the question whether an instruction should have been given upon the

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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subject of ratification, and quotes fully the evidence supposed to bear on that point. We do not think this evidence supports the idea of a ratification of an employment assumed by Howe to exist. It seems clear that Miller did not make any direct employment for Howe to sell for him to the doctors. Miller himself negotiated with them. His offer was before them before Howe came to see him. He had repudiated to them the idea of an agency in Howe. His acquiescence in Howe's statement that the latter had secured a loan for the prospective purchasers could not fairly be said to justify the conclusion that by such acquiescence he ratified the agency claimed by Howe, for no claim of agency was suggested by Howe's statement. We think these views are sustained by the reasoning in *Viley v. Pettit*, 98 Ky. 576, 29 S. W. 438, and *Greene v. Owings* (Ky.) 41 S. W. 264.

The petition is overruled.

MEDDIS v. DELLENGER et al.¹

(Court of Appeals of Kentucky. Jan. 17, 1902.)

VALIDITY OF JUDGMENT—PRESUMPTION THAT WARNING ORDER WAS MADE.

It appearing from the clerk's certificate on the petition in an action and from a docket entry made by him that a warning order was made, and the report of the warning order attorney appearing in the record, the fact that the warning order is not found in the papers after the lapse of 20 years does not render the judgment void, as it will be presumed that it has been detached from the petition, and lost, rather than that it was never made.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by John H. Dellenger and others against Charles S. Meddis for specific performance of a contract. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lem H. McHenry and John J. McHenry, for appellant. C. H. Shield, for appellees.

WHITE, J. This is an action for specific performance of a contract of sale of realty. Appellant admitted the contract, but declined to comply, because, as he alleged, appellees were unable to convey a title in fee, for various defects in the title suggested in the answer. The court sustained a demurrer to the answer, and adjudged specific performance, and hence this appeal.

It is alleged in the answer that appellee derived title by purchase at a judicial sale in an action to settle the estate of Louis Lentz, deceased: that Lentz derived title by purchase at judicial sale in an action No. 32,754, brought by Floyd Frye, to sell said land in order to its reinvestment. It is in this action No. 32,754 that there is a defect

of title pleaded. The facts as to that action are that Floyd Frye was the owner and holder under the will of his grandfather, Floyd Parks, of a defeasible fee in this land, the defeasance being that Frye should die without issue of his body. Frye instituted action No. 32,754 to sell the land and to reinvest the proceeds in other property in the state of Indiana. In that action Frye made all living persons who might take under the will of Floyd Parks in case of defeasance parties defendants. All who would first take under the will were either actually served with process or appeared and answered, but some of the defendants to that suit who might, in case of defeasance, inherit through the parents, or take under the will by reason of the death of their parents, if that should occur before defeasance, were non-residents, and were not personally served, and did not appear. It appears from the record of that suit No. 32,754 that an affidavit for warning order was made, and the clerk indorsed on the petition and on his docket that a warning order had been made, and an attorney appointed to represent the nonresidents; but the warning order itself is not in the record. It was not written on the petition, and is not found in the papers of the case. The nonresidents' attorney made his report, and the proceedings thereafter are regular, as the record shows. The land was sold, and by judgment the proceeds were invested in lands in Indiana, to be held under the same conditions and limitations as the lands here were held by Frye. These proceedings and judgment were had and rendered in 1878. It is alleged that the appellee Dellenger, since his purchase at decretal sale, had brought an action to quiet his title, in which he obtained judgment, but that in that action there were nonresidents constructively summoned, and that such judgment had not been rendered five years, and it was therefore possible for any defendant herein to obtain a new trial if the defect suggested in action No. 32,754 was well taken, and thereby rendered the judgment and decree void. The question presented by the answer pleading a defect in the title is: Is the judgment rendered in 1878 at the instance of Floyd Frye—case No. 32,754—void by reason of the fact that the warning order written out by the clerk does not appear in the record or papers on file? In our opinion, this does not render the judgment void. Aside from the question of whether the non-residents therein were necessary parties to that suit, we are of opinion, and so hold, that the mere failure to find the written warning order made by the clerk will not authorize the court, at this remote period of time, to declare the judgment void. The record leaves no doubt that a warning order was made. The clerk so certifies on the petition, and also makes such a memorandum on his docket book. These indorsements are: "Pet. and aft. fd. and 2' exhs. fd. Sum. &

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14 cos. issd. W. O. and L. A. Wood atty. Att.: S. F. Chipley, clk." These entries evidently mean, "Petition and affidavit filed, 2 exhibits filed. Summons and 14 copies issued. Warning order and L. A. Wood, attorney. Attest: S. F. Chipley, Clerk." These are the usual file marks of the clerk of his acts, and are made by him in his official capacity. After the lapse of more than 20 years, the court must conclude, in the absence of a contrary showing, that this certificate of the clerk is true, and that the warning order was made. The report or answer of the warning order attorney is on file, and, as this is a jurisdictional fact, we are authorized to presume in favor of the jurisdiction, rather than against it. It may not have been possible or practical to write the warning order on the petition. If it had been written on a separate piece of paper, and attached to the petition, it would have been sufficient. It could not be that, if it was detached from the petition, and lost, the judgment would be destroyed. We must presume that it was written as the clerk certifies, and has been lost out of the papers, which presumption upholds the judgment, rather than ignore the certificate, and the docket entry, and the other facts apparent from the record, and from the mere failure, after 20 years, to find the warning order in the records, declare a solemn decree of a court of general jurisdiction void. *Newcomb's Ex'rs v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222; *Wilson v. Teague*, 95 Ky. 47, 23 S. W. 656; *Sears' Heirs v. Sears' Heirs*, 95 Ky. 173, 25 S. W. 600, 44 Am. St. Rep. 213; *Berry v. Foster* (Ky.) 58 S. W. 709. In this view of the case it is immaterial that the nonresidents in the suit by appellee to quiet title may yet have time to answer and set aside the judgment, as they cannot, so far as the facts appear herein, present a valid objection to the old action No. 32,754, from which appellee obtained title. We conclude, therefore, the answer of appellant, Meddis, presented no defense to this action, and the demurrer thereto was properly sustained.

Judgment affirmed.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT v. DEPOSIT BANK OF FRANKFORT.

(Court of Appeals of Kentucky. Jan. 15, 1902.)

"Not to be officially reported."

Dissenting opinion. For majority opinion, see 65 S. W. 10.

O'REAR, J. To my mind, the controlling question in this case is, does the judgment of the United States circuit court, of June, 1898, in the action of *Bank v. Stone*, 88 Fed. 883, decide necessarily the matter involved in this suit? If it does,—the parties to this suit having been parties to that, and the

judgment being unreversed and yet in force,—it is a bar to this suit by appellant. Here appellant seeks to recover of appellee bank certain taxes under the existing revenue law. Appellee in the former action in the United States court claimed, and that court decided, that it had such a contract with the state of Kentucky, by having accepted the provisions of what was known as the "Hewitt Law," that it could not, without its consent, be taxed otherwise than as provided by that law, which did not admit of the taxation now sought to be enforced. In the suit in the federal court, taxes for the years 1895, 1896, 1897, and 1898, "and any subsequent years," seem to have been put directly in issue. The court's judgment, though, goes beyond the mere adjudication of the right to collect the municipal tax for those years "and subsequent years." The court expressly adjudged: "It is further adjudged, ordered, and decreed that by reason of the several pleas of *res adjudicata* relied on by the complainant in its bill, and as shown by the exhibits therewith, the complainant has established a contract with the commonwealth of Kentucky, under the provisions of article 2 of the act of the general assembly of the state of Kentucky entitled 'An act to amend the revenue laws of the commonwealth of Kentucky,' approved May 17, 1896, and the acceptance of the same by the complainant, the terms of which contract the commonwealth cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for state purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the commonwealth of Kentucky, and the act of November 11, 1892, so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2, and 3 of article 2 of the said act approved May 17, 1896, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of, and repugnant to, the federal constitution, and void." It is said in the majority opinion that as the decision of the federal court was based upon a judgment then in force in the state court, but subsequently reversed, the United States court probably would not have decided the case as it did if the state court judgment had not then been in force. I apprehend that the question presented here by the plea of *res adjudicata* is not what the court ought to have decided, nor as to whether its decision was

supported by the facts or in law, but, did it decide the question now involved? From the language quoted from its judgment, I think it did. That judgment distinctly and unequivocally declared the acceptance of the Hewitt law by appellee was an irrevocable contract. It enjoined the city from attempting to collect any tax upon appellee's shares of stock, except in the manner and to the extent provided in the Hewitt bill. If we were at liberty to disregard the fact that was adjudicated, and in this collateral attack look merely to the basis or reason for the decision, we would at once have to determine, upon any plea of *res adjudicata*, the merits of the original controversy. This, of course, could not be allowed. To do so would be to abandon at once the whole doctrine of *res adjudicata*,—one of the most necessary branches of the law of estoppel. The temptation is often very strong, in a case of peculiar merit, to abandon, or at least to lay aside, the doctrine. Sometimes its very harshness repels the instinctive sense of justice. Yet upon a careful reconsideration of the reasons underlying it, and especially of the interminable confusion and uncertainty that must result in the conflicts inevitable upon its abandonment, I believe a safer course lies in its uniform, strict observance. This court has from a very early date, and with entire consistency, until this decision, subscribed to the efficacy of the doctrine as generally applied by common-law courts. In *Garner's Adm'r v. Strode*, 5 Litt. 314, where the judgment collaterally attacked was rendered by the court in which the plea against the attack was made, it was said: "To avoid the effect of a decree in another cause, where its merits are collaterally brought into question, cannot be permitted. The first record must be first changed, and then its collateral operation will not be injurious. However strong the equity of the appellant may be, the bar must operate while it exists, unaltered and unreversed." In the earlier case of *Dupuy v. Johnson* (1809) 1 Bibb, 565, by Judge Boyle, this court held: "That a judgment or a decree pronounced by a court having competent jurisdiction of the case is binding until it is reversed by a court of appellate jurisdiction, and that it can never be overhauled or its correctness questioned in an original suit, is a doctrine founded upon principles too solid to be shaken, and too obvious to require discussion. The contrary doctrine would involve the monstrous absurdity of making litigation endless, and rendering every decision fruitless and unavailing." As late as *Paul v. Smith*, 82 Ky. 451, this view has been sustained. So far as I know, it has never before been questioned by the court.

For these reasons alone, the judgment below should have been affirmed.

DU RELLE and BURNAM, JJ., concur in this dissent.

DANIELS v. COVINGTON & C. EL. R. & TRANSFER & BRIDGE CO. et al.¹

(Courts of Appeals of Kentucky. Jan. 17, 1902.)

MASTER AND SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. A bridge builder engaged in repairing a bridge assumed the risk of the danger necessarily incident to such work.

2. Where plaintiff, who was one of a crew of four men engaged in removing ties from a railroad bridge for the purpose of putting in new ties, placed his hand on the end of a tie in guiding it so that his hand struck a girder, causing him to faint, and fall into the river below, the fact that the foreman, whose duties called him to another part of the bridge, did not call some one to take his place for the purpose of giving the word to heave or launch the ties did not render the master liable, as one of the crew gave the word, as had been the custom in the foreman's absence, and plaintiff, with knowledge of that method of working, had made no complaint, thereby assuming the risk.

3. As the proximate cause of the injury was plaintiff's negligence in placing his hand upon the end of the tie, where, if the tie struck a girder, it was certain to be injured, a peremptory instruction for defendant was also proper on that ground; a servant having no right to look to the master for damages for negligence if, by the exercise of ordinary care, he could have avoided injury.

Appeal from circuit court, Kenton county. "Not to be officially reported."

Action by Gregory Daniels against the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company and another to recover damages for personal injuries. Judgment for defendants, and plaintiff appeals. Affirmed.

Harvey Myers and W. S. Pryor, for appellant. Galvin & Galvin, for appellees.

DU RELLE, J. The appellant, who is a bridge builder, was employed by appellee bridge company in repairing its bridge across the Ohio. The bridge, which was being repaired by putting in new ties, is a double-track railway bridge, with wagon and foot ways on either side of the track. Between the tracks and the wagon and foot ways is an open space some feet in width, and about three feet below the level of the tracks is a series of parallel steel bars, called a "hog chain," running lengthwise of the bridge, and forming a platform some two feet or more in width, upon which a man could walk. The purpose of the hog chain is explained in the briefs as similar to that of the cable in a suspension bridge. The ties could only be removed and replaced a few at a time, so as not to interfere with the passage of trains. The crew in which Daniels worked seems to have consisted of six men, four of whom furnished the power which moved the tie from under the rails. The rails were jacked up a little from the ties, which seem to have been sawed ties, about the same size and weight as ordinary railroad ties. At each end of the

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

tie two men lay down astride of the rail, one on each side of the tie, and, to use appellant's expression, "launched" it, by shoving it toward the open space. The other two men stood on the hog chain, and guided the tie, so that it might not strike against the uprights, and might be dropped into the river below through the open space. The work had been going on for some time. Appellant had been doing work on the bridge and bridge approaches for some weeks, and for some days, at least, had been engaged in this particular work. There was a foreman in charge of several crews engaged in similar work, and in doing other things toward the repair of the bridge. He had general supervision over all the crews, and gave general directions as to what work each crew should perform. As matter of course, he did not remain continuously with any one crew. This was not necessary. The men understood their work, and nothing could have been done by the foreman except to give the word to the four men engaged in shoving the ties out, so that they might shove together. This word could be given as well by one of the men as by the foreman, and seems to have been so given. As the ties were pushed out one by one, if they struck one of the uprights beyond the hog chain the men on the hog chain pushed or pulled the tie so as to clear the upright, and the tie dropped into the river below, and floated away. The work was necessarily dangerous, as all bridge work must be. Of that danger the men assumed the risk. In guiding one of the ties, Daniels appears to have put his hand upon the end of the tie. It was shoved against an upright, and his thumb badly mashed, though it does not appear that any bones were broken. He undertook to bandage his thumb with his handkerchief. The foreman came up, and stooped to assist him in doing so, but, probably from the shock of the injury, he fainted, and fell 94 feet to the river. How he was gotten out does not appear, but he regained consciousness in the hospital, from which he was discharged some two weeks later. Daniels thereupon brought suit against the appellees for \$10,000 damages, the negligence alleged being that the section hands, "in the presence of and by the consent of their said foreman, while plaintiff necessarily had his hand upon said timber or cross-tie for the purpose of guiding it through said opening and throwing it into the river, did, with negligence and carelessness, in the presence of and by the consent of said foreman, and without warning to plaintiff, so throw or push the same that it caught and crushed the thumb upon plaintiff's right hand," etc., and carelessly permitted him, while unconscious, to fall from the bridge to the river. By amendment he also averred negligence on the part of the foreman, who knew of his dangerous position, to watch and prevent injury to him, and failure to employ a sufficient number of hands to handle and remove

the cross-ties in a reasonably safe manner, and the employment of unskilled laborers.

There is no evidence to connect the railway company with the appellant's employment or injury. The bridge company was his sole employer. The claims that the force was insufficient, and that the injury was inflicted in the presence of or by the consent of the foreman, seem to have been abandoned. In the argument it is not insisted that the foreman was compelled to remain at the point of danger, but that it was his duty, in the exercise of proper care and precaution, when he left that place to discharge other duties, to have called some of the hands working on the bridge to take his place. The case of *Railroad Co. v. Semonis* (Ky.) 51 S. W. 612, was a case of insufficient working force, and does not seem to us at all analogous to the case at bar. There seems to have been no one outside of the crew to give the word to heave or launch the ties, except at long intervals, when the foreman happened to be present. This was known to appellant, who continued to work without complaint; and we doubt whether it would have been a just ground of complaint. The two men upon the hog chain occupied a much better position to see what was going on than the men who were launching the ties. They were standing upon the steel hog chain, some two feet or more in width, with their bodies above the level of the ties. Indeed, the proximate cause of the injury to appellant's thumb seems to have been his own negligence in placing his hand upon the end of the tie, where, if the tie struck a girder, it was certain to be injured. The servant cannot look to his employer for damages for negligence if, by the exercise of ordinary care, he could have avoided injury. The action of the trial court in granting a peremptory instruction seems fully justified by the doctrine laid down in the cases of *Kelly v. Asphalt Co.*, 93 Ky. 363, 20 S. W. 271; *Lostutter v. Dailey*, 14 Ky. Law Rep. 926; *Mellott v. Railroad Co.*, 101 Ky. 212, 40 S. W. 696; *Lee v. Railway Co.* (Ky.) 38 S. W. 509; *Volz v. Railway Co.*, 95 Ky. 188, 24 S. W. 119; and *Clark's Adm'r v. Railroad Co.*, 101 Ky. 34, 39 S. W. 840.

The judgment is affirmed.

HILL v. PETTIT.¹

(Court of Appeals of Kentucky. Jan. 15, 1902.)

DEEDS—MISTAKE IN RECITING CONSIDERATION—NO RELIEF FROM MISTAKE UNLESS MUTUAL—BURDEN OF PROOF AS TO CREDITS ON NOTE—DAMAGES FOR VENDOR'S REFUSAL TO RELEASE LIEN.

1. Relief will not be granted against a mistake in a written contract unless the mistake is mutual, and therefore the consideration recited in a deed will be taken as the true consideration, where the deed expresses the ven-

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

dor's intention as to the amount, though it fails to express the intention of the purchaser; there being no fraud.

2. Where the obligor in a note proved a credit claimed by him by exhibiting his check for that amount payable to plaintiff, and which was shown to have been paid to him, the burden was on plaintiff to show that a part of the amount was paid on some other account; and, that fact not being satisfactorily shown, it was error to change the credit.

3. A vendor is not liable for damages for his refusal to release his lien upon the making of a tender to him by the purchaser where the accounts between them were so complicated that even the court, with the aid of a commissioner, had difficulty in adjusting them, and the purchaser, besides, instead of tendering money, tendered time paper, substituting other debtors for himself.

Appeal from circuit court, Daviess county.
"Not to be officially reported."

Action by R. G. Hill against Thomas S. Pettit to enforce specific performance of a contract, and to compel defendant to cancel and satisfy certain purchase-money liens. Judgment for defendant, and plaintiff appeals. Reversed.

R. G. Hill, in pro. per. Sweeney, Ellis & Sweeney, for appellee.

O'REAR, J. This litigation involved a settlement of complicated accounts between the appellant, Hill, and appellee, Pettit, growing out of numerous transactions, including sales of land, and resales, indemnities, etc. The principal matter, and, indeed, the great bulk of the large record made, relates to issues of fact only. These have been very carefully and satisfactorily determined by a report of Special Commissioner Edwin R. Settle, filed in this record. The principal legal controversy involved grows out of this state of facts: Appellant proposed to sell to appellee a certain tract of land and real estate notes for the consideration of \$14,660. Appellee proposed that, instead of certain portions of the land, he would take a couple of storehouses in Owensboro, at \$3,000; making the total price of the property to be transferred \$14,660. This was accepted by appellant, and deeds were drawn accordingly, in which the consideration was stated as \$14,660. After this, suit was brought by appellant to compel appellee to cancel and satisfy the purchase-money liens held by appellee against other of appellant's lands, of which appellee had been the vendor, and retained purchase-money liens. Appellee claims that there was a mistake in the contract first mentioned, and that, instead of being \$14,660, the consideration should have been \$14,195.87. The testimony of the witnesses (and there are but two) is that Pettit claims that the land was sold at \$30 per acre, and that the difference in acreage and the storehouses substituted at \$3,000, made the difference between \$14,660 and \$14,195.87. Appellant testifies that the sale was in gross, that the land notes were drawing interest, and that, as their amounts and dates are not

shown in the contract, he intended and understood that he was to receive, and the writing so states that he was to receive, \$14,660 for all the property. Thus we find that Pettit was evidently laboring under a mistake, but Hill was not. The question is, is Pettit entitled to relief from the written terms of his contract upon his mistake alone?

While a mistake is a ground of relief from express contracts, yet the mistake must be certain, and must be material, and must be mutual. In this case we are unable to determine from the evidence that there was in fact a mistake. But, even if there was, it was not mutual. A court of equity has no power to reform an agreement between parties, except to conform it to the facts of the agreement, where these facts by mutual mistake are not made to appear, or where by the fraud of the successful party his adversary has been overreached in the drafting of the contract. Otherwise it would be in truth a power exercised by the court to contract for the parties. It follows that the mistake which it may correct in such writing must be, as it is usually expressed, the mistake of both parties to it; that is, such a mistake in the drafting of the writing as makes it convey the intent or meaning of neither party to the contract. If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it as it was written by mistake, when it exactly expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before; and the court would have engaged in the singular office, for a court of equity, of doing right to one party at the expense of, and precisely equal wrong to, the other. *Diman v. Railroad Co.*, 5 R. I. 130. In *Botsford v. McLean*, 45 Barb. 478, the court said: "A little confusion and misconception, I think, has crept into the cases from the inexact use of the word 'mutual,' as applied by way of description or classification of the kind of mistakes which courts of equity would reform. According to the real signification of the word 'mutual' in such connection, and the ordinary acceptance and understanding of the term, 'mutual mistake' would mean a mistake reciprocal and common to both parties, when each alike labored under the same misconception in respect to the terms of the written instrument." *Reeder v. Lewis*, 7 Ky. Law Rep. 378; *Stockhoff v. Brannin*, 14 Ky. Law Rep. 717.

The court below, in adjusting the accounts of the parties, directed the commissioner to assume that the consideration in the first-named contract, under the facts recited above, was \$14,195.87. This, we conclude, was error. The commissioner should have been required to accept the true consideration, stated in the paper to be \$14,660, as of the date of the paper, February 29, 1890.

Among the credits claimed by appellant was one for \$534. He proved it by exhibiting his check for that amount, payable to appellee, which was shown to have been paid him. Appellee insisted that the credit should have been for \$500 only; that the \$34 was used on account of appellant for making a trip to Louisville for him. This is denied by appellant, and it is not shown satisfactorily, and we think the court erred in changing the credit. The burden of proof upon this item was upon appellee, and he failed.

In all other respects, and as to all the other items of accounts between the parties, we are unable to see wherein the commissioner or the court could have arrived at a different conclusion upon the facts. Therefore the judgment in these other respects will be affirmed. By making the corrections indicated in the two paragraphs just preceding, the judgment of \$503 and interest in favor of appellee will have to be reversed. The statement of accounts according to this conclusion would result in a judgment in favor of appellant against appellee for \$8.93.

In the course of numerous transactions between these parties, appellant sold to appellee certain real property which was incumbered by a mortgage to the Mutual Life Insurance Company of Kentucky for about \$6,000. Appellant agreed to free it from these incumbrances within a certain time, or at least by the time when its payments should be required by the insurance company. It was further agreed between these parties that, until this release was procured, appellee should have a lien upon a farm of about 1,400 acres in Davless county sold to appellant by appellee. Upon this farm appellee also held certain purchase-money notes. He had agreed with appellant to release his liens upon the farm when he was paid for it at the rate of \$16 per acre. This suit involved, among the other matters discussed above, the claim of appellant that he had fully paid these purchase-money notes; that he had sold parts of this farm on payments, part cash, and the remainder secured by lien notes on the parts sold, and, upon application to appellee to release his lien and accept these payments at the rate of \$16 per acre, he had declined to do so. Appellant endeavors in this action to recover his damages alleged to have been sustained because of appellee's refusal and failure to release the lien. The court below dismissed the petition. In view of all the circumstances in this case, we cannot say that this was error. In the first place, the accounts between the parties were so complicated, and their respective contentions were so widely variant, that it was impossible, it seems, for them to agree upon the state of their accounts, and, indeed, was of great difficulty, under all the evidence, for the court and the commissioner to settle. Inasmuch as there was no tender to appellee of the \$16 per acre for the acreage desired to be released,

he was not bound to accept time paper substituting other debtors for appellant.

The cause is remanded for judgment in accordance with this opinion.

HILL v. PETTIT.¹

(Court of Appeals of Kentucky. Jan. 15, 1902.)

JUDICIAL SALES—FAILURE TO SELL IN SEPARATE PARCELS, AS REQUIRED BY JUDGMENT—DEED INTENDED AS MORTGAGE—QUESTION NOT RAISED BY EXCEPTIONS TO REPORT OF SALE—SALE INVALID IN PART SET ASIDE AS A WHOLE.

1. Exceptions to a commissioner's report of sale should have been sustained, where the report showed that the land was sold as an entirety, without showing that it was first offered in separate parcels, as required by the judgment, which found the land to be divisible.

2. The court cannot determine, upon exceptions to a report of sale, that a deed purporting to convey the absolute title is but a mortgage; no pleading being filed attacking the genuineness of the transaction.

3. Where there was a sale of farm land, and also of town lots, under a judgment enforcing a mortgage lien, and it was necessary to set aside the sale of the farm land because it was not offered in separate parcels, the sale of the town lots must also be set aside, as the mortgagor had sold the lots, agreeing to indemnify the purchaser against loss by reason of the mortgage, and it cannot be determined how much of the mortgage the mortgagee will be entitled to enforce against the lots until the farm land has been sold.

Appeal from circuit court, Davless county. "Not to be officially reported."

Exceptions by R. G. Hill to commissioner's report of sale of land. Judgment overruling exceptions, and R. G. Hill appeals. Reversed.

R. G. Hill, in pro. per. Sweeney, Ellis & Sweeney, for appellee.

O'REAR, J. This appeal grows out of a case of the same style, and this day decided in this court. 66 S. W. 188. A judgment of sale, foreclosing certain purchase-money and mortgage liens in favor of appellee against appellant's property, was entered, decreeing that the farm property, consisting of eight separate parcels, should first be sold; that they should be offered first in separate parcels, and then as a whole; and that the bid realizing the most money should be accepted by the commissioner. The farm property was the property of appellant. It, and two houses and lots in Owensboro, which had been conveyed by appellant to appellee, were in lien by mortgage from appellant to the Mutual Life Insurance Company of Kentucky. The mortgage had been executed before the conveyance of the two storehouses in Owensboro to appellee. The life insurance company had been made a party defendant, and had by cross petition procured an enforcement of its lien upon all the property. The commissioner's report filed in the case shows that the farm property was sold as an

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

entirety for \$3,000. It does not state whether it was offered in separate parcels, as directed by the judgment; nor does it show what bids had been offered for it in that manner. Appellant excepted to the sale and to the commissioner's report on this ground. His exceptions were overruled. We think this was error. The property being divisible, and in fact the judgment having so found, and directed it to be sold in parcels, it should have been so offered.

The two storehouses in Owensboro were also sold together, and not separately. Appellant objects to this, claiming that they were his, because he and Pettit had contracted, when appellant sold Pettit the lots, to be applied as a credit on the purchase of the farm, that appellant might redeem them at any time within three years from February, 1899, by paying to appellee \$3,000. Appellant claims this was a mortgage. The contract provides that appellant might repurchase the property within the time specified for \$3,000. Throughout this whole litigation the transaction has been treated as a sale from appellant to appellee. Appellant has procured credit upon his indebtedness upon that theory. No pleading has been filed in the record attacking the genuineness of the transaction. The court cannot determine, upon mere exceptions to the commissioner's report of sale, that a deed apparently conveying the absolute title is but a mortgage. Therefore appellant is not concerned in the question whether these two lots were sold according to the judgment or according to law. Appellee became the purchaser of these lots at this sale. They were his before the sale, subject to the lien of the insurance company. If this were all, we would be inclined to affirm the judgment confirming the sale of the two lots to appellee. But this is not all. Appellant and appellee had agreed (and, indeed, appellant's covenants of warranty would involve the same thing) that appellant would reimburse appellee for, and indemnify him against, any sum that might be exacted from him because of the mortgage to the insurance company of the lot sold him, and that this sum should be a lien upon the 1,400 acres of land, a part of which was the land sold, and above referred to. Now, it cannot be determined how much the insurance company will be entitled to enforce against the town lots until the farm land has been sold under its mortgage. Therefore, as the sale of the country land has been set aside, it must follow that the sale of the town lots should also be set aside, and a resale ordered.

The judgment affirming the sale, and decreeing Pettit to recover of Hill the sum of \$2,227.55,—the difference between the insurance company mortgage debt and the price realized at the former sale of the farm land,—is directed to be set aside. A resale will be ordered, and the cause is remanded for proceedings consistent herewith.

STONE et al. v. HART et al.¹

(Court of Appeals of Kentucky. Jan. 15, 1902.)

ATTORNEY AND CLIENT — AGREEMENT NOT TO CHARGE FEE BINDING ON PARTNER—ASSIGNMENT OF FEE—ESTOPPEL TO PLEAD AGREEMENT OF ASSIGNOR NOT TO CHARGE FEE—BENEFICIARIES OF ALLOWANCE OF COUNSEL FEES TO TRUSTEES.

1. An agreement by an attorney, in advance of the rendition of legal services, not to charge a fee therefor, is binding on his partner, though the latter was ignorant of the agreement under which the services were rendered.

2. Where an attorney assigned to a creditor his fee for services rendered to trustees, and the trustees, by correspondence with the assignee, led him to believe that the only question as to the fee was one of amount, to be fixed by the court, and thereafter a large allowance was made to the trustees as counsel fees, they will not be allowed, as against the assignee, after the assignor has died, and his estate has proved to be insolvent, to retain a part of that amount, which is less than the assignor's services were worth, upon the ground that under their agreement with the assignor he was not to receive a fee for his services, and that their other attorneys had agreed that they might retain that part of the allowance to reimburse them for certain losses, though the court had refused to allow a fee to the assignor for the reason that his services had been rendered under an agreement by him not to make any charge therefor.

3. A bond executed by assignees for creditors for the faithful discharge of their duties is for the benefit of all who may be entitled to share in the assets, though the covenant is to the assignor alone, and a failure by the trustees to pay any part of the assets to any person as required by law and directed by a court of competent jurisdiction is a breach of the bond.

4. A cause of action on such a bond does not accrue to a distributee until the trustee has been ordered to pay him a definite sum, and has failed to do so.

Paynter, J., dissenting.

Appeal from circuit court, Fleming county.
"Not to be officially reported."

Action by R. K. Hart and R. H. Sousley, assignees of David Wilson, against David Wilson and others, to settle the assigned estate. Judgment as to attorney's fees, and H. L. Stone, surviving partner, and the Louisville National Banking Company, appeal. Reversed.

H. L. Stone, Leopold & Pennebaker, Barnett & Barnett, and Hazelrigg & Chenault, for appellants. W. G. Dearing, G. A. Casidy, B. S. Grannis, J. H. Power, A. M. J. Cochran, and John P. McCartney, for appellees Hart and Sousley. St. John Boyle and L. R. Yeaman, for appellee surety company.

O'REAR, J. Appellees Hart and Sousley are the trustees named in, and qualifying and acting under, a general deed of assignment for the benefit of creditors executed by David Wilson, banker. The trustees employed counsel to assist them in the management and settlement of the trust. Sudduth, of the law firm of Stone & Sudduth, having peculiar personal reasons for keeping in close touch

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

with the management of the trust, agreed to, and did, give his professional attention to the trustees' affairs, agreeing to charge no fee therefor. Of this arrangement his partner was ignorant. At the close of the suit brought to settle the trust, a motion was made by Stone, as surviving partner,—Sudduth having died,—for an allowance to him, as such, of a reasonable fee for the services of his partner. On the facts stated, the court is of the opinion that the agreement of Sudduth was the condition upon which he was permitted to render the service, and, as between his partner and the clients, the partner should suffer, if either must. For the breach of duty was to the partner. The clients have done no wrong in the matter. The circuit court having ruled accordingly, its action is approved.

A more serious question is presented, however, on the claim of the Louisville National Banking Company. Sudduth was indebted to this bank several thousand dollars. The bank had placed the paper with its attorneys for suit, and was taking steps to coerce the payment of the money. In order to procure further time, Sudduth proposed to assign to the bank, as collateral on his indebtedness to it, his fee against the trustees of Wilson in the matter of the trust estate. Sudduth's purposes and necessities in this matter were known to the assignees, Hart and Sousley, and they executed with him the following paper in the form shown, to wit:

"As additional security for my indebtedness to the Louisville Banking Company, I hereby assign to said Louisville Banking Company all of my fee for services as attorney for the assignees of David Wilson in the settlement of the assigned estate, which fee is to be allowed by the Fleming circuit court in the case of R. K. Hart and R. H. Sousley vs. David Wilson, etc., and authorize said assignees to pay such fee to the Louisville Banking Company, which sum shall be applied to my said debt or debts, and the remainder, if any, paid over to me. August 31st, 1897. [Signed] W. A. Sudduth.

"As assignees of David Wilson, we accept notice of the above assignment, and agree to pay the Louisville Banking Company whatever sum in fees may be allowed to W. A. Sudduth. This August 31st, 1897. [Signed] R. K. Hart, R. H. Sousley, Assgns. of David Wilson. Attest: [Signed] Lawrence S. Leopold."

To have this act confirmed before finally accepting it, the president of the bank wrote the assignees the following letter:

"Sept. 8, 1897. Mess. R. K. Hart & R. H. Sousley, Assignees of David Wilson, Flemingsburg, Ky.—Gentlemen: Mr. W. A. Sudduth has delivered to us his assignment to us of his fee for services as your atty. in the settlement of the estate of David Wilson, together with your acknowledgment of notice thereof, and your promise to pay us. But I beg to ask you when W. A. Sudduth's

fee will probably be allowed, and what you think will be the amount of it? Also the 5% divd. upon the cert. of deposit we hold, and which we have written you about. May I again request that you will have the kindness to remit it to us? Very resp'y [signed] Theodore Harris, Pt."

To it they responded thus:

"Sept. 10th, 1897. Theodore Harris, President, Louisville, Ky.—Dear Sir: We are unable to say what Mr. Sudduth's fee will be in the settlement of the affairs of the Exchange Bank, as the fee will be regulated by the court. It should be a large one. He has done very valuable services. We will be unable to remit 5% to you until further orders of court. Yours, truly, [signed] Hart & Sousley, Assignees."

Later, having his fears aroused by some rumor reaching him that Sudduth was to have no fee, the bank's president wrote one of the assignees, and the following correspondence ensued:

"July 2, 1898. Mr. R. K. Hart, Flemingsburg, Ky.—Dear Sir: I wish to trouble you for a little information. There is a mystery in the matter of yours and Mr. Sudduth's and our affairs, which I am sure you will be able to solve. Mr. Sudduth insists that there is a fee coming to him in the case of yours and Mr. Sousley's as assignees of Wilson. He seems to have good reason, too, for thinking so. He refers me to his assignment of his fee dated August 31, 1897, and to your acknowledgment of that assignment, and agreement to pay us whatever sum in fees should be allowed Mr. Sudduth. Moreover, we have your letter of September 10th, 1897, answering our questions as to what Mr. Sudduth's fee would be, wherein you say it should be a large fee, as he had done very valuable service. Now we understand you to doubt if anything will be allowed Mr. Sudduth. Please explain this, for I do not understand it. How is it Mr. Sudduth, who was the attorney for yourself and Mr. Sousley as assignee, and his services were very valuable, is to get nothing, or next to nothing? Very truly yours, [signed] Theodore Harris, President."

"Flemingsburg, Ky., July 4th, 1898. Theodore Harris, Pres., Louisville, Ky.—Dear Sir: Yours of July 2nd to hand. Now, as to what you may understand as to something that has been told you I should have said, I am not responsible. I say to you that whatever fee the court allows Mr. Sudduth in the case of Hart & Sousley, assignees, vs. David Wilson, you shall have. I hope this will be satisfactory to you. Yours, truly, R. K. Hart."

Without the knowledge of the bank, and by the procurement of the assignees, allowances were made to them of \$9,500, as counsel fees, in addition to the allowances for their own services. The most of this sum they disbursed to other attorneys. But they retained \$1,850 of it under an agreement with their other attorneys not to collect it

from them because of some loss the trustees are alleged to have sustained. They received credit for it, though, in their settlement with the court. When Stone & Sudduth, and the Louisville National Banking Company, as the assignee of Sudduth's fee, filed their intervening petitions, asking to have a reasonable fee allowed and paid on account of Sudduth's services to the estate, it was resisted, and successfully so, by the assignees, Hart and Sousley, on the ground that Sudduth was not to be paid anything for his services. However that might be in fact, it does not lie in the mouths of these assignees to say so to the bank, whom they have deluded by their agreements and correspondence into nonaction till Sudduth is dead, and his estate found to be insolvent. To do so would be to sanction a great wrong, against which the conscience must revolt. The record shows that the \$1,850, assets of the trust estate, have been set apart to the trustees, with which to pay their attorney's fees in that matter. No one else is claiming it. Properly it does not belong to the trustees. It was trust estate, especially dedicated by order of the court to pay the fees of their attorneys, not named, but presumably such as they should be obliged to pay. Sudduth's services are shown to have been worth much more than \$1,850. As between these two trustees and the banking company, we hold that they will not be heard to say that their claim to this sum lies on an easier conscience than does the bank's. They will be required to turn it over to the appellant Louisville National Banking Company. In this action the surety of the trustees on their bond under the deed of assignment was made a party defendant. The bond was declared on, the breach alleged being in the failure of the trustees to pay over to the banking company Sudduth's fee. The demurrer of the surety to this petition was overruled. The surety then answered jointly with the principals, Hart and Sousley, raising no question in its pleading that the action against it was premature, other than the traverse, denying that Hart and Sousley had failed to keep and perform the covenants of their bond, or to faithfully, in proper time, discharge their duties as assignees.

Argument is made for the surety that its undertaking was to the assignor only. The terms of the bond executed were not prescribed by statute. The bond was for the benefit of all who might be entitled to participate in the distribution of assets of the trust estate. It is as follows: "Now, we, R. H. Sousley and R. K. Hart, as principals, and Fidelity and Deposit Company of Maryland, their sureties, do hereby covenant to and with said David Wilson, the grantor in said conveyance, that the said R. K. Hart and R. H. Sousley will well and faithfully, and in proper time, discharge all the duties imposed on them by said conveyance, or by the laws of the land." A failure by the trust-

tees to pay these assets to any one as required by law, and directed by a court of competent jurisdiction, we are of opinion, is a breach of their bond, for which the surety would then be liable. We are of the further opinion, though, that a cause of action on this bond does not accrue to the distributee till the trustee has been adjudged or ordered to pay him a definite sum, and has failed to do it.

The judgment is reversed and remanded, with direction to set aside the order of final settlement with the trustees, and to enter judgment in favor of the Louisville National Banking Company against Hart & Sousley, assignees of David Wilson, for such sum as will pay the balance owing on its debt by W. A. Sudduth's estate, but not to exceed \$1,850. Demurrer of the surety, the Fidelity & Deposit Company of Maryland, to the petition, should be sustained, and the petition of the banking company as to it dismissed, without prejudice to a future action, and for further proceedings as may be necessary, not inconsistent with this opinion.

PAYNTER, J. (dissenting). I concur with the conclusion of the court, wherein it holds, in the first part of the opinion, that Stone, as surviving partner, was not entitled to be paid out of the assigned estate for the professional services rendered by Sudduth. If, then, Stone & Sudduth had no claim against the estate for such services, they could not, by an assignment to the banking company, vest it with a right to assert a claim against the estate which did not exist. An assignment of a supposed right can never have the effect of creating it. It is only when the right exists that it may be vested in another by an assignment. As no claim existed in favor of Stone & Sudduth against the assigned estate, and as they could not vest the bank with any rights based on a nonexistent claim, it follows that the assignees of the assigned estate could not, by a writing or otherwise, make the estate liable for a claim which had no validity in the judgment of the law. It is a universal rule that a personal representative cannot bind the estate of his decedent by the execution of a writing purporting to obligate it, either for a valid debt, or one which has no existence in the law. Neither can the assignee of an assigned estate for the benefit of creditors execute a valid writing which will obligate the estate for a valid or invalid claim asserted against it. Of course, I am not discussing a case where a will or deed gave a trustee authority to execute obligations, etc. Even if the assignees had been authorized to accept notice of the assignment, and by a promise bind the estate, it would only be bound by the terms of the acceptance. By it they only agreed "to pay the Louisville Banking Company whatever sum in fees may be allowed to W. A. Sudduth." Nothing was allowed Sudduth by the court. Notwithstanding this

the court proceeds to appropriate a sum not exceeding \$1,850 on a claim which confessedly had no existence in law or equity. As the court refused to allow Sudduth any fee, they never violated the agreement with the bank. Neither as assignees nor individually did they promise to pay the bank anything unless it was allowed (meaning, of course, by the court) in the case to settle the estate. It was simply a promise that they would perform a duty which the law imposed, to wit, pay the bank such sum as the court allowed it. The mere fact that they expressed an opinion in a letter subsequent to the agreement that Sudduth should be allowed a fee did not add to their undertaking. They may have, in good faith, believed that he should be allowed the fee. But if they did not so believe, they did not make themselves liable beyond the terms of their contract. Had it purported to be a personal obligation, instead of a fiducial one, there could not have been a recovery on it, except to the extent money came to their hands under the order of the court. The bank was bound to know that it could only receive on its assignment such sum as the court allowed. It knew that the assignees had only promised to pay such sum as was allowed. It cannot be held, in law or equity, to have been deceived. The doctrine of estoppel has no application to the facts of the case. I dissent from the opinion of the court.

JONES et al. v. HILL et al.

SAME v. SEABORN et al.

(Supreme Court of Arkansas. Dec. 21, 1901.)

HUSBAND AND WIFE—CONVEYANCE OF WIFE'S PROPERTY.

Under Const. 1874, enabling a married woman to convey her separate property the same as if she were single, a deed executed by a husband of the wife's property, in which she joins and relinquishes dower, conveys the fee to grantees who took without notice of any claim by the wife to the property.

Appeal from White chancery court; Thomas B. Martin, Chancellor.

Consolidated suits by W. M. Jones and others against Hill, Fontaine & Co., and against Robert Seaborn and others. From a decree in favor of the defendants, the plaintiffs appeal. Affirmed.

W. T. Tucker, for appellants. J. W. & M. House, for appellees.

BUNN, C. J. The evidence in these two cases is the same in all essential particulars, and they were heard together, and will be considered so here. This suit was originally in ejectment, but on coming in of the answer and cross complaint the cause was transferred to the First chancery district, and heard before the Honorable Thomas B. Martin, chancellor, and decree was rendered for defendants, and plaintiffs appealed to this court.

The facts are substantially as follows, to wit: J. W. Jones, being the owner of the following lands, situate in White county, Ark., namely, "70 acres in the east half of northwest quarter, section 17, township 5 north, of range 8 west; and the north half of lot No. 2 in block 16, and lot 10 in block 3, in Hutt's survey of the town of Beebe; also the east half of southeast quarter and east half of southwest quarter of section 33, township 6 north, range 8 west, containing 100 acres, more or less,"—sold and conveyed the same to his wife, Nancy J. Jones, for the expressed consideration of \$28, on the 9th April, 1875; and this deed was recorded April 10, 1875. In this deed is a clause explaining the consideration as follows: "The above-conveyed land was purchased with the money belonging to Nancy J. Jones obtained from the sale of stock and real estate sold in the state of Mississippi, which was owned by her previous to our marriage, and placed in my hands in trust to purchase real estate for her benefit and children by me." This deed was acknowledged before a justice of the peace, but his certificate was not in accordance with the provisions of the statute, the word "consideration" and all equivalent words being omitted. This deed is exhibited with the complaint, and is that upon which the claim of plaintiffs for title rests. Nancy J. Jones died in 1879. The appellee Robert Seaborn claims title to 58 acres of said lands by deed from Samuel B. Shipley, dated April 13, 1881, who held by deed from said J. W. Jones, dated September 2, 1886, who held by deed from J. W. House, as administrator of Samuel A. Taylor, dated August 31, 1886, and Samuel A. Taylor held by deed from said J. W. Jones and wife, Nancy J. Jones, dated December 29, 1876, and in this deed the said Nancy J. Jones united with her said husband in the conveyance or granting clause, and also relinquished her dower in due form. The appellee D. C. Harris claims two acres of said land by purchase of her co-appellee, Robert Seaborn; the appellee S. E. Humphries five acres of said land, purchased from said Samuel B. Shipley by deed dated June 1, 1888. Appellee Martha Boss claims by deed from H. B. Strange dated December 2, 1876, lot 3 (1 acre) off of W. $\frac{1}{2}$ N. W. $\frac{1}{4}$, section 17, township 5 N., range 8 W., and lot 4 (1 acre) in Jones' addition to Beebe (this being no proof of the land conveyed by J. W. Jones to his wife as aforesaid). Strange held by deed from Edward Mahoney, dated March 20, 1874, and Mahoney by deed from J. W. Jones and wife, Nancy J. Jones, dated October 14, 1873, before the date of the deed from J. W. Jones to his wife. Appellee Humphries claims five acres of said land by deed from Samuel B. Shipley dated 1st of June, 1888. Appellee Henry Folsom claims title to lot 2 in Jones' addition to the town of Beebe, a part of said lands by deed from said J. W. Jones and Nancy J. Jones, his wife, to Mary E. Bowles,

dated July 24, 1874; by deed from Mary E. Blair (née Bowles) to J. M. Gowdy, dated November 1, 1884; by deed from J. M. Gowdy to A. J. Smith, dated October 3, 1885; by deed from A. J. Smith to T. J. Camp, dated January 5, 1888; and by deed from T. J. Camp to himself dated April 20, 1889. These are the defendants and appellees in case No. 4,501. These cases,—Nos. 4,500 and 4,501,—resting on substantially the same essential facts, are heard together here.

It appears that in all the aforesaid deeds made by J. W. Jones and Nancy J. Jones, his wife, both before and after his deed to his said wife (the 9th April, 1875), the wife joined in the granting clause, and also relinquished her dower. The rule laid down by this court in *Bryan v. Winburn*, 43 Ark. 28, and still adhered to, is, as expressed in the syllabus, the following: "Since the adoption of the constitution of 1874 [October 30, 1874] a married woman can convey her separate property the same as if she were single; and where she joins her husband in a deed of her land, and also relinquishes dower, the deed will convey the fee, though she acknowledge only relinquishment." The case at bar comes under this rule, especially as to all the parcels of land conveyed by J. W. Jones and his wife, Nancy Jones, after the date of the adoption of the present constitution, and as to these lands Mrs. Nancy J. Jones conveyed all the title she had, and so conveyed the fee. Whether the conveyance of the one or two small parcels made before the adoption of the constitution come under the rule, it is not necessary to determine here, since up to April 9, 1875, all these lands appeared on the records, and also appear from the evidence as having been always considered the property of J. W. Jones, and the parties appear to have bought with that understanding. His deeds carried the title to innocent purchasers at least. From the evidence no one appears to have ever known or heard that Mrs. Nancy J. Jones ever at any time laid claim to any of this property. The land claimed by Hill, Fontaine & Co., appellees in case No. 4,500, appears to be lot 10, block 3, in Hutt's survey of the town of Beebe. The land was purchased from J. W. Jones and his wife, Nancy J. Jones, by J. M. Battle, about January 1, 1878. The deed is not exhibited. Battle testifies that he took possession under his deed about that time. The deed, according to Battle's testimony, was made by J. W. Jones and his wife, Nancy J. Jones. He says he had heard Jones say before that that he was going to put his property in his wife's name, he being in financial troubles at the time; but understood from Jones when he bought that he had made, and then, before delivery, destroyed, the deed he intended for his wife. The property conveyed in this deed to Battle is that involved in case No. 4,500. Battle, who was well acquainted with Jones and his family, never heard of any claim to any of the property by Mrs.

Jones, while she lived. Moreover, there does not appear to be any contention to Battle's title. He occupied the property he bought about five years, and then sold to Naylor, who put improvements on the property, as all must have known, and mortgaged it to Hill, Fontaine & Co., who foreclosed the same, and became the owners of it by purchase at foreclosure sale.

The findings of the chancellor are not set out in the record of either case, but, assuming that his findings were in fact the same in both cases, for the facts in evidence appear to be the same substantially, his decree dismissing the complaint and cross complaint in each case is in all things affirmed.

TOWN OF SALEM v. COLLEY.

(Supreme Court of Arkansas. Jan. 4, 1902.)

CRIMINAL LAW—ASSAULT AND BATTERY—FORMER PROSECUTION—CERTIORARI.

1. Where a warrant issued out of a justice court on an affidavit for assault is returned unserved, and the proceedings are abandoned, the offense may be prosecuted in the mayor's court.

2. Act March 18, 1899, providing that circuit courts shall have power to issue writs of certiorari to any inferior tribunal to correct any erroneous or void proceedings, and to hear and determine the same, etc., does not enlarge the writ of certiorari into an appeal or writ of error, and certiorari will not lie to quash a mayor's court judgment of conviction for assault because of the mayor's refusal to sustain a plea of former conviction, a motion to dismiss for want of cost bond, and refusal to call a jury.

Appeal from circuit court, Sebastian county, Greenwood district; Styles T. Rowe, Judge.

Tom Colley was convicted of assault and battery in the mayor's court of the town of Salem, and, on the judgment being quashed by the circuit court, the town appeals. Reversed.

On the 9th day of November, 1899, Tom Colley struck J. F. Hudson, in the town of Salem, in the Greenwood district of Sebastian county. On the same day Hudson made affidavit before one Strozler, a justice of the peace of Prairie township, in Sebastian county, charging Colley with "aggravated assault and battery." A warrant was issued by Justice Strozler and placed in the hands of one J. J. McAllister, who was not the constable, and not sworn, but was appointed by the justice to serve the warrant. McAllister found Colley in Dayton township, of Sebastian county, but did not arrest him, for the reason that he was held under a warrant of arrest issued by Justice Bull, of Dayton township, charging him with assault and battery, and Justice Bull and the constable of Dayton refused to surrender him to McAllister. The warrant issued by Justice Strozler was returned unserved. The proceedings before Justice Bull were as follows: Colley, after the commission of the offense, went before Justice Bull, and made a full state-

ment of what he had done, whereupon the justice issued a warrant of arrest for the defendant for the crime of assault and battery. A subpoena was issued for Hudson, the party assaulted, also for one Stephens, and a trial was had under the law of submission; the defendant, Colley, having entered his plea of guilty to assault and battery. He was fined \$1, and the fine and costs were paid. O. D. Young was appointed city attorney by J. F. Hudson, the party injured; and on the 11th day of November he filed an information against Tom Colley before the mayor of Salem, charging Colley with the crime of an aggravated assault and battery on J. F. Hudson, on the same facts upon which the other warrants were issued, and upon which the submission was had before Justice Bull. A warrant was issued by the mayor, served by the marshal, and the defendant, Colley, was tried before the mayor, convicted of an assault and battery, and fined \$2.50 and costs. He gave notice of appeal, and filed affidavit for same, but the appeal was not prosecuted. Before the mayor, Colley entered a plea of former conviction, which was overruled. He moved to dismiss for want of cost bond, which was overruled. He also called for a jury, which was denied him. A few days after this trial, application was made to the circuit judge for writ of certiorari to quash the judgment of the mayor's court. The circuit court quashed the mayor's judgment on the "ground of irregularities under the acts of 1899 governing practice under certiorari of the mayor's court, and adjudged that Justice Strozier, of Prairie township, had the jurisdiction to try said cause; he having issued the first warrant of arrest, and the case before him not having been dismissed." The town ordinance under which the defendant was tried is a copy of the state law on assault and battery and aggravated assault. The ordinance was also introduced, showing the authority of the city attorney to appoint a substitute, and the authority of the substitute to file an information without oath or bond for costs.

Robert A. Rowe, for appellee.

WOOD, J. (after stating the facts). Section 1125, Sand. & H. Dig., is as follows: "They [circuit courts] shall have power to issue writs of certiorari to any officer or board of officers, or any inferior tribunal of their respective counties, to correct any erroneous or void proceeding, and to hear and determine the same," etc. This act of March 18, 1899, amended this section by inserting the words "city or town council" after the word "officers." The amendment did not change the rule of procedure for the correction of mere errors or irregularities in judicial proceedings. That must still be by appeal or writ of error. *Railway Co. v. Barnes*, 35 Ark. 95.

The mayor's court had jurisdiction of the cause of action and of the person of the defendant, appellee, Colley. Sections 5147, 5148, Sand. & H. Dig. (Acts 1899, p. 45). Justice Strozier likewise had jurisdiction of the cause of action, but he had no jurisdiction of the person of appellee. The warrant of arrest first issued by him, it appears, was returned unserved. No other warrant was issued by him for the appellee until after the trial was had before the mayor. The rule as to concurrent jurisdiction is that the court wherein the proceedings are first instituted will have the jurisdiction to conduct the matter to an end without interference. *State v. Devers*, 34 Ark. 188; *Estes v. Martin*, Id. 410; 1 Bish. Cr. Proc. § 315, and authorities cited. But where the proceedings first instituted are abandoned, the offense may be prosecuted in another court of concurrent jurisdiction. The facts of this case bring it within the rule announced in *Bradley v. State*, 32 Ark. 722. The mayor's court having jurisdiction, the other matters complained of could have been corrected on appeal. 2 Crawford Dig.

The judgment is reversed, and the judgment of the mayor's court is affirmed.

CRENSHAW v. STATE.

(Supreme Court of Arkansas. Jan. 4, 1902.)

MANSLAUGHTER—EVIDENCE—SUFFICIENCY.

In a prosecution for homicide, where there was proof that defendant provoked the difficulty by abusive language, that he announced just before the encounter that he was going to break up the festival in a jamboree, and that he immediately began to curse deceased, and to use a deadly weapon, a conviction of manslaughter was sustained.

Appeal from circuit court, Poinsett county; Thomas P. McGovern, Special Judge.

Dan Crenshaw was convicted of manslaughter, and appeals. Affirmed.

G. W. Murphy, Atty Gen., for the State.

WOOD, J. The indictment charges appellant with the crime of murder in the first degree. He was tried, and convicted of manslaughter. There was proof tending to show that appellant provoked the difficulty by using violent, profane, and abusive language toward and about the deceased and in his presence and hearing, which was well calculated to arouse the deceased to anger. Not only so, but the evidence tends to show that he was the first to draw and use a deadly weapon. He announced just before the fatal encounter that he was going to break up the festival in a "jamboree," and immediately thereafter began to curse deceased, and proceeded to draw and use his weapon with deadly effect; thus giving the word a new and more serious interpretation than had ever been anticipated by the lexicographers. Cent. Dict., verbo "Jamboree."

There were no errors of law, and the proof shows that the jury were exceedingly lenient. Affirmed.

RANKIN et al. v. SCHOFIELD et al.

(Supreme Court of Arkansas. Jan. 4, 1902.)
APPEALS—TIME FOR TAKING—STATUTES—CONSTRUCTION—VALIDITY—MINORS—CONSENT DECREE.

1. Act March 16, 1899, § 1, providing that an appeal or writ of error must be taken within one year after the rendition of the judgment or order sought to be reviewed, unless the appellant is an infant or of unsound mind, when an appeal may be taken within six months after the removal of the disability, is prospective, and does not apply to judgments or orders existing at the time of the passage of the act.

2. Sand. & H. Dig. § 1027, required appeals or writs of error to be prosecuted within three years after the rendition of the judgment or order appealed from, unless the party applying therefor was an infant, etc., when one year was allowed after the removal of the disability. Act March 16, 1899, amending such statute (section 2), required appeals or writs of error from all judgments, final orders, or decrees rendered more than two years prior to the passage of the act to be taken within three years from the date of the judgment, order, or decree. *Held*, that the latter act was unconstitutional, as affecting a judgment against an infant rendered more than three years before the passage of the act, as it would immediately defeat the right of infants to appeal.

3. A decree settling an estate, reciting that litigation was likely to be long, and in order to put an end thereto, and as an amicable settlement, it was decreed by the court, as well by the consent of all the parties, etc., shows on its face that it was merely a compromise decree.

4. A compromise judgment affecting the interests of a ward in an estate, to which his guardian assents, does not preclude an appeal by the ward after attaining his majority, as a guardian cannot make any compromise of the property interest of his ward without the concurring sanction of the court.

Appeal from circuit court, Woodruff county, in chancery; Matthew T. Sanders, Judge.

Suit between Sallie Spott Rankin and others and Octavia Schofield and others. A compromise decree was rendered, from which a minor party appeals on the removal of the disability. Motion to dismiss overruled.

Gustave Jones and J. A. Watkins, for appellants. Otis W. Scarborough and Jos. W. House, for appellees.

WOOD, J. The decree from which this appeal was taken was rendered in February, 1899. This appeal was granted by the clerk of this court February 19, 1900. The appellant was born June 24, 1881. She was therefore 18 years, 7 months, and 25 days old when this appeal was granted. The decree from which she appeals had been rendered 11 years before. The act approved March 16, 1899, to regulate the time in which appeals and writs of error may be taken to this court, is as follows:

"Section 1. An appeal or writ of error shall not be granted except within one year next after the rendition of the judgment, order or

decree sought to be reviewed, unless the party applying therefor was an infant or of unsound mind at the time of its rendition, in which cases, an appeal or writ of error may be granted to such parties or their legal representatives, within six months after the removal of their disabilities or death.

"Sec. 2. The parties to all judgments, orders or decrees rendered within two years prior to the passage of this act shall have one year from the time it shall take effect within which to pray an appeal or sue out a writ of error. The time for taking an appeal or suing out a writ of error on all judgments, final orders and decrees rendered more than two years prior to the passage of this act, shall be three years from the date of the judgment, order or decree."

Acts 1899, p. 111.

This act was passed to amend section 1027, Sand. & H. Dig., which is as follows: "An appeal or writ of error shall not be granted, except within three years next after the rendition of the judgment order, unless the party applying therefor was an infant, married woman, or of unsound mind, at the time of its rendition, in which case an appeal or writ of error may be granted to such parties, or their legal representative, within one year after the removal of their disabilities, or death, whichever may first happen."

Appellee contends that the appeal was barred under either of the sections of the act of March 16, 1899, *supra*.

(a) The first section is prospective in its operation. It applies only to appeals from judgments, orders, and decrees rendered after the act took effect. This is the general rule of construction, and that it is the true rule to apply to this section is manifest when considered in connection with the second section, for that section expressly provides the time for appeal from all judgments, orders, or decrees rendered prior to the passage of the act. The first section has therefore no application.

(b) The first clause of the second section has no application here, for that refers to appeals from judgments, etc., rendered within a period of two years prior to the date of the passage of the act. The decree in this case was rendered about 10 years prior to the passage of the act, so it comes within the latter clause of the second section of the above act, which prescribes: "The time for taking an appeal or suing out a writ of error on all judgments, final orders and decrees rendered more than two years prior to the passage of this act, shall be three years from the date of the judgment order or decree." From all judgments, final orders, and decrees rendered three years or more prior to the passage of the act, no time is given in which to appeal. This would, eo instanti, deprive infants of the right to appeal. The legislature could not do that. Section 15, art. 7, Const. O'Bannon v. Ragan, 30 Ark. 181.

2. The decree appealed from, after sett

out the issues, proceeds as follows: "And it appearing that numerous depositions have been taken in this case, and the litigation herein is likely to be long and tedious of family matters: Now, therefore, in order to put an end to litigation, and as an amicable adjustment and settlement of a family affair in regard to the descent inheritance and settlement of the rights of the plaintiffs and defendants in regard to all the real and personal estate of the said J. N. S. Gibson as above described and mentioned as being in the hands or control of his administrator, L. D. Snapp, as aforesaid, it is hereby ordered, considered, and decreed by the court, as well as by the consent and agreement of all the parties hereto, both plaintiffs and defendants, that," etc. It appears that the court did not enter upon the merits of the controversy, but rendered the decree "to put an end to litigation, and as an amicable settlement and adjustment of a family affair." The question, then, is, can appellant appeal from a compromise decree entered by the consent of her regular guardian? The statute provides that "no judgment can be rendered against an infant until after a defense by a guardian." Section 5647, Sand. & H. Dig. We have held under the statute that the defense of the guardian must be not merely formal, but real and earnest. He should put in issue and require proof of every material allegation to the infant's prejudice, whether it be true or not, and make no concessions on his own knowledge. *Pinchback v. Graves*, 42 Ark. 222. Again, we have held that an infant is not prejudiced by admissions of his guardian. *McCloy v. Trotter*, 47 Ark. 445, 2 S. W. 71; *Moore v. Woodall*, 40 Ark. 42; *Evans v. Davies*, 89 Ark. 235. Now, every compromise involves an admission or concession to some extent of the claims of the other party. Anderson says it is the mutual yielding of opposing claims; the surrender of some right or claimed right in consideration of a like surrender of some counterclaim. And. Law Dict. verbo "Compromise"; *Gregg v. Town of Wethersfield*, 55 Vt. 387. In the absence of authority given by statute, the general rule is, says Mr. Rodgers, that a guardian cannot agree to any compromise or settlement by which the property interests of his ward are affected without the concurring sanction of the court to which he must look for authority to bind his ward. *Rodg. Dom. Rel.* § 859. The recitals of the record supra show affirmatively that the chancellor performed no judicial act of investigation into the merits of the controversy before entering the decree. On the contrary, it appears that was purposely avoided, out of consideration of mere expediency, "to put an end to tedious litigation, and as an amicable settlement and adjustment of a family affair." Such added dignity to the compromise of the guardian did not make it any the less his compromise. In the face of such a record we cannot indulge the maxim, "Omnia præsumuntur rita

et solemniter esse acta." It was plainly not the compromise of the court. There was nothing to show that it was for the benefit of the infant. The facts shown by this record do not bring the appellant within the maxim of "consensus tollit errorem," and bar her right of appeal. To hold otherwise, we think, would be contrary to the trend of our own statute and decisions, as well as the weight of authority. *Walton v. Coulson*, 1 McLean, 120, Fed. Cas. No. 17,132; *Bank v. Ritchie*, 8 Pet. 128, 8 L. Ed. 890; 1 Black, Judgm. § 197, and authorities cited; 15 Enc. Pl. & Prac. 13, authorities cited.

The motion to dismiss the appeal is therefore overruled. In the absence of a request from the attorneys and an opportunity to be heard, it would not be proper to go further, and determine whether the decree should be affirmed or reversed on the merits.

BENNETT v. STATE.¹

(Supreme Court of Arkansas. Dec. 21, 1901.)
CRIMINAL LAW—LARCENY—EVIDENCE—DECLARATIONS—INSTRUCTIONS.

1. On prosecution for theft of a horse which defendant had taken off the range to his own premises, where he exercised ownership over it, evidence that he said the horse was an estray, and that he refused to sell it, was not admissible, not being explanatory of defendant's acts, but only a denial of them.

2. Evidence that at the time he made these statements the horse was not in his possession was not admissible, being an attempt to prove innocence by his own assertions.

3. An instruction that if the horse was running at large, and was regarded as an estray in the neighborhood, and if the jury believed "from the evidence" that defendant took possession of him, "or exercised such ownership over him as owners of live stock usually exercise over the same," with intent to steal the horse, defendant was guilty, was not subject to the objection that, as there was no evidence of how ownership was exercised over stock in the community, the jury might believe a claim of ownership over the horse while it was on the range would constitute theft; since the instruction referred to the evidence, and the only evidence of ownership was of the bridling and leading the horse from the range to defendant's premises, and there using and claiming him.

Wood and Riddick, JJ., dissenting.

Appeal from circuit court, Poinsett county; Felix G. Taylor, Judge.

W. W. Bennett was convicted of larceny, and appeals. Affirmed.

W. W. Bennett was indicted for larceny, alleged to have been committed by the defendant unlawfully and feloniously stealing, taking, and carrying away one horse, the property of Henry Sullins. He was tried and convicted, and his punishment was fixed at imprisonment in the state penitentiary for five years.

Evidence was adduced in the trial tending to prove substantially the following facts:

Henry Sullins was the owner of a young gray stallion. This animal ran on the range near his owner's place of residence until he

¹ For dissenting opinion, see 66 S. W. 914.

was about two years old, and in the early part of the spring of 1897 ran near a mill a few miles above the same place. Sullins saw him "every few days" until the latter part of July, 1897, when he disappeared. About that time the defendant, Bennett, was seen riding a horse and leading the said stallion in the direction of his home, and in the fall of 1898 was seen riding him, and in December of the same year was heard claiming him. Sullins hunted for, but did not find, his missing horse until May, 1899, when a man named White told him his horse was at defendant's, when he went to Bennett's farm, and found his horse there in possession of a man named Hall, who told him that the defendant had "taken him up." Previous to this, in April, 1899, J. A. Cash accompanied the defendant to his horse lot to look at a mare whose foot was hurt, and while there he saw Sullins' horse in a stable, and the defendant asked him what he would give him for the stallion, and, Cash declining to make any offer, the defendant said "if he did not dispose of him he would castrate him, and make a saddle pony out of him." About the same time Dee Sullivan saw the same gray stallion in a lot on the defendant's farm.

In the course of the trial the defendant offered the evidence of William Herold and several others to the effect that defendant, in the spring of 1899, said that the horse was an estray, and on that account refused to sell him, which was rejected by the court, and the defendant excepted. At this time the defendant proved or offered to prove by the same witnesses that the horse was not in his possession at the time these statements were made.

The court instructed the jury as follows:

"(1) The defendant, W. W. Bennett, is indicted for the larceny of a horse which is alleged to be the property of Henry Sullins.

"(2) Larceny is the felonious stealing, taking, carrying, riding, or driving away the personal property of another.

"(3) If you find from the evidence beyond a reasonable doubt that the defendant, in the county of Poinsett and state of Arkansas, within three years next before the finding of the indictment in this case, took possession of the horse described in the indictment, and that the said horse was the property of Henry Sullins, with the felonious intent to steal said horse, you will find him guilty.

"(4) It is not necessary, to constitute larceny, that the property should be taken from the immediate possession of its owner. Therefore, if you find from the evidence beyond a reasonable doubt that the horse referred to in the indictment was the property of Henry Sullins, and that the defendant took said horse (if he did take said horse) with the felonious intention to steal and convert the horse to his own use, you will find him guilty, although the horse may have been,

at the time of the taking, at large, running on the range.

"(5) The jury are instructed that, although you may find from the evidence that the defendant may have taken the horse in question, you cannot find him guilty unless you further find from the evidence beyond a reasonable doubt that the taking was with the felonious intent to steal, and that the horse was the property of Henry Sullins.

"(6) If the jury believe that the horse in question was running at large, and regarded as an estray in the neighborhood, and they further find from the evidence beyond a reasonable doubt that defendant took possession of said horse, or exercised such ownership over him as owners of live stock usually exercise over same, with intent to steal said horse, they will find defendant guilty.

"(7) If the jury find defendant guilty, they will assess his punishment in the state penitentiary for some period not less than five nor more than fifteen years.

"(8) If, after considering all the evidence, you have a reasonable doubt of the guilt of defendant, you will return a verdict of not guilty."

And the defendant asked, and the court refused to give, the following instructions:

"(1) Even though you may find from the evidence that defendant stated to parties that he owned the horse with the larceny of which he is charged, yet such statements, unaccompanied by possession of said horse at some time, are not sufficient to warrant a conviction; and if you find from the evidence that defendant never had possession of said horse, you will find him not guilty.

"(2) Before you can find the defendant guilty, you must believe from the evidence beyond a reasonable doubt that some time within three years from the finding of the indictment defendant took possession of said horse with the intent to steal, take, or carry it away, and that said horse was the property of Sullins.

"(3) Even though you find from the evidence beyond a reasonable doubt that defendant took possession of said horse, and that it was the property of Henry Sullins, yet if you believe from the evidence that defendant took possession of said horse for any other purpose than depriving the true owner of same, you will find him not guilty.

"(4) A claim of ownership by defendant to the horse of Henry Sullins, without the taking of possession of same by him with the intent to steal, is not larceny."

J. J. Mardis and L. C. Going, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

BATTLE, J. (after stating the facts). The evidence offered by the defendant and rejected by the court was inadmissible. He offered to prove that he said the horse stolen was an estray, and that he refused to a

him. An estray is an animal running at large, the owner being unknown. The evidence offered was not explanatory of any act of the defendant, but simply a denial of every act which needed explanation. At the time he offered the rejected evidence, he adduced or offered to produce evidence to prove that he was not in possession of the horse at the time he said the horse was an estray, and refused to sell. The effect of the offer was an effort to prove his innocence by his own assertions.

Defendant objects to instruction numbered 6, because "there was no evidence of the way or manner in which owners of live stock in that community 'exercised acts of ownership' over their live stock, and under it the jury may have assumed that owners of live stock permitted it to run on the range, and the only exercise of ownership over the same was to claim it once a year, and that appellant, having claimed the horse, was therefore guilty of larceny." In this the defendant is mistaken. The court told the jury if they found "from the evidence beyond a reasonable doubt that defendant took possession of said horse, or exercised such ownership over him as owners of live stock usually exercise over same, with intent to steal said horse, they will find defendant guilty." This instruction is tautological, "took possession" and "exercised such ownership" being used to some extent in the same sense. The finding of the jury, under this instruction, must have been based upon the evidence. The only acts of ownership of the defendant shown by the evidence were the bridling and leading the horse from the range on which he ran to the home of the defendant, and there confining him in his lot, and riding him, and while in such possession claiming him as his property. Inasmuch as the jury were directed to find from the evidence, the instruction must be understood as having reference only to the acts of ownership shown by the evidence. Then, again, the court instructed the jury that the ownership must be exercised with the intent to steal. No one can infer from a mere claim an intent to steal. No person seeking by that means alone to steal would be capable of committing larceny; and a man who would impute to a person capable of committing that crime an intent to steal, and find him guilty of larceny upon that evidence alone, would be competent to serve as a juror.

According to the instructions of the court, in order to find the defendant guilty of larceny, it was necessary to find that the horse alleged to have been stolen was the property of Henry Sullins, and that the defendant took possession of him with the intent to steal. The defendant did not ask the court to instruct the jury that it was necessary to find anything in addition thereto in order to convict him of larceny. The instructions given substantially and in effect embraced all that is contained in the requests

of the defendant. We see no reversible error in the instructions when read as a whole, as they should have been.

Judgment affirmed.

WOOD and RIDDICK, JJ., dissent.

NEAL v. BRANDON et al.

(Supreme Court of Arkansas. Jan. 4, 1902.)

LANDLORD AND TENANT—MORTGAGE—CROP ADVANCES—PRIORITY—CREDITS—STATUTE OF FRAUDS—INSTRUCTIONS—APPEAL.

1. Sand. & H. Dig. § 4795, provides that a landlord's lien for crop advances shall be prior to mortgage liens. A mortgagee of a crop grown on leased land, and other property, having taken the crop, began replevin against the landlord to recover the balance, being then chargeable with notice of crop advances made to the tenant. The mortgagee was seeking to enforce the mortgage as security for an account of the tenant for which he claimed the landlord was liable, but the landlord denied such liability, and also claimed that credits due him from the mortgagee for the crop advances more than discharged his liability on the mortgage. *Held*, that under the statute the landlord was entitled to such credits whether the mortgage was security for the tenant's account or not.

2. If the landlord was liable for the tenant's account, and the credits proved insufficient to completely satisfy his liability, an instruction in the replevin suit that he was not entitled to the credits would be harmless.

3. As the landlord had introduced evidence that he was not liable for the tenant's account, it was error to instruct that, if the goods furnished by the mortgagee to the tenant were furnished on the landlord's credit, then the latter would be responsible for the balance of the tenant's account, such instruction taking from the jury the question as to the landlord's liability on the tenant's account.

4. An erroneous instruction will be presumed on appeal to have been prejudicial unless the contrary appears.

5. The relation of landlord and tenant exists between a landowner and a person contracting to cultivate his land for a share of the crop, to be paid as rent, to have exclusive possession of the premises, and to furnish all supplies except certain specified supplies to be furnished by the landowner and to be paid for from the share of the tenant.

6. Act April 6, 1885, giving a landlord a lien on the tenant's crop for advances made to the latter for necessary supplies, applies to landlords strictly as such, and also to landlords as employers.

7. Act March 21, 1883, authorizing employers' liens, etc., has no application to the relation of landlord and tenant.

8. Where there is evidence in a suit in which it is sought to hold a landlord on an oral contract for supplies furnished his tenant that the goods were not originally sold on the credit of the landlord, but to the tenant on his own credit, the landlord being simply a surety, it is error to refuse to instruct that a promise to answer for the debt of another is invalid unless in writing.

Bunn, C. J., dissenting in part.

Appeal from circuit court, St. Francis county; Hance N. Hutton, Judge.

Replevin by Brandon & Baugh against Wiley Neal. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

This was a suit by mortgagees to replevy some mules. The answer and amended answer and cross complaint denied any indebtedness under the mortgage, and claimed that appellees were due appellant a small amount. Appellees contended that appellant, Neal, the mortgagor, was indebted to them not only on his own account, but that he was also liable on his mortgage for the account of one Tom Hall, a tenant, whom they had furnished at appellant's request, and they produced testimony tending to support their contention. Appellant contended that the mortgage had been paid; that he was not liable for the account of Tom Hall with appellees; that Tom Hall was his tenant, and, as such, was indebted to him for rents and supplies; that appellees, having received the crop of Tom Hall knowing that he was tenant of appellant, were liable to appellant for so much of the crop in their hands as might be necessary to pay appellant the amount of the rents and supplies due him from his tenant; that, taking what appellant had paid appellees on his own account, and what they were due him out of the proceeds of the crop of Tom Hall, appellant's mortgage had been paid, and appellees were indebted to him in a small sum. He further contended that appellees had sold Hall goods on his own responsibility and on his individual mortgage to them; that there was no written agreement or promise of appellant to answer for Hall's debt, and that he was consequently not liable therefor. Appellant produced proof also to support his contention. Appellant presented his request for instructions as follows: "(1) If defendant, Neal, rented land in Lee county, Ark., to Tom Hall, to make a crop of cotton and corn in the year 1898, and it was stipulated in the contract that said Neal should receive his rent by becoming the owner of an undivided interest in the crop, the relation of landlord and tenant existed as to the premises, and the parties were tenants in common of the crop; (2) if defendant, Neal, agreed to furnish Tom Hall with land, two mules, and eighty-eight bushels of corn, and the latter agreed to do the work to make a crop, of which they were to be the tenants in common, then Tom Hall was an employé of said Neal, within the meaning of the act of April 6, 1885, which gives a landlord a lien on the crop raised on the premises for advances to his tenant or employé of any necessary supplies, either of money, provisions, clothing, stock, or other necessary articles; (3) under the act of March 21, 1883, a landlord may waive his lien for advances to an employé only by written indorsement upon the mortgage or other instrument by which the employé transfers his interest in the crop; (4) no person could be charged upon any special promise to answer for debt, default, or miscarriage of another, unless the promise or agreement is in writing or signed by the party to be charged therewith." These were refused. At the conclusion of the argument

the court instructed the jury that defendant, Neal, was not entitled to the credit claimed by him on his own account with Brandon & Baugh for the value of the mules and corn furnished by him to Tom Hall to make a crop. The court also instructed the jury that, if the goods furnished by Brandon & Baugh to Tom Hall were furnished on the credit of Neal, then Neal would be responsible for the balance due on Tom Hall's account.

R. J. Williams and N. B. Fizer, for appellant. Norton & Prewitt, for appellees.

WOOD, J. (after stating the facts). The court erred in telling the jury "that defendant Neal was not entitled to the credit claimed by him on his account with Brandon & Baugh for the value of the mules and corn furnished by him to Tom Hall to make a crop." The uncontradicted proof shows that two mules, valued at \$115, and corn valued at \$44, were furnished Hall to make the crop. The proof shows also that appellees knew that appellant had furnished his tenant the mules. The circumstances were such as to put them on inquiry as to any supplies furnished. They received the crop of Hall upon which appellant had a lien for these supplies superior to the lien of their mortgage on Hall. They were therefore liable to appellant out of the proceeds of Hall's crop for the value of the mules and corn. Section 4795, Sand. & H. Dig. Appellant was entitled to have the amount credited on his account with appellees, whether he was liable for Hall's account or not. If appellant was liable for Hall's account, and the account of appellant (including Hall's) remained unpaid, after giving him the benefit of a credit for the amount of these supplies, he would not be prejudiced by the instruction. But appellant contends, and there was evidence tending to support his contention, that he was not liable for the account of his tenant, Hall. The instruction was erroneous, because it took this matter away from the jury. Until the contrary is shown it must be presumed to have been prejudicial.

Since the cause must be remanded for new trial, we will pass upon the propositions embodied in appellant's request. Concerning the relation existing between appellant and Tom Hall, appellant testified: "I made a contract with Tom Hall to cultivate some of my land in Lee county for the year 1898. I agreed to furnish him with the land, two mules, and eighty-eight bushels of corn, and he agreed to perform the labor, supply himself with everything else that was necessary, and give me one-fourth of the cotton and one-third of the corn for the rent of the land, the pay for the corn and mules to come out of his part of the crop after paying the rent." The other party to the contract, Hall, testified substantially the same. It is somewhat difficult, under this evidence, to deter-

mine whether the relation of the parties was that of landlord and tenant or that of owner-employer and cropper-employé. It could not be both, as the propositions in appellant's request seem to assume. Our opinion is that it was a contract for the cultivation of land on shares, where the occupier was to have the exclusive possession of the land for the year 1898, and that he was to pay or deliver to the owner certain portions of the crop as rent, which created the relation of landlord and tenant. *Tinsley v. Craige*, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570; *Deaver v. Rice* (N. C.) 34 Am. Dec. 388; and other cases cited in note to *Putnam v. Wise* (N. Y.) 37 Am. Dec. 309, under title "Cases Holding Occupier to be Tenant," etc.

The title to the crops as between appellant and his tenant is not involved here.

The proof as to the relation between appellant and Hall is uncontroverted. If upon a retrial it remains the same, the court should hold to the view that the relation was that of landlord and tenant. The act of April 6, 1885, applies to landlords strictly as such, and also to landlords as employers. The act of March 21, 1883, has no application to the relation of landlord and tenant, but only to that of employer and employé.

The fourth proposition should have been given. There was evidence tending to show that the goods furnished Hall by appellees were not furnished on the credit of Neal, as an original undertaking, but that they furnished Hall on his own credit, Neal simply being security for his account. For the error indicated, reverse the judgment, and remand for new trial.

BUNN, C. J., dissents in some particulars.

JONES et al. v. DILLARD.

(Supreme Court of Arkansas. Jan. 4, 1902.)
HOMESTEAD—LIEN OF CREDITOR—SETTING ASIDE.

1. Where the evidence shows that land levied on exceeded in value the sum of \$2,500, and that the homestead of the debtor was upon the tract, the judgment creditor had no lien to so much of the tract including the dwelling house and such contiguous lands as the debtor might select, not exceeding in value \$2,500.

2. The right of homestead is a personal privilege to be availed of by the debtor or his wife in the manner prescribed by Sand. & H. Dig. §§ 3714, 3718.

Appeal from Woodruff chancery court; Edward D. Robertson, Chancellor.

Suit by Jennie E. Dillard against S. M. Jones and others. From a judgment in favor of complainant, defendants appeal. Reversed.

Appellee seeks by this suit to enjoin the sale of lands. She alleged that S. M. Jones had some time previously obtained judgment against her husband, A. C. Dillard, and that he had caused an execution to issue on the same, and the defendant sheriff had levied

it upon the S. E. $\frac{1}{4}$ of section 27, township 8 N., range 2 W.; that she was the owner of the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 27 by virtue of a conveyance, which she exhibited, made to her by her husband on the 24th day of October, 1896. The appellants answered that on the — day of February, 1896, Jones obtained a judgment against A. C. Dillard, which was a lien upon the real estate conveyed by him to his wife, and that at the time of such conveyance the land which he owned, and upon which he had his home and resided, exceeded in value the sum of \$2,500. The court found for plaintiff, and granted the injunction.

Fletcher Roleson and Hicks & Dowdy, for appellants. P. R. Andrews, for appellee.

WOOD, J. (after stating the facts). The counsel for appellee states in his brief that "the only question is one of fact, and one only, and that is as to whether or not at the time of the execution of the deed to his wife in October, 1896, the entire 160 acres of land was his homestead, and whether it exceeded in value \$2,500." We are not advised of the grounds upon which the chancellor based his decision. But, taking the statement of counsel, *supra*, as the theory upon which the case was tried below and here, the decree was clearly against the weight of evidence. The proof, we think, shows by a decided preponderance that the 160 acres, of which the land in controversy was a part, exceeded in value the sum of \$2,500. The judgment creditor was seeking to subject the whole tract. It is clear from the answer and the proof that the homestead of Dillard was upon the tract when he made the deed to his wife. Upon this homestead, including the dwelling house or home and such contiguous lands of the tract as Dillard or his wife might select, not exceeding in value the sum of \$2,500, the judgment creditor had no lien. *Stanley v. Snyder*, 43 Ark. 429; *Carmack v. Lovett*, 44 Ark. 180; *Bogan v. Cleveland*, 52 Ark. 101, 12 S. W. 159, 20 Am. St. Rep. 153; *Davis v. Day*, 56 Ark. 156, 19 S. W. 502; *Crampton v. Schaap*, 56 Ark. 253, 19 S. W. 669; *Pipkin v. Williams*, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241. The right of homestead, however, is a personal privilege, of which appellee has not yet sought to avail herself as the law prescribes. Sections 3714, 3718, Sand. & H. Dig.; *Snider v. Martin*, 55 Ark. 139, 17 S. W. 712; *Brown v. Peters*, 53 Ark. 182, 13 S. W. 729; *Pace v. Robbins*, 67 Ark. 232, 54 S. W. 213. The complaint does not even set up the homestead right. Nor is there anything in the proof to show that the 40 acres in controversy would necessarily be embraced in any selection of the homestead that could be made. The dwelling or home is not shown to be on the 40 in controversy. On the contrary, the answer shows it to be on the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 27, etc.

Reversed and remanded, with directions to dismiss the complaint for want of equity, but without prejudice.

**NATIONAL BANK OF CLEBURNE v.
GULF, C. & S. F. RY. CO. et al.**

(Supreme Court of Texas. Jan. 20, 1902.)

**RAILROADS—MECHANICS' LIENS—GENERAL
LIEN LAW—BONDS—SURETIES—
CONSTRUCTION.**

1. Rev. St. art. 3312, giving to mechanics, laborers, and operatives who perform labor in the construction of any railroad a lien "on such railroad and its equipments," does not give a lien to mechanics and laborers performing labor in the erection of machine shops, work shops, round houses, etc., on land belonging to the company and adjoining its right of way; the lien which such parties might have asserted being provided for in article 3294.

2. Where contractors erecting buildings for a railroad gave a bond with sureties "as an additional security to such railroad company for due performance of said articles of agreement," conditioned that the contractor should "pay all laborers and material men, and save and keep harmless the railroad company from the payment of any and all liens, claims," etc., "taken or obtained against the railroad company by reason of the nonpayment of any of the debts before mentioned," was an indemnity bond to the railroad company, and did not give a right of action to the laborers and material men against the sureties on the bond.

Certified questions from court of civil appeals of Fifth supreme judicial district.

Action by the National Bank of Cleburne against the Gulf, Colorado & Santa Fé Railway Company and others. From a judgment for defendants, plaintiff appeals to the court of civil appeals, which certified the case on questions of law. Questions answered.

Wear & Morrow, L. B. Davis, and W. D. McCoy, for appellant. J. W. Terry, D. W. Odell, and Moore & Tenley, for appellee railway company. M. M. Crane, for appellee S. E. Moss. Henry, Brown & Patton and Adams & Truelove, for appellees James, Capps & Carper.

BROWN, J. The court of civil appeals for the Fifth district has certified to this court the following statement and questions:

"The appellant sued to recover of Evans & Hoshour, contractors, for the value of labor performed in the construction of machine shops, engine house, etc., and to foreclose against the Gulf, Colorado & Santa Fé Railway Company's property a lien alleged to exist thereon by virtue of such labor, etc. Consolidated with this action were the suits of the Lutchter & Moore Lumber Company and the Lutchter & Moore Cypress Lumber Company, seeking to recover against Evans & Hoshour and their sureties for material furnished to the contractors and used in the construction of said structures. The court sustained general demurrers to the petitions of the bank and the two lumber companies, from which this appeal is prosecuted. The

substance of the plaintiff's allegations, in so far as a lien is sought to be established, is: That the Gulf, Colorado & Santa Fé Railway Company contracted with Evans & Hoshour for the latter to build for it, in the town of Cleburne, certain machine shop, work shop, paint shop, and boiler house, chimney, and pattern house, and also to build in the town of Temple a round house or boiler house, said structures to be erected on land belonging to said company which adjoins the right of way, and 'is a part of same,' and connected with said right of way by 'numerous switches, turn-outs, and side tracks; and said switches, turn-outs, and side tracks are used in connection with the business and operations of the said railway company, and are necessary to the conduct of said business of said company in the operation of its said line of road, and they extend from the main line into and upon said strip of land aforesaid, which, as aforesaid, had been added to the right of way.' That said structures are a part of said railway, and inseparably connected therewith, 'and are used for and in connection with the operations of said railway, and are built upon and over a portion of its said tracks, switches and turn-outs, and are a part of said works, and are used for no other purpose than of operating said railway, and are useless for any other purpose, and are such works as are necessary, usual, and common in the operation of railroads.' That the contractors, Evans & Hoshour, employed a large number of laborers and mechanics to labor and work for them in the construction of said structures, and that for the value of the labor performed by them the contractors issued to them duebills or pay checks, which were transferred to plaintiff for a valuable consideration, etc. Plaintiff sues to recover of the contractors on the duebills or pay checks outstanding, and to foreclose an alleged lien on the property of the company, which is claimed by virtue of the work and labor performed on said structures. No lien is claimed by plaintiff to have been fixed by the filing of a contract or itemized statement, as required by the act of 1895 (Rev. St. art. 3294 et seq.), but is claimed to have been fixed by filing suit within twelve months after the labor was performed, as provided by Rev. St. art. 3313. The allegations of the two lumber companies (which are adopted by plaintiff as to liability of the sureties on bond) seeking to recover on the contractors' bond executed to the railway company set forth, in substance, the furnishing of material to the contractors, etc., the execution of the contract and bond, and the provisions thereof. The effect of the contract alleged was that the contractors would construct the buildings for a specified consideration, and deliver the same to the company 'free and discharged of all liens, claims, or charges whatever, completely finished, on or before the 1st day of November, 1898.' The stipulations of the

bond pertinent to the issues herein are as follows: 'And whereas, in the treaty of said contract it was agreed that this bond or obligation should be entered into as an additional security to the said Gulf, Colorado & Santa Fé Railway Company for the due performance of said articles of agreement, and of all and every the covenants, matters and things therein contained on the part and behalf of the said above-bounden E. B. Evans and C. A. Hoshour to be done and performed: Now, the condition of this obligation is such that, if the said above-bounden E. B. Evans and C. A. Hoshour shall well and faithfully pay to all laborers, mechanics, and material men, and persons who supply such contractors with provisions or goods of any kind, all just debts due to such persons, or to any person to whom any part of such work is given, incurred in carrying on such work agreed to be done and performed by the said above-bounden E. B. Evans and C. A. Hoshour, and also shall well and truly save and keep harmless the said Gulf, Colorado & Santa Fé Railway Company from the payment of any and all liens, claims, demands, costs, suits, judgments, and executions that may be made, taken, rendered, had, or obtained against the said Gulf, Colorado & Santa Fé Railway Company or its property by reason of the nonpayment of any of the debts, claims, or demands of any of the several parties hereinbefore mentioned and provided for, and shall duly perform and observe all the stipulations and agreements contained in said contract and on his part to be performed and observed, and so that any alteration which may be made by agreement between said above-bounden E. B. Evans and C. A. Hoshour and the Gulf, Colorado & Santa Fé Railway Company in the terms of said contract or the nature of the work to be done thereunder, or the giving by the said Gulf, Colorado & Santa Fé Railway Company, its successors or assigns, of any extension of the time for performing the said contract or any of the stipulations contained therein and on the part of the said above-bounden E. B. Evans and C. A. Hoshour to be performed, or any other forbearance on the part of the Gulf, Colorado & Santa Fé Railway Company, its successors or assigns, to the said above-bounden E. B. Evans and C. A. Hoshour, his successors, administrators, successors, or assigns, shall not in any way release the said above-bounden sureties, or either of them, or either of their executors, administrators, successors, or assigns, from their or his or its liability under the above-written bond,—then this obligation shall be null and void; otherwise to be in full force and virtue.'

"Questions.

"(1) Does article 3312, Rev. St., which gives a lien to mechanics, laborers, and operatives who perform labor in the construction, operation, or repair of any railroad, include

mechanics and laborers who perform labor in the erection of machine shops, work shops, round houses, etc., for a railroad company, in manner and form as alleged by plaintiff; or are such mechanics and laborers, in order to fix liens, governed by the provisions of article 3204 et seq., Rev. St.? In other words, does the term 'railroad,' as used in article 3312, include such structures when constructed for the purpose of operating said road? (2) Is the bond declared upon to be considered only as indemnity for the railroad company, or are the mechanics, laborers, and material men who performed labor and furnished material in the construction of said structures, by its terms, beneficiaries, and entitled to a right of action thereon?"

Article 16 of our state constitution embraces the following sections:

"Sec. 35. The legislature shall, at its first session, pass laws to protect laborers on public buildings, streets, roads, railroads, canals and other similar public works, against the failure of contractors and sub-contractors to pay their current wages when due, and to make the corporation, company or individual for whose benefit the work is done, responsible for their ultimate payment."

"Sec. 37. Mechanics, artisans and material-men of every class shall have a lien upon the buildings and articles made or repaired by them, for the value of their labor done thereon, or material furnished therefor; and the legislature shall provide by law for the speedy and efficient enforcement of said liens."

In pursuance of the requirements of section 37, the 15th legislature enacted a law entitled "An act to provide for and regulate mechanics,' contractors,' builders' and other liens in the state of Texas," approved August 7, 1876 (Laws 1876, p. 91). This act constitutes the basis from which our present law on the subject of mechanics' liens has been developed. It did not embrace the rights of laborers upon railroads in its original form, and in that respect has not been enlarged since its original adoption. *Railway Co. v. Driscoll*, 52 Tex. 13. The 16th legislature, in obedience to the mandate of section 35, quoted above, enacted a law entitled "An act to protect mechanics, laborers and operatives on railroads against the failure of owners, contractors and sub-contractors or agents, to pay their wages, when due, and provide a lien for such wages," approved February 18, 1879 (Laws 1879, p. 8). The first section of this act, with a slight amendment, made in 1887, constitutes article 3312 of the Revised Statutes, which is the subject of investigation in this case: "Art. 3312. All mechanics, laborers and operatives who may have performed labor, or worked with tools, teams or otherwise, in the construction, operation or repair of any railroad, locomotive, car or other equipment of a railroad, and to whom wages are due or owing for

such work, or for the work of tools or teams thus employed, or for work otherwise performed, shall hereafter have a lien prior to all others upon such railroad and its equipments for the amount due him for personal services, or for the use of tools or teams."

The first question submitted calls for the construction of the phrase "such railroad and its equipments," used in the above-quoted article. The word "equipment" is used in the same article in association with other words, thus: "Locomotive, car or other equipment of a railroad." From its association with the words indicating the movable equipments of the railroad, the legislature intended, by "other equipments," to include all other things used in like manner in connection with the operation of the railroad; but it cannot be construed to include everything that is necessary to the operation of the railroad, and therefore it is not broad enough to include structures like machine shops, round houses, and the like. *Suth. St. Const. § 262; Schenley's Appeal, 70 Pa. 98.* This reduces the inquiry to the question, "are machine shops, work shops, round houses," etc., not upon the right of way, embraced within the meaning of the term "railroad"? We have no specific statutory definition of the word, but the following articles of our Revised Statutes serve to show what our legislature meant by "railroad" in article 3312:

"Art. 4422. Any railroad corporation shall have the right to construct and operate a railroad between any points within this state and to connect at the state line with railroads of other states."

"Art. 4425. Such corporation shall have the right to lay out its road not exceeding two hundred feet in width, and to construct the same; and for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of its railway, and to cut down any standing trees that may be in danger of falling upon or obstructing the railway, making compensation in the manner provided by law."

"Art. 4483. Such corporation shall have the right to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery for the accommodation and use of passengers, freights and business interests, or which may be necessary for the construction or operation of its railway; but no railway company shall have the power, either by its own employes or other persons, to construct any buildings along the line of their railroad to be occupied by their employes or others, except at their respective depot stations and section houses, and at such places only such building as may be necessary for the transaction of their legitimate business operations, and for shelter for their employes, nor shall they use, occupy or cultivate any part of the right of way over which their respective roads may pass, with

the exception aforesaid, for any other purpose than the construction and keeping in repair of their respective railways."

The power to construct roads in this state between any points, and to erect upon the right of way all buildings, machinery, and other things necessary for the "accommodation and use of passengers or business interests, or for the construction and operation of its railway," together with the "right to lay out its road not exceeding two hundred feet in width, and to construct the same," recognizes the right of way as the road, and operates as a designation of that right of way, and structures upon it as the "road" or "railroad" of the corporation. We have given careful consideration to the authorities cited by the honorable court of civil appeals in support of its judgment upon this point, but we find no one of them that involved a state of facts similar to this case, and the broad declarations appropriate in those cases cannot be accepted as authority in this. We conclude that the term "railroad," as used in article 3312, is confined to the limits of the right of way of such railroads. We think that this construction is supported by the fact that all claims for construction of every other class of buildings or improvements of any character whatever were, at the passage of this act, and are now, amply secured by the terms of article 3294 of the Revised Statutes; and the terms of the two articles do not indicate that the legislature intended that either of them should cover both subjects of legislation, but they are so framed as to show that each is restricted in the main to the subject indicated by the section of the constitution under which the law was framed.

We are not prepared to hold that the railroad company might not have required of the contractors a bond binding them and sureties to pay all debts contracted with persons for labor, material, or other things necessary to the performance of the contract, whether the claims might be asserted against the railroad company's property as a lien or not; and that under such a contract, if it had been made, the material men and the laborers might sustain an action against the contractors and their sureties upon the bond. The terms of the contract involved in *Jordan v. Kavanaugh, 63 Iowa, 157, 18 N. W. 851*, were much more specific than in this case. But we find in the bond under consideration no provision which will justify such interpretation. The only support for that construction is the following language: "Now, the condition of this obligation is such that, if the above-bounden E. B. Evans and C. A. Hoshour shall well and faithfully pay all laborers, mechanics, material men, and persons who supply such contractors with provisions or goods of any kind, all just debts due to such persons or to any person to whom any part of such work is given incurred in carrying on such work agreed to be done and performed by the said above-bound-

en E. B. Evans and C. A. Hoshour." There is not in this clause any promise by Evans and Hoshour to pay to those persons who might contract with them during the progress of the work. It is simply the expression of a condition upon which their liability to the railroad company is defined, and for a breach of which they would be liable to the company itself. Standing alone, the clause would not support the claim. The character of the instrument as a bond of indemnity to the railroad company is clearly established by the language which precedes that clause, which is, in substance, that the bond is intended and given as additional security to the railroad company for the performance of the contract, and by the clause which immediately follows that relied upon, viz.: "And also shall well and truly save and keep harmless the said Gulf, Colorado & Santa Fé Railway Co. from the payment of any and all liens, claims, demands, costs, suits, judgments, and executions that may be made, taken, rendered, had, or obtained against the said Gulf, Colorado & Santa Fé Railway Co., or its property by reason of the nonpayment of any of the debts, claims, or demands of any of the several parties hereinbefore mentioned and provided, and shall duly perform and observe all the stipulations and agreements contained in said contract and on his part to be performed, * * * then this obligation shall be null and void; otherwise to be in full force and virtue." If there were doubt as to the meaning of the language first quoted, it is surely dispelled by the full expression of intention contained in the context of the bond. No liability of the railroad to plaintiffs, nor lien upon its property, being shown, there has been no breach; therefore no right of action upon the bond. We therefore answer the first question that the liens which the parties to this suit might have asserted against the railroad company are provided for in article 3294, Rev. St., and are not included in article 3312. The instrument submitted is an indemnity bond to the railroad company, and does not give a right of action to the laborers and material men against the sureties upon the bond.

HARDMAN v. CRAWFORD.

(Supreme Court of Texas. Jan. 23, 1902.)

SCHOOL LANDS—CONVEYANCE BY SETTLER—REQUIREMENTS ON VENDEE—ACTUAL RESIDENCE—AGREED FACTS—PRESUMPTION.

1. An agreed statement of facts, that the only issue before the court of civil appeals is "one of law, which arose on the trial and was decided by the trial court adversely to the defendant," together with the further statement that only the evidence necessary to present the issue of law is presented, eliminates from the case presented to the supreme court on appeal from the civil appeals every question of fact on which plaintiff's right to recover depends.

2. Where in trespass to try title to school lands the agreed facts show that plaintiff ac-

tually settled on the land, that he applied to purchase it, and paid one-fortieth of the purchase price and all necessary payments, "all of which was in due form of law," and also that, before the respective applications of plaintiff and defendant's assignor, the land was regularly appraised and placed on the market, the court will assume that the commissioner of the land office would not have accepted plaintiff's application unless the land was regularly on the market at the time, and that the court which tried the cause would not have assumed the existence of such fact without proof.

3. Under Sayles' Ann. Civ. St. art. 4218k, authorizing an actual settler on school lands to sell the land, but providing that the vendee shall file his own obligation with the land commissioner, together with his affidavit, in case three years' residence has not already been had on the land, that he has in good faith settled thereon, etc., actual settlement on the land by the vendee for the remainder of the three years is necessary to give him any rights therein, and his settlement on an adjoining tract of school land then owned by him is insufficient.

Error to court of civil appeals of Third supreme judicial district.

Action by Perry Crawford against L. A. Hardman. From a judgment of the court of civil appeals (63 S. W. 659, 64 S. W. 938) affirming a judgment for plaintiff, defendant brings error. Affirmed.

Rector & Brown and J. K. Rector, for plaintiff in error. Allison & Walters and N. A. Rector, for defendant in error.

BROWN, J. Perry Crawford instituted this suit in the district court of San Saba county in the form of trespass to try title against plaintiff in error, Hardman, to recover 320 acres of land in San Saba county, the north half of section No. 6 of state school land, surveyed by the Houston & Texas Central Railroad Company, by certificate No. 38-4389. The defendant pleaded not guilty. From the statement of facts embraced in the opinion of the court of civil appeals (63 S. W. 659), we make the following condensed statement of the case: "In this cause it is agreed by the parties that the only issue involved in this case is an issue of law, which arose on the trial of said cause and was decided adversely to the defendant by the trial court. It is further agreed that the only facts in evidence which are necessary to enable the appellate court to pass upon said issue are the following: It was proved that the 320 acres of land in controversy belonged to the common school fund, and is described as the N. ½ of Sec. No. 6, surveyed by the Houston & Texas Central Railroad Company, by virtue of Cert. No. 38-4389, as an alternate for the common school fund; that prior to the date of the respective applications of purchase of W. M. Gober and Perry Crawford, as hereinafter mentioned, said land had been duly classified, appraised, and placed upon the market for sale by the commissioner of the general land office, and county clerk of San Saba county notified, and that he registered the same in a book kept by him for that purpose; that plaintiff Perry Crawford,

with his family, consisting of wife and six children, moved and made actual settlement on the land in question on October 23, 1899. Afterwards, on October 26, 1899, said Crawford, in due form, made application to purchase said land as an actual settler, and on the same day paid to the state treasurer one-fortieth of the purchase money due on said land, and executed his obligation for the balance of such purchase money, all done in the manner required by law; and that said Crawford has, since the 23d day of October, 1899, with his family, continuously lived upon said land, occupying the same as a home, and made all payments thereon as required by law; that said Crawford owned no other land, and made settlement on the land in question in good faith for the purpose of making his home thereon." On the part of defendant, it was proved that on January 28, 1896, W. M. Gober, in due form, applied to purchase the land for the purpose of making a home upon it, and he paid the one-fortieth part of the purchase money, and executed his obligation for the balance, as required by law, and that on March 6, 1896, the land was duly awarded to Gober by the commissioner of the land office. Gober was a married man, his family consisting of himself and wife. At the time that Gober made his application to purchase the land, the wife, being in bad health, was living with Hardman, her brother, who was living upon a part of a section of school land, for the purchase of which application had been made by another, and then regularly conveyed to Hardman, who filed his obligation and made his payments according to law. The northeast corner of the land in suit and the southwest corner of the land on which Hardman lived touched, but the surveys touched at no other point. Prior to the year 1896, the land involved in this suit had been occupied by one Dodson, who made some improvements thereon, which had been purchased by Hardman prior to the time Gober made his application to purchase. In February, 1897, Gober's wife died, and he abandoned the land, selling and conveying his interest in it to the plaintiff in error, Hardman, who has continuously since that time claimed the land under said purchase; but Hardman at the time was living upon that tract of land on which he resided, as above stated, and never did move upon the land in question nor in any manner actually occupy the same by himself or his family. Hardman did not substitute his obligation in the land office for the obligation of Gober, nor comply with the statute which provides for the sale of land by an actual settler to another. In August, 1899, defendant Hardman forwarded to the general land office his application, made in due form, to purchase the land in question, but gave no obligation to purchase the land as an actual settler thereon. The land in question had 25 acres in cultivation on it, and a small dwelling house, and

had been under the control of Hardman and used by him for agricultural and grazing purposes from the time that he purchased it from Gober. The trial court instructed the jury as follows: "You are instructed that an actual settler is one who, prior to his application to purchase, has in good faith actually settled upon the land for the purpose of making his home thereon. You are further instructed that the two deeds introduced in evidence by defendant, to wit, the deed from J. A. Hankin to J. J. Dodson, dated January 15, 1887, conveying to the latter the land in controversy, and the deed from J. J. Dodson to L. A. Hardman, the defendant, conveying to said Hardman the same land, and dated January 10, 1889, are withdrawn from your consideration, and they will not be considered by you as evidence in reaching a verdict or for any purpose. You are instructed that one who purchases school land filed upon by another as an actual settler is also required to continue in good faith to occupy said land for the purpose of making his home on said land. If, therefore, you find from the evidence that defendant purchased the land in question from W. M. Gober about October 29, 1897, and that Gober had held said land under an application to purchase as an actual settler thereon, and you further find that defendant, at the time and after his purchase from said Gober, lived upon another and different tract of land, and has continued to occupy such other land as his home, and has never occupied said school land sued for in this cause as his home, then you are instructed that you should find a verdict for the plaintiff, if you further find that plaintiff has shown (1) that on October 26, 1899, he applied to purchase said land as an actual settler, and made his first payment thereon as required by law; (2) that he made and executed his obligation for the unpaid balance of said purchase money; and (3) that on said October 26, 1899, said plaintiff had actually, in good faith, settled on said land for the purpose of purchasing the same as a home. If you do not find the last three matters above submitted to you in the affirmative, then you will find a verdict for the defendant." Verdict was returned by the jury for the plaintiff, Crawford, and judgment entered against Hardman, which judgment was affirmed by the court of civil appeals.

The first ground assigned in the application is that the court erred in holding Crawford entitled to recover the land, there being no proof to show that a forfeiture had been declared by the commissioner of the land office and the land put on the market after it was abandoned by Gober. This was claimed to be a fundamental error, and we granted the application upon that ground. Upon considering the record carefully, we are of opinion that the question is not raised by the agreed statement of facts; therefore it is not before us for determination. The agreement that the only issue was "one of law

which arose on the trial of the said cause and was decided by the trial court adversely to the defendant," together with the further statement, in effect, that the parties embodied in the agreed statement only the evidence necessary to present the issue of law, eliminates from the case every question of fact upon which the plaintiff's right to recover might depend, because we must presume that each fact necessary to sustain the judgment of the court was proved, and was omitted because not deemed necessary to a revision of the particular question which the parties desired to present. In addition to this reason, the facts agreed upon show that Crawford actually settled upon the land, that he applied to purchase it and paid one-fortieth of the purchase price and all payments necessary and required by law, "all of which was in due form of law," and it is also stated that, before the "respective" applications of Crawford and Gober to purchase, the land was regularly appraised and placed upon the market. The conclusion follows that the commissioner of the land office would not have accepted the application unless the land was regularly on the market for sale, and that the court which tried the case would not have assumed the existence of these facts unless they had been established by proof.

What question of law is raised in the record which was decided by the court adversely to the plaintiff in error is not stated distinctly, but it will be defined by ascertaining the conflict between the charge given by the court and the special charge asked by Hardman, which was refused by the court. The court charged the jury as follows: "You are instructed that one who purchases school land filed upon by another as an actual settler is also required to continue in good faith to occupy said land for the purpose of making his home on said land." This proposition the court applied to the facts by instructing the jury, in effect, if they believed that Gober applied to purchase the land in question, and acquired a right under the laws of the state as an actual settler, and that Hardman, continuing to occupy his home place, purchased the right of Gober in the land, the latter abandoning his occupancy, then the jury would find for the plaintiff, if they found that he made actual settlement upon the land and complied with the law in the particulars stated. Hardman antagonized the general instruction, submitting the proposition that if Gober purchased the land in good faith as an actual settler, in compliance with the law, and sold it to Hardman, who at the time occupied another tract of land as an actual settler, which he had bought from the state, then Hardman, by virtue of his actual settlement and residence upon the tract of land which he occupied and continued to use as his home, could hold, as part of his homestead, the land bought of Gober. In connection with the special charge requested, Hardman asked the court to sub-

mit the issue of plaintiff's right to recover in practically the same terms as were expressed in the charge given by the court. The only question of law which appears from the record to have been raised and decided by the court against Hardman was whether Hardman could hold the land in controversy as an actual settler under the purchase made by Gober, although Hardman did not actually reside upon that land, but in fact resided upon an adjoining survey. There is no question that Gober acquired a right under his purchase as an actual settler, and it is conceded that he might lawfully sell his claim to the land to another person under the following provision of article 4218k, Sayles' Ann. Civ. St.: "Purchasers may also sell their lands, or a part of the same, in quantities of forty acres or multiples thereof, at any time after the sale is effected under this chapter, and in such cases the vendee, or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the commissioner of the general land office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies or to which said county may be attached for judicial purposes, together with his affidavit, in case three years' residence has not already been had upon said land and proof made of that fact, stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase, save himself, and thereupon the original obligation shall be surrendered or cancelled or properly credited, as the case may be, and the vendee shall become the purchaser direct from the state, and be subject to all the obligations and penalties prescribed by this chapter, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon." The statute authorizes the actual settler to convey to another, but requires of the vendee to make the same character of settlement upon the land as was required of the original purchaser. In other words, the state allows an actual settler to be substituted by another with the same qualifications, and performing the same duties, but there is no provision by which land once sold to and occupied by an actual settler can be transferred, before the expiration of three years' occupancy, to another person, unless the state at the same time acquires another actual settler in place of the one that is released. This is a matter of statutory provision, and so plainly expressed as to leave no room for construction. It is claimed that the actual settlement of Hardman attached to the Gober land and made him virtually an actual

settler upon that. In *Busk v. Lowrie*, 86 Tex. 132, 23 S. W. 984, this court said: "The language of the statute was used by the legislature for a definite purpose, which was to secure real bona fide settlers upon the land. The word 'actually' is used in the sense of being a real, and not a constructive or virtual, settlement. The courts of this state have so construed the same language used in pre-emption laws." Article 4218k requires actual settlement of the vendee of an actual settler. The purchase by Hardman from Gober without actual settlement and compliance with the law gave him no right whatever, and the abandonment of the land was good cause for forfeiture of the contract under which Gober held possession.

It is claimed that because Hardman might have purchased the land under article 4218l, which authorizes one who has purchased a section of agricultural land to buy three additional sections of grazing lands, he should be allowed to hold the land under his purchase from Gober. If he had applied to the state to purchase this land as land additional to his home tract, and had complied with the law, he might have been entitled to purchase it, but the record shows that he did not apply for it under any provision of the statute, nor make any obligation to the state to pay for it. Therefore it is unnecessary for us to consider what might have been done if he had complied with the statutory provision.

We are of opinion that there is no error shown in the judgment of the district court and court of civil appeals, and the said judgments are therefore affirmed.

PARRISH et al. v. HAWES et al.

(Supreme Court of Texas. Jan. 20, 1902.)

HOMESTEADS—CONVEYANCES—DESIGNATION—ESTOPPEL—SELECTION—TRIAL INSTRUCTIONS.

1. Where the defendant and his wife, being in possession of two separate pieces of property, using and possessing each in a manner calculated to produce the impression that each was a homestead, executed a deed of trust on one of the pieces to defendant, reciting in the deed that such piece was not the homestead, and at the same time executed and delivered to the mortgagees a written designation stating that the homestead was at that time on the property not covered by the deed of trust, and the mortgagees relied thereon, it was error, in an action to foreclose, and defense of homestead, to refuse to submit the question of estoppel.

2. It was not error to refuse to instruct that if the defendants were "only incidentally using the property mortgaged while the use of the other place was for all the principal purposes of a home," etc.; the evidence being merely of a use of both places.

3. Plaintiffs had a right to rely on the statements, and the court did not err in leaving to the jury the question whether or not plaintiffs' agents, as prudent men, were justified in relying on the statements.

Certified questions from court of civil appeals, Third supreme judicial district.

66 S.W.—14

Action by Parrish & Potter against J. K. Hawes and others. Judgment for defendants, and plaintiffs appeal. Case certified by the court of civil appeals on questions of law. Questions answered.

See 41 S. W. 132.

Gregory & Batts, for appellants. A. E. Firmin and M. L. Robertson, for appellees.

WILLIAMS, J. The court of civil appeals for the Third district certifies for decision the following questions:

"There is now pending and undecided in this court the above styled and numbered cause, on appeal from the district court of Travis county. The action is one by appellants to recover from J. K. Hawes on a promissory note for \$3,750, and against J. K. Hawes and his wife to foreclose a deed of trust lien to secure the above note. The property incumbered by that instrument is in the record known as the 'Live Oak Street Property,' situated in the city of Dallas, Dallas county, Texas. The appellees, in defense, pleaded that at the time the deed of trust was executed the property in controversy was their homestead, to which defense the appellants pleaded estoppel. The court submitted the homestead issue to the jury, and verdict and judgment thereon were in favor of appellees, from which the appellants appeal.

"We find the following facts: The deed of trust above mentioned was on the 7th day of January, 1891, duly and legally executed by appellees, incumbering the Live Oak street property to secure the amount of indebtedness sued for. The deed of trust contained a recital that the property therein described was not the homestead of appellees. At the same time they executed and delivered to appellants a written designation, in effect stating that their homestead was at that time on lot 6, on Watt street, in the city of Dallas. At the time of the execution of these instruments, Brown Bros. were the agents of appellants; and one Freeman acted as their agent in making the loan to Hawes of the amount sued for, and in negotiating the execution of the deed of trust and the written designation of the Watt street property as the homestead of appellees. Freeman at the time resided in the city of Dallas, where the property is situated. Neither he nor Brown Bros. took any steps to ascertain whether appellees were in actual possession and use of the Watt street or the Live Oak street property as their homestead at the time of the execution of the above-named instruments of writing; but we find that both Freeman and Brown Bros., acting for appellants in making the loan and accepting the homestead designation and the deed of trust, believed the representations and statements therein contained concerning the homestead of appellees were true, and upon the faith of such belief the contract was consummated.

And the evidence warrants the conclusion that neither Freeman nor Brown Bros. had any actual knowledge or notice of the actual place of residence of appellees at that time; nor did they make any effort or exercise any diligence to ascertain which of the two pieces of property the appellees were using and occupying as their homestead, but relied upon the statements and designation as contained in the above instruments. The court, in its charge to the jury, submitted to them the question whether the appellees at the time of the above transactions were in actual use of the Live Oak street or the Watt street property as their homestead; and from the evidence as found in the record, and as being consistent with the verdict of the jury, the conclusion of fact can be reached that the appellees at that time were in actual possession, use, and enjoyment of the Live Oak street property as their homestead, and at the time it was a residence and grounds suitable for that purpose. The evidence also warrants the conclusion that before the deed of trust was executed the Live Oak street property was also used by the appellees as their homestead. And we are authorized from the testimony to also reach the conclusion that the statements in the deed of trust and in the designation referred to, in effect stating that the Live Oak street property was not their homestead, were false. We also find that there is evidence in the record tending to show that before the execution of the deed of trust and the homestead designation, and at that time, the appellees were also in possession of and using the Watt street property in a way calculated to produce the impression that it was their homestead. In fact, there is testimony which tends to show that at the time mentioned they were in such manner using both the Live Oak and the Watt street properties. And there is some evidence which warrants the conclusion that the Watt street property was a residence suitable for homestead purposes. We also find that the facts bearing upon the use and possession of the Watt street property by the appellees was of such a character as would authorize the court to submit the issue to the jury whether at that time they were using and enjoying that property as their homestead; and the same conclusion could be reached as to the Live Oak street property, but the evidence of use of the latter for homestead purposes was much stronger than that which related to the Watt street property. The charge of the court did not submit to the jury any element of estoppel. The appellants requested that the court give the following charges, which are numbered 1 and 2, respectively, which the court refused, and which action is complained of by proper assignments of errors and propositions contained in appellants' brief: 'If you believe from the evidence that at the time the loan was made, on January 8, 1891, the defendant J. K. Hawes was using as a home-

stead both the Watt street property and the Live Oak street property, and was not using either one of them exclusively as such, and that he and his wife, for the purpose of procuring the money represented by the note sued on, made the statements contained in the homestead designation and deed of trust, to the effect that they were then using and occupying the Watt street property as their homestead, and that no other property except the Watt street property constituted at the time any portion of their homestead, and that plaintiffs, through their agents, made the loan represented by the note sued on in this case on the faith of said statements, believing them to be true, and that but for such statements plaintiffs would not have made said loan, then you will find for plaintiffs, foreclosing the lien to secure the note herein sued on on the property described in plaintiffs' petition, as defendants would be estopped from claiming said property as a homestead.' 'If the defendants on said 8th day of January, 1891, were actually using and occupying the Watt street property as their home for all the principal purposes of a home, and were only incidentally using the Live Oak street property, and said defendants, while so using and occupying said Watt street premises, represented to plaintiffs that said Watt street property was their homestead, and then used and occupied by them as such, and that said Live Oak street property was not their homestead, or claimed or used by them as such, and said representations were made by Hawes and wife for the purpose of securing a loan on the premises on Live Oak street from plaintiffs, and plaintiffs and their agents making said loan believed said statements to be true, and relied on the same, and, on the belief of the truth of such statements, made the loan of money here sued for on the Live Oak street property, and plaintiff or their said agents making said loan had no notice that such statements were false, or had no notice of such facts as would have put an ordinarily prudent man upon inquiry as to the truth of such statements, which, if followed up, would have shown their falsity, then, if you find the facts to be as stated in this charge, you will find the defendants are estopped from now claiming said Live Oak street property as their homestead, and you will find for the plaintiffs against both defendants, foreclosing their deed of trust on the premises therein described.'

"In view of the above statement and findings, the court of civil appeals of the Third supreme judicial district of Texas certifies to the supreme court of Texas the following questions: (1) Does the issue of estoppel arise from the facts as above stated? (2) Was it error for the court to refuse to give either or both of the above-mentioned charges?"

1. The charge of the court, as stated, in submitting to the jury the question whether

the parties were in the actual use of the one property or of the other as their homestead, gave no rule to enable the jury to determine the case, in the event they found to exist another state of facts which there was evidence tending to establish, viz., that the parties were in such use of both places. If such was the fact, and there were no others to fix conclusively upon one place, to the exclusion of the other, the character of the homestead, exempt from forced sale and protected from mortgage, it was within the power of the husband and wife, by their conduct, to attach their exemption to one, and to estop themselves from afterwards claiming it for the other. The certificate states no such other facts, and we must assume that some of the evidence tended to show such use of each place as would be sufficient to make it homestead if its owners chose to so treat it. The other facts stated show that they represented the Watt street property to be their homestead, and that this was believed and acted on by plaintiffs' agents in lending the money upon the Live Oak street property. We are of the opinion that a question of estoppel arose from these facts. It may happen that families, the heads of which own more than one place suitable for a residence, will reside sometimes upon one and sometimes upon another, in such way that either serves to meet all the purposes of the home. No question of exemption or of power to mortgage or alienate may have ever arisen to make it necessary for them to select the place which will be claimed and held as the home. Upon this state of facts alone, no court could say, as matter of law, which one of the places thus used constitutes the homestead to which the constitutional protection is given; nor could persons dealing with the owner of the property. To determine the question thus arising, something more than mere use would have to appear. In such cases we see no reason why the husband and wife, if not the husband alone, would not have the absolute right, when occasion arises, to determine by selection the place to be held and protected as the homestead; nor why, after having selected and designated one of the places, and mortgaged another to a lender acting upon the faith of the selection, they should not be estopped, as to him, from claiming the mortgaged property as exempt. Under this view, the provisions of the mortgage and the statements in the other paper, called the "Designation," would amount to such an election,—nothing having been previously done to impress definitely upon the Live Oak street property exclusively the homestead character,—and these facts thus present a question of estoppel. Or, if it were held that, the use of both places being sufficient for homestead purposes, the mere intention of the owners to hold the one or the other as their homestead would give it character as such, an estoppel might arise from their misrepres-

entation of their intent. The intention could only be definitely known to and disclosed by themselves; and, if facts had not transpired which certainly made one of the places their homestead under the law, persons dealing with them would naturally rely and act upon their statements as to its existence in such way as to estop them from afterwards disputing the truth of the representations made.

2. The second special charge does not seem to be applicable to the facts stated in the certificate. No evidence is given under which the jury could have found that the defendants were "only incidentally using the Live Oak street property," while the use of the other place was for all the principal purposes of a home. The case made is that both were in use, and the most that plaintiffs could claim under the evidence is that the occupancy of the Watt street property was sufficient, and not that the use of the other place was only incidental to it. Upon this state of facts alone, the court did not err in refusing this charge. The first special charge is applicable, and should have been given, unless there were other facts than those stated requiring a qualification of it. It is urged that plaintiffs' agent had no right, without inquiry into the facts as to the homestead rights of the defendants, to rely upon their statement that the Live Oak street place was not their homestead; and to sustain this contention the case of *Loan Co. v. Blalock*, 76 Tex. 85, 18 S. W. 12, and other cases supporting the doctrine there laid down, are relied upon. In that case Blalock and wife at the time they gave the mortgage were living upon the mortgaged property as their home, and used no other property as such. They represented that it was not their homestead, but that other land was, which they did not then and had never resided upon or used as a home. In fact and in law, the property mortgaged was their only home; and the court so held, saying: "If property be homestead in fact and law, lenders must understand that liens cannot be fixed upon it, and that declarations of husband and wife to the contrary, however made, must not be relied upon. They must further understand that no designation of homestead, contrary to the fact, will enable parties to evade the law and incumber homesteads with liens forbidden by the constitution." It was further said: "The fact of actual possession and use as the home of the family was one against which the lender could not shut his eyes; and this fact, coupled with the interest held by the borrowers in the land, made the property homestead in fact and in law, on which the constitution declares no lien such as claimed in this case can exist." These observations were perfectly just and true of the case before the court, and of all others in which the facts so unequivocally manifest such exclusive use of the one piece of property as homestead that the law stamps it as

such. Its status in fact and in law is thus established, and of this all persons must take notice, and hence declarations of the husband and wife plainly contrary thereto cannot be relied on. But if we should attempt to apply the doctrine to the present case, which one of these places should we say was, in law, the homestead of defendants? Plainly, we could say this of neither place; and, if the court cannot know this, how can it be held that persons dealing with the husband and wife must know it from the same facts? The determination of the homestead depending, as we have seen, either upon the election of the parties or upon the existence of an intention in their minds, every one who would ascertain the homestead must necessarily learn what election is made or what intention exists. This is precisely what the lender did. The fact of an unequivocal and exclusive use of the place to the exclusion of the other was not present, as in the Blalock Case, to notify the lender that the representations made were false; that they were, in truth, misrepresentations not only of patent and notorious facts, but of a legal status which the property had acquired. If possession and use in the Blalock Case notified the lender that the property on which they were lending money was certainly and unequivocally the homestead, the possession and use in this case notified the lenders that either place might be the homestead upon the election or intention of the owners, and this was the point upon which the declarations were sought and made. Such declarations were not contrary to, but consistent with, facts which the evidence tended to establish. If, under such facts, the mortgagors could disregard such action, and defeat the mortgage upon the plea of homestead, the same defense, under the same facts, would have been open to them had they made such representations concerning the other property and mortgaged it. It was also urged in argument that the special charge was defective in not leaving to the jury the question whether or not plaintiffs' agents, as prudent men, were justifiable in relying on the statements made. This may undoubtedly be an element of estoppel which should be explained to a jury in a case calling for it; but upon the case made by the certificate, and supposed in the instruction, we think the court should have assumed that reliance on the statement was justifiable. Supposing the facts to be as stated, and that no others appeared to indicate to the lenders the untruth of the representations, there was no reason why the plain and unequivocal statement by the parties who alone knew the facts stated might not be implicitly relied on by persons so dealing with them. While it may be true that a person cannot assert an estoppel based upon a representation which, under the circumstances, he ought not to have believed and acted upon, it is, we think, equally true that

where one states a fact which is or should be within his knowledge, intending that it be believed and acted on as true, he should not ordinarily be heard to say that the other party ought not to have believed him; there being nothing to show to such other the falsity of the representation. *Nichols-Stewart v. Crosby*, 87 Tex. 452, 29 S. W. 390; 7 Am. & Eng. Enc. Law, 16, and cases there cited. The certificate states no fact within the knowledge of the lenders to show that they were not justifiable in believing the representations made to them, and hence, upon these facts, the charge requested was sufficient for the case.

It is perhaps proper that we add that we do not mean to hold that, because two places may have been used as the home, one of them may not have been, by the claim and conduct of the owners, so clearly and unequivocally designated as homestead as to make it such in law, and to require all persons dealing with them to take notice of its status. We deal only with the facts certified.

MARTIN et al. v. ROTAN GROCERY CO.¹
(Court of Civil Appeals of Texas. Jan. 22, 1902.)

PAROL EVIDENCE—CONSIDERATION OF CONTRACT—AGENT—AUTHORITY.

1. Oral evidence in an action against guarantors that an unconditional written transfer by the debtor of his notes and credits, made in consideration of securing the guaranteed debt, was also made in consideration of the release of the guarantors, is admissible to show an additional consideration, and is not a violation of the rule prohibiting parol evidence to vary written contracts.

2. An agent of a creditor empowered to procure a transfer of the accounts and notes of the debtor as security may bind his principal by a contract to release the guarantors of the debtor in consideration of such transfer.

3. A creditor receiving the benefit of a transfer of the accounts and notes of the debtor, under a contract made in consideration of the release of the guarantors of the debtor, cannot deny such consideration in an action against the guarantors.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by the Rotan Grocery Company against Martin & Rogers and others on certain notes the payment of which, it was alleged, was guaranteed by the defendants Cardin, Brown & Wood. From a judgment in favor of the plaintiff, the defendants appeal. Reversed.

Stinnett Bros., J. E. Walker, and S. F. Sadler, for appellants. A. C. Prendergast, for appellee.

FISHER, C. J. As to the effect of the contract of guaranty sued upon, we adhere to the ruling made by this court on the first trial of this case, which will be found reported in 57 S. W. 706; but we are now of the opinion that we erred in the former dis-

¹ Writ of error denied by supreme court.

position of the case, in holding that parol evidence was not admissible to explain and prove an additional consideration to the written contract executed by W. C. Martin and R. S. Rogers on October 29, 1896, wherein they transferred to the Rotan Grocery Company the partnership notes, open accounts, and their books. This instrument recites that the transfer is made in consideration of securing the indebtedness due the Rotan Grocery Company. The additional consideration for the execution of this instrument, which was sought to be established by the parol evidence which was excluded, is to the effect that, upon the execution of the transfer of the notes and accounts and books to the Rotan Grocery Company, the sureties or guarantors of Martin & Rogers, who are sought to be held liable on their contract of guaranty in this case, should be released from all liability. The excluded testimony tends to prove that when this transfer was made it was understood and agreed between the agent of the Rotan Grocery Company, who was representing it in procuring the transfer, and Martin & Rogers, that, as a part of the consideration for the same, the guarantors should be released. There is nothing upon the face of the instrument that discloses this part of the agreement; but we are now of the opinion that the effect of this testimony is to establish an additional consideration, which the authorities hold can be done without violating the rule which prohibits parol evidence to change the legal effect of an unambiguous contract. In *Taylor v. Merrill*, 64 Tex. 496, it is held that a different or additional consideration may be established by parol evidence; and to the same effect is *Northington v. Tauboy*, 2 Willson, Civ. Cas. Ct. App. § 326, where many authorities are collected upon this subject. In *McLean v. Ellis*, 79 Tex. 400, 15 S. W. 394, it is said that the true consideration may be shown. In *Bank v. Bruhn*, 64 Tex. 575, 53 Am. Rep. 771, it was held that parol evidence was admissible to prove that a note was secured by additional collaterals than those called for in the written contract. Many additional authorities from the different states upon this subject supporting those announced might be cited, but we deem it unnecessary to do so. The admissibility of this testimony cannot be denied on the ground that the agent of the Rotan Grocery Company did not have authority to make such an agreement. He was the agent of the company to procure a transfer of the books and accounts, etc., mentioned in the instrument; and his authority, to this extent, would authorize him to enter into an agreement establishing a consideration upon which such transfer should be based. The Rotan Grocery Company, having received the benefit that resulted to them under the transfer, could not deny the consideration resulting to the appellants for its execution and delivery.

For the error of the court in refusing to

admit this testimony, the judgment will be reversed and the cause remanded. We find no other error in the record.

Reversed and remanded.

STUBBS v. LANDA COTTON OIL CO.
(Court of Civil Appeals of Texas. Jan. 22, 1902.)

APPEAL—STATEMENT OF FACTS—TIME—EXCUSE—BOND—INSUFFICIENCY—DISMISSAL.

1. Under Rev. St. arts. 1379-1381, prescribing the time and rules for preparing a statement of facts, and article 1382, providing that if the failure of appellant to file within such time is not due to his fault, or that of his attorney, and arose from causes beyond his control, the court could permit it to remain as part of the record, a statement filed after the statutory time must be stricken out, where no sufficient excuse for the failure to file within time is shown.

2. Under Rev. St. art. 1400, requiring an appeal bond to be double the probable amount of the costs as fixed by the clerk, where the bond is only equal to the amount of costs as so fixed the appeal should be dismissed, unless appellant furnishes a new and sufficient bond within such time as the court may prescribe.

Appeal from district court, Comal county; L. W. Moore, Judge.

Action between Felix Stubbs and the Landa Cotton Oil Company. From a judgment in favor of plaintiff, defendant appeals. Appeal dismissed.

J. W. Bains, N. T. Stubbs, and A. E. Aitgelt, for appellant.

FISHER, C. J. A motion is on file in this court, made by the appellee, to strike out the statement of facts because it was not filed in time. The case was tried in the district court of Comal county, and on the 5th day of September, 1901, the court entered an order granting the appellant 10 days after adjournment of court in which to prepare and file a statement of facts. The statement of facts was filed October 17, 1901. The court adjourned on the 6th day of September, 1901. To the statement of facts is appended this certificate of the trial judge: "Lockhart, Texas, October 15th, 1901. I hereby certify that the parties to this suit failed to agree to a statement of facts. Each presented to me their respective statements, and from these and my own knowledge of the facts as testified to by the witnesses I do make out the above and foregoing statement of facts as a correct statement of all of the facts proven upon the trial, and as such I certify the same. I further certify that the defendant did present to me a statement of facts made out by him on September 16th, 1901, being the tenth day after adjournment of the district court of Comal county, which I could not approve, being incorrect, and I could not examine the same correctly or make out a statement of facts, as I was then in the midst of a trial of an important case in the district court of Hays county,

Texas, and I made the above statement of facts at my first convenient opportunity." This was signed by the district judge. Article 1379, Rev. St., prescribes the manner in which parties may prepare and agree to a statement of facts. Article 1380 prescribes the rule for preparing a statement of facts by the judge when the parties do not agree. Article 1381 authorizes the court, by an order entered upon the record, to allow a statement of facts to be made up and signed and filed in vacation, at any time, not exceeding 10 days, after the adjournment of the term. Article 1382 reads as follows: "Whenever a statement of facts shall have been filed after the times respectively prescribed in the preceding articles, 1379, 1380, and 1381, of this chapter, and the party tendering or filing the same shall shew to the satisfaction of the courts of civil appeals that he has used due diligence to obtain the approval and signature of the judge thereto, and to file the same within the time in this chapter prescribed for filing the same, and that his failure to file the same within said time is not due to the fault or laches of said party or his attorney, and that such failure was the result of causes beyond his control, the courts of civil appeals shall permit said statement of facts to remain as part of the record, and consider the same in the hearing and adjudication of said cause, the same as if said statement of facts had been filed in time." *Matthews v. Boydston* (Tex. Civ. App.) 31 S. W. 816, and *Thompson v. Hawkins* (Tex. Civ. App.) 38 S. W. 236, indicate, in a general way, the construction that has been placed upon the provisions of the statutes noticed by a number of cases where these statutes have been construed. The first case cited is to the effect that the statement of facts must be filed within the time required by the statute, or else it will not be considered. In the second case it is, in effect, stated that the statement of facts must be filed within the time allowed by the order of the court made in pursuance of the statute; and that the trial judge has no power to order the clerk to file it later than that time. The policy of the law upon this subject seems to be to absolutely prohibit the court from considering a statement of facts not filed within the time allowed by law and the order of the court, unless the party brings himself within the rule announced in article 1382 of the Revised Statutes. This article seems to contemplate that in any case where the statement of facts is not filed within the time required the burden is upon the party offering the same to acquit himself of faulty negligence or delay in causing to be prepared and filed within the time required the statement of facts. In this particular case, the appellant must have known that the trial judge was engaged in holding court in an adjoining county, and that more than likely the press of business before him at that time might be of such a character

as not to enable him upon the last day upon which the statement should be filed to prepare and file a statement of facts. In other words, under the section of the statute quoted, the appellant should have met the motion to strike out, which was not done, with some statement to the effect negating the facts stated in the certificate of the judge, or should have shown that, by reason of particular facts and circumstances, he was justified in waiting till the last day in which to request the trial judge to make up a statement of facts; and that the failure or delay, under the particular facts and circumstances, was not attributable to any laches or negligence upon his part. There is no counter affidavit or statement made by the appellant upon these points; and, in the absence of any excuse offered for not having caused to be prepared and filed within the time required the statement of facts, he does not bring his case within article 1382. Consequently, the motion will be granted, and the statement of facts stricken out.

We also think the motion of appellee to dismiss the appeal is well taken. The motion is made upon the ground that the appeal bond is not double the probable amount of the costs, as fixed by the clerk of the trial court. The amount of costs fixed by the clerk is estimated at \$100. The appeal bond is for \$100. Article 1400 of the Revised Statutes requires the bond to be double the probable amount of the costs of the suit in the court of civil appeals, supreme court, and the court below, to be fixed by the clerk, etc. The appellant will be allowed 12 days from the date of this order in which to file a new bond. Upon his failure to do so the case will be dismissed.

Motions to strike out statement of facts and dismiss appeal granted.

INTERNATIONAL & G. N. R. CO. v. LEHMAN et ux.

(Court of Civil Appeals of Texas. Jan. 22, 1902.)

RAILROADS—PERSON ON TRACK—DUTY—INSTRUCTIONS.

In an action against a railroad company for damages resulting from the death of a child, alleged to have been caused by the negligence of the defendant, the court charged that: "The defendants had a right to run their trains upon the track, and are not responsible for injury done to persons on the same that could not be avoided by the use of ordinary and reasonable care and diligence. This, however, would not excuse the running over of a person on the track." *Held*, that such contradictory charge was reversible error, notwithstanding the jury were correctly instructed as to the rights and duties of defendant in other parts of the charge.

Appeal from district court, Milam county; J. C. Scott, Judge.

Action by John A. Lehman and wife against the International & Great Northern

Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

S. R. Fisher, J. H. Tallichet, and N. A. Stedman, for appellant. Monta J. Moore and Hefley, McBride & Watson, for appellees.

KEY, J. This is a statutory action by a father and mother to recover damages resulting from the death of their child, alleged to have been caused by the negligence of the railroad company. We sustain the eleventh assignment, and reverse the judgment on account of affirmative error in the third paragraph of the trial court's charge to the jury, which reads as follows: "(3) The defendant, as a railroad company, had a right to run their trains upon the track, and are not responsible for injury done to persons on the same that could not be avoided by the use of ordinary and reasonable care and diligence. This, however, would not excuse the running over of a person on the track. It was the duty of the servants and agents of the defendant in charge of a running train on its tracks at all times, and especially in passing through towns or villages, and in approaching crossing places on its track where people were accustomed to pass, to keep a lookout. It was also the duty of said servants and agents, in running a train into and through a town or village, to operate same at a rate of speed as a person of ordinary prudence would have done under similar circumstances." The objection urged to this charge is that it instructed the jury that the use of ordinary and reasonable care and diligence by the defendant would not excuse the running over of a person on the track. This criticism is well founded. The second sentence in this charge must have been understood by the jury (because it cannot properly be construed otherwise) as placing a limitation upon the right referred to, and the doctrine of nonliability announced in the preceding sentence. It is no answer to this construction of the charge to say that, because it announced a proposition of law radically wrong, judges and lawyers might reach the conclusion that the court did not mean what it said. Charges are written for the information of jurors, who are laymen, and, while presumed to be men of average intelligence, are not supposed to know whether a particular proposition announces a correct rule of law or not. It is true, as pointed out in the appellees' brief, that in other and subsequent portions of the court's charge the law on the subject referred to was correctly stated; but in no place did the court refer to, and withdraw or correct, the error committed in the paragraph of the charge quoted above. This left the court's charge contradictory in different paragraphs, and the jury without any proper rule for their guidance. They could say that one paragraph of the charge read one way and another the opposite; and, not

knowing which was correct, they might select either or neither. *Baker v. Ashe*, 80 Tex. 861, 16 S. W. 36; *Railway Co. v. Robinson*, 73 Tex. 277, 11 S. W. 327; *Pound v. Turck*, 95 U. S. 461, 24 L. Ed. 525; *Sullivan v. Railway Co.*, 88 Mo. 169.

We express no opinion upon the merits of the case as developed by the testimony, but decide against appellant on the other points of law presented in its brief.

For the error indicated, the judgment is reversed and the cause remanded. Reversed and remanded.

WEST et ux. v. CLARK et al.

(Court of Civil Appeals of Texas. Jan. 4, 1902.)

CONTRACT TO MAKE WILL—MARRIED WOMAN — SPECIFIC PERFORMANCE — PETITION — FRAUD—SERVICES—COMPENSATION—LIMITATIONS.

1. Where, in an action for the specific performance of a contract by a married woman to make a will in favor of plaintiff, the petition does not allege that the contract was made so as to be binding on such married woman, a demurrer thereto should be sustained.

2. Where a petition alleges that plaintiff was induced to and did live with and work for defendant and his wife for 11 years by their promise that, if she did so, they would each will her all their property, and that such promise was fraudulently made, and never intended to be kept by them, and that the wife had died, leaving a will, which gave all her property to others, and defendant had made a similar will, such allegations are sufficient to authorize a recovery of the value of plaintiff's services.

3. Where plaintiff was induced to enter into and to perform a contract by promises falsely and fraudulently made by defendant, which he never intended to perform, limitations do not commence to run against plaintiff's claim for services performed under such contract until the fraud is discovered.

Appeal from district court, Erath county; W. J. Oxford, Judge.

Action by J. R. West and wife against G. W. Clark and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Daniel & Keith, for appellants. Parker, Carlton & Parker, for appellees.

STEPHENS, J. Appellants brought this suit December 6, 1900, for the specific performance of a contract made with Louisa Hethcock, now Louisa West, when she was about 18 years of age, by the terms of which appellee G. W. Clark, and his wife, L. C. Clark, agreed that if Louisa Hethcock would live with them as their child, and assist them in their work till she was of age or married, they would adopt her as their heir, or will their property to her, and she should have all of the property of each of them at death, and "that they would fix things so that she would get it," they having no children. The petition alleged full compliance on her part with this condition, charging that, relying upon said promises, she served them faithfully till she was 24 years old, March 31, 1897, when she became the wife of J. R.

West; that she assisted them in accumulating and saving about \$9,000 worth of property; and that the services so rendered were worth \$3,600; praying in the alternative to recover that sum. She was adopted by G. W. Clark and wife as the heir of each of them by a written instrument dated June 30, 1890, executed as provided in our statute on that subject; but Mrs. Clark died October, 1900, leaving a will, made in May of that year, by which she devised and bequeathed all her property, consisting of her share of the community estate, of the estimated value of \$5,000, to G. W. Clark for life, with remainder to her collateral kin, who were made defendants. It was also alleged that G. W. Clark had made a similar will, and that it was his declared purpose to prevent Louisa West from inheriting any part of the estate of himself and deceased wife. The petition contained, among others, the following paragraphs:

"Plaintiffs allege that the defendant G. W. Clark and his wife, Lucy Catherine Clark, falsely and fraudulently made the promises, representations, and agreements to and with said Louisa West, as hereinbefore alleged, in order to induce the said Louisa West to remain with them in their home, and to thereby secure her services and labor; that the defendant and wife did not intend to carry out such promises and agreements at the time they made them, and knew that they did not intend to do so, but made them for the purpose of deceiving the said Louisa West, and to thereby secure her services; that the said Louisa West, relying upon and having implicit confidence in the said G. W. Clark and his wife, and fully believing that they and each of them would do toward her as they had promised and agreed to do, was by such false promises and representations induced to live with them, and work for said Clark and wife, for a period of about 19 years, to her great and irreparable injury and damage. * * *

"Plaintiffs allege that they never discovered the fraud which had been perpetrated upon the said Louisa West by the said Clark and wife until about the 1st day of October, 1900, and that they never knew the said Clark and wife intended to disregard their contract and agreement with the said Louisa West until about the last-named date."

The court sustained various demurrers to the petition and dismissed the suit.

We are inclined to the opinion that, as a suit for specific performance, the petition was subject to demurrer, because the contract which appellants sought to enforce was not one which a married woman has the legal capacity to make. True, she may adopt an heir, but that is because the statute so provides. She could not be compelled to make a will or bind herself not to make one. *Jones v. Goff*, 63 Tex. 248. At all events, the petition failed to show, as is required in suits for the specific performance of the con-

tracts of married women, that Mrs. Clark had made the alleged contract in such manner as to make it binding upon her. *Cross v. Everts*, 28 Tex. 523. We are, however, clearly of opinion that the allegations of the petition entitled Mrs. West to recover for the value of her services, and that the statutes of limitation pleaded in the thirteenth and fourteenth special exceptions were no bar to this recovery, especially in view of what is alleged in the paragraphs of the petition quoted above, to the effect that her services had been obtained under false pretenses. No cause of action for the value of services rendered on the faith of a genuine promise to give compensation by devise or bequest arises until such promise is repudiated or otherwise broken, nor does limitation begin to run where the promise is merely a deceitful pretense until the fraud is or ought to be discovered.

Because the court erred in sustaining the thirteenth and fourteenth special exceptions, the judgment is reversed, and the cause remanded for a new trial.

J. S. MAYFIELD LUMBER CO. v. CARVER.¹

(Court of Civil Appeals of Texas. Dec. 14, 1901.)

CONTRACTS—BREACH—DAMAGES—TRIAL—CONTINUANCE—AMENDMENT—APPEAL—ASSIGNMENTS OF ERROR—EVIDENCE—FINDINGS.

1. Where, at the close of the testimony, plaintiff was allowed to amend his petition, and defendant asked for a continuance, because of such amendment, to obtain the testimony of three witnesses, and the depositions of the two of such witnesses who are best qualified to testify were in evidence, and fully covered the matters affected by such amendment, it was not error to refuse such continuance.

2. Where, in an action for breach of a building contract, defendant applies for a continuance to show that the contractor was another than defendant, but shows no diligence, the application is properly refused.

3. Where witnesses appeared and testified before the trial was concluded, it was not error to refuse a continuance on the ground of their absence.

4. Where, under assignment of error on the ground of variance, no substantial variance is pointed out, the assignment cannot be sustained.

5. Where, under an assignment of error, testimony set out in the bill of exceptions as objected to is not quoted in the brief, while that quoted in the brief does not seem to have been objected to, such assignment cannot be sustained.

6. Where, at the time of giving notes for the balance of the contract price for a building, it is agreed that all questions of damages for breach of such contract shall be left for future adjustment, the recovery of judgment on such notes does not preclude the owner from claiming damages for defects then known to exist.

7. Where the evidence is conflicting, and the preponderance is not clearly against the findings of the trial court, his decision thereon will not be reversed.

¹ Rehearing denied January 18, 1902, and writ of error denied by supreme court.

Appeal from district court, Clay county; A. H. Corrigan, Judge.

Action by E. B. Carver against the J. S. Mayfield Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Galloway & Templeton, for appellant. Allen & Wantland, and Matlock, Miller & Dycus, for appellee.

STEPHENS, J. Appellant, a private corporation, undertook to construct for appellee a two-story brick building on lot 3, block 7, in the town of Henrietta; but, as the evidence tended to show, failed to construct the building of as good material in some respects as was called for in the contract, and failed to construct some of the walls thereof of the thickness and in the manner required by the contract, to appellee's damage, as found by the judge, before whom this case was tried without a jury, \$1,000. The recovery, however, was fixed by the judgment at \$800 in response to the written offer of appellee to remit whatever damage he might be entitled to on account of the walls of the upper story being 13 instead of 18 inches thick. The contract for the construction of the building was made June 30, 1890, and, according to the contention of appellee, was parol. The following written specifications, however, were drawn up at the time, and a copy thereof was left with appellee, although he did not sign the instrument:

"Specifications for two-story brick building for E. B. Carver, 28 by 110 feet, height of wall. 80 feet of south wall to be 13, laid in Portland cement. 30 feet of south wall to be 18, laid in best lime mortar. 30 feet of east wall to be 18, laid in best lime mortar. 10 feet of north wall to be 18, laid in best lime mortar. Floor joists to be 2 feet centers, 4 tiers, bridging $\frac{1}{4}$. Clg. joists to be 2 tiers straight, 1 at each end. To be floored with $1\frac{1}{4} \times 4$ D-M fig. below, and $\frac{1}{4}$ D-M fig. above. Overhead to be celled with $\frac{5}{8} \times 4$ D-M clg. Roof to be trussed with 2 crown in center. 2-6 rafters, covered with solid 1 inch sheeting, graveled 4 ply, same as roof on other building. Roof to have 4 foot fall from front to back end. One front and one back door, to correspond with and made as doors in other building. Front and back doors to have beveled plate glass. Two show windows in front, square-edge plate glass. (To be more explicit) front and back to correspond with same of other building, including transom windows—11 or 12. All painting to be two-coat work; walls plastered and white coated. Iron lintels and door sills; wood columns; locks and hardware same as other building. Dirt and rubbish cleaned away to receive building. Foundation built and repaired. Excavation to be three feet deep, and foundation laid with hard rock. All material and work to be of best quality and grade. Brick same quality as in other

building. For 3700.00. J. A. George, Contractor.

"Guarantee above contract. The J. S. Mayfield Lumber Company, per Caskey."

The "other building" referred to in these specifications was what was known as the "Opera House Building," belonging to appellee, and situated on the lots north of and adjacent to said lot 3. The testimony of appellee tended to show that appellant, in making the contract to erect the building in question, agreed to duplicate the Opera House Building; that is, in material and workmanship, and in the height and thickness of the walls. The Opera House Building stood upon two lots, the south half of it being a one-story building, on 80 feet of the south wall of which the north wall of the building in question was to have been and was built. The south and west walls of the second story of the Opera House Building were built upon iron columns, and were only 13 inches thick; but all the other walls of that building were 18 inches thick. The thickness of 80 feet of the south wall of the building in question did not exceed 13 inches, and was not cemented to the adjoining wall, and none of the walls of the second story exceeded 13 inches. The opera house was built of Thuber brick, which the evidence tended to show was better material than the Gainesville brick, which was used in the construction of the house in question. The evidence also tended to show that the glass in the windows and the wood in the doors of the latter were inferior to the glass in the windows and the wood in the doors of the former; and that the walls of the building in question had cracked, as a possible result of bad material and workmanship, one or both, and that they were thus inferior to those of the opera house. The evidence also tended to show that, owing to the defects above specified, the building, as constructed, was worth about \$1,000 less than it would have been worth if it had been constructed so as to duplicate the Opera House Building, as appellee claimed it should have been. In appellee's original petition, upon which the cause went to trial, it was alleged to be within the terms of the contract "that the dimensions of the walls of said building should be substantially the same as the walls of said Opera House Building, except that 80 feet of the south wall of said building should be only 13 inches in width, and laid in Portland cement, and said 80 feet of wall should be solidly cemented to an adjoining wall on the south of the same," and that the second story walls should be 13 inches in width; but that these walls were only $12\frac{1}{4}$, instead of 13, inches in width, and also that the 80 feet of south wall had not been cemented to the adjoining wall. In the amended petition, which was not filed till after the evidence had all been introduced and the opening argument for appellee had been concluded and that of appellant begun, it was alleged to be a part

of said contract of June 30, 1899, "that the entire south wall should be eighteen inches thick," with 80 feet thereof cemented to the rock wall adjoining it on the south; and that the walls of the upper as well as lower story were to be 18 inches thick, except the upper west or front wall, which was to be 13 inches. On account of these changes in the petition, counsel for appellant objected to the filing of the amended petition at that advanced stage of the trial, and, upon his objection being overruled, applied for a continuance, pleading surprise, etc. The continuance was sought mainly to procure the testimony of Morgan Mayfield, who was general manager of appellant when the contract was made; C. C. Caskey, who represented appellant in making the contract; and J. A. George, who superintended the construction of the building for appellant,—all of whom were nonresident witnesses, whose depositions had been taken and read in evidence by appellant. Appellant stated that it expected to disprove by these witnesses the new allegations of the amended petition, and to show that "the defendant never did agree to erect 80 feet of lower south wall of said building of greater thickness than what is 'commonly called a thirteen-inch wall.'" The objection to the changes in the amended petition affecting the thickness of the walls of the upper story seems to have been fully met by appellee's withdrawal of that portion of his claim for damages which resulted in the reduction of his judgment \$200. It only remained, therefore, for appellant to prove by these witnesses that the thickness of the 80 feet of lower south wall was not to exceed 13 inches. But on this point at least two of them, Caskey and George,—and the two having the best opportunities of knowing,—had already testified by deposition to the effect that the written specifications quoted above, of which each party retained a copy, and in which the thickness of this wall was fixed at 13 inches, included all that was to be done by appellant; that is, according to their testimony (and that of Mayfield was to the same effect), the written specifications were the exact terms of the contract. True, there was some testimony tending to show that, after the contract was made, by agreement or understanding of both parties the thickness of the 80 feet of south wall was to be increased 4 inches, but this testimony was introduced by appellant, or at least dropped out while one of his witnesses was testifying, and this new agreement, if any was made, was not declared on. We are of opinion, therefore, that in allowing the amendment to be filed after the evidence was all in and the argument had begun, and in refusing to continue the case, the discretion of the trial judge was not so clearly abused to the detriment of appellant as to warrant this court in reversing the judgment. *Telegraph Co. v. Bowen*, 84 Tex. 476, 19 S. W. 554; *Bank v. Sharpe* (Tex. Civ. App.) 33 S. W. 676;

Tomson v. Heidenheimer (Tex. Civ. App.) 40 S. W. 425; *Ford v. Liner* (Tex. Civ. App.) 59 S. W. 948; *Live Stock Co. v. Thomson* (Tex. Civ. App.) 51 S. W. 890. Clearly, the alleged surprise at the testimony of appellee on the issue of settlement pleaded by appellant did not warrant a continuance, especially in view of his replication to that defense and the testimony of appellant's witnesses on that issue. The application to continue for the purpose of showing that the building contract was that of George, and not appellant's, was also wanting in merit, as no diligence was shown. Nor was there error in refusing to continue the case in the first instance on the application then made, since the absent witnesses appeared and testified before the trial was concluded. It follows from these conclusions that the first, second, third, fourth, fifth, sixth, ninth, tenth, nineteenth, and twentieth assignments of error must be overruled.

The seventh and eighth assignments cannot be sustained, because no substantial variance between the allegations of the amended petition and the evidence relied on by appellee to sustain these allegations is pointed out in or under these assignments, which complain of a variance between the allegations and proof. Nor can the fifteenth assignment, which complains of the admission of "the testimony of the plaintiff as to value," be sustained, because what was set out in the bill of exceptions (No. 2) as objected to is not quoted in the brief, and seems to have been admissible, while what is quoted in the brief from the statement of facts as objectionable testimony does not seem to have been objected to.

The eighteenth assignment must be overruled, because, according to appellee's testimony, at the time the notes were executed by him to cover the balance of the contract price for the building, which notes had become merged in a judgment rendered in an ordinary suit thereon in which only the general issue was pleaded, it was understood that the matters involved in this litigation were to be left open for future adjustment.

We have thus disposed of all the assignments except those complaining, in different forms, of the sufficiency of the evidence to support the judgment. The trial court evidently gave great weight to the testimony of appellee, for in more particulars than one the preponderance of the evidence seems to have been against him. There was, for instance, the written instrument drawn up at the time the contract was made, of which appellee kept, and produced on the trial, a copy, which, in one important particular at least,—that is, as to thickness of the 80 feet of south wall,—contradicted him, to say nothing of the testimony of appellant's witnesses, who were equally credible, and, unlike appellee, disinterested. The written instrument, however, did not appear to be a complete contract on its face, but only to contain

details of a more comprehensive agreement, and was therefore not conclusive. *Ayers v. Herring* (Tex. Civ. App.) 32 S. W. 1061, and authorities there cited. Besides, according to its terms, when read in the light of other testimony, the quality of the brick used in the building in question was to be the same as in the Opera House Building,—all material and work, in fact, to be of the best quality and grade, if not the same as in that building; and there was ample evidence that as to brick and in other particulars these requirements of the contract, had not been met, though there was also evidence tending to show that they had been modified or waived. There was disinterested and credible testimony, corroborated by circumstances, tending strongly to prove that the matters litigated in this suit were fully covered by the settlement made when appellee executed his promissory note for the balance due on the contract. The district judge, however, whose province it was to weigh the testimony, had appellee before him, and observed his manner of testifying through a long and rigid cross-examination, and resolved the conflict of evidence in his favor, interested though he was, and we do not feel warranted in disturbing his finding on this or any other issue of fact.

It follows that the judgment must be affirmed.

GALVESTON, H. & S. A. RY. CO. v. QUAY.¹
(Court of Civil Appeals of Texas. Dec. 11, 1901.)

RAILROADS—NEGLIGENCE—EMPLOYE—DANGEROUS POSITION—NOTICE—EVIDENCE—VERDICT.

1. While plaintiff, a locomotive fireman, was cleaning an engine which was standing over a pit in defendant's roundhouse, other servants of defendant, by direction of the foreman, detached the tender, and pushed it away from the engine without notice to plaintiff. Plaintiff, in prosecuting his work in the engine cab, stepped back and fell through the open space left by the removal of the tender, into the pit. *Held*, that a finding that defendant was negligent in so removing such tender without notice to plaintiff was justified.

2. The question whether plaintiff was negligent in failing to notice that the tender had been removed was for the jury.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Albert M. Quay against the Galveston, Houston & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Newton & Ward and Baker, Botts, Baker & Lovett, for appellant. H. C. Carter and Perry J. Lewis, for appellee.

NEILL, J. This action was brought by appellee against the appellant to recover damages for personal injuries alleged to have been caused by the negligence of the

company. Appellant answered by a general denial and a plea of contributory negligence. The trial resulted in a verdict and judgment in favor of appellee for \$10,000.

Our conclusions of fact will be found in observance of the well-established principle that the most favorable inferences which the entire evidence will authorize should be drawn in support of the verdict. The issues of fact to be solved are (1) whether the appellant was guilty of negligence proximately causing appellee's injuries, and (2) whether appellee was guilty of negligence contributing to them. The facts are these: On the 28th day of September, 1900, appellee, a locomotive fireman, was ordered by appellant to clean one of its engines, standing, with its tender attached, over a pit about four feet deep, in the company's roundhouse in San Antonio. The platforms on the engine's cab and of its tender when connected constitute what is called by railroad men a deck, upon which the engineer and fireman discharge their respective duties, and, running back from the head of the boiler, is about six or eight feet long. In obedience to his orders the appellee, when the engine and tender were connected, went on board of this deck and proceeded to clean the engine as directed. While engaged in this work, two of appellant's servants, whose grade of employment was not the same as appellee's, under the direction of the company's vice principal, without notice to appellee, without his having reason to believe the tender would be separated from the engine while he was at work thereon, and without his knowledge, detached the tender, and, with a pinch bar applied to the wheels farthest from where appellee was engaged, pushed it back three or four feet from the engine, thus separating the part of the deck constituted by the tender from that made of the platform of the engine's cab, leaving appellee with just half of the deck he had when he went to work, and without protection from the pit behind him, the bottom of which was about eight feet from the platform of the cab where he was at work. Having cleaned the head of the engine's boiler, appellee, without knowing or having reason to believe the tender had been moved, but believing the condition of the deck was the same as it was when he commenced the job, stepped back to inspect the work he had done, caught his heel under the apron of the tender, which was displaced when the tank was moved, fell backward across a beam of the pit, and from it to the bottom, whereby he sustained permanent bodily injuries. The appellee's petition alleges that appellant was guilty of negligence in moving the tank while he was at work on the engine, without his knowledge or giving him warning. Appellant's contentions are that the facts do not constitute negligence on its part; that if they do the undisputed evidence shows that appellee was guilty of contributory negligence, and that

¹ Rehearing denied January 22, 1902, and writ of error denied by supreme court.

therefore the trial court erred in submitting the case to the jury, and not peremptorily instructing a verdict in its favor.

Primarily the question of negligence is one of pure fact, and where the evidence is either conflicting or fairly susceptible of different interpretations, or the inference from the evidence doubtful, the question is for the jury. The master is bound to use ordinary care, diligence, and skill for the purpose of protecting his servants from encountering unnecessary risks in his service. The servant has the right to presume and act upon the presumption that his master has performed and will continue to discharge the duty he owes his employé. Warning of danger should be given whenever the master knows it is reasonably necessary to protect the servant from danger. The servant can presume that while in the discharge of his duty his master will warn him of a danger that has supervened from a change of conditions, brought about by the act of the master, since he commenced his work, and of which he had no knowledge. *Rehman v. Railway Co.* (Minn.) 44 N. W. 522; *Shumway v. Manufacturing Co.*, 98 Mich. 411, 57 N. W. 251; *Michael v. Machine Works* (Va.) 19 S. E. 261, 44 Am. St. Rep. 927; *Davis v. Railway Co.* (Mass.) 34 N. E. 1070; *Railroad Co. v. Amato*, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 596. When the appellee went to work the deck was entire, and, had it remained so, after cleaning the boiler head, he would have encountered no danger in stepping backwards. His peril in making this step was brought by the act of servants in another department and grade of employment—with which appellant is chargeable—after appellee began his work on the engine. He was not informed of the separation of the tender from the engine, knew nothing of it, and was not warned of the perilous position it left him in. Appellant could have readily anticipated that appellee, without notice or warning of the danger, might act (as he had the right to do) upon the assumption that conditions had been unchanged, and that the danger did not exist, and that in acting upon such assumption he was liable to be seriously injured. The jury, upon a proper charge, found from the evidence that appellant was guilty of negligence as alleged, and we believe the evidence on this issue is sufficient to support their verdict.

Does the evidence show that appellee was guilty of contributory negligence? As a general rule, the master cannot escape liability on the ground of the servant's contributory negligence unless the elements of danger are shown to have been known, either actually or constructively, to the servant. Negligence can only be affirmed in respect to situations and conditions known to the party to whom it is imputed. *Brown v. Railroad Co.*, 111 Ala. 275, 19 South. 1001; *Higgins v. Williams*, 114 Cal. 176, 45 Pac. 1041. The evidence of the appellee, which the jury evi-

dently believed, shows that he did not know the tank had been separated from the engine. Consequently, he could have known nothing of the danger to which he was exposed. But appellant contends that the tank could not have been pushed back when he was on the engine without his knowledge, because he must have heard the noise necessarily incident to detaching and moving it, from the engine. This was a question for the jury to determine, not for us. The roundhouse was filled with the din and noise incident to the many different kinds of work in progress there. And it may be that if appellee heard the noise made in moving the tender he did not know where it came from, or, if he knew its source, that he did not know that it indicated the tender was being moved. This was for the jury to determine, and to enable them to do so the question necessarily had to be submitted by the court in its charge. As illustrative of the principle that it was the duty of the court to submit the question of contributory negligence, we cite the case of *Perras v. Booth & Co.* (Minn.) 84 N. W. 739. In that case the evidence was that A. Booth & Co. maintained a warehouse for the storage of goods. The building was several stories high, with a basement for cold storage. A door opened from the rear of the building, on the ground floor, upon a railroad side track. Inside the building, at this door, was a freight elevator, used in receiving goods from railroad cars, and conveying them to the upper stories, or to the cold-storage rooms in the basement. It was the custom in unloading goods from the cars to connect the sill of the door with the floor of the car with an iron plate, forming an inclined plane from the car to the door sill, which was a few inches lower than the car. When unloading the cars the elevator was held stationary on a level with the doorsill, so that the hand trucks used in conveying the goods from the car ran down the iron plate into the elevator without obstruction. The elevator shaft extended into the basement about 10 feet. The doorway was protected by an outer door and an inner gate, but was not kept closed when the elevator was being used in connection with unloading cars. With the elevator away there was nothing to obstruct the entrance to the elevator shaft from the outer door. One of the company's servants, who frequently assisted in unloading cars, was ordered by the foreman to assist another employé in unloading a car of fish. He commenced the work of transferring the fish therefrom to the cold-storage rooms in the basement, the outer door leading to the elevator shaft being open and fastened. After the work had been going on some time, the foreman, without notice or warning to the servants unloading the car, pulled the elevator up to the third floor. The servant, who did not know the elevator had been removed, wheeled a truck loaded with boxes of fish

from the car upon the iron plate, and, in lowering the truck to the elevator, walked backwards, his face being to the truck and his back to the elevator. He did not notice that the elevator had been removed until it was too late to save himself. He was precipitated into the elevator shaft and killed. The defenses of the company to an action brought by the servant's administrator were (1) assumed risk, (2) negligence of a fellow servant, and (3) contributory negligence. On appeal from a judgment on a verdict peremptorily instructed for the company, the supreme court of Minnesota held that the questions of assumed risk and contributory negligence should have been submitted to the jury, and reversed the judgment of the trial court because of its failure to submit them. The constitutional provision of this state, which provides that the right of trial by jury shall remain inviolate, means something more than a mere empty form of such a trial. It asserts and gives a substantial right. The supreme court has steadily held that where there is any evidence tending to support an issue it is the duty of the trial court to submit it to the jury, and that if the evidence is reasonably sufficient to support the verdict it should not be disturbed. In view of this constitutional right, and the decisions of the court of last resort in this state, we are not prepared to hold that a servant, placed to work by his master on a deck which is perfectly safe and furnishes ample room to perform the service, who, without warning or notice of the danger caused by a removal of a part of it at the instance of his employer, steps back without looking and falls into a pit, is guilty of contributory negligence as a matter of law.

The court did not err in submitting the case to the jury. Its charge presented fairly all the issues raised by the pleadings and evidence, and is, upon the measure of damages, in perfect harmony with the decisions of the supreme court. The evidence is reasonably sufficient to sustain the verdict, and it is not excessive. Therefore the judgment is affirmed.

WEHNER et al. v. LAGERFELT.¹

(Court of Civil Appeals of Texas. Dec. 11, 1901.)

ELECTRICITY—DANGEROUS WIRE—NEGLIGENCE—INJURY—PROXIMATE CAUSE—WITNESS—EXPERT.

1. Where, in an action for injury caused by electric shock, a physician of 35 years' practice testifies that he has read the best of authorities on the subject, and knew what they said as to the result of electricity on the human system, but that he had had no personal experience, was not an expert, and did not feel qualified to give an opinion, an objection to his testifying as an expert should be sustained.

2. Defendants operated an electric light plant in a city. There was a broken wire hanging

to one of their poles. A small wire extended from such wire to a point on an electric wire where the insulation was worn, and conveyed a dangerous current of electricity to such hanging wire. This dangerous condition had continued for two weeks. Plaintiff, while walking on the sidewalk, came in contact with such hanging wire, and was injured thereby. Held, that by permitting the wire to hang from their pole, and to be so dangerously connected with their wire, defendants were responsible.

3. Where plaintiff was injured by coming in contact with a broken wire hanging from defendants' pole, and which was by another wire connected with defendants' electric wire, and thereby charged with a dangerous current of electricity, a charge that, there being no testimony that the injury to plaintiff was proximately caused by the negligence of defendants, the jury should return a verdict for them, was properly refused.

Appeal from district court, El Paso county; J. M. Goggin, Judge.

Action by Dagmar Lagerfelt against Peter Wehner and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Millard Patterson and O. N. Buckler, for appellants. Beall & Kemp, for appellee.

NEILL, J. This appeal is from a judgment against appellants in favor of appellee for \$1,000, damages occasioned by the negligence of appellants in permitting a wire charged with electricity to hang down from the poles of an electric light company which they were operating near a public street. The conclusions of fact and law fully show the nature of the case. On or about the 1st day of July, 1900, appellants, Wehner & White, a partnership composed of Peter Wehner and Z. T. White, were in possession of and operating under a lease all the property of the El Paso Gas, Electric Light & Power Company, a corporation organized for the purpose of generating and selling electricity to the city of El Paso and its inhabitants, including its entire plant, posts, wires, appliances, etc., and under their lease from the company had exclusive control and management of the machinery, works, poles, wires, and appliances of said company. On that day, and long prior thereto, the appellants, as such lessees, maintained and operated along the streets of said city a large number of poles, electric wires, and lamps, for the purpose of furnishing electricity to the city and its inhabitants. One of the electric wires, so maintained and operated by appellants, was suspended from poles along the north side of San Antonio street, one of the principal thoroughfares of said city, and charged with a strong and dangerous current of electricity. Below and near this wire was suspended from the same poles one that was uninsulated, the end of which was broken and hanging within a foot or two of and above the sidewalk on the north side of said street. The insulation of the upper wire, through which the strong electric current was conveyed, was worn and abraded. In contact with one of its abrasions was a small bare wire, which extended therefrom, and rested upon the uninsulated

¹ Rehearing denied January 22, 1902, and writ of error denied by supreme court.

and broken wire beneath, thereby conveying to and charging it with a strong and dangerous current of electricity from the defectively insulated wire above; thus rendering the uninsulated hanging wire very dangerous to persons passing along said street and sidewalk. This dangerous condition of the wire existed on the day above stated, and had been maintained continuously for about two weeks prior to and up to that time, and, by the exercise of ordinary care, could and should have been known by the appellants. On the evening of the day stated the appellee, Dagmar Lagerfelt, a little 10 year old girl, with a younger brother, while walking along said sidewalk, in ignorance of the danger, came in contact with the uninsulated hanging wire, charged with a strong and dangerous current of electricity in the manner and by the means aforesaid, and thereby received serious and painful wounds and burns, from which she suffered exceeding physical and mental pain and anguish, and from which she still suffers. It was negligence in appellants to maintain said wire charged with electricity so near a public street as to endanger persons in the exercise of their rightful use of it, and such negligence was the proximate cause of appellee's injuries.

Conclusions of Law.

1. The appellants offered to prove by A. L. Justice, a physician of 35 years' practice, that a shock to the human system from electricity, such as had been received by appellee, would leave no permanent injury or bad results, and that there would be no tissue change on account of such shock. The appellee's counsel objected to the introduction of such testimony, on the ground that it had not been shown that the witness was competent to testify as an expert as to such facts. The witness, being then interrogated by appellants' counsel, said that he had read the best authorities on the subject, and knew what the authorities said and claimed to be the result of electricity upon the human system. But at the same time he said he was not an expert, and, to be very frank, did not feel qualified to give an opinion; that he did not know what would be the probable result of a shock from electricity, such as is complained of in this case, from actual experience, because he had no experience in treating such cases, but, from reading the best authorities on the subject, he knew what they said about the matter; whereupon the court held that the witness had not shown himself to be sufficiently expert in the matter, and sustained the objection, and refused to permit him to testify as to such matters. The definition of the word "expert" is: "An expert or experienced person; one instructed by experience; one who has skill, experience, or extensive knowledge in his calling or in any special branch of learning." *Webst. Int. Dict.* An "expert," as the word imports, is

one having had experience. *Lawson, Exp. Ev. (2d Ed.) 230.* Rule 36, which follows the definition by the same author, is thus stated: "Therefore, to render the opinion of a witness admissible on the ground that it is the opinion of an expert, the witness must have special skill in the subject concerning which his opinion is sought to be given." Then, quoting from *Carr v. Northern Liberties*, 36 Pa. 324, 73 Am. Dec. 342, he says: "Matter of opinion is entitled to no weight with a court or jury, unless it comes from persons who first give satisfactory evidence that they are possessed of such experience, skill, or science in such matters as entitle their opinions to pass for scientific truth." Of all others the witness was best qualified to know whether he was an expert on the subject concerning which his opinion was sought to be given. To his credit, learning, and candor, be it said, he knew himself well enough to know that he was not an expert, and did not feel qualified to give an opinion on the subject of inquiry. Frankly expressing to the court this knowledge and opinion of himself, it became apparent that, if he gave any opinion, it could not be such as would be "entitled to pass for a scientific truth." When a witness states he knows nothing about the subject of inquiry, and that he is not qualified to give an opinion, he should not be permitted to express any; for, in order to say something concerning a matter, the witness should know something. *Wheeler v. Blandin*, 22 N. H. 167, and *Id.*, 24 N. H. 168. In the case before us the witness had no experience, and did not consider himself either an expert or qualified to give an opinion. He only knew what the books said upon the subject. It was not sought to be shown that he had formed an opinion from the books, or, if he had, what such opinion was. While an expert may testify to an opinion of his own derived from books, for one to do so he must be an expert, and have an opinion of his own upon the subject of inquiry. Books of science and art are not admissible in evidence to prove the opinions contained therein. *Lawson, Exp. Ev. 202.* If they are not, how can one who knows their contents, but has formed no opinion of his own upon the subject under consideration, be allowed to testify to what the books say? The books themselves would be the best evidence, and they are no evidence at all. The witness testified to everything he knew about the effect of the electric shock upon the child, and the court did not err in refusing to permit appellants to prove anything more by him.

2. It is a matter of no consequence who was in fact the owner of the uninsulated broken wire which hung from appellants' poles over the street, and shocked and injured the appellee with its electric current. *Macon v. Railway Co. (Ky.) 62 S. W. 498.* The negligence of appellants consisted in allowing the wire to remain in a condition dangerous to persons using the street. There-

fore the court did not err in refusing to allow appellants to prove that the wire did not belong to them, but was owned by some one else, if the property of any one. It was on the poles maintained by them, and in position and condition to receive a dangerous current of electricity from a wire they did own, and injure persons passing along the street. This condition and position they knew, or by the exercise of ordinary care could have known, and have reasonably anticipated the danger to the public. The business of supplying the public with electricity, for lighting or other purposes, involves the handling of a highly dangerous agent, and therefore requires a corresponding degree of care on the part of one who undertakes it, to prevent injury to persons passing along streets where his wires are strung. And one who lets the use of a structure, e. g., a telephone pole, for electric wires thereto, is liable for defects in the structure by which electricity is caused to escape from the lessee's wires, injuring third persons. *Telegraph Co. v. Thorn*, 12 C. O. A. 104, 64 Fed. 287. In the case cited defendant's broken telegraph wire, which hung to the ground, came in contact with a third party's electric wire on the same pole, and a shock was communicated to plaintiff from the latter wire through defendant's wire, and the court held the defendant liable.

3. By special charge No. 1 appellants asked the court to charge the jury as follows: "There being no testimony in this case that the injury to the plaintiff was proximately caused by the negligence of the defendants, you are therefore instructed to return a verdict for the defendants." The refusal of the court to give the instruction is assigned as error. In connection with this, we are asked to consider the sixth assignment, which complains of the court's refusal to give appellants' fifth special charge, which, though argumentative, is in effect the same as the first. We have stated in our preceding conclusions, which we think fully warranted by the evidence, the agencies and means by which appellee was injured. From the evidence upon which our conclusions are based, we cannot perceive how it can seriously be contended that appellants' negligence was not the proximate cause of the injuries sustained by the appellee. "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which the event would not have occurred." *Shear. & R. Neg.* (5th Ed.) § 26. "Where there is negligence, and injury flowing from it, and there is also an intermediate cause, disconnected from the negligence, and the operation of this cause produces the injury, the person guilty of the negligence cannot be held responsible for the injury. The inquiry must always be whether there was any intermediate cause disconnected from

the primary fault, and self-operating, which produced the injury. * * * Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but as a rule these agencies, in order to accomplish such result, must entirely supersede the original culpable act, and be in themselves responsible for the injury, and it must be of such a character that they could not have been foreseen or anticipated by the wrongdoer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be the efficient cause of the injury. The intermediate cause must supersede the original wrongful act or omission, and be sufficient of itself to stand as the cause of the plaintiff's injury, to relieve the original wrongdoer from liability. 'One of the most valuable of the criteria furnished us by the authorities is to ascertain whether any new force has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient as the cause of the misfortune, the other must be considered too remote.' * * * The new force of power here would have been harmless but for the displaced wire, and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account." *Ahern v. Telegraph Co. (Or.)* 33 Pac. 408, 35 Pac. 549, 22 L. R. A. 640. The following quotation from the opinion on motion for rehearing shows the similarity of that case to the one under consideration: "The suspended telephone wire, while it was charged with electricity from contact with the electric wire, was not less dangerous than the electric wire itself would have been, similarly suspended as to the street." Here we have a case where the appellant negligently permitted an uninsulated wire to hang from their poles within a foot or two of a public street. They negligently permitted the wire above it, which was charged with electricity, to become abraded as to its insulation, and negligently suffered these two wires to become and remain connected by a smaller wire, which conveyed the dangerous current of electricity to the hanging wire, thereby endangering lives of persons on the street. Each of these negligent acts concurred and caused appellee's injuries. Had it not been for coming in contact with the hanging wire it would not have occurred. *Railway Co. v. Sweeney (Tex. Civ. App.)* 36 S. W. 800, and cases cited. The court did not err in refusing to give the requested special charges.

The charge of the court is a correct enunciation of the principles of law applicable to the evidence, and none of the assignments which complain of it is well taken. *Power Co. v. Maxwell*, 3 Tex. Ct. Rep. 328, 65 S. W. 78; *Perham v. Electric Co. (Or.)* 53 Pac.

14, 40 L. R. A. 800, 72 Am. St. Rep. 730; *Electric Co. v. Simpson* (Colo.) 41 Pac. 499, 31 L. R. A. 566, note, and immediately succeeding cases of same nature.

No error is assigned which requires a reversal of the judgment, and it is affirmed.

OATES v. McCLURE et al.¹

(Court of Civil Appeals of Texas. Dec. 7, 1901.)

EXEMPTIONS—BUGGY AND HARNESS—TOOLS OF PROFESSION—DAMAGE—PLEA IN RECONVENTION—APPEAL—STATEMENT OF FACTS.

1. A single man, who is a land, loan, and insurance agent, cannot claim a buggy and harness, which he uses in such business, as exempt from execution, as tools and apparatus belonging to his trade and profession.

2. Where a plea in reconvention alleged that defendants sustained damage from the wrongful suing out of an injunction to restrain the sale of property under execution to the value of such property, and the court so found, in the absence of an exception to such plea and a statement of facts in the record such finding cannot be disturbed.

On Motion for Rehearing.

The statement in a bill of exceptions of all the facts proven on the trial cannot be treated as a statement of facts.

Appeal from district court, Wise county; J. W. Patterson, Judge.

Action by J. H. Cates against T. F. McClure and others. From a judgment for defendants, plaintiff appeals. Affirmed.

R. E. Carswell, for appellant. J. M. Basham, for appellees.

STEPHENS, J. Appellant, a single man, was, as alleged in his amended petition for injunction to restrain the sale of his buggy and harness under execution, "engaged in the business of land, loan, and insurance agent," and "using said buggy and harness in the prosecution of his said business." It was further alleged not only that said buggy and harness was suitable for such business, and useful therein, but also that the same, "or a like vehicle," was "absolutely necessary" and "indispensable to the conduct of his said business," and therefore exempt from sale under execution as "tools and apparatus belonging to his trade and profession." The court, on final hearing, sustained a general demurrer to the petition, dissolved the injunction granted in the first instance, and gave judgment on plea of appellees in reconvention against appellant and the sureties on injunction bond for the value of the buggy and harness.

That appellant was not entitled to the exemption claimed seems to have been, in effect, decided both by the court of civil appeals for the Fifth district and by the supreme court in the case of *Smith v. Horton*, 46 S. W. 401, 627, in which it was held that a bicycle was not exempt to an "architect and building superintendent," although it was, in substance, alleged that a bicycle,

or some other means of rapid locomotion, was necessary in the prosecution of that "trade or profession." The reasons given in the able opinion of Justice Rainey in that case, and expressly approved by the supreme court, are equally applicable to the case at bar, and need not be repeated.

The plea in reconvention alleged, though in very general terms, that appellees had sustained damage from the wrongful suing out of the writ of injunction "in the sum of the value of said property," and so the court found. The plea was not excepted to, and the record contains no statement of facts. We could not, therefore, disturb the judgment for damages.

Whether or not we should give damages for delay, the case having been submitted on suggestion of delay, is not so clear; but we have finally concluded to affirm the judgment without such damages.

On Motion for Rehearing.

(Jan. 18, 1902.)

Counsel for appellant calls our attention to the fact that there is a bill of exceptions in the record, which contains a statement of all the facts proven on the trial affecting the issue of damages, which it is insisted should be treated as a statement of facts; but in thus seeking to have us pass upon the sufficiency of the evidence to sustain the judgment the learned counsel must have overlooked the rule of practice long since established in this state by the decisions of our supreme court that it is inadmissible to substitute a bill of exceptions for a statement of facts. See *Carolan v. Jefferson*, 24 Tex. 230, and *Roundtree v. City of Galveston*, 42 Tex. 612. We must therefore adhere to the conclusions already announced, and overrule the motion.

DE VITT v. KAUFMAN COUNTY et al.¹ (Court of Civil Appeals of Texas. Nov. 2, 1901.)

LANDLORD AND TENANT—OPTION TO PURCHASE—CONDITIONS—VARYING CONTRACT BY PAROL.

1. A lease reserved to the lessor right to sell the land and terminate the lease at the end of any rental year on six months' notice, and gave the lessee the privilege of buying the land at a price to be set by the lessor, and which might be offered for the land by any other party. *Held*, that the option to buy applied only in case the lessor elected to terminate the lease by making a sale.

2. Parol evidence was not admissible to show the option of the lessee was unconditional, the language being certain and unambiguous.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

Action by D. M. De Vitt against Kaufman county and others. From a judgment for defendants, plaintiff appeals. Affirmed.

¹ Rehearing denied, and writ of error denied by supreme court, January 9, 1902.

¹ Writ of error denied by supreme court.

Cowan & Burney and Morrow & Boggess, for appellant. K. R. Craig and G. G. Wright, for appellees.

TEMPLETON, J. In July, 1895, Kaufman county leased to De Vitt & Scharbauer 960 acres of its free school lands, situated in Hockley county. The lease contract reads thus: "Kaufman County, Texas, July 20th, 1895. This instrument witnesseth that Kaufman county, acting by and through Nestor Morrow, judge and legal agent for said county, hereby agrees to lease, and does hereby lease, to De Vitt & Scharbauer, a firm composed of D. M. De Vitt, of San Angelo, Texas, and John Scharbauer, of Midland, Texas, a certain tract of land, situated in Hockley county, Texas, and patented to Kaufman county as a part of its free school lands, and containing 960 acres, and particularly described as follows: [Inserting description:] for and during the period of three years, at the sum of three (3) cents per acre, payable annually in advance, with the privilege at the expiration of said term of a further lease of two (2) years at such rental price as hereinbefore mentioned, or at such higher rate as may be offered bona fide to said county for said lands. It is further provided that said county reserves the right to sell said land at any time, and terminate said lease at the end of any rental year, provided six months' notice thereof shall be given to said De Vitt & Scharbauer prior to the end of any year for which the rent is paid, and provided, also, that said De Vitt & Scharbauer shall have the privilege of buying said lands at such price as the county may see fit to accept, and which may be bona fide offered for the same by any other party. It is expressly agreed that in case said lessees, De Vitt & Scharbauer, shall fail to pay the annual rent for thirty days after it shall become due, said lease shall be at once forfeited and at an end. It is agreed at the termination of this lease, except by forfeiture, the said lessees shall have the right to remove any improvements they shall place or erect on said land. It is further agreed that said lessees shall not take or remove any wood, coal, stone, or other mineral from said land upon penalty of forfeiture. The said De Vitt & Scharbauer hereby agree to take said land upon the terms above mentioned, and to pay said rentals, and comply with the terms hereof. The rental year, as herein stated, shall begin August 1st." Within three years Scharbauer sold out his interest under the contract to De Vitt, who, with the consent of the county, availed himself of the option to continue the lease for the full term of five years. About January 1, 1899, the county determined to sell the land subject to the lease. De Vitt, being notified of the fact, made a bid of \$1 per acre, one-tenth cash, and the balance in 10 years, with 8 per cent. interest. In May, 1899, the county sold and conveyed the land to Ferrell for \$1 per

acre cash. De Vitt had no notice of Ferrell's bid or of the sale until after it had been consummated. In July, 1899, and soon after learning of the sale to Ferrell, he offered to pay the county the sum paid by Ferrell, and demanded a deed to the land, claiming to have a prior right to purchase under the provisions of the lease contract. The proposal was rejected. The deed to Ferrell recognized the right of De Vitt to hold the land under the lease until the expiration of the full term of five years. De Vitt brought this suit against the county and Ferrell to compel conveyance to him and to cancel the deed to Ferrell, and tendered the consideration paid by Ferrell. Slaughter, having acquired the Ferrell title, made himself a party to the suit, set up his claim, and, on a trial before the court without a jury, obtained judgment.

The trial court held, and we think correctly, that the option to buy applied only in case the county elected to terminate the lease by making a sale. The purpose of the contract is disclosed by the first clause thereof, and was the leasing of the land in question by the county to De Vitt & Scharbauer. If it had been the purpose of the parties, and one of the objects of entering into the contract, to provide for an unconditional option to buy, the same would have naturally appeared in the first, or in an independent, clause of the contract. But the expressions relating to the option to buy are introduced by a proviso, and in a clause reserving to the county the right to terminate the lease before it would have otherwise expired by making a sale of the land. The structure of the entire contract, and especially of the second clause, indicates that it was the intention of the parties to give to De Vitt & Scharbauer a prior right to purchase only in case the county determined to sell, and by the sale shorten the term of the lease, and force the lessees to yield possession before the full term had expired. The right to terminate the lease by sale having been reserved by the county, it was natural that the lessees should desire some protection against such contingency; hence, in case of such sale, the right to buy was insisted upon and conceded. The word "provided" means "on condition," and therefore the second clause of the contract simply recognizes the county's right to sell, and thereby terminate the lease, on condition of its giving the six-months notice, and on condition, also, that the lessees should have the first right to purchase. The lease not being affected by the sale made to Ferrell, De Vitt could not complain of the sale, and the right to purchase never accrued in his favor.

De Vitt offered to testify that it was agreed and understood when the contract was entered into that the option to buy should be unconditional. The language used in the contract must be held to express the intention of the parties, and the ordinary rules of construction require the conclusion

that they did not agree, as the proposed testimony would have shown. Such being the case, the evidence of De Vitt, if admitted and considered, would have had the effect to vary the terms of the written contract. The terms of the contract are not ambiguous or uncertain in the sense which permits the explanation thereof by parol, and the court did not err in excluding the evidence.

The judgment is affirmed.

WAXAHACHIE COTTON OIL CO. v. McLAIN.¹

(Court of Civil Appeals of Texas. Nov. 16, 1901.)

MASTER AND SERVANT—PERSONAL INJURIES—EMPLOYMENT OF MINOR—ASSUMPTION OF RISK—KNOWLEDGE—FELLOW SERVANT—FOREMAN—SCOPE OF EMPLOYMENT—DANGER—DUTY TO ASCERTAIN—EVIDENCE—SUFFICIENCY—INSTRUCTIONS.

1. Plaintiff was employed in an oil mill, and was directed to get on the crusher, and put one foot on the belt, which had choked, to press it down; and in doing so he slipped, and his foot was caught in the crusher. *Held* that, it not appearing that there was any rule as to how the work should have been performed, it was not error to instruct that the servant assumed the risks ordinarily incident to the business, and to refuse to instruct that, if he knew, or ought to have known, how the business was conducted, he assumed the extraordinary hazards arising from the manner in which it was conducted.

2. Where plaintiff was employed by the superintendent, and told to report to a foreman, and plaintiff was not instructed in his duties, or warned of danger by the superintendent, and the plaintiff and others were called by the foreman to assist him in starting an elevating belt on certain machinery managed by him, the foreman was a vice principal, and not a fellow servant, of plaintiff.

3. Plaintiff, an inexperienced minor, was employed in trucking oil cake to a crusher. An elevating belt frequently became choked, and the foreman would then call plaintiff and others to assist him in unchoking it. Plaintiff was directed to get on the crusher, and press with one foot on the belt, and in doing so he slipped, and his foot was crushed. *Held*, that the court properly instructed that it was the duty of a master who puts an inexperienced minor at work more dangerous than that for which he was engaged to warn him of the danger.

4. In view of plaintiff's inexperience, and that he was working under the immediate direction of the foreman, and had little opportunity to consider the act, a verdict in his favor should be sustained.

5. Defendant, being suddenly called to go on the crusher, fulfilled his duty if he exercised ordinary care in doing so, and was not chargeable with negligence in not having ascertained what dangers were incident to such work.

6. A special instruction that even a minor assumes the ordinary risks of his occupation which he actually knows or appreciates, or which are so apparent that he should know and appreciate them, and that, though he was not warned, if he obtained or should have obtained a knowledge of the dangers, he was not entitled to recover, was not in conflict with the main charge that plaintiff assumed the risks which were known to him, or which were patent and obvious.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by E. B. McLain against the Waxahachie Cotton Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Groce & Skinner and Baker, Botts, Baker & Lovett, for appellant. Templeton & Harding and Finley, Etheridge & Knight, for appellee.

TEMPLETON, J. In January, 1900, the appellee, E. B. McLain, applied to one Shine, the superintendent of the appellant, the Waxahachie Cotton Oil Company, for work. McLain was then 19 years old. He had been raised in the country on a farm, and appears to have had the intelligence and experience common to youths so brought up. He had never worked in an oil mill, and was ignorant of the construction and operation of machinery. Shine at first employed him to work at odd jobs about the mill. After doing this work for several days, McLain applied to Shine for a job in the meal room, a vacancy having occurred in that department. He was thereupon employed in that capacity, and was told to report to one Williams, the foreman in the meal room, who would instruct him as to his duties. Shine had authority to employ and discharge hands, and knew of McLain's minority and inexperience, but he did not explain to McLain the character of the work he would be called upon to perform, or warn him of the danger attending its performance. McLain reported to Williams for duty, and was assigned to work trucking oil cake to the crusher, which was a machine for grinding cake. The crusher was fed by another employé by placing the cake into the hopper and pressing the same against the cylinders, which broke the cake into small pieces. The pieces fell into a receptacle under the crusher, where they were taken up by cups fastened onto a revolving belt, which passed from under the machine into an upright frame, the pieces of cake being in this way carried overhead, where they were subjected to other processes. The frame arose near the crusher, and was open on the side immediately opposite the crusher. Sometimes the elevator would choke up, and cease to perform the service for which it was intended. When this occurred, Williams would call upon any or all of the hands in the room, as he might see proper, to assist in unchoking the elevator. The evidence is conflicting as to whether McLain had ever assisted in this work prior to the time he was injured. On the 7th day of February, 1900, after McLain had been at work about a week, the elevator became clogged, and Williams called on all the hands in the room, five in number, including himself and McLain, to assist in putting it into operation again. Williams directed McLain to get up on the crusher, and put one foot on one of the cups fastened to the elevator belt, and press it down. Mc-

¹ Rehearing denied December 7, 1901, and writ of error denied by supreme court January 16, 1902.

Lain thereupon got up on the hopper of the crusher, and, standing with one foot on the rim of the hopper, put the other foot on one of the elevator cups and attempted to press the cup down, when he lost his balance and fell. The crusher had not been stopped, but it was not then being fed. McLain's foot slipped from the rim of the hopper into the hopper and between the cylinders, where it was so badly mangled as to necessitate amputation. There was a shoulder to the crusher, upon which Williams says he intended McLain to stand, but McLain says that he did not know the shoulder was there, as it was covered up with partially crushed cake. McLain was not warned by Williams or any one else of the hazard of the act he was doing when injured. He knew that the cylinders were in the crusher, and that they were in motion when he got up on the hopper. He knew that, if his foot slipped into the hopper, it would be caught between the cylinders, and badly hurt. He fed the crusher five or six hours during the week he worked in the meal room. The rest of the time he was engaged in trucking cake. A suit for damages brought by McLain against the company on account of his injuries resulted in a verdict and judgment in his favor for \$8,000.

1. Under the first assignment of error appellant complains of the action of the trial court in charging the jury that the servant assumes the risks ordinarily incident to the business in which he is engaged, and in refusing a special charge which contained a statement of the rule that the master may conduct his business as he pleases, and, if the servant knows or ought to know how the business is actually carried on, he assumes the extraordinary hazards arising from the manner in which the business is conducted. The evidence herein shows that the elevator frequently became choked, and that it was the duty of the hands in the meal room, working under the direction of the foreman, Williams, to remove the obstruction, and put the elevator in operation again. It was not shown whether appellant had adopted any rules for doing the work, but it seems that it was done in such manner as the foreman saw fit to direct, and that he had authority to act as he pleased in this regard. It does not appear that he had any rule in respect to the particular work appellee was doing when injured. It was not shown that on any other occasion an employé in the meal room was required to move the elevator belt with his foot. The court did not submit any theory of the case authorizing the jury to consider the failure of appellant to have its business conducted according to safe rules as an element of liability. It was unnecessary, in this state of the case, to give the special charge. If appellee knew, or should have known, the peril of the act he was called upon to perform, he assumed the risk, and could not recover. This rule was given

in charge to the jury, and, under the instruction, it was immaterial whether appellant's business was usually carried on according to safe rules or in a more hazardous manner. The jury was informed by the charge that in any case appellee assumed the actual risks incident to his employment of which he knew or ought to have known. Appellant's method of doing business was not involved in the decision of the case. If a recovery had been sought on the ground that appellee's injury was occasioned by the failure of appellant to have safe rules for the conduct of its business, and that issue has been submitted to the jury, then the rule invoked would have been pertinent. Such is not the case, however, and the trial court did not err in refusing to give the special charge.

2. The court charged the jury that the servant did not assume any risk arising from the negligence of the master; and, in submitting appellee's theory of the case, further instructed the jury that if appellee was ordered to get on the crusher while it was running, and his position was dangerous, and he was not warned of the danger, and if the failure to warn, and the giving of the order, and the failure to stop the machinery was negligence on the part of appellant, then the appellee was (other facts concurring) entitled to recover. Appellant requested a special charge, which was refused, that if, in the ordinary use of the elevator, it would become clogged and temporarily stopped, and if in such case it was the duty of all the employes in the meal room to work together to overcome the stoppage, and that such work required no special skill, and Williams had power to direct his co-employes in respect to their common work, but had no authority to employ or discharge them, and if the employes were working together at the time of the accident to overcome a temporary stoppage of the elevator, and if Williams gave a direction to appellee with which he attempted to comply, and if the giving of such direction was negligence on the part of Williams by reason of which appellee was injured, then appellee could not recover. Appellant complains of these things under the first and fifth assignments of error, and insists that Williams was the fellow servant of appellee, and that it is not chargeable with his negligence. Appellee denies that the principle contended for by appellant is applicable to this case, for the reason that the duty of the master rested upon Williams in respect to the matters complained of, and that he was, as to such matters, a vice principal, and not a fellow servant. The absence of the master from the place where the servant is at work will not absolve the master from any duty owing by him to the servant in respect to such work. Appellant cannot escape responsibility for any dereliction of duty for the reason that it was not present, by a formally constituted agent, at the time of the accident, and that it had not specially

delegated to Williams the performance of the duty. When appellant employed appellee knowing him to be a minor and inexperienced, it owed to him the duty of assigning him to work, and of giving to him such instruction and warning as to the best and safest way of doing the work as an ordinarily prudent person would have given a servant of like discretion and capacity. When it failed to do this, and put appellee under the control of Williams, and gave Williams authority to employ appellee at such work as he saw fit, and to direct him in the manner of doing the work, Williams became the representative of appellant as to all duties which appellant owed to appellee concerning the work required of him. As such representative, the duty of the master rested upon him not to engage the subordinate servant in any unnecessarily hazardous work, and to give him proper instruction and warning as to the duties and dangers of his position. Negligence on the part of Williams in these respects would be the negligence of appellant, and the trial court did not err in so instructing the jury. *Newbury v. Manufacturing Co.* (Iowa) 69 N. W. 743, 62 Am. St. Rep. 582; *Hayes v. Colchester Mills* (Vt.) 37 Atl. 269, 60 Am. St. Rep. 915; *Foley v. Horseshoe Co.* (Cal.) 47 Pac. 42, 56 Am. St. Rep. 87.

3. In this connection we will consider the third assignment of error, which complains of that part of the charge of the court wherein the law is stated governing the case of an unwarned minor employé who is directed to do work outside of the employment for which he is engaged, and more dangerous in character than the work he is employed to do. The objection to the charge is that the evidence does not raise such issue. The charge complained of is simply an abstract statement of the law, and in stating the conditions upon which a recovery by appellee was authorized the court omitted all reference to the principle objected to. It would seem, therefore, that the charge in question could not have influenced the finding of the jury. Moreover, the charge simply declares it to be the duty of the master, who puts the inexperienced minor to work at an employment more dangerous than that for which he was engaged, to warn the servant of the hazard he is called upon to encounter. The duty to warn such servant of the dangers to which he is exposed exists in all cases when the service is perilous, no matter whether the work done is in the scope of his employment or not; and the charge does not, therefore, impose too great a burden upon appellant. Besides, the reason for the rule stated in the charge was in some degree applicable to this case; even if the rule itself, strictly speaking, was not. According to the manner in which the business was conducted, it was the duty of the hands in the meal room to assist in unchoking the elevator. But appellee cannot be said to

have assumed such duty until he was informed that it was embraced within his employment. For a time, at least, it must have appeared to him that he was employed only to truck cake, and, when additional and more dangerous duties were assigned to him, the same were outside the apparent scope of his employment, and as much reason existed for warning him of the extraordinary hazard as if the new duties had been in fact outside the work he was employed to do.

4. Under the first and second assignments of error appellant presents the proposition, based upon refused charges, that it was the duty of appellee to ascertain whether any and what dangers were incident to his employment, and that he should be held to have known such dangers as ordinary care would have disclosed. It may be conceded as a general proposition that even an unwarned minor servant should use ordinary care to learn the duties of his employment, and the safest way of performing the same. The evidence in this case, however, does not suggest the theory that appellee failed to use such care. He was not only inexperienced in such work, but he had never before been called on to perform the service he was engaged in at the time of the accident. There is nothing in the record to show that he had, prior to that time, had any occasion to consider whether the act he was doing when injured was dangerous, or what was the best and safest manner of doing it. He was suddenly called on to perform a duty outside the scope of his regular work, and cannot be held guilty of want of care in not having theretofore acquainted himself with the hazards attending the performance of such duty. While there is evidence to the effect that he had once before assisted in unchoking the elevator, he was not then engaged in working with the belt, and appears to have had no reason to investigate and determine whether it was proper and safe for one standing on the crusher to undertake to move the belt with his foot. Why should he make an examination as to the proper means of unchoking the elevator? What was the best method of doing so was a question which appellant had put Williams there to decide. Appellee was vested with no discretion either as to the general manner in which the work should be done or as to his share in it. Williams had sole authority in the premises, and appellee was not bound to make investigation to the end that he might set up his judgment against that of his superior. Williams, being placed in authority by appellant, was presumably experienced, careful, and competent. Appellee had been directed to obey orders, and was not obliged to anticipate what orders would be given him, and learn in advance whether he could safely comply with them. Before Williams ordered appellee to get on the crusher, he had no reason to expect such a service would be required of him, and no occasion to in-

quire as to the safety or propriety of such an act. These facts would not relieve him from the duty to exercise ordinary care for his own safety in executing the order, and he was also bound to give the order such consideration, as regarded its prudence, as the opportunities of the situation afforded and the surrounding circumstances demanded. If he was not at fault in these respects, the measure of his duty was filled, and he was not chargeable with negligence in not having learned the duties of his position better, or in not having anticipated the services he would be called on to perform and discovered the dangers to which he would be exposed in performing them. The court, at the request of appellant, instructed the jury that even a minor assumes the ordinary dangers and risks of his occupation, which he actually knows and appreciates, or which are so apparent that one of his age and capacity would, under like circumstances, know and appreciate; and that, even though the jury believed that appellee was not warned of the dangers of his employment, yet, if he obtained a knowledge of the dangers to which he was subjected from other sources, or from his own observation, or in the exercise of ordinary care, his age and capacity considered, he should have known the danger to which he subjected himself, then he was not entitled to recover. This charge presented the duty of appellee in respect to the care required of him as fully as was necessary under the evidence. Neither is this charge in conflict with the main charge, wherein it was stated that appellee assumed the risks which were known to him, or which were patent and obvious.

5. Under the fourth assignment of error appellant complains that the court, in the main charge, confused the defenses of assumed risk and contributory negligence, and, in effect, submitted only the latter issue. Conceding that the criticism is just, the omission was cured by the giving of the special charge set out above.

6. Under the sixth assignment of error appellant contends that the verdict was not warranted by the evidence. It was shown beyond controversy that appellant employed appellee, an inexperienced minor, and, with knowledge of his minority and inexperience, required him, without instruction or warning, to engage in a dangerous service, in which he was injured. That appellant was negligent is clear, and the accident must be attributed to such negligence, unless appellee failed to use ordinary care for his own safety in executing the order of Williams, or unless the danger of attempting to obey the order was such that he ought to have refused to perform it. The real issue of fact in the case is whether appellee, knowing, as he did, the conditions which made the act he was doing dangerous, ought to have had sufficient discretion to realize and appreciate the danger. In view, not only of

his lack of experience and immaturity of judgment, but also of the fact that he was working under the immediate direction of the foreman, and had little or no opportunity for consideration of the act, we think the verdict should be sustained.

The judgment is affirmed.

SAN ANTONIO & A. P. RY. CO. v. GRAY.¹
(Court of Civil Appeals of Texas. Dec. 18, 1901.)

RAILROADS—NEGLIGENCE—PERSONAL INJURY
—PLEADING—EVIDENCE—CITY ORDINANCE—VERDICT—AMOUNT.

1. Plaintiff's petition alleged that while near defendant's railroad track he saw his son, two years old, come on the track in front of a train, and run towards plaintiff. The train was about 300 yards from plaintiff, and 200 yards from the child, running at an unlawful rate of speed, and made no signals. Plaintiff ran towards the child, calling to him to get off the track, and in running across a trestle which was between them fell, striking on the rail, and thence to the ground, receiving serious injuries. The engineer and fireman both saw him before and at the time of his fall, and while lying under the trestle as the engine passed over him, but did not slow up or blow the whistle. *Held*, that such petition was good as against a general demurrer.

2. Where a father, seeing his two year old child on a railroad track a short distance in front of a rapidly advancing train, runs on the track towards his child in an attempt to save it from being run over, he is not a trespasser on the track.

3. Where plaintiff was injured while attempting to save his child from being run over by a railroad train, a charge that the fact that those in charge of the train saw his peril in time to avoid the injury could be proven by circumstantial evidence was proper.

4. Under Rev. St. art. 558, providing that all ordinances of the city, when published by authority of the city council, shall be admitted in all courts without further proof; and article 559, providing that the style of all ordinances shall be "Be it ordained by the city council of the city of —, but it may be omitted when published in the form of a book," a book published by a city council entitled "Revised City Ordinances," and containing all ordinances then in force, and introduced to prove the contents of one of such ordinances, is not subject to objection because such ordinance as shown by the book had no enacting clause.

5. Where plaintiff was injured by falling on a railroad trestle, and the evidence is undisputed that both the engineer and fireman saw him, the admission of evidence that when the train stopped at the station one of them said, "They came near running over a man back there," even if erroneous, was not prejudicial to defendant.

6. Where defendant failed to question a juror with reference to his ability to read or write, the discovery, after the trial, that he could not read or write or understand the English language is not sufficient grounds for setting aside the verdict.

7. Where, in an action for personal injury, tried 26 days after the accident, the amount of the verdict shows that it was based on the supposition that the result of injury would be permanent, and the only evidence of permanency was that of a physician who leaves it in serious doubt, the amount should be reduced.

¹ Rehearing denied January 22, 1902.

Appeal from district court, Kerr county; I. L. Martin, Judge.

Action by John Gray against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiff, defendant appeals. Modified.

Houston Bros. and R. J. Boyle, for appellant. Geo. Powell, Lee Wallace, and W. W. Burnett, for appellee.

JAMES, C. J. Plaintiff, Gray, recovered judgment for personal injuries. The general nature of the occurrence will be indicated by plaintiff's testimony, in part substantially as follows: Plaintiff lived in Kerrville, near defendant's track, and started to the depot to send a telegram. After he got upon the track he heard the train whistle, and looked back, and saw some horses on the track, and after going a little further, the time he thought the train would about get to the horses, he looked back, and saw Dr. Wright's two children on the track. He "kept hollering" at them to get off the track, and they soon ran down the embankment, and as they ran down plaintiff's little boy, about two years of age, came running up the embankment. Plaintiff "kept hollering" for him to get off, when he ran up and got on the track. Then plaintiff started down the track to reach him. It was about 40 yards from plaintiff to a trestle, and about 53 steps from the trestle to where the boy came upon the track, and the train was below the main crossing (crossing of the main street), when plaintiff began to run,—about 250 or 300 yards from plaintiff. When plaintiff got to the bridge, he saw the child coming running towards him in the track. "And I had two handsaws in this hand. I never thought about throwing them down, and I started back as fast as I could. I don't suppose I would throw off in a race like that. Well, he was coming up. The distance, as I tell you, from where he got on the track was about fifty-three yards. In my distance back (say about forty yards) I am guessing at this. I couldn't say right exactly where I was standing, but while I was running to this trestle I suppose he stayed right on the track, and ran towards me. I suppose he may have run say nearly half way. He couldn't run nearly as fast as I,—that is, my child. He was coming up this way, and he was in thirty yards of me. He ran twenty yards, while I ran this forty or fifty, and I came very near getting across the bridge further on the side near to the train than I was on this side when I fell on the track. The child, as I fell, was right on the track,—in the middle of the track,—and that kind of blinded me. I saw I was hurt. I couldn't get up on my left arm at all, and the train came right close to the child. Then I thought sure it would kill him. I just got hold of one of the cross-ties, and shoved myself off. I didn't exactly get off, but got my leg in the cross-ties, and fell right off the trestle. Yes, sir; I fell over the trestle, on

the ground. I started to tell you I know that when I fell I fell on the rail with this shoulder, and hurt it, dislocated my arm, and cut my arm up here (pointing to left arm above wrist), and hurt my knee (indicating right knee). Then, as I fell off the trestle, I fell on this side (indicating right knee). Then, as I fell off the trestle, I fell on this side (indicating), as I turned over like. I couldn't say whether it was the engineer or the fireman, but one of them was standing, on my side, looking out, and the other man had his head out looking over this way,—looking to see if he didn't knock the child off. I didn't know that the child got off. One was standing looking right at me. Just as I turned over the train passed, and one was standing looking right out. I couldn't see all of them. The other man had his breast stuck out over this way (indicating out towards him), and they both were looking at me, and they never slowed up, and never blew the whistle, with the exception of this time, when they blew the whistle coming out of Richard's pasture." In plaintiff's cross-examination he stated that when he got on the trestle the train looked to him to be about 100 yards from the child, and the child was coming this way, and that when he fell on the bridge the train must have been a hundred yards from him.

The first assignment of error deals with a general demurrer to the second amended original petition, and states that it affirmatively appears therefrom that plaintiff's injuries resulted from his own negligence in going upon and running along defendant's track and trestle in front of an approaching train, knowing it to be approaching, and not through any negligence on the part of defendant. The only proposition of law presented in connection with this assignment is that "one who trespasses upon a track of a railway company is guilty of negligence, and if such negligence contributes to cause his injury he cannot recover therefor, unless the servants of the railway company, after discovering him in a position of peril, inflict the injury upon him through a failure to exercise ordinary care." The petition alleges negligence in respect to signals and speed; also in failing to exercise care after discovery of plaintiff's peril. The petition was certainly good as against general demurrer. It alleged substantially the facts shown in the above evidence.

We may here dispose also of the fourth assignment, which, in effect, is that the court erred in not instructing the jury to find for defendant, because the evidence shows that plaintiff was a trespasser upon defendant's track, and does not show that defendant's employees discovered the peril of plaintiff, and because the evidence shows that plaintiff's injuries were caused by his own negligence in knowingly going upon the track in front of an approaching train, and running along the track and trestle.

Upon the state of facts testified to by plaintiff, he was not a trespasser. The trestle or bridge spanned the gulch, and it seems that the most practicable and expeditious way of reaching his child to rescue it was by his running towards it down the track. In doing this in a manner that a reasonable person would adopt in a like situation, he is to be treated as a person lawfully upon the track. *Becker v. Railroad Co.* (Ky.) 61 S. W. 997, 53 L. R. A. 267. He could, even as a trespasser, recover upon the theory that defendant's employes discovered his perilous situation in time to have avoided injuring him, and failed to do so. As it was, he could base recovery, not only upon that theory, but upon negligence of defendant, as in other cases. The testimony was such as to warrant recovery on either theory. There was evidence that defendant was violating an ordinance of the city in reference to speed, going from 20 to 25 miles an hour, instead of 10 miles, as enjoined. There was evidence that one of the men on the engine was looking at him a considerable distance before it reached the trestle. And in this connection we may dispose of the eighth assignment of error, which complains of a charge which informed the jury, in effect, that the fact that those in charge of the engine saw plaintiff and his child in time to have avoided injury to plaintiff may be established and proven by circumstantial or by direct evidence. This we think is the law. It seems to be now settled that, to base a case upon this form of negligence, it must be shown that defendant's employes actually knew of the peril of the party injured. *Railway Co. v. Magee*, 92 Tex. 621, 50 S. W. 1012. But it is not essential that this must be proved by direct evidence, or in any more positive manner than is required of proof of any other fact. What has been said disposes also of the ninth assignment.

The fifth complains of a charge whereby the court submitted the case upon the theory of discovered peril, and we think the charge is not subject to any of the objections made to it. The sixth complains of a charge submitting the case on the other theory. The objection to this charge, as embodied in the single proposition advanced by the brief, is based on the contention that plaintiff was a trespasser on the track, which is not so as a matter of law. Error in no other respect is claimed in regard to this charge.

There are two assignments (the second and the third) complaining of rulings on testimony, which we must admit have given us more difficulty in their solution than the others. Assignment No. 2 involves the proof of the city ordinance regulating the speed of railroads, and requiring the ringing of the bell on engines within the city limits, and punishing violations thereof. Rev. St. art. 558, provides that "all ordinances of the city where printed and published by authority of the city council shall be admitted and received

in all courts without further proof." Article 559: "The style of all ordinances shall be 'Be it ordained by the city council of the city of — (inserting the name of the city); but it may be omitted when published in the form of a book or pamphlet.'" The bill of exceptions shows that plaintiff first offered to prove the ordinance by introducing some instrument which was headed:

"Revised City Ordinances.

"An ordinance adopting the Digest of Revised Ordinances of the City of Kerrville.

"Be it ordained by the city council of the city of Kerrville:

"Section 1. That the ordinances of the city of Kerrville as prepared and revised by City Attorney Lee Wallace and containing the ordinances in each of the following numbered and entitled chapters be and the same are hereby declared to be the digest of all ordinances of said city of a general nature now in force and are approved and adopted as the municipal laws of said city, to wit: [Divided into chapters 1 to 53].

"Sec. 2. That the digest of the ordinances of the city of Kerrville when published or written in a book provided for that purpose shall be known and may be cited as the Revised Ordinances. That all ordinances in said digest shall take effect and be in force from and after publication of the ordinances.

"Chapter 36.—Regulating the Speed of Railroad Locomotives.

"Section 1. That it shall be the duty of persons having charge of steam locomotives and railroad cars, while running the same within the city limits, to decrease the speed of such locomotives so as not to exceed ten miles an hour.

"Sec. 2. That a bell which is placed on each locomotive engine shall be rung while running within the city limits, and shall be kept ringing until said locomotive engine be stopped.

"Sec. 3. [This section provides the penalty for violations.]"

—And offered to show, and did show, by the testimony of J. D. Hutchinson, mayor of the city of Kerrville, that "said alleged ordinance was the existing ordinance of the city of Kerrville upon the subject of regulating the speed of railroad locomotives; to the introduction of which said ordinance the defendant then and there objected, because the said ordinance regulating the speed of railroad locomotives has no enacting clause, as provided by law, and is therefore void; which said objection was overruled by the court, and the said alleged ordinance admitted in evidence, to which action and ruling of the court defendant then and there in open court excepted; and the plaintiff thereupon offered in evidence a printed pamphlet, styled 'Revised Ordinances of the City of Kerrville, Kerr County, Texas, to be in force and effect from and after September 15th,

1892,' and chapter 21 thereof, regulating the speed of railroad locomotives, being in terms the same as ordinances theretofore introduced by plaintiff over defendant's objection; to the introduction of which ordinance the defendant objected as having no enacting clause, and therefore void, which said objection was overruled, and the said ordinance admitted in evidence."

Appellant's contention is that the printed pamphlet was not entitled to be admitted as proof of the ordinance, because the ordinance itself was in evidence, and was shown to be without the enacting clause, and therefore void. If these were the facts, the assignment should be sustained. This is the only matter of objection we may consider. There is no question made that, but for this, the printed pamphlet was entitled to be used.

The digest above quoted from purported to be a digest of all ordinances of said city of a general nature "now in force." This showed that these were not the ordinances themselves. It is true this ordinance adopting the digest enacted, by section 2 thereof, that all the ordinances in the digest "shall take effect and be in force from and after publication of the ordinances." If the council had attempted to enact ordinances in such form originally, without the style prescribed for each respectively, they would not be ordinances. But this digest shows upon its face that every ordinance therein contained was already in force. It did not attempt to repeal any, but declared all ordinances to be in force and to take effect from and after their publication. It is useless to contend that the digest contained the original ordinances when it expressly shows the contrary. Doubtless the form of the ordinances as contained in the digest would render them invalid; in other words, they are not ordinances as they appear in this digest, and the original ordinances as they then existed were and remained in force. We therefore conclude that appellant's proposition, viz., "Where an alleged city ordinance offered in evidence is void as having no enacting clause it is error to admit same in evidence over objection," is not well taken, the ordinance itself not appearing to have been introduced.

The third assignment objects to the admission of the testimony of Tom Tarver, who was allowed to testify that he heard one of the enginemen (engineer or fireman) say, two or three minutes after the train arrived at the depot, that they "came near running over a man down the road"; the objection being that it was incompetent, not a part of the *res gestæ*, and not in rebuttal of any testimony introduced by defendant. It appears from the bill that it was after plaintiff had rested, and defendant had rested without offering any testimony, and the court had overruled defendant's motion to instruct the jury to find for the defendant, that the testimony was admitted. Appellant's proposition is that "a declaration, to

be admissible as part of the *res gestæ*, must be made at the time of the transaction, and must be expressive of the character, motive, or object of the act material to be understood." The testimony, as appellant says in its brief, was not expressive of anything material to the case, since it did not indicate, or tend to indicate, any negligent act of defendant. This would seem to be good reason why its admission should be held harmless. That they came near running over a man down the road was the undisputed evidence. The statement in question went to show that the engineman knew that they had come near running over plaintiff. This, however, was also the undisputed evidence; for plaintiff testified that as the train passed over the trestle he saw the engineer and fireman both looking at him. In fact, plaintiff's testimony to the effect that one or both of the persons on the engine, while a considerable distance off, were looking at him, the view being unobstructed, and they never slowed up, was not contradicted. Of course, the testimony in question, being irrelevant, ought not to have been admitted, but, under the circumstances, we cannot hold that it prejudiced defendant. *Tucker v. Smith*, 68 Tex. 478, 3 S. W. 671; *Railway Co. v. Great-house*, 82 Tex. 108, 17 S. W. 834.

From the eleventh assignment it appears it was discovered after the trial that one of the jurors could not read, write, understand, or speak the English language. This point cannot avail defendant, for the reason that it also appears defendant failed to question the juror as to his qualification with respect to reading and writing.

As to the amount of the verdict, which is questioned for excess: The accident occurred on March 6, 1901, and the trial took place on April 10, 1901, about 28 days after. The verdict was for \$7,000, which was reduced to \$5,000 by remittitur in the district court. The verdict for such amount must have been given upon the theory that plaintiff's injuries were permanent. In the short time plaintiff appears to have advanced well towards recovery. The only testimony of permanency was that of a physician, who leaves it in serious doubt; his testimony rather going to show that the injury is not permanent. We regard the sum recovered as excessive, and shall require a further remittitur of \$1,500. If this is filed within 10 days, the judgment will be affirmed for \$3,500; otherwise, reversed.

FIRST NAT. BANK OF ITASOA v. WATSON.

(Court of Civil Appeals of Texas. Jan. 22, 1902.)

PARTNERSHIP—DISSOLUTION—PLEDGE OF ACCOUNTS—EVIDENCE—ORIGINAL PETITION—LOAN—CHARGE—APPEAL—STATEMENT.

1. Where, in an action to recover notes and accounts of a firm of which plaintiff had been

a member, and which, on dissolution of the firm, were pledged to him as security for any sum he might thereafter pay on the firm debts, and which were afterwards transferred to the defendant by the remaining partners composing a new firm, evidence by him as to the agreement of dissolution is not inadmissible, as hearsay.

2. Where an action is tried on an amended petition, and the original petition contained averments valuable to defendant as admissions, it was error to exclude such original petition as evidence, though it was not verified.

3. Where, immediately after the dissolution of a firm, one member retiring and the business being continued by the other two, the latter borrowed money from a bank, it was not error to refuse to charge that, if the bank agreed to loan the money to the firm before the dissolution, then the debt would be that of the old firm.

4. Where, after the dissolution of a firm, notes and accounts which had been pledged to the retiring member were, by the remaining partners, transferred to a bank, if it knew of the dissolution, but did not know of the pledge, it could not presume that the full title of the claims was in the new firm, or that it had acquired full title thereto.

5. Where error is assigned to the giving of a requested instruction on the ground that the court had in the general charge given its purport, and there is no statement under the assignment verifying the fact stated, such assignment should not be sustained.

Appeal from district court, Hill county; W. Poindexter, Special Judge.

Action by J. T. Watson against the First National Bank of Itasca. From a judgment for plaintiff, defendant appeals. Reversed.

Appellee, Watson, sued appellant for \$4,000, the alleged value of certain notes and accounts, which had been agreed to be delivered to him as retiring member of the firm of J. S. Patton & Co. to save him harmless for any debts of the firm which he might have to pay; the other two members of the firm, Patton and J. P. Carter, continuing the business under the old firm name. The old firm owed the Stroud-Gibson Grocery Company something over \$3,000 at the time of the dissolution, which the new firm was to pay; and on the night of the dissolution, the 5th of January, 1898, \$1,500 was procured from appellant bank to pay the grocery company that amount on its debt, appellee signing, with the other members of the firm, notes to it to cover the balance of its debt, which appellee had to and did pay. By the terms of the dissolution, Patton and Carter, constituting the new firm, were to pay the debt to the Stroud-Gibson Grocery Company, as well as all other debts. The firm dissolved about 9 or 10 o'clock p. m. on the 5th of January, 1898, and it was after the dissolution the \$1,500 was obtained from appellant, the bank, to pay Stroud, of the firm to whom the debt of over \$3,000 was due; the bank advancing the money, and contending in this suit that it did not know of the dissolution, and that the agreement to advance the money was made by it during the daytime of the 5th of January, 1898, before the dissolution, and that, therefore, Watson was liable to it for the loan of \$1,500, it having dealt with old

firm for several years prior to dissolution, and advanced the money to Carter, a member of the old and the new firm. The \$1,500 were delivered to Carter by the bank a few minutes after the dissolution, the same night, or at least Stroud received a deposit slip for the money at that time, Watson not being present, Carter accompanying him to the bank, ordering the money paid to Stroud. The bank insists that Watson is liable to it for the unpaid balance due on the loan, and that it had, by agreement, a lien on the notes and accounts subsequently delivered to it as security for the loan. The payments to which the note of \$1,500 was entitled to credit were derived by collection of the bank on some of the notes and accounts of the old firm. The trial resulted in a verdict for the plaintiff, Watson, for \$1,203.77 principal and \$111.22 interest, \$1,314.99 total, for which judgment was rendered against the bank, and it has appealed.

J. B. Reynolds and Nelson Phillips, for appellant. John E. Clarke and Wear, Morrow & Smithdeal, for appellee.

COLLARD, J. (after stating the facts). It is assigned as error that the court erred in permitting Watson, plaintiff, in his own behalf to testify as to the terms of the agreement of dissolution of the firm, because it was not binding upon defendant, nor admissible in evidence against it, in the absence of notice of its terms to defendant, and was hearsay testimony. The witness testified that he was to retire from the firm, and that Patton and Carter should assume all indebtedness of the old firm, and that they should execute to him an instrument, which he testified was executed, conveying to Stroud-Gibson Grocery Company, in trust (to save appellee harmless in the event he should be compelled to pay any of said indebtedness), all the notes and accounts due the firm, amounting to \$4,000. The testimony was objected to upon the ground that it was an agreement private from appellant, and was hearsay in character. It was not hearsay. It was proper to allow testimony of the dissolution and its terms, and then testimony as to knowledge of defendant as to the dissolution and its terms. Besides this, the written instrument of dissolution, corresponding with Watson's testimony, was read in evidence without objection. It is as follows:

"State of Texas, County of Hill. Know all men by these presents, that whereas, the firm of J. S. Patton & Co., a firm composed of J. S. Patton, J. P. Carter, and J. T. Watson, has this day been dissolved, and the said J. T. Watson has retired from said firm; and whereas, the said new firm of J. S. Patton & Co., a firm composed of J. S. Patton and J. P. Carter, has assumed the payment of all debts due and owing by the former firm of J. S. Patton & Co. to all parties; and whereas, the said J. T. Watson is liable to pay the

debts due by said firm heretofore incurred: Now, therefore, know all men by these presents, that, in order to secure the said J. T. Watson against any and all sums of money which he may or might be compelled to pay by reason of said former debts, which we, the undersigned, have assumed to pay, we, said J. S. Patton & Co., a firm composed of said J. S. Patton and J. P. Carter, do hereby assign, transfer, and deliver unto Stroud-Gibson Grocery Company, of Hillsboro, Texas, in trust to secure said J. T. Watson as aforesaid all the notes and accounts which we own and which are due and owing to us by any and all parties in connection with said business heretofore conducted, composed as aforesaid. Witness our hands this January 5th, 1898. J. P. Carter. J. S. Patton. Witnesses: Frank H. Booth. N. Stroud.

"I certify this to be a true copy of the original. N. Stroud."

The dissolution was published in a newspaper in the town where the business had been carried on on the next day after dissolution, viz., January 6, 1898. The objection to Watson's testimony was not upon the ground that there was better evidence, but on the grounds stated, which we believe were not tenable.

The court excluded the original petition in this case, which was offered in evidence by defendant, to which ruling defendant excepted, and now assigns that ruling as error. The original petition was superseded by an amended petition, on which the case was tried. The part of the petition offered in evidence and excluded is as follows: "That the title of the plaintiff to the notes and accounts for the value of which this suit is brought was subject to a lien in favor of defendant [bank] for the sum of \$1,500 owing to defendant by J. S. Patton and J. P. Carter, composing the firm of J. S. Patton & Co., which said debt is evidenced by their certain promissory note for said sum of \$1,500 of date January 5, 1898, and due on or about October 1, 1898, with ten per cent. interest thereon from date." The bill of exception shows that "the foregoing averment of the original petition was offered as an admission of plaintiff of the priority and superiority of defendant's lien upon the notes and accounts over and above the alleged lien of plaintiff." The court erred in refusing to admit the averment of the petition in evidence, though it does not appear that it was sworn to. The following authorities support our view of the question: *Southern Pac. Co. v. Wellington* (Tex. Civ. App.) 57 S. W. 856; *Barrett v. Featherstone* (Tex. Civ. App.) 35 S. W. 11; *Id.* (Tex. Sup.) 36 S. W. 245; *Railway Co. v. Eckles* (Tex. Civ. App.) 54 S. W. 651; *Jordan v. Young* (Tex. Civ. App.) 56 S. W. 762. In the first case cited above the court of civil appeals followed the

rule as announced in *Barrett v. Featherstone* (Tex. Civ. App.) 35 S. W. 11, in which it was held that an abandoned pleading was admissible to prove a material fact when offered by the adverse party to the pleading. The same court of civil appeals followed the supreme court in *Railway Co. v. Eckles* (Tex. Civ. App.) 54 S. W. 651, and *Jordan v. Young* (Tex. Civ. App.) 56 S. W. 762, holding that an abandoned pleading offered by the party adverse to it was admissible though not sworn to. In holding as we do on this question, we do not intend to hold that the averment offered in evidence is conclusive of the facts affirmed. It is capable of explanation, and may be opposed by other testimony.

We find no error in refusing the requested charge of defendant to the effect that if the bank agreed to loan the firm of Patton & Co. the \$1,500 before dissolution of the firm, to be paid to Stroud-Gibson Grocery Company, then the debt would be that of the old firm. If the bank had notice, actual or constructive, of the dissolution, before the money was received, and it was drawn by the new firm after notice, it could not be charged to the old firm, not being its contract. It does not appear that the money was placed to the credit of the old firm, subject to its order at any time, either before or after dissolution. After notice to the bank of the dissolution, the notes and accounts of the old firm would naturally be the property of the members of the old firm, though they may have been left in the custody of the new firm. The new firm could not assign them without the consent of the retired partner. So, even if the bank did not know the notes and accounts had been pledged to Watson to indemnify him, if it had notice of the dissolution, it could not presume that the full title of the claims was in the new firm. So the charge requested by defendant in opposition to this view was properly refused.

We find no error in the court's charge instructing the jury, by request of plaintiff, that, if the jury should find the old firm was dissolved, plaintiff retiring from it, and that after the bank had notice of the dissolution it loaned the \$1,500 to Patton and Carter, or to the partnership which they formed after retirement of Watson, he would not be liable for any part of the \$1,500. The objection is that the court had in the general charge given the purport of the requested charge. There is no statement under the assignment verifying the fact stated. We do not find that the statement is supported.

We have examined all the questions raised by the assignments of errors that should be considered, and find no error before verdict, except as noticed, and because of that error the judgment of the lower court is reversed, and the cause remanded. Reversed and remanded.

BURLESON et al. v. ALVIS et al.
(Court of Civil Appeals of Texas. Jan. 22, 1902.)

TRESPASS TO TRY TITLE—SURVIVING WIFE—COMMUNITY PROPERTY—PRESUMPTION OF HEIRS—NOTICE—DEEDS—VENDOR'S LIEN—EVIDENCE—EQUITABLE TITLE.

1. Where defendants in trespass to try title deraigned title from a decedent, having bought from his surviving wife with knowledge that she was such survivor, the law charged them with knowledge that he left children surviving him, and it was error to instruct that, if they purchased in good faith, without notice of the children's claim, the jury should find for defendants.

2. The land, having been conveyed to the deceased husband during coverture, was presumed to be community property, so that an instruction as to an innocent purchaser from the surviving wife, if given, should have been limited to one-half the property.

3. Where property conveyed to a husband was conveyed by his surviving wife by a deed reserving a vendor's lien, and it was subsequently reconveyed to her, the title never passed from her, and subsequent purchasers from her were still charged with knowledge of the interest of the husband's children therein.

4. In trespass to try title plaintiffs claimed a portion of the S. survey through conveyances from the assignee of S. Defendants introduced evidence of an equitable title in a certain railroad company, arising out of a contract with S. prior to his patent. *Held*, that the court properly ignored such evidence in its instructions, the defendants not having connected themselves with such title, or shown that it was ever divested from the company.

5. The evidence was also properly ignored because, the plaintiffs' title being a legal one, defendants, to defeat it with such equitable title, should have shown that plaintiffs' ancestor and his grantors had notice thereof.

Appeal from district court, San Saba county; M. D. Slator, Judge.

Action by Matt A. Burleson and others against J. B. Alvis and J. B. Taft. From a judgment for defendants, plaintiffs appeal. Reversed.

Jones & Jones and Leigh Burleson, for appellants. Allison & Walters and Sidon Harris, for appellees.

KEY, J. This is an action of trespass to try title to 150 acres of land, part of the Jacob Schmidt survey in San Saba county. The appellants Matt and Jessie Burleson were the plaintiffs, and J. B. Alvis and J. B. Taft were the defendants. There was a jury trial, resulting in favor of the defendants, and the plaintiffs have appealed.

The Jacob Schmidt 640-acre survey of land was patented to David Taylor, as assignee of Jacob Schmidt, September 28, 1873. March 14, 1867, David Taylor conveyed the certificate by virtue of which the land was patented to Chas. B. and Naomi S. Taylor; and the plaintiffs introduced in evidence a power of attorney dated November 18, 1875, executed by Chas. B. Taylor and Naomi S. Yett, formerly Naomi S. Taylor, authorizing W. A. Yett to sell the Jacob Schmidt survey; also a deed executed by Chas. B. Taylor and Naomi S. Yett, by W. A. Yett, as attorney in fact,

dated November 24, 1875, conveying said survey to N. D. McMillan; also deed from N. D. McMillan to A. E. Burleson for the land in controversy, dated September 14, 1875. The plaintiffs also proved that A. E. Burleson died in 1882, intestate, and that they are his only heirs. They also submitted testimony tending to show that the land was paid for with means which was the separate property of their father, A. E. Burleson. The defendants offered testimony tending to show that Naomi S. Yett never signed or executed the power of attorney authorizing W. A. Yett to sell the land, and further testimony tending to show that Chas. B. Taylor died in November, 1875, the exact day not being stated by the witness. The defendants also proved that Mrs. Alice J. Burleson, the surviving wife of A. E. Burleson, qualified under the statute as such survivor; and by virtue of such qualification she had the power to sell any community property belonging to herself and her deceased husband, until she married again, which occurred October 5, 1887, when she became the wife of G. C. Bills. Prior to her second marriage, and while she was authorized to sell community property, she executed a deed to the land in controversy to C. L. Nichols, reserving therein a lien upon the land to secure the payment of three purchase-money notes for \$200 each, bearing 12 per cent. interest from July 7, 1885, the day on which the deed and notes were executed. In May, 1888, after Mrs. Burleson had married again, C. L. Nichols and his wife conveyed the land back to her for the consideration, as stated in the deed, "of \$800 cash to us in hand paid by Mrs. Alice J. Bills, formerly Mrs. Alice J. Burleson, surviving wife of A. E. Burleson, deceased, which consideration is paid by her surrender to us and canceling notes executed to her by said C. L. Nichols, on which there is now due that amount." The defendants also showed that they hold by mesne conveyances from Alice J. and G. C. Bills. They also introduced testimony tending to show an equitable title in the German Immigration & Railroad Company to an undivided one-half interest in the Jacob Schmidt survey, arising out of a contract between the company and Jacob Schmidt, dated January 17, 1847. That instrument was acknowledged October 9, 1854. It was shown that it had never been recorded, nor does the record show when it was filed in the land office. Some other testimony was introduced, which will be referred to hereafter. On the question of title the court submitted to the jury two issues: (1) Whether the property was the separate property of A. E. Burleson, or the community property of said Burleson and his wife, Alice; and (2) whether or not the defendants bought without notice of the claim of the plaintiffs. On the latter subject the court charged as follows: "You are instructed that if you find from the evidence in this case that the defendants, J. B. Alvis and J.

B. Taft, or the said M. I. Bostick purchased the land in controversy, and paid therefor a valuable consideration in good faith, without notice, either actual or constructive, as these terms have been defined to you, of the claim of the plaintiffs herein, then you will find a verdict in favor of the defendants." It is contended on behalf of appellants that the court should not have given this charge. This contention must be sustained. The defendants derails title under the deed to A. E. Burleson. They bought from his surviving wife, with knowledge of the fact that she was such survivor; and, however ignorant they may have been of the fact that he left children surviving him, the law charged them with knowledge of that fact, and that they were his heirs. *Hill v. Moore*, 62 Tex. 610; *Patty v. Middleton*, 82 Tex. 591, 17 S. W. 909. But it is contended on behalf of appellees that Mrs. Burleson, as surviving wife, conveyed the property to O. L. Nichols, who, after her second marriage, conveyed it back to her; and that, while the latter conveyance may have been made in settlement of outstanding purchase-money notes against the land, thereby in equity restoring it to its former status, yet, if the defendants purchased without notice of that fact, they could hold as innocent purchasers. Two objections are urged in reply to this contention, which are: (1) That the deed from Mrs. Burleson to Nichols in express terms reserved a vendor's lien to secure the payment of the purchase-money notes, and therefore, under the rule established in this state, the title did not pass to Nichols; and (2) that the consideration recited in the deed from Nichols to Mrs. Bills was necessarily sufficient to put a purchaser upon such inquiry as would have disclosed the fact that the deed was made in settlement of the former purchase money notes. Undoubtedly, the first proposition is correct, and we are also disposed to sustain the second, though that is not necessary. As the deed from Mrs. Burleson to Nichols did not divest her of the title to the land, the deed from Nichols back to her did not vest the title in her. She could not be invested with that of which she had never been divested. But there is one phase of the case that presented the question of innocent purchaser. In so far as the plaintiffs sought to recover all of the land on the theory that it was the separate property of their father, the doctrine of innocent purchaser might apply. The land having been conveyed to A. E. Burleson during coverture, it was presumed to be community property, and a purchaser from his surviving wife could deal with her on the faith of that presumption, and purchase from her title to an undivided half interest, although Burleson may have paid for the land with his separate means, unless such purchaser had notice of the latter fact. *Sanborn v. Schuler*, 86 Tex. 116, 23 S. W. 641. But the charge of the court on the subject of innocent purchaser should have submitted

that question only, and should have told the jury that the defendants' plea of innocent purchaser constituted no defense as to an undivided half interest in the land. The charge, as given, was entirely too broad, and no doubt misled the jury; for which reason the judgment must be reversed.

But, in view of another trial, it becomes necessary to decide some questions presented by the appellees under their cross assignments. Ruling on these questions, we hold that the court properly ignored the transfer by Jacob Schmidt to the German Immigration & Railroad Company: (1) Because that was at most an equitable title, and defendants failed to connect themselves with it, not having shown that it was ever conveyed by or divested out of the particular company named; (2) because, if the plaintiffs have any right, it is a legal title, and, such being the case, if the defendants would defeat such legal title with a mere equitable right, it devolves upon them to show that the plaintiffs' father and those from whom he purchased had notice of the right now asserted by the defendants at the time they purchased, or that they paid no money or other thing of value for the land. *Saunders v. Isbell*, 5 Tex. Civ. App. 513, 24 S. W. 307.

We agree with counsel for appellees that the judgment rendered in the suit of Mrs. Naomi Yett against Bostick was not admissible in evidence in this case, and should have been excluded on account of its immateriality. We think the testimony raised the issue, which should have been submitted to the jury, whether or not the deed from David Taylor to his daughter, then Naomi S. Taylor, but subsequently Naomi S. Yett, was intended as a gift or sale; because, if it was a gift, it was her separate property, and, as the power of attorney from her to her husband was not properly acknowledged, it conferred no authority upon him to sell her separate property.

We also sustain appellees' contention that the evidence raises the issue as to whether or not Chas. B. Taylor was alive at the time W. A. Yett, as agent, executed the deed to N. D. McMillan; and that issue should have been submitted to the jury, because, if Chas. B. Taylor was not then alive, the deed referred to did not convey his interest in the land.

The evidence also presented the issue as to whether Mrs. Naomi S. Yett signed the power of attorney referred to. It is contended by appellants that, as the defendants' answer contained no special plea under oath charging that Mrs. Yett had not signed the power of attorney, that question was not involved; and it was for that reason, perhaps, that the court did not submit that issue to the jury. No doubt, the pleadings will be amended so as to eliminate that objection.

On the other questions presented by the cross assignments, we decide against the appellees.

For the error pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

BOWIE COUNTY v. POWELL¹

(Court of Civil Appeals of Texas. Dec. 7, 1901.)

ACTION AGAINST COUNTIES—TRESPASS TO TRY TITLE—CONDITION PRECEDENT—CONDEMNATION PROCEEDINGS—JUDGMENT OF COMMISSIONERS' COURT—CONCLUSIVENESS AS TO NOTICE—BURDEN OF PROOF—ISSUES—PLEADINGS—EVIDENCE.

1. Rev. St. art. 790, prohibiting suit against a county unless the claim on which suit is founded shall have first been presented to the commissioners' court for allowance, has no application to an action of trespass to try title against the county.

2. The order of the county commissioners' court approving the report of the jury of view, showing a condemnation of land, raises no presumption that the jury caused notice of the proceeding to be legally served on the owner; and, to show a valid condemnation, the county must prove that the notice was duly served.

3. Where a county, sued in trespass to try title, justifies its entry and claim by virtue of a condemnation proceeding, proof of service of notice therein is admissible without special pleadings.

4. On the issue whether notice of condemnation proceedings was served on the landowner, he testified that he never received notice. One of the jury of view testified that the owner had acknowledged receipt of the notice to him. It was proved conclusively that the notice was mailed to the owner at his place of residence and post-office address, and he admitted receiving his mail regularly. Two of the jury of view testified to conversations with the owner a few days before the road was located through his land, in which he objected to cutting his fence, and that his only objection to the road was that his land was under fence, and that nothing was said about the notice. *Held* to show service of the notice.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Action by L. A. Powell against Bowie county. From a judgment for plaintiff, defendant appeals. Reversed.

Horace Vaughan, for appellant. Smelser & Mahaffy, for appellee.

TEMPLETON, J. Powell sued Bowie county in trespass to try title, to recover a strip of land which was claimed by the county as a public road. Powell bought the land of which the strip sued for was a part from one McGill, and received a warranty deed there-to, in which no mention was made of the road. The county pleaded that while McGill owned the land it caused the strip in controversy to be condemned as a public road according to law. A trial before the court without a jury resulted in a judgment for the plaintiff. No conclusions of fact and law were filed.

The defendant demurred to the petition on the ground that it did not appear therefrom that Powell's claim to the land in controversy had been presented to the commissioners' court for allowance, under the rule prescribed by article 790 of the Revised

Statutes. The statute has no application to claims like the one sued on, and the demurrer was properly overruled. It was alleged in the petition that the claim for the damages set up had been presented to the court and disallowed.

The evidence was conflicting on the question as to whether the notice in condemnation was served on McGill. In other respects the proceedings seem to have been regular and in conformity with law. The report of the jury of view, and the judgment of the court approving the report, contained no statement respecting service of the notice. The record presents the questions whether it was incumbent upon the county, in order to establish a legal condemnation, to show such service, and, if not, whether the plaintiff was entitled, under the pleadings, to prove that notice was not served.

Appellant invokes the general rule that a judgment of a court of competent jurisdiction cannot be attacked collaterally on the ground that citation was not served. In such cases the citation is issued by a duly elected, sworn, and bonded officer of the court, and is served by another such officer. Written return of service must be made, and the citation and return must be on file in the court having jurisdiction of the cause, before the court is authorized to render judgment. The citation and return are before the court when the cause is heard, and must be preserved among the records of the court. It will be presumed that the court performed its duty. Therefore, when such court enters judgment in such a cause, the presumption arises that before doing so it inquired into and determined the question whether citation had been duly served, and the judgment can be assailed only in a direct proceeding brought for that purpose. The case before us is altogether different. The notice which takes the place of citation in ordinary cases is not issued by the court or any officer thereof, but by a specially created tribunal, which, within certain limitations, is independent of the court. The manner of service and return is not prescribed, and the notice is not served by an officer of the court. The notice and return are not required to be before the court, or even to be filed and preserved. No duty whatever in respect thereto is imposed on the court. It cannot be said, therefore, that the court, when it heard and approved the report of the jury of view, considered and decided the question whether notice had been duly served, because no such question was before the court. The order of the commissioners' court of Bowie county approving the report of the jury of view, showing a condemnation of McGill's land, raises no presumption that the jury caused notice of the proceeding to be legally served on McGill; and it was necessary for the county, in order to show a valid condemnation, to prove, either directly or by circumstances, that the notice was duly served.

In *Vogt v. Bexar Co.* (Tex. Civ. App.) 23 S. W. 1044, it was held that such service should be affirmatively shown, and that, if it was not done the proceeding was void. In *McIntyre v. Lucker*, 77 Tex. 250, 18 S. W. 1027, it was held that service of notice was a jurisdictional fact, which must be affirmatively shown, to sustain the jurisdiction of the commissioners' court to open a public road over private property, and that without service the action of the jury of view and the order of the court are nullities. Appellant insists that these cases are in conflict with *Onken v. Riley*, 65 Tex. 468, and *Sneed v. Falls Co.*, 91 Tex. 168, 41 S. W. 481. We do not find them so. In the first case it appears that notice had been given to Onken, the complaining landowner. In the second case it was simply decided that it was not necessary, as a prerequisite to the validity of the proceeding, for the record thereof to show affirmatively the matters which were not required by the statute to be incorporated into such record. It is not contended that service of notice should be presumed upon proof of the appointment and qualification of the jury of view, and the making of a report showing the condemnation. It seems that, even had the contention been urged, it would have been unavailing. In *Parker v. Railway Co.*, 84 Tex. 333, 19 S. W. 518, the plaintiff sued to recover a strip of land claimed by the defendant to have been legally condemned as a part of its right of way. The judgment of the county court on the report of the commissioners appointed to condemn the land, and the report itself, recited service of notice, but proof of service was not otherwise made. The court said: "The proceeding to condemn land for public use is special in its character, and its validity must depend upon a compliance with the law authorizing it. Nothing is to be presumed in favor of the power of such a special tribunal, and it is incumbent on one seeking to show right under its decree to show that the court had acquired jurisdiction to render it. Notice to the owner of the land sought to be condemned is necessary to jurisdiction, and this cannot be presumed from declarations contained in the report of the commissioners, nor from recitals in the decree of condemnation, but must be proved." The county having attempted to justify its entry and claim under and by virtue of the condemnation proceeding, it was a material issue whether the notice was served, and proof on such issue was admissible without special pleadings.

On the issue whether the notice was served, McGill testified by deposition that he never received the notice. Stagner, one of the jury of view, testified by deposition that McGill, after the notice was mailed, and before the road was located, told him that he had received the notice. Stagner admitted that he was interested in the suit, and that he was prejudiced against it, but denied be-

ing prejudiced against the plaintiff. He also testified that McGill's general reputation for truth and veracity was bad. The plaintiff introduced some evidence to sustain McGill's reputation for truth, but it was of a character in itself to raise some suspicion or doubt in regard to it. McGill was not questioned as to the statement testified to by Stagner. An examination of the evidence of these two witnesses discloses nothing indicating that McGill's testimony was more reasonable or probably true than that of Stagner. Thus far the evidence might be held to be in a balance, and, if no other testimony had been produced, it might be held that the plaintiff should recover, as the burden of proof on this issue was on the defendant. But the county proved conclusively that the notice was mailed to McGill, at Texarkana, Tex., which was his place of residence and post-office address, and McGill admitted that he received his mail regularly. This, it would seem, ought to be sufficient to overcome the balance and determine the question in favor of the county. But this was not all. Another juror (Goodwin) testified by deposition that he had a conversation with McGill a few days before the road was re-viewed and located, and McGill asked him not to cut his wire fence which inclosed the land over which it was proposed to run the road, in reply to which request Goodwin told him that the jury was only going to locate the road, and were not going to cut it out; that nothing was said about the notice. Goodwin appears to have had some interest or feeling adverse to the plaintiff in the result of the suit, but there is nothing else in his evidence tending to discredit him. Still another juror (Mose Day) testified that he had a conversation with McGill between the time the road was located and the time it was cut out, and that McGill told him that the only objection he had to the road was that his land was under fence; that nothing was said about the notice. It seems to us that the evidence clearly preponderates in appellant's favor.

We are loath to disturb the finding of the able and experienced trial judge, and have searched the record carefully in an effort to discover the reason for his finding. If a sufficient reason appeared in the trial, it has not found its way into the transcript, and we feel constrained to hold that the decided weight and preponderance of the evidence on the issue of service of notice were in favor of the appellant.

We do not regard the evidence as being sufficient to show that the county had acquired the easement claimed by estoppel or by prescription. The deed under which Powell claimed contained no reference to the road, and if the county had not in fact acquired the easement, as against McGill, Powell would not be estopped from asserting the invalidity of the condemnation proceedings because he knew before he bought the

land that there had been an attempted condemnation.

The judgment is reversed and the cause remanded. Reversed and remanded.

HODGES v. HODGES.¹

(Court of Civil Appeals of Texas. Dec. 11, 1901.)

HUSBAND AND WIFE—FRAUD—CONVEYANCE—EVIDENCE—LIMITATIONS—CONSIDERATION.

1. Defendant, owning a lot of land, was married, as she supposed, and conveyed one-half of the lot to her supposed husband. He was in fact married to plaintiff, and deeded such half lot to her. From the time of their supposed marriage, defendant and the man resided together on the property as husband and wife until his death. *Held*, that a finding that he by fraud, threats, and intimidation, and because the defendant thought he was her husband, compelled her to execute the conveyance, was justified.

2. Where a man, by fraudulently representing himself as single, married defendant, and obtained from her a conveyance of her land without other consideration than the relationship existing between them, limitations do not begin to run as to her right to cancel such conveyance until she discovers the fraud.

3. Where a conveyance of a house and lot was fraudulently obtained from a woman by her supposed husband by a deed in which he covenanted to pay a mortgage on the premises, and it was also provided that the rents of such premises should be applied to such mortgage, such rents thereafter collected being more than sufficient to pay such mortgage, a finding that none of his money was paid out as a consideration of such deed is justified.

Error from district court, Bexar county; S. J. Brooks, Judge.

Action by Mary Hodges against Josephine Hodges. From a judgment for defendant, plaintiff brings error. Affirmed.

Jas. Raley, for plaintiff in error. Thos. O. Murphy, for defendant in error.

JAMES, C. J. The only statement of the evidence is in the conclusions of fact filed by the trial court. The material facts are that Lyman Hodges married appellee, Josephine, in San Antonio in 1885. He fraudulently represented himself as a single man, but had a wife in Michigan (appellant), whom he had deserted. Appellee did not know of this fact until after his death in 1890. The suit is by appellant for the $8\frac{1}{2}$ of lot 4, block 5, in North Pecos street, in San Antonio. The lot 4 was bought with Josephine's money. On July 20, 1895, she and Lyman Hodges, as man and wife, executed to Juan Barrera a deed to the undivided half of said lot, with the understanding that he would deed it at once to Hodges, which was done on the same day. There was no consideration for either deed, and the court says in its findings that "Hodges, by fraud, threats, and intimidation, and because she thought he was her husband, compelled her to join him in executing the deed." On August 18th, same year, they,

as man and wife, entered into a contract with a building and loan association, by which a house was erected on the north half of said lot, they obligating themselves to pay \$1,000 therefor, with 12 per cent. interest, in monthly payments of \$8.78, giving a lien on the lot. On July 21, 1891, they executed a deed of partition, by which she conveyed to him the south half of the lot, with house thereon, and he conveyed to her the north half, with the house. With respect to this deed the court made the same finding as to fraud, threats, etc. This partition deed is set forth in extenso. It recites that they were desirous of partitioning their property so that each might thereafter manage, control, and dispose of his or her part without the approval of the other; and he releases and relinquishes to her the north half, with improvements, and she, in consideration of the assumption by Lyman S. Hodges, her husband, of the payment of 28 notes held by said association, secured by a lien on the lot, released and relinquished to him the south half, with improvements. It was a further agreement, expressed in the instrument, that the rents derived from the place on the north half of the property were "to be applied as usual, until the indebtedness hereinbefore referred to has been canceled." The north half was rented continuously for \$15 a month until the death of Hodges in 1897. He paid off the notes to the association. Besides these rents, he received \$14 a month pension, and at one time got \$800 for back pay or bounty. The court did not in terms find that the notes were paid out of the rents of the north half of the property, nor how they were paid. It found that it was not proved that any of his money was invested in the place. Plaintiff, in January, 1889, obtained a divorce from Hodges in the courts of Michigan. On December 11, 1897, he conveyed the south half of the lot to plaintiff, without consideration, reserving to himself for life the use thereof. He died in 1890, in the south half of the lot, where he was living with defendant, as her husband, up to that time.

The first assignment is that "the court erred in canceling the deeds introduced, because it was proven that the right to have them canceled for fraud and duress was barred by limitation." Appellant's idea is that, if duress was used in obtaining the deeds, this was something which she must have known at the time they were made; and, even if she had been his wife, her right to cancel them upon that ground was barred. The findings of the trial court we must accept as fully proved, not knowing the testimony from which they were derived. The finding is that both deeds respectively were procured "by fraud, threats, and intimidation, and because she thought he was her husband." What the particular fraud was to which the court had reference is not specified, but, as the findings speak of fraud in Hodges' representing himself as unmarried

¹ Rehearing denied January 22, 1902, and writ of error denied by supreme court.

when he married defendant, and as to her not discovering this fraud until after his death, we take it that the finding referred to the continuing deception, which kept her in the belief that they were lawfully married. The finding we construe to mean that this fraud entered into and induced the execution of the instruments, and was at the bottom of the transactions. Mr. Bigelow, in his work on Fraud (volume 1, p. 554), states the rule in this connection: "In case the marriage in question was absolutely void,—as where one of the parties was lawfully married at the time,—an action for damages for fraudulent misrepresentations, successfully made for the purpose of effecting the marriage, is maintainable; and all contracts effected under the same influence, so far as the rights of innocent third persons have not intervened, could, no doubt, be set aside in favor of the injured party. And where a devise or legacy has been given to one as husband or wife of the testator, who was not such, under downright deception in regard to the relation of the parties, the gift will be invalid, though it would, perhaps, be otherwise if the gift was made from other motives than those furnished by the supposed marriage relation, and independently of that, as clearly it would if there was no fraud on the part of the devisee or legatee." The statute of limitations did not begin to run against her until she discovered this fraud. This disposes of the first and second assignments.

As to the third assignment, we say that the findings tend to show that the building and loan association was paid out of the rents of the north half of the property. The entire lot was the individual property of defendant. The deed of partition itself indicates by its recitals that there were then only 28 of the notes remaining; that these rents had been used to pay the notes, and that thereafter they were to be so applied. This north half of the lot was defendant's property, including the improvements, subject, however, in equity, to whatever claim there was for money of Hodges that may have been invested in the improvements. The strong inference from what is found in the court's statement is that the house was paid for by its own revenues, and that none of Hodges' money went into it.

What has been said disposes of all the other assignments.

Affirmed.

LYTLE v. CRESCENT NEWS & HOTEL CO.¹

(Court of Civil Appeals of Texas. Dec. 11, 1901.)

WRONGFUL ACT OF SERVANT—LIABILITY OF MASTER—LINE OF DUTY.

Plaintiff, a mail clerk, bought food at defendant's eating house, but, owing to the start-

ing of his train, left before receiving his change from defendant's agent. Some days later plaintiff took dinner there and paid for it, and demanded the change due him the day before. The agent said plaintiff took his change, and an altercation ensued. As plaintiff left the eating house he applied a vile epithet to the agent, who seized a revolver, ran out of the eating house, and shot plaintiff as he was getting on his car, inflicting a serious wound. There was no evidence that such agent had previously been quarrelsome or dangerous. *Held*, that such shooting was not in the line of such agent's duty or service to defendant, and that it is not responsible therefor.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by W. J. Lytle against the Crescent News & Hotel Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Samuel Belden, Jr., and M. W. Davis, for appellant. Newton & Ward, for appellee.

FLY, J. This is a suit for damages instituted by appellant against appellee, alleged to have arisen from the acts of an agent of appellee in charge of a certain lunch counter in Schulenburg, Tex. After hearing the evidence introduced by appellant, the court instructed a verdict for appellee. The grounds of recovery stated in the petition were that D. E. Rhodes, the servant of appellee, whilst acting within the scope of his employment, had negligently shot appellant, and that the character and disposition of said Rhodes was so vicious and dangerous as to render it dangerous for appellant to pursue his business in Schulenburg. The testimony established that appellant was a railway postal clerk, running between San Antonio and Houston, and some time in June, 1900, when the train reached Schulenburg, he went to a lunch counter conducted by D. E. Rhodes for appellee, to get something to eat. Rhodes handed him a piece of pie, and appellant gave him 50 cents, out of which to get the 5 cents for the pie. Just as appellant got the pie, the train bell rang, and he ran to catch the train without getting his change. The next day appellant was going west from Houston, and took his dinner in the dining room adjoining the lunch stand, and, after eating, went to the lunch stand, and asked Rhodes for the change he had left, and Rhodes said that appellant had gotten his change. Several days afterwards appellant went to the lunch stand, and, after eating, again demanded the 45 cents he had left. After talking for a while, appellant charged Rhodes with taking the money, and Rhodes, with an oath, told him he would "fix him," and started to get over the counter. Appellant started out, and when just outside the door applied a very opprobrious and insulting epithet to Rhodes, who then got a pistol and ran after appellant, and, as he was getting on the train, shot him in the leg. There was no testimony tending to show that Rhodes was of a violent or dangerous

¹ Writ of error denied by supreme court.

disposition, except that he shot appellant after he had charged him with theft and applied to him a vile epithet that always provokes intense resentment in this section of the country, and had invited him out to fight. It will be noted that the difficulty occurred several days after appellant lost his money, and after appellant had been waited on and paid for his lunch. Rhodes at the time was not engaged in any service for his master, and the quarrel arose over a matter in which appellee did not have the least interest, or with which it was at all connected. Rhodes was not acting in furtherance of the master's business, or for the accomplishment of the object for which he was employed. He was resenting insults heaped on him by appellant; and while the remote cause of the difficulty was a matter connected with the business of appellee, it was too remote to connect appellee with it. "When a recovery is sought of the master for an injury inflicted by his servant, the plaintiff must show that the servant did the wrong while acting within the scope of his employment." *Railway Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1089, 27 Am. St. Rep. 902; *Railroad Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517.

There is no error in the judgment, and it is affirmed.

On Motion for Rehearing.

(Jan. 22, 1902.)

It is contended by appellant that the servant of appellee was acting within the scope of his employment when he shot appellant. The general and inflexible rule controlling in all such cases as the present is, as stated in *Wood, Mast. & S. § 279*, that for all acts done by the servant under the express orders or direction of the master, as well as for all acts done in the execution of his master's business, within the scope of his employment, the master is responsible, but, when the act is not within the scope of his employment, or in obedience to the master's orders, it is the act of the servant, and not the master, and the servant alone is responsible therefor. If the foregoing rule is applied to the facts in this case it is clear appellee cannot be held liable. It is not contended that Rhodes was acting under express orders of appellee when he shot appellant, and he was forwarding no part of his master's business when he fired the shot. He had collected the amount due for the food furnished appellant, and was not therefore engaged in collecting for the master. He was not protecting the property of the master, for no attack was being made. The difficulty arose from insults heaped upon the servant, with which the master could have no possible concern. No stretch of the doctrine that masters are liable for the torts of servants when committed within the scope of their employment can make it cover such

a case as this. *Candiff v. Railway Co. (La.)* 7 South. 601; *Turley v. Railroad (N. H.)* 47 Atl. 261. In the last-named case the appellant was shot by a servant of appellee employed to clean and care for the lamps in the freight yard. Appellant was trespassing on the yard, and was fired upon and wounded by the servant, and it was said by the court: "As there was no evidence tending to show that the shooting of the plaintiff by Saxton resulted from any fault of the defendants, was directed by them, or done by their authority, or was any part of Saxton's work of cleaning and caring for the lamps in the yard, for which he was employed, and which was the sole capacity in which he represented the defendants, it cannot be found that the act of Saxton complained of, whether willful or negligent, was the defendants' act, or within the scope of Saxton's employment by them." The case of *Railway Co. v. La Puelle (Tex. Civ. App.)* 65 S. W. 488, decided by the court of civil appeals of the Third district, is cited as being in conflict with the opinion herein expressed, but we are of the opinion that the cases are not at all similar. In that case a conductor made an assault on a passenger while on a train. In such cases it is held, by the weight of authority, that it is not merely a question of negligence, nor is it strictly a question depending upon the scope of the servant's particular employment, but it is a question of the absolute duty of a railroad company to its passengers as long as the relation subsists, and a breach of that duty on its part whether caused by the willful act of an employé or not. As said by Elliott, in his work on *Railroads*, § 1638: "A carrier is bound to discharge the implied duty, arising out of its contract and imposed by law, that its passengers shall be protected from injury by its servants, and shall not be willfully insulted and harmed by them, and if it commits the discharge of this duty to an employé it may well be held to do so at its peril, notwithstanding the exercise of care on its part in selecting its servants." It is doubtless true that the words of provocation used by appellant did not justify the assault by Rhodes, but he was performing no service for appellee when he committed the assault, his action was without the sanction of the master, and it was done at a time and place when appellee owed no duty whatever to appellant, and it is in no wise responsible for any damages arising from such assault. *Howe v. Newmarch*, 94 Mass. 49. As said in the case last cited: "And in an action of tort in the nature of an action on the case the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within

the scope of his employment, the master is not liable."

The motion for rehearing is overruled.

MCBRIDE v. PUCKETT.¹

(Court of Civil Appeals of Texas. Dec. 18, 1901.)

LANDLORD AND TENANT—RENT—SHARE OF CROP—LANDLORD'S LIEN—PROCEEDINGS DESTROYING LIEN—PLEADINGS—INDEFINITE ALLEGATIONS—OBJECTION TO EVIDENCE—MOTION FOR NEW TRIAL—DILIGENCE.

1. Where a petition is good as against a general demurrer, and subject only to special exception, advantage of the defects cannot be taken by objections to testimony tending to support its allegations, however general or indefinite they may be.

2. Where a crop of cotton is raised on land rented on condition that the landlord shall receive one-half the crop, he is entitled to one-half the cotton seed as well as to one-half the lint.

3. Where a landlord levied a distress warrant on cotton raised on his land by his tenant for failure to pay the rent, and the tenant replevied the cotton, such proceedings did not discharge it of the landlord's lien.

4. Where it appears from the affidavits in support of a motion for new trial that the evidence claimed to be newly discovered, and for which the new trial is asked, either was or should have been known before the trial, and no diligence is shown to excuse its absence, the motion should be denied.

Appeal from county court, Karnes county; A. J. Parker, Judge.

Action by T. D. Puckett against S. S. McBride. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Belcher and M. B. Little, for appellant. A. J. Prichard, for appellee.

NEILL, J. The appellee sued appellant for \$216.78, alleged to be due him on a rental contract made between the parties in January, 1900, by which appellee leased to appellant for the term of one year 190 acres of land. The petition alleges that appellee, as appellant's landlord, on divers days during the term of lease, at appellant's special instance and request, under the contract, advanced the latter, for the purpose of enabling him to make and gather the crop on the rented premises, the several sums of money, supplies, merchandise, and rents specified in an itemized account attached to and made a part of the petition, amounting in the aggregate to \$216.78; that by the terms of the contract, as well as perforce of statute, the appellee has a landlord's lien upon all the corn and cotton raised by appellant on the premises during the term of lease to secure the payment of said indebtedness, which was alleged to be due and unpaid. The petition averred that prior to the institution of the suit appellee had sued out a distress warrant for said indebtedness, which was levied upon 10 bales of cotton raised by appellant upon the premises; that after the levy appellant

executed, with two sureties, his replevy bond to him, and thereby obtained possession of the cotton after it had been seized, by virtue of the writ, by the sheriff. He prayed judgment for his debt, together with a foreclosure of his lien, as well as for judgment against appellant and the sureties, on his replevy bond. The appellant (defendant below) answered: (1) By plea to the jurisdiction, in which he averred that appellee had falsely alleged the amount of the indebtedness to be \$216.78 for the fraudulent purpose of giving the court jurisdiction; (2) that he did not owe certain items of indebtedness specified in the account attached to the petition; and (3) by pleading set-offs. He also pleaded in reconvention actual and vindictive damages for the wrongful and malicious suing out of the distress warrant. The case was tried before a jury, and the trial resulted in a judgment in favor of appellee for \$165.

Conclusions of Law.

1. The first and second assignments of error complain of the court's admitting evidence tending to prove certain items specified in the account attached to the petition, upon the grounds that appellee's allegations were not sufficient to notify him that such testimony would be offered in evidence, and that there was a variance between the testimony offered and the allegations in appellee's petition. The petition is good against a general demurrer, and it is well settled that a petition subject only to special exceptions cannot be taken advantage of by objections to testimony tending to support its allegations, however general or indefinite they may be. Appellant should have indicated his objections by special exceptions to the petition, and not by excepting to testimony tending to support its allegations. *Powers v. Caldwell*, 25 Tex. 352; *Insurance Co. v. Woodward* (Tex. Civ. App.) 45 S. W. 187, and authorities cited. We can see no variance between the allegations in the petition and the evidence objected to that would authorize the court to exclude the testimony.

2. The same may be said as to the third and fourth assignments of error, in which objections are made to evidence offered to establish an item of indebtedness of \$53 in the account for cotton seed, and to the charge in submitting such item to the jury, and allowing them to find it due plaintiff as rents. Appellee sued for rent, as well as supplies and money advanced to appellant as his tenant. The testimony shows that appellee, under the contract of lease, was entitled to one-half of the cotton grown on the land in part consideration of his letting it to appellant. This compensation is in the nature of rent, and appellee was as much entitled to one-half of the seed when the cotton was ginned as to the lint. The evidence shows that appellant appropriated to his own use the value of appellee's half of the seed. And we think that the allegations in the petition,

¹ Rehearing denied January 22, 1902.

in the absence of special exceptions, were sufficient for the admission of the evidence, and that the evidence sustains the allegations, and authorized the court to submit the question of the rent due in its charge to the jury.

3. The fact that the cotton seized by virtue of the distress warrant was replevied by appellant did not discharge it of the landlord's lien. The facts constituting such a lien having been alleged and proved, the court did not err in decreeing its foreclosure. *McEvoy v. Niece* (Tex. Civ. App.) 50 S. W. 424.

4. The court did not err in refusing to grant appellant a new trial upon the ground of newly-discovered evidence. It appears from the affidavit of the parties attached to the application for a new trial, by whom it is claimed that the evidence newly discovered could be shown, that such evidence was or should have been known by appellant when the case was tried, and no diligence whatever is shown which can excuse him for not having the testimony of the witnesses when the case was tried. Besides, such evidence would be cumulative only.

The judgment of the county court is affirmed.

BOYD v. MONTGOMERY.¹

(Court of Civil Appeals of Texas. Nov. 16, 1901.)

SCHOOL LANDS—ELIGIBILITY TO PURCHASE.

Under Rev. St. art. 4218f, providing that no school land shall be sold except to an actual settler thereon, or to a bona fide purchaser of other school lands as additional thereto, one who marries the widow of a purchaser of school land, and thereafter resides thereon with her, is not thereby made eligible to purchase additional school lands.

Appeal from district court, Nolan county; W. R. Smith, Judge.

Action by J. C. Montgomery against W. H. Boyd. From a judgment for plaintiff, defendant appeals. Affirmed.

Beall & Beall, for appellant. A. H. Kirby, Claud McCauley, and Theodore Mack, for appellee.

CONNER, C. J. This suit was instituted by appellee for the recovery of the E. $\frac{1}{4}$ of section 62, block 21, state school lands, in Nolan county. The facts show that appellee was the owner of and an actual settler upon the S. E. $\frac{1}{4}$ of section 55, block 20, within a radius of five miles of the land in controversy, and that as such, on June 25, 1900, he made application, obligation, and first payment in due form to purchase said east half section as additional land to his home section, as provided in our statutes on the subject. This application was rejected by the commissioner of the general land office on the ground that the land had theretofore been awarded to appellant, and hence this suit.

Appellant's title, as appears from the evidence excluded, and to the exclusion of which error is assigned, was by virtue of an application, obligation, and payment made by him in May, 1886, followed by an award of the commissioner. The award of the land in controversy to appellant was as additional to the S. W. $\frac{1}{4}$ of said section 62, upon which he resided at the time, and the proceedings were in all respects regular, and conferred the superior right herein, unless the facts upon which depend appellant's right to said S. W. $\frac{1}{4}$ of section 62 have the effect to defeat him. These facts are that in 1885, or prior thereto, one E. Coffee became the purchaser and owner in fee simple of said S. W. $\frac{1}{4}$ of section 62, and resided thereon with his wife and several children as his home. E. Coffee died, and about the year 1886 appellant married his widow. Appellant and the widow of E. Coffee, since their marriage, together with the children of said Coffee and subsequent children of their own, continuously resided upon, cultivated, and used said southwest quarter as their home. The substantial question presented by the assignments of error on this appeal, which is from a judgment against him, is whether such facts constitute appellant an eligible purchaser of the land in controversy.

"Except where otherwise provided by law," no sale of state school land to one not an "actual settler" thereon is authorized. Rev. St. art. 4218f. The same article, however, provides that "any bona fide purchaser who has heretofore purchased, or who may hereafter purchase any lands as provided herein, shall have the right to purchase other lands in addition thereto." It is the aid of the latter provision alone that is invoked in behalf of appellant herein, for it is conceded that he is not, nor has he ever been, an "actual settler" on the land in controversy, though since the award to him he has placed thereon improvements and cultivated and used in connection with his home some 35 acres thereof. It seems quite plain to us that the question presented must be determined adversely to appellant's contention. The unmistakable purpose of all of our laws on the subject has been to limit the sale of state school lands. No authority is conferred upon the commissioner of the general land office to sell to persons generally, or to accept the application to purchase of any person not within the classes specified in the law. So far as is pertinent to the present controversy, that statute has defined but two classes,—those who are actual settlers upon land the purchase of which is desired, and those who may theretofore have purchased and become actual settlers upon adjacent school lands. The classes seem quite distinct and easy of ascertainment. Appellant plainly does not fall within either class. To entitle him to additional land, he must not only be a resident—an actual settler—upon school land within the prescribed ra-

¹ Rehearing denied January 18, 1902, and writ of error denied by supreme court.

dus, but he must also have been a purchaser thereof. Appellant never purchased or became the owner of the S. W. $\frac{1}{4}$ of section 62, upon which he resides, within the meaning of the statute quoted. Full title thereto became vested in E. Coffee before his death. Appellant's right therein was but possessory,—the right to occupy, use, and cultivate it as a homestead. The statute authorizes the lease of school lands in certain instances and for certain fixed periods, whereby persons may acquire possessory right thereto; but such possessory right alone has never been held to confer upon the lessee the right to purchase school land additional thereto. We cannot see that appellant's right in his home quarter is on any higher plane. The mode of its acquisition is, indeed, different, and its duration and value may be greater; but his status or class is nevertheless that of a mere possessor, and not that of a purchaser. There was no error, therefore, in excluding appellant's application.

Appellant presented no issue of improvements in good faith, and there is evidence supporting the court's finding that appellee's purchase was without the collusion charged, and we therefore adopt the trial court's findings of fact, and affirm the judgment.

STRATTON v. WEST et al.¹

(Court of Civil Appeals of Texas. Dec. 18, 1901.)

PARTITION DEED—WATER RIGHTS.

The respective grantors of plaintiff and defendant, owning a tract of land as tenants in common, divided it into lots, and partitioned it by deed. A creek ran through the land, and a dam and system of irrigating ditches had been constructed, conveying the water to tanks for watering cattle on lots which were allotted to defendant's grantor, and for irrigating purposes to the lot received by plaintiff's grantor. The partition deed provided that "all water rights and rights to use said ditches are expressly understood to remain," and "forever shall inure to the owners of the land abutting" on the creek. Plaintiff's deed gave him the same rights as his grantor had under such partition deed. *Held*, that defendant had the right to maintain the ditches and tanks and use the water for watering stock on his lands as such ditches and tanks existed and water was used when such partition was made.

Appeal from district court, Kinney county; J. M. Goggin, Judge.

Action by R. Stratton against West & Bennett. From a judgment granting only a portion of the relief sought, plaintiff appeals. Affirmed.

The amended original petition of appellant alleged that he owned and used as a hay farm, orchard, etc., a tract of 316 acres of land in the Dolores Soto de Beales 11-league grant, in Kinney county, and near its southwest boundary line, and owned also a dam and irrigation ditch and system beginning with the dam in Las Moras creek, about

the middle of the grant, and running on the east side of the creek down to and over plaintiff's farm, the same being a well constructed, defined, and maintained ditch, capable of carrying, and which does at all times when not molested carry, a large quantity of water from said dam to the farm, which is used to irrigate it for the purposes aforesaid; that said district is arid, and fruit raising and hay growing and farming generally are practically impossible without irrigation; that plaintiff's farm has been irrigated and cultivated by means of said dam and ditch from time immemorial; that on June 8, 1892, the said Dolores Land & Cattle Company owned said grant and cultivated said farm with said ditch, and at said time said company partitioned said grant, R. F. Alexander receiving the said farm, together with said dam and ditch and irrigation system, as appurtenant thereto and as a part thereof; that the land above said farm on the creek, and through which said ditch ran, went to other parties; that Alexander at once went into possession and use of the farm, ditch, and dam, and so continued without hindrance until August 3, 1893, when he sold and conveyed the farm to plaintiff, together with the dam and ditch, as appurtenant thereto and as part thereof, and that from that time down to February 10, 1901, plaintiff has continuously possessed and used the farm, ditch, and dam to the exclusion of every one else; that on the last-named date defendants entered upon and took possession of plaintiff's ditch, and excluded plaintiff therefrom, and cut said ditch at a point just above his farm, and again at a point about two miles above said farm, and at both places diverted the water to the total exclusion of plaintiff, and continued to do so until the temporary injunction was granted plaintiff herein to his great and irreparable damage (special damages being alleged); that plaintiff and his grantors have had peaceable and adverse possession of the dam, ditch, and system, using and enjoying the same, for more than 10 years. The prayer was for perpetuation of the injunction, for the damages, and general relief. The judgment recites that after hearing the evidence the court was of opinion that defendants have the right to divert a reasonable amount of water from the ditch for the purpose of irrigating their tillable land abutting the ditch, and conveying water to the tank situated upon certain land conveyed to defendants by Pratt & Hays, but they have no right to divert the water from said ditch at a point above the Stratton farm, and conveying the same to ground tanks or ditches upon the land conveyed by Alexander to defendants, or to convey water from said main ditch upon lands to the south and east of plaintiff's land, and decreed accordingly, amending the injunction. The material facts are as follows: Prior to June 30, 1892, the 11-league grant was owned by the Dolores Land & Cattle

¹ Rehearing denied January 22, 1902, and writ of error denied by supreme court.

Company and R. F. Alexander as tenants in common. On that date they had a partition by deed, by which Alexander got those subdivisions on the map attached hereto, marked "A," and the company got those marked "Dol." The trial court found as a fact that for many years prior to said partition, and at that time, the Las Moras creek had been diverted into a system of irrigation ditches on its east side, and running nearly parallel with the creek, through subdivisions 10, 9, and 8, and its waters had been used for the purpose of irrigating such land as was subject to irrigation from the ditches, and also for the purpose of watering the stock running in the pastures inclosed in said subdivisions, and that the main ditch divided upon subdivision 9, just north of the Stratton farm, —one branch running down and across said farm, and the other bearing to the southeast, connecting with an artificial tank for the purpose of filling such tank in subdivision 9. The court also found that prior to 1892 two ditches other than the above one now in use had been constructed and used for the purpose of irrigating the land now belonging to defendants, lying between the ditch now in use and the Las Moras creek, but that in 1892, when the partition deed was made, and for about eight years prior thereto, neither of said two ditches had been used; that at many places the ditch now in use is of easy access for cattle to water, but that defendants maintain a wire fence parallel with, and about 300 varas east of, it, extending from the railroad right of way south, which prevents cattle from reaching the ditch or the creek, which fence was constructed before the partition, and has so remained ever since; that prior to the partition the Dolores Land & Cattle Company had fenced that portion of its land north and east of the Stratton land, thereby cutting off that portion of the land used for pasture purposes, with the tanks thereon, from the farm afterwards acquired by Stratton, with the branch of the ditch leading thereto; that there had been no changes in the fences since; that, for the purpose of watering stock on said pasture lands (that is, on the lands acquired by Alexander, as well as those partitioned to the Dolores Land & Cattle Company), both the owners of said pasture lands had conducted water through the ditches running to said tanks, in order that the cattle running therein might have water. The partition deed has the following provision relative to water rights: "All water rights and rights to use said ditches are expressly understood to remain appurtenant to the lands fronting on the said Las Moras creek or said ditches, and forever shall inure to the owners of the land abutting thereon, without diminution, except that arising from the reasonable use of the water by owners above; and these rights shall extend to and include the right of any owner to clean, keep open, and repair said ditches on any lands above him, her, or it included

within the Dolores grant." Alexander in August, 1893, sold the tract of 316 acres marked "Stratton" on the plat to appellant by a deed which contains the following clause: "And it is understood and agreed that this conveyance guarantees to the said R. Stratton the same rights to the water and ditches on the Dolores grant that were secured to me in the deed of partition. * * * And it is also understood that the said R. F. Alexander reserves the right to the ditches, and to convey water across the land hereby conveyed to other lands below, if so desired." Alexander in March, 1896, conveyed to defendants West & Bennett the balance of the lands he acquired in the partition; and in December, 1899, they by purchase became the owners of all the subdivision 9; also held by lease all other lands owned by the Dolores Land & Cattle Company on the east side of the creek. The court found also that another artificial tank on subdivision 8, southeast of the Stratton farm, had been enlarged by defendants since they bought the land, and that by running the waters of the creek through said ditches as originally constructed and used they were filling the first tank on No. 9, and thence conducting the water through ditches as originally constructed over subdivisions 9 and 8 into said second tank. As the decree perpetuates the injunction as to this second tank for other reasons, and as there are no cross assignments, we need notice it no further in this opinion. Appellant's brief is founded in part upon what he claims are mistakes in the court's findings of fact. Before proceeding to the law of the case, these matters of fact should be settled. It appears to be claimed that there is no testimony upon which to base the fact that the lateral ditch going from the main ditch in question to the tanks was in use before and at the time of the partition for the purpose of supplying water for stock in the pasture. The testimony of Hodges, Alexander, and Terasas indicates that such was the fact. There is testimony that the owners long prior to the partition and at that time had the pasture fence so adjusted as to keep stock from the ditch and creek, and, to supply water to the pasture, used this lateral. It is not for us to substitute our views of the evidence resolved by the trial judge, where there is testimony in favor of his finding. There is also testimony that the ditch in question had been to some extent used, and was being used, to irrigate tillable lands above the Stratton farm. And at that time, and for a long time previous, all ditches leading from the creek had ceased to be used, except the one in question. Under these circumstances the partition deed was made. It stipulated that each and all of the subdivisions to be allotted shall front on the Las Moras creek, and run to back lines of the grant, to give the back lands access to the creek; and following this provision is the clause defining future water rights. The evidence is that

the lands apportioned above the Stratton farm are only in small part capable of irrigation, and that the rest of the lands were adapted only to grazing and stock raising.

Joseph Jones and J. S. Morin, for appellant. Floyd McGown and O. C. Clamp, for appellees.

JAMES, C. J. (after stating the facts). 1. The provisions of the partition contemplated that the back lands should have access to water, and this could have been with a view to watering stock only. Of course, as appellant contends, the fences could possibly have been, and can now be, so adjusted that stock could water at the ditch or creek, and it was and is not absolutely necessary for the owner of the back lands to conduct water to tanks in pastures for that purpose. The conditions, however, which existed at the time and before, are entitled to weight in arriving at what was intended and contemplated by Alexander and the Dolores Land & Cattle Company when they stipulated with reference to their future water rights. It cannot be denied that, being the owners, they could agree as they chose in reference to this. Appellant insists that this water clause has reference only to ditches taken directly out of the creek below the main ditch in question, and above Stratton's tract, and, as to this main ditch, it was constructed and intended exclusively to conduct water to appellant's farm, and he is entitled to have it unmolested by any one throughout its entire length,—the only limitation upon such right being the right of the upper owners to take water from the creek by ditches below where appellant's ditch leaves the creek, and above his farm; that, with this limitation, after the water passes into the ditch in question it becomes a part and parcel of his farm, just as if it was taken out of the creek at his farm. This contention we cannot sustain without doing violence to the very terms of the clause. It includes all ditches, and we cannot exclude from its operation the only ditch leading from the creek in actual existence and use at that time. We therefore conclude that, as far as appellees' right to the use of the waters of the ditch for purposes of irrigating lands abutting on the ditch is concerned, the judgment must be approved.

2. The next question is in reference to the judgment allowing appellees water from this ditch to fill the tank. This, in view of the facts as determined by the trial judge, we must also sustain. The water clause under consideration is broad, and does not limit the use to irrigation. The owners made this contract in view of conditions then existing. The pasture inclosing the back lands was then, and had for a long time been, fenced off from the water, and supplied with water by means of the lateral ditch. Convenience doubtless had dictated these conditions, and the future use of the water in this manner

was not excluded by the partition agreement, as naturally would have been the case, with these conditions before the parties, if they had not intended them to continue as they were. Evidently, and as the court appears to have found, the fences were constructed to separate the pasture land from the irrigable land, including the land afterwards acquired by Stratton. In the partition, subdivision 9, upon which was the first tank, was allotted to the Dolores Land & Cattle Company, and No. 8, with the second tank, to Alexander; both being then in a pasture segregated from the ditch by a fence, and this lateral furnishing water, or adapted to furnish water, to both tanks,—the pasture containing no other water. It can hardly be presumed that they contemplated depriving their lands of this water supply, in view of these circumstances, without some expression to that effect. On the contrary, they must be taken to have meant by "ditches" the only ditches then in use (the others having long before been discontinued),—the main and this lateral ditch. The judgment is affirmed.

SAN ANTONIO & A. P. RY. CO. v. CONNELL.¹

(Court of Civil Appeals of Texas. Dec. 16, 1901.)

INJURY TO EMPLOYE—FAILURE TO OBEY RULES.

1. Where, in an action against a railroad company for injury to an employé, it is claimed that plaintiff failed to comply with certain rules of the company, it is not error to permit the jury to find whether a violation of such rules was negligence, and to refuse to charge that a failure to obey the rules was negligence per se.

2. Where in an action for personal injuries the court is of the opinion that the amount of the verdict returned is excessive, it may require a remittitur of so much as exceeds reasonable compensation for the injury.

3. Where a railroad engineer, 41 years of age, earning from \$135 to \$150 a month, was so injured that one of his legs is, and perhaps will remain, practically useless, a greater amount than \$16,000 for such injury is excessive.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Sam Connell against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiff, defendant appeals. Modified.

Houston Bros. and R. J. Boyle, for appellant. Carter & Lewis, for appellee.

FILEY, J. Appellee instituted this suit to recover damages accruing by the negligence of appellant in failing to send a flagman from a certain train standing on the track at a water station at Buckner Creek, and warn appellee by signals, so as to prevent the collision between the engine on which appellee was engineer and the rear end of the stand-

¹ Rehearing denied January 22, 1902, and writ of error denied by supreme court.

ing train. The trial resulted in a verdict for \$22,000, of which \$4,000, in obedience to a requirement of the court, was remitted by appellee, and judgment was accordingly entered for \$18,000. We conclude that the jury was justified by the facts in finding that the injury occurred through the negligence of appellant's employees, in not properly warning the approaching train on which appellee was engineer that another train was standing on the track, and that appellee was not guilty of contributory negligence. The facts are more fully set forth in connection with the consideration of assignments of error questioning their sufficiency.

The first, second, and third assignments complain of the charge of the court because it permitted the jury to find whether a violation of rules was negligence; the contention being that the court should have instructed the jury that a failure to obey rules promulgated by the railroad company was negligence per se. The instructions complained of are as follows: "(2) You are further charged that if you find from the testimony that the train which was standing at Buckner Creek sent out a flagman, and that such flagman signaled the train on which plaintiff was engineer in time for the plaintiff to have stopped the train on which he was engineer and prevented the collision, and that the plaintiff failed to discover such signal, if any, or failed to obey it if he did discover it, and that such failure on the plaintiff's part was negligence, then the plaintiff cannot recover. (3) You are further charged that if you find from the testimony that it was plaintiff's duty to approach the standpipe at Buckner Creek with his train under full control, and you further find that he failed to have his said train under full control in approaching said Buckner Creek, and that such failure was negligence, and that such negligence contributed to the collision, then the plaintiff cannot recover, and you must so find. (3½) You are further charged that if you find from the testimony that defendant company had at the time and prior to the departure of plaintiff from Yoakum a notice posted in the bulletin book in its office at Yoakum, or on the clip in the yard of said company at said place, directing all engineers to protect their trains at the Buckner Creek water tank or standpipe, and you further find that it was plaintiff's duty to examine said bulletin book and clip, before leaving with his train, and you further find that plaintiff failed to observe said notice so posted, if you find it was so posted, and that such failure, if any, was negligence, and that such negligence, if any, either caused or contributed to his injury, then plaintiff cannot recover, and you must so find. The burden of proof is upon plaintiff to establish his case by a preponderance of the testimony." None of the cases cited by appellant sustains its contention, and we have not seen any case in which it was held that a court would be jus-

tified in telling a jury that the infraction of a rule formulated by the master was negligence per se in the servant; and, on the other hand, the converse of the proposition has been time and again held by the courts of Texas. In the leading case of *Railway Co. v. Murphy*, 46 Tex. 357, 28 Am. Rep. 272, it is held that except in cases where the entire facts show negligence, or where a statute declares certain acts negligence, it is error for a court to instruct a jury that a given state of facts constitute negligence. While not giving unqualified approval to all that was said in the *Murphy* opinion, it was said in *Railway Co. v. Hill*, 71 Tex. 451, 9 S. W. 351: "We have been cited to no case where it had been held competent for the court to charge upon any combination of facts as constituting negligence, save when so declared by law." In the case of *Railway Co. v. Gasscamp*, 69 Tex. 545, 7 S. W. 227, it was said: "According to the rule in this court, in order that an act shall be deemed negligent per se, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence that we can say, without hesitation or doubt, that no careful person would have committed it." This has been reiterated in many cases. *Railway Co. v. Lee*, 70 Tex. 496, 7 S. W. 857; *Campbell v. Trimble*, 75 Tex. 270, 12 S. W. 863; *Railway Co. v. Anderson*, 76 Tex. 244, 13 S. W. 196; *Calhoun v. Railway Co.*, 84 Tex. 226, 19 S. W. 841; *Gartelser v. Railway Co.*, 2 Tex. Civ. App. 230, 21 S. W. 631; *Railway Co. v. Long*, 4 Tex. Civ. App. 497, 23 S. W. 499. Speaking of the identical proposition contended for in this case, it was said in *Railway Co. v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. 137: "This would have been in contravention of the rule forbidding the trial court to say, in the absence of statutory declaration, that any particular act or omission constitutes negligence." In the case of *Railroad Co. v. Sweeney*, 36 S. W. 800, this court said: "It is also contended that the charge should not have left to the jury whether or not the violation of the rules by the engineer was negligence, and, practically, that the court should have instructed the jury that such an act was in itself negligence. * * * We cannot give a rule the force of a statute in this respect. It would place it within the power of a master to make that negligence, which may not be negligence at all, by means of rules." In the case of *Railroad Co. v. Adams*, 58 S. W. 831, the supreme court of Texas said: "The plaintiff in error presents in different forms the proposition that a servant who, in discharging his duties, disobeys the regulations of his master, is guilty of negligence per se, and if injured, and the act which violates such rules contributes to the injury, no recovery can be had. This rule would give to regulations of the master the force of statutory enactments. We do not understand the law to be consistent with that contention."

A violation of a rule of the master by the servant is a circumstance which, taken in connection with the other circumstances of the case, might, when the facts taken together lead irresistibly to the conclusion that the servant had been injured through his own negligence, justify a court in taking the case from a jury; but the violation of a rule does not justify a court in instructing a jury that such violation is negligence per se. The rules of railway companies have never been put upon a parity with the laws of the state, and no court has ever so declared. We do not understand that such a proposition is countenanced in *Railway Co. v. Gormley*, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894, nor in *Railroad Co. v. Brown* (Tex. Sup.) 63 S. W. 305. We have discussed this question at length, not because it is an open one, but for the reason that it is so earnestly insisted in the brief of appellant that the court should have declared the infraction of a rule by the employé negligence in itself.

The facts disclosed that on the morning of April 22, 1900, about 5:45 o'clock, a freight train, upon which appellee was engineer, ran into the rear end of another freight train standing on the track at a place known as "Buckner Creek Standpipe," and appellee, in jumping from the engine to save himself, had his leg broken below the knee, and the knee so injured that it is permanently stiff. The trainmen on the train in front failed to have a flagman out in the proper place to warn approaching trains that the train was standing on the track. Appellee swore that he had no notice that he had to run slow at Buckner Creek Standpipe, not having seen any bulletin to that effect. The standpipe at Buckner Creek was a temporary one. Appellant introduced in evidence a rule to the effect that "regular freight trains and extra trains of all kinds must carefully approach and pass with train under full control water tanks and stations protected by yard-limit boards. The responsibility for accidents at such points will rest with the following freight or extra trains." This rule was shown to contemplate regular and permanent water tanks, and not those temporarily established; but those are provided for by bulletins which appellee looked for in the customary place, and did not find.

The findings of fact dispose of the fourth assignment of error.

The court had the authority to require the remittitur of \$4,000. *Railroad Co. v. Johnson* (Tex. Civ. App.) 58 S. W. 624.

The facts established that one of the legs of appellant was injured so that it is, and perhaps will remain, practically useless, and he is doubtless in no better condition than if his leg had been amputated just above the knee. It may therefore be classed with those cases in which the injured person has lost a leg, and an investigation of such cases fails to disclose one in which a verdict for an amount as large as this has been sustained.

In the Case of *Cooper*, 2 Tex. Civ. App. 43, 20 S. W. 990, the plaintiff lost a leg below the knee, and the verdict was for \$15,000. He was 46 years old, and was earning from \$1,500 to \$2,000 yearly. In the *Hynes Case* (Tex. Civ. App.) 50 S. W. 624, the verdict was for \$18,000, and it was sustained by this court. He lost a leg below the knee, and the remaining foot was permanently damaged. In the case of *Railroad Co. v. Bernard* (Tex. Civ. App.) 57 S. W. 686, plaintiff had lost a leg above the knee, and a remittitur was required, reducing the judgment to \$16,000. Bernard was 24 years old, and was earning on an average about \$90 a month. Appellee was 41 years old when injured, and was earning from \$135 to \$150 a month. The physical suffering seems to have been about the same. In the light of precedents, this court concludes that \$16,000 will compensate appellee for his injuries, and, if a remittitur of \$2,000 is entered in 10 days, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded.

MORRIS et ux. v. WELLS.¹

(Court of Civil Appeals of Texas. Nov. 9, 1901.)

PAROL GIFT OF LAND — HOMESTEAD — BONA FIDE PURCHASER — IMPROVEMENTS — RECOVERY OF VALUE.

1. Where a husband makes a parol gift of land which is a part of a homestead, and the donee takes possession, the transaction is void for lack of compliance with the statutory requirements as to a conveyance of the homestead.

2. Where a parol gift of land constituting part of a homestead is void, a purchaser from the donee in possession, who places improvements on the land in good faith, is entitled on a recovery of the land by the donor to a personal judgment against him for the value of the improvements.

3. Limitations would not run against the claim for improvements until after the gift had been disavowed by the donor.

4. Rev. St. art. 5278, declares that where in trespass to try title it appears that defendant has made valuable improvements, and been a possessor in good faith, the court or jury shall estimate the value of the use and occupation while defendant was in possession, exclusive of the improvements thereon made by him. *Held*, that where it appeared that defendant had made improvements in good faith, but the same could not be charged against the land because it was a homestead, such condition was no reason for imposing on defendant liability for rent, the land having had no actual rental value without the improvement.

Appeal from district court, Fannin county; Ben. H. Denton, Judge.

Action by Wash Morris and wife against G. W. Wells. From the judgment, plaintiffs appeal. Affirmed.

E. C. Armstrong and Gross & Gross, for appellants. Richard B. Semple, for appellee.

¹ Rehearing denied February 6, 1902, and writ of error denied by supreme court January 8, 1902.

TEMPLETON, J. Wash Morris owned a lot in Honey Grove, on which he resided with his family. His son, Nevison Morris, married in 1890, and he made a parol gift to his said son of an unimproved portion of the lot. Nevison Morris at once improved the property and went into possession. In 1896 he sold the same by warranty deed to Wells, and in 1898 surrendered possession to Wells. The evidence is sufficient to justify the conclusion that Nevison Morris claimed and treated the property as his own, and that Wash Morris knew that fact and assented thereto. Wells paid a valuable consideration, believing at the time he bought that he was getting a good title. His belief was based on the facts that his vendor was in peaceable possession, and had been for years, and that he knew of no adverse claim. Inquiry on his part would have developed the fact that Nevison Morris was claiming under a parol gift, but would not have disclosed that Wash Morris was denying the gift or asserting its invalidity. In 1899, Wash Morris sued Wells in trespass to try title, and for rents. Wells replied, setting up the facts above stated, and asking judgment for the value of the improvements which had been placed on the lot, in the event of the recovery of the land by the plaintiff. Wash Morris' wife made herself a party plaintiff, and joined in a supplemental petition, wherein the homestead character of the property was pleaded in avoidance of the gift. A plea of limitations was interposed to the claim for improvements. On a trial without a jury, judgment was rendered in favor of the plaintiffs for the land, but their claim for rents was disallowed, as the land, without the improvements, had no rental value. Judgment was rendered in favor of Wells against Wash Morris alone for the value of the improvements, but no charge on account thereof was fixed on the land. Morris and wife alone have appealed.

The gift was void because the subject thereof was homestead, and the plaintiffs were entitled to recover the lot in controversy. Wash Morris was, however, liable to Wells for the value of the improvements, if the same were made in good faith. The evidence is such as to justify the finding that Nevison Morris and Wells acted in good faith and had sufficient reason for believing that they had title to the lot. A parol gift of land, when the donee takes possession and makes valuable improvements, is sometimes sufficient to vest title. *Hendricks v. Snediker*, 30 Tex. 296. It seems that in this case the title failed only because the land was homestead and the transaction was not a compliance with the statutory provisions relating to a conveyance of such property. The claim of Nevison Morris and Wells was necessarily adverse to that of Wash Morris. Wells, being the holder of the rights of Nevison Morris, who was an improver in good faith, was entitled to personal judgment

against Wash Morris for the value of the improvements. *Eberling v. Deutscher Verein*, 72 Tex. 341, 12 S. W. 205; *Railway Co. v. Greiner*, 84 Tex. 450, 19 S. W. 564. Limitations would not run against the claim for improvements, at least until after the gift had been disavowed by the donor, which appears to have first occurred within two years before the claim was asserted in court. The trial court correctly applied the rule prescribed by article 5278, Rev. St., to the action for recovery of rents. But for the fact that no charge on account of the improvements could be fixed on the homestead, the judgment in favor of Wells for improvements would have been entered in exact accordance with the statute, and because he was deprived of his complete remedy in that respect is no reason for imposing on him an obligation to pay rents for which he was not liable under the statute.

The judgment is affirmed.

NATIONAL EXCH. BANK OF DALLAS v. FOLEY et al.¹

(Court of Civil Appeals of Texas. Dec. 19, 1901.)

JURISDICTION—SALE OF CLAIM—COLLUSION.

F., having a claim against defendant, who resided in another county, and knowing that suit would have to be brought thereon, guaranteed the claim and sold it to plaintiff for the purpose of being made a party defendant to the suit thereon, whereby jurisdiction was obtained in the county where F. lived. Plaintiff knew nothing of such purpose, paid value for the claim, had no secret agreement as to the return of the money, and bought the claim because F. guaranteed it. *Held*, that there was no collusion depriving the court of the district where F. lived of jurisdiction.

Appeal from district court, Harris county; C. E. Ashe, Judge.

Action by W. L. Foley and others against the National Exchange Bank of Dallas and others. From a judgment in favor of plaintiffs, defendant bank appeals. Affirmed.

Perryman & Kottwitz and Coleman & Abbott, for appellant. Hutcheson, Campbell & Hutcheson, for appellees.

GARRETT, C. J. The appellee W. L. Foley brought this action of debt in the district court of Harris county, in the Eleventh judicial district, against the appellant, the National Exchange Bank of Dallas, and John Finnigan, of Harris county, and R. E. Payne, of New York, composing the firm of John Finnigan & Co., doing business in the city of Houston, Harris county. The facts upon which the alleged indebtedness arose, as stated in the petition and shown by the evidence, were that one H. T. Brady, who managed the business of John Finnigan & Co. in the city of Dallas, April 5, 1899, drew a check for the sum of \$2,000 against the de-

¹ Rehearing denied.

posit account of said Finnigan & Co. with the said National Exchange Bank in payment of his own debt to said bank, which the bank charged to said account, and applied so much thereof to payment of said Brady's debt. On or about October 26, 1900, John Finnigan, having made out a claim for said sum of money, with interest, against the bank, discounted and sold the same to the appellee, with their guaranty of payment of said claim, as well as of attorney's fees and all costs. It was alleged and proved that the claim had been placed in the hands of attorneys for collection, at an expense of \$200. John Finnigan & Co. sold the claim to the appellee for the purpose of procuring the venue in Harris county of a suit which he knew must be brought thereon, but the appellee bought the claim for value paid, in good faith, as an investment without knowledge of the purpose on the part of John Finnigan & Co. The bank pleaded to the venue that the claim was collusively transferred to the appellee by John Finnigan & Co. for the fraudulent purpose of depriving it of the right to be sued in the county of its domicile, and to confer jurisdiction upon the district court of Harris county. Upon trial of this issue, the good faith of the appellee appearing, the court below overruled the plea. Other defenses were made, and evidence heard thereon, but it is not deemed necessary to a disposition of the case to make any statement thereof, or to find further facts.

The appellant's third assignment of error is the only one that is at all in conformity with the rules, and the remaining ones will not be considered, because they are too general. The third assignment is that the court erred in its finding upon the plea of privilege, because it was unsupported by the evidence, and was in direct conflict with the evidence, from which it appeared that appellee had entered into a simulated transaction with Finnigan & Co. for the purpose only of conferring jurisdiction on the district court of Harris county. The proposition under this assignment will not be disputed. It is that "a plaintiff cannot, by collusion, and for the sole purpose of suing a defendant in a county other than his residence, join others as defendants, and, by assignment of the debt to a third person, collusively, and with no other purpose than to gain jurisdiction over the defendant, procure such jurisdiction in a county other than his place of residence." No collusion was shown, because the appellee did not participate in the purpose of Finnigan & Co., but, as an investment, purchased and paid for the claim at a reasonable discount, without knowledge of such purpose. Payne testified that it would have cost him \$500 or \$600 to bring the suit in Dallas county, and upon the advice of his attorney he sold the claim to appellee at a discount of \$100 and guaranteed it; that he said nothing to the appellee about the status

of the claim, and that appellee asked him no questions; that there was no secret understanding about the return of the money; and that the transaction was genuine. Foley testified that it did not occur to him that it is a peculiar transaction. He is not a broker. He is in the dry goods business, and does not make it a rule to buy accounts. Finnigan & Co. said nothing to him about suing when he bought the account, and he did not know when he bought it that there would be a lawsuit. He expected it would be paid on presentation, and bought it because Finnigan & Co. guaranteed it. He knew them to be a solvent concern, and knew Mr. Payne's business integrity, and there was no agreement outside of the paper. We are of the opinion that the finding of the trial court was supported by the evidence, and the appellee, having bought the claim in good faith, for value paid, had the right to join John Finnigan & Co. and the appellant as defendants in a suit against them on said claim in the district court of Harris county; the residence of Finnigan in said county giving jurisdiction over the other defendants.

The judgment will be affirmed. Affirmed.

RIO GRANDE & E. P. RY. CO. v. MENDOZA.

(Court of Civil Appeals of Texas. Dec. 23, 1901.)

APPEAL—INSUFFICIENT RECORD—FAILURE TO PERFECT—EFFECT.

Where the court of civil appeals continues a motion by an appellee to affirm on certificate, to enable the appellant to perfect the record, and he fails to take any steps to do so, but, instead, sues out a writ of error from the judgment below, he will be taken to have abandoned the appeal, and the motion to affirm will prevail.

Appeal from district court, El Paso county; J. M. Goggin, Judge.

Action by Julio Mendoza against the Rio Grande & El Paso Railway Company. Judgment for plaintiff, and defendant appeals. Motion by appellee to affirm on certificate. Granted.

Turney & Burges and J. W. Terry, for appellant. M. W. Stanton, for appellee.

On Motion to Affirm on Certificate.

JAMES, C. J. Cause No. 2,202 on this court's docket was one in which the record failed to show a final judgment, in that there did not appear to have been any judgment disposing of the Atchison, Topeka & Santa Fé Railway Company, and in which the supreme court held this court had no jurisdiction of the appeal for that reason. *Mendoza v. Railroad Co.*, 62 S. W. 418. After the rendition of that opinion the appellee, Mendoza, filed in this court a certificate asking affirmance, on May 30, 1901. Thereupon this

court, in view of the circumstances, and in view of the fact that the certificate showed a judgment dismissing the Atchison, Topeka & Santa Fé Railway Company, and to enable appellant to perfect the record on appeal in this particular, entered the following orders:

"A., T. & S. F. Ry. Co., Appellant, vs. Julio Mendoza, Appellee. (No. 2,202.) Appeal from El Paso County. In this cause it is ordered by the court that the judgment heretofore at this term rendered herein, reversing the judgment and remanding the cause, be set aside, and the opinion delivered herein be withdrawn, and the cause be reinstated on the trial docket of this court as before submission. And in view of what appears in a certificate for affirmance filed by appellee, it being reasonably apparent to that court that there was a final judgment of the district court in this cause, disposing of the Atchison, Topeka & Santa Fé Railway Company, which is not in the record as filed, the cause will be continued to afford appellant an opportunity to file a motion for certiorari to perfect the record if it sees fit to do so.

"Rio Grande & El Paso Ry. Co., Appellant, vs. Julio Mendoza, Appellee. Appeal from El Paso County. Motion to Affirm on Certificate. This motion is continued for the term."

And before adjournment the court entered this further order:

"It is ordered by the court that all motions and all causes not heretofore disposed of be, and they are hereby, continued until the next term of this court."

Appellant has not seen fit to avail itself of the benefits of said first order, and has taken no steps to perfect the record, and instead prosecutes a writ of error; the petition therefor having been filed in the district court June 12, 1901. Under these circumstances, the motion for affirmance, being in all things regular, should prevail, and the proceedings in appeal and in writ of error dismissed.

On Motion for Rehearing.

(Jan. 22, 1902.)

This is the identical case on appeal in which the supreme court delivered the opinion which ascertained that the record disclosed no final judgment, in that it showed no disposition of the Atchison, Topeka & Santa Fé Railway Company. 62 S. W. 418. Afterwards, on May 30, 1901, appellee filed in this court a certificate asking affirmance of the judgment. This certificate showed that the Atchison, Topeka & Santa Fé Railway Company had in fact been disposed of by an order, and that the judgment was in fact final. In our view of the law and of proper practice, and in view of the provisions of article 1017, Sayles' Ann. Civ. St., we did not at that time affirm on certificate, but continued the motion; and to enable the

appellant to complete the record on the appeal in said respect, which we perceived it could do if it so desired, the court at the close of its last term entered the following order:

"A., T. & S. F. Ry. Co., Appellant, vs. Julio Mendoza, Appellee. (No. 2,202.) Appeal from El Paso County. In this cause it is ordered by the court that the judgment heretofore at this term rendered herein, reversing the judgment and remanding the cause, be set aside, and the opinion delivered herein be withdrawn, and the cause be reinstated on the trial docket of this court as before submission. And in view of what appears in a certificate for affirmance filed by appellee, it being reasonably apparent to that court that there was a final judgment of the district court in this cause, disposing of the Atchison, Topeka & Santa Fé Railway Company, which is not in the record as filed, the cause will be continued to afford appellant an opportunity to file a motion for certiorari to perfect the record if it sees fit to do so."

To this day no further steps have been taken in reference to said appeal. After the opinion of the supreme court in the case was known, and after the motion to affirm on certificate had been filed here, and in fact at the time we made the above order, the Rio Grande & El Paso Railway Company had sued out a writ of error from the judgment; and when this court delivered the opinion filed on the motion for affirmance on certificate (on December 23, 1901) a record in the writ of error proceeding was also here. In this record the judgment dismissing the Atchison, Topeka & Santa Fé Railway Company was again omitted; and plaintiff in error filed a motion for certiorari to supply the omission, and attached thereto a certified copy of the order, and this was received and treated by the court as perfecting that record. There was never any question in our minds as to the propriety of granting the motion to affirm as against the writ of error. It was filed here before the petition for writ of error was filed in the district court. The only question that seemed to us to arise was the propriety of ignoring under these circumstances the record on the appeal. We certainly would not have dismissed the appeal on account of the want of a final judgment if that record had been perfected in this respect, which could readily have been done. But we have no right to coerce litigants to perfect records, nor to consider records as perfected which litigants do not care to perfect. It is certain that the record on appeal does not show a final judgment, any more than it did when it first came here; and we take it we could not have passed on such appeal except by the record appertaining to it. The writ of error came up for hearing in December, 1901. A motion to dismiss was filed because the record therein showed no final judgment; but, as already stated, this was supplied in that particular

record, and the case was submitted,—the court then having before it the record on appeal (insufficient), the motion to affirm, and the record on writ of error (complete). We have shown that the record on the writ of error had been perfected so as to show a final judgment, but not so the record on appeal. Unless we treated one record as a part of another, we had no alternative but to dismiss the appeal and affirm on certificate. The cases were separate and never consolidated, and we would seriously question the propriety of consolidating these cases so as to make one record supplement the other, unless by consent of parties. No motion was made to that effect. It appears to us, as a matter of fact, and we so conclude, that counsel refrained from completing the record in the appeal case, intending not further to rely on it. It was stated by plaintiff in error's counsel, who was also the counsel for appellant, in argument, that they had sued out and prosecuted the writ of error, as, from what is said in the opinion of the supreme court, they did not believe the record on appeal could be made available. This is also substantially so stated in this motion for rehearing. If we consider that counsel have wholly failed to take any steps whatever to perfect the record in the appeal case by adding thereto an order showing the judgment to be a final one, although permission and ample opportunity to do so were tendered them by the court, and that they preferred to proceed by writ of error because they doubted the practicability of obtaining relief through the appeal on the state of that record, even though it were perfected to show a final judgment in the case, they should, we think, be held to have abandoned the appeal.

The motion is overruled.

GILLASPIE v. MURRAY et al.¹

(Court of Civil Appeals of Texas. Jan. 7, 1902.)

LIMITATIONS—TAX DEED—COLOR OF TITLE—DEED OF TRUST—POWER OF SALE—REVOCA-TION—DEATH OF GRANTOR—EXECUTION OF POWER—GUARDIAN—POWER OF SUCCESSOR.

1. Tax deeds not void on their face are admissible in support of a plea of five years' limitation under a deed, without proof of the prerequisites necessary to authorize the sale of the land for taxes.

2. Where tax deeds are introduced to support a plea of limitations, it is not necessary to object to their introduction in evidence to limit their effect to the purpose for which they were introduced.

3. A tax deed is not a support for a plea of three years' limitation under color of title, without evidence that it was executed in completion of a sale regularly made for taxes duly levied and assessed.

4. A power to sell under a deed of trust is a power coupled with an interest, so as not to be revoked by death, and may be exercised after the expiration of four years, within which letters of administration may be taken out.

5. Where a trust deed to a certain person, guardian of certain minor heirs, empowered the trustee to sell, without any provision for a sale by his successor as guardian, such power did not pass to such successor.

6. Under Rev. St. art. 2302, evidence of one claiming under a sale of land by a trustee that the beneficiary, since deceased, requested the trustee to sell the land to pay the debt, is inadmissible, as relating to a transaction with a decedent.

Appeal from district court, Walker county; J. M. Smither, Judge.

Action by J. A. Murray and others against W. O. B. Gillaspie. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

J. K. P. Gillaspie, for appellant. Ball, Dean & Humphrey, for appellees.

GARRETT, C. J. This was an action of trespass to try title brought by the appellees against the appellant for the recovery of a tract of 196.7 acres of land, a part of the Harvey Gray and H. L. Hunter surveys, situated in Walker county. The appellees are the heirs of J. H. Murray and his wife, N. B. Murray. J. H. Murray is common source of title; the claim of appellant being derived through a sale under a deed of trust executed by Murray and his wife to secure a promissory note in favor of James M. Farris as guardian of the minor heirs of Susan Gillaspie, deceased. The appellant also claims title by limitation, under the statute of three and five years. The case was tried without a jury, and resulted in a judgment in favor of the appellees for the recovery of the land. The trial judge filed conclusions of fact, from which the following statement is made, as supported by the evidence introduced by the parties: On September 2, 1872, J. H. Murray and his wife, N. B. Murray, executed a promissory note for the sum of \$360, payable September 2, 1873, to J. M. Farris, guardian of the minor heirs of Susan Gillaspie, deceased, or his legal successors, and on the same date executed a deed of trust conveying the land in controversy to J. M. Farris as guardian of the minor heirs of Susan Gillaspie, deceased, or his legal successor, to secure the payment of said note; said deed of trust providing that in default of payment of said note the said J. M. Farris, guardian of the minor heirs of Susan Gillaspie, could sell said land to settle the same; making no provision for the appointment of a substitute trustee. J. H. Murray died in April, 1873, and his wife died in 1897. The appellees are their sole heirs. It was admitted that the title down to J. H. and N. B. Murray was good in them. W. O. B. Gillaspie, the appellant, became the legal successor of J. M. Farris as guardian of the minor heirs of Susan Gillaspie, deceased; and, the note being unpaid, he sold the land, as trustee under the deed of trust, on August 20, 1877, after due advertisement, and bid the same in at the sum of \$360 for the said minors, and executed a deed therefor to

¹ Rehearing denied.

himself as guardian for said minors. Appellant afterwards acquired the title of the minors. The appellant took possession of the premises January 23, 1878, which continued until the latter part of 1880, when it was interrupted for a year or so, and no continuous possession was ever had for a period of five years at any time. No such possession of the premises by appellant, either for himself or for said minor heirs, as would support title by limitation, was shown. Two tax deeds for the land in controversy were put in evidence, but the prerequisites necessary to authorize the sale of the land for taxes were not proved. The appellant paid all taxes on the land from the year 1878 up to the time of the trial.

The two deeds were admissible in evidence, without proof of the prerequisites to a sale of the land for taxes, in support of the plea of five years' limitation, and it was not necessary for the appellees to object to their introduction in order to have proper effect given to them as evidence. A tax deed not void on its face will support the plea of limitation of five years' possession under a deed. *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120. But in order to support the statute of limitation of three years by showing color of title, a tax deed, though admissible for the purpose, must be shown to have been executed in the completion of a sale regularly made for taxes duly levied and assessed. *Telfener v. Dillard*, 70 Tex. 146, 7 S. W. 847. Five years' possession was not shown, and, even if it should be conceded that a possession of three years was shown, the tax deeds were not supported by proof of a compliance with the prerequisites of the sales for taxes. The finding of the trial court that the possession of the land was not sufficient to support the plea of limitation is approved, as supported by the evidence.

More than four years having elapsed after the death of J. H. Murray without any administration having been taken out upon his estate, the power to sell under the deed of trust could be executed. *Rogers' Heirs v. Watson*, 81 Tex. 400, 17 S. W. 29; *Silverman v. Landrum* (Tex. Civ. App.) 47 S. W. 404. The power to sell given in a deed of trust is a power coupled with an interest, and is not revoked by the death of the constituent, but its exercise has been held to be inconsistent with the administration of the probate law of this state. *Robertson's Adm'r v. Paul*, 16 Tex. 472; *McLane v. Paschal*, 47 Tex. 365. After the expiration of the four years allowed for taking out letters of administration, the reason for denying the exercise of the power ceases. But by its terms the deed of trust made J. M. Farris, the guardian of the minor heirs of Susan Gillaspie, deceased, the trustee to sell. No provision was made for his successor as such guardian to exercise the power. If the legal guardian of the minors, whoever he might be, had been made trustee, then the power could have

been exercised by W. O. B. Gillaspie, who was then the legal guardian, or any person who should happen to be the legal guardian, as where the sheriff is empowered to sell. *Silverman v. Landrum*, supra. The conveyance of the land to J. M. Farris as guardian of the minor heirs of Susan Gillaspie, deceased, or his legal successor, does not confer the power to sell upon his legal successor. Farris alone is given the authority to sell, and the words "guardian," etc., following his name, can only be regarded as *descriptio personæ*. The office of trustee is one of personal confidence, and cannot be delegated. *Fuller v. O'Neill*, 69 Tex. 350, 6 S. W. 181, 5 Am. St. Rep. 59. The makers of the trust conferred the power of sale upon Farris alone, and may have done so from their personal confidence in him; and, although the land was conveyed as security for the debt to the guardian of the minors, the makers of the trust may have been unwilling to confer the power of sale upon any person who happened to be guardian. There was no evidence of the failure or refusal of Farris to execute the trust, or of the substitution of Gillaspie, even if there had been a provision in the deed of trust for a substitute trustee. W. O. B. Gillaspie was without power to sell the land, and his sale thereof was void. The minors acquired no title by the sale, and did not have the right of possession. No right of possession was given by the deed of trust, and appellant had no equities in the land that would require satisfaction by the appellees before they could recover possession thereof. They owned the land subject to the lien of the deed of trust, and were entitled to the possession thereof until the lien should be foreclosed. The attempt to foreclose was fruitless, and, the debt being barred by limitation which was set up against it, the appellant, in default of a trustee with power to sell, was without remedy.

On objection by the appellees, the court refused to receive and consider the evidence of the appellant to the effect that N. B. Murray wrote a letter to one E. J. Addickes in which she stated that she was unable to pay the debt, and for Addickes to tell Gillaspie to proceed under the deed of trust and sell the land and collect the debt, and that he sold the land in accordance with the request of Mrs. Murray, and the power conferred in the deed of trust on the legal successor of J. M. Farris. The appellant stated that the letter was shown to him, and that he recognized the signature to it as that of N. B. Murray, and that at the time he had no interest in the transaction. The objection to the consideration of this evidence was that the appellant, as a party to the suit, could not testify to any transaction with the deceased, N. B. Murray, and the testimony of the appellant related entirely to a transaction with her. It comes clearly within the statute making such evidence incompetent. Rev. St. art. 2302; *Parks v.*

Caudle, 58 Tex. 216; Stringfellow v. Montgomery, 57 Tex. 349. Being incompetent, we need not anticipate what would have been the effect of the evidence if admissible.

The judgment of the court below will be affirmed. Affirmed.

MUNDINE v. PAULS.

(Court of Civil Appeals of Texas. Jan. 22, 1902.)

FIXTURES—WHAT CONSTITUTES—VENDOR'S LIEN—REMOVAL OF FIXTURES—TRIAL—JUROR—EXCLUSION OF JUROR—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—APPEAL.

1. The exclusion of a juror, who is also a witness for plaintiff, and disqualified under Rev. St. art. 3141, before the jury is sworn and the substitution of an unobjectionable juror in his place, is not erroneous, though the defendant has exhausted all his challenges.

2. Where the defendant in an action to recover mill machinery claims that such machinery belongs to realty purchased by him at a sale thereof under a vendor's lien, it is error to allow plaintiff, for the purpose of showing that defendant would not be injured if required to return the machinery, to show that the real estate exclusive of the machinery was of greater value at the time of the foreclosure sale than at the time the lien was reserved, though the machinery was placed on the property thereafter.

3. An assignment of error containing more than one question, and not followed by propositions on each issue relied on, will not be considered on appeal.

4. Where an instrument in issue is in the form of a bill of sale, and there is no evidence to show that it is a mortgage, the court should instruct that it is a bill of sale, though a witness at a former trial designated the instrument by another name.

5. Where the question whether certain machinery removed from a mill is a fixture is a disputed question of fact, an instruction assuming that the machinery is a part of the realty is properly refused.

6. The purchaser of real estate at a sale foreclosing a vendor's lien, having knowledge of facts which would put a reasonable man on inquiry as to the ownership of certain machinery on the premises, and apparently a part thereof, is chargeable with full knowledge of the facts which he can obtain in reference to such ownership.

7. Machinery placed on lots by a vendee, which may be removed without injury to the realty, does not become a part thereof as to one having a mere lien on the land resulting from the purchase of vendor's lien notes.

8. A person to whom vendor's lien notes are transferred, but who does not receive a conveyance of the title of the vendor, does not occupy the position of the original vendor, but only acquires a lien on the land.

9. The intention with which machinery is attached to realty is to be considered in determining if such machinery becomes a part of the realty as between the owner and holder of a lien thereon, existing at the time the machinery is installed.

Appeal from Lee county court; I. H. Bowers, Judge.

Action by J. E. Pauls against F. M. Mundine to recover certain machinery. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This suit was brought by appellee, Pauls, against appellant, Mundine, to recover one 70-saw Chatham gin stand, feeder, and condenser, worth \$50; one 50-saw Colbert gin stand, feeder, and condenser, worth \$50; one grist mill, worth \$50; one Skinner & Wood plain engine, valued at \$70; and one 50 horse power Atlas boiler, with attachments, valued at \$150; and, if the property could not be had, then for its value. The petition alleged that the property was in the gin house formerly owned by Nathan Green, in Lexington, Lee county, Tex., and that the property was on January 1, 1901, unlawfully taken and converted by Mundine. Defendant set up that W. W. Mundine, the owner, on the 1st of January, 1897, conveyed lots 3, 4, 13, and 14, in block 17, of the town of Lexington, to Green, taking promissory notes of Green for part of the purchase price, retaining express vendor's lien to secure payment for the lots, expressed in the deed and notes; that F. M. Mundine, at the October term of the district court of Lee county, obtained judgment against Green on the notes, which he had obtained from W. W. Mundine, and foreclosure of the lien, and that F. M. Mundine purchased the premises at foreclosure sale the first Tuesday in January, 1901, under order of sale on the judgment, and the sheriff executed to him a deed therefor. It is alleged by Mundine that the property sued for were fixtures on the premises purchased by him, placed on the same by Green after his purchase of the premises long before the institution of the suit on the vendor's lien promissory notes. The answer shows how the property was attached to the realty, so as to become a part of the same. Defendant further set up that, if plaintiff held any "bill of sale" by Green to him of the property in suit, it was executed after the articles were attached to the land, and became a part of the same without Mundine's consent, and did not affect his right to the same. Plaintiff replied that he held a mortgage on the engine and boiler mentioned in his petition and the gin stand, the mortgage bearing date April 9, 1897, which was duly registered in Lee county, and filed by the county clerk of Lee county on the 24th of April, 1897; and Nathan Green, who had executed the mortgage, executed to plaintiff a bill of sale of all the property described in the petition; and that on the day of sale, under order of the court,—the 1st day of January, 1901,—and before sale, he gave notice that the machinery sued for was his property, and that Mundine purchased the same with notice of his (plaintiff's) right to the same. The trial by jury resulted in verdict and judgment for plaintiff for the property sued for, and, in case it could not be returned, for its value, found to be \$375; from which this appeal is taken by Mundine.

Rector & Watson, for appellant. J. L. Rousseau and Eason & Eason, for appellee.

COLLARD, J. (after stating the facts).
 1. After both parties had announced ready for trial, lists of the jurors for the week were drawn and furnished the attorneys for the parties, who struck from the lists peremptorily, leaving others, among whom was a juror (Ruthven) legally chosen. Other jurors were ordered summoned, and the sheriff was sworn, and directed to summon other jurors to fill the panel. The plaintiff's counsel informed the court that he wished to use the accepted juror, Ruthven, as a witness for plaintiff, though not summoned as a witness, and moved that he be excused from the jury. Defendant objected. The court overruled the objection, and retired the juror, defendant excepting. Defendant had exhausted all his challenges, and had to accept talesmen. No objection is urged against the jurors last accepted, and none was made to the court. No injury is shown as a result of the action of the court, and defendant has no ground of complaint. *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772. Ruthven was used as a witness for plaintiff as to exchange of boilers with Nath Green, Green to give some boot, and made a mortgage for the difference. This boiler exchanged to Green is now in litigation in this suit, it having been placed on the lots sold to Green by Mundine (W. W.). The court was not in error in excluding the witness from the jury before it was sworn to try the case, and as soon as he was informed that he was a witness in the case. Any witness in a case is disqualified for serving as a juror on its trial. Rev. St. art. 3141. When the court is informed of the disqualification before the jury is sworn to try the case, and other unobjectionable jurors can be had and are accepted, no injury is shown, and, consequently, no error.

2. On the trial the court permitted plaintiff's witness Green to testify, over objections of defendant, that the premises (the lots sold by W. W. Mundine to him—Green—on which a vendor's lien was retained to secure the purchase-money notes), including the gin house, engine room, and mill, would be of greater value than were the naked lots when Green purchased them, and would be worth more after the machinery placed thereon by Green had been removed. The objection of defendant to the question and answer was that, if the machinery had been so attached to the realty as to become a permanent accession to the freehold, it was immaterial, irrelevant, and incompetent to show the present value of the same without the machinery. Thereupon the attorney for plaintiff, in the presence of the jury, stated to the court that it was his purpose to show by the witness that Mundine, the defendant, would not be injured, because he would still have the property greater in value than the debt owed by Green for the purchase money. The court permitted the witness to testify that the premises, including the gin house, engine

room, and well (improvements made by Green after his purchase from Mundine), would be of greater value than were the naked lots when he purchased them, even after removing therefrom all the machinery sued for by plaintiff. Defendant excepted to the ruling of the court. The ruling is assigned as error, and we believe it was erroneous. It was prejudicial to defendant's rights under his purchase of the realty for the jury to be informed that the realty left after removing the machinery would still be worth more than the naked lots, on which defendant had a vendor's lien, which were foreclosed upon, and defendant purchased the property as improved. There was no such issue in the case, and hence the testimony was irrelevant. It may, and probably did, influence the jury in finding for plaintiff on questions submitted to them concerning the rights of the parties, and in concluding that, if their verdict should be in favor of plaintiff, defendant would not be injured in his original rights acquired by his vendor's lien notes. Whether the machinery sold by Green to pay Pauls was or was not, at the time of the mortgage to Pauls and the transfer to him, attached so as to become a part of the realty, was the main question in the case to be passed on by the jury; and it was improper to allow proof irrelevant to the issues before the jury, which was calculated to influence them to the prejudice of defendant. The jury might have found that some of the machinery was attached to and became realty, and might have been correct in their conclusion, but failed to so find, because of the testimony objected to. The testimony was irrelevant and inadmissible, and it was error to admit it.

3. The third assignment ought not to be considered, inasmuch as it contains more than one question, and is not followed by propositions on each issue relied on.

4. The same is true of fifth assignment of error.

5. The court did not err in styling the instrument executed by Green to Pauls a bill of sale. It is in form of a bill of sale; and it is immaterial what it was called by witness on former trial, if he did in fact express himself on the subject. Facts in proof may determine that an instrument in form of a conveyance is and was intended to be a mortgage, but there is no such facts in proof. Hence it was not error for the court to call the instrument a bill of sale in the charge. It was his duty to so charge.

6. The sixth assignment of error is also at variance with the rule that an assignment relied on as a proposition, to entitle it to consideration by the court, must not contain more than one question.

7. It is assigned as error that the court erred in failing to charge the jury that, if Green did execute to plaintiff a bill of sale to the machinery sued for, but that, if neither W. W. nor F. M. Mundine knew of the ex-

istence of the bill of sale, and the machinery was undetached from the soil, and if defendant procured a judgment against Green on his vendor lien notes, with foreclosure of the lien on the premises on which the machinery was placed, under such circumstances notice to F. M. Mundine only a few minutes before the sale of the premises would not affect his rights to acquire title to the premises, including the machinery in controversy, which Green had affixed as a permanent accession to the freehold; and in this connection the court erred in refusing plaintiff's special charge No. 2, which properly embodied the issues. There is a proposition under this assignment to the effect that under the facts showing that Nathan Green bought the lots on which the machinery was afterwards placed, executing vendor's lien notes, subsequently owned by appellant, and the evidence also showing that the machinery in suit had been attached to the realty so as to make it a part thereof, Green could not sell the machinery as chattels by bill of sale to a creditor to the injury of the security held by appellant, by virtue of his vendor's lien notes; and "any attempted sale of the machinery without severance from the freehold and delivery to the creditor would be ineffectual to pass title to the machinery as chattels, in the absence of knowledge thereof and consent thereto by appellant." Neither the assignment nor the proposition should assume that the machinery was so affixed to the realty as to become a part thereof. That question was for the jury, under proper instructions by the court. Actual notice at the time of the sale to him at public vendue is not the only criterion. Implied notice is also a question to be considered; and, if Mundine had knowledge of facts that would put a man of ordinary prudence upon inquiry as to the truth, he would be charged with notice of such full knowledge of the facts so attainable.

8. The true rule as to chattels or realty in this case is, if the machinery could be removed without injury to the realty, it was not realty, and did not pass by the sale to Mundine, who purchased only the lots under the foreclosure of the vendor's lien notes executed by Green to W. W. Mundine. F. M. Mundine, by the transfer to him of the notes retaining vendor's lien, acquired thereby no title to the lots, there being no conveyance of the equitable title left in W. W. Mundine after his sale, which retained such lien in the notes and the deed of conveyance to Green. F. M. Mundine did not occupy the position of the original vendor without such conveyance. He only had a lien on the lots, and lien rights only are in issue as to him, and these are limited in appellant's brief to time arising from his purchase at the foreclosure sale. We believe the opinion in the case of *Willis v. Munger Improved Cotton Machine Mfg. Co.* (Tex. Civ. App.) 36 S. W. 1010, lays down the correct doctrine as to the

question of machinery on land, there being a lien on the land. It is said in the *Munger Case*: "The vendees had the right to place the machinery on the lot without forfeiting the right of its removal, so long as it could be done without injury to the property. As they possessed that right, they could encumber it with a mortgage to another with such right of removal to satisfy the mortgage." A sale to satisfy the mortgage debt would confer the same right upon the purchaser. In placing chattels upon realty, the intention at the time as to whether or not they were to become immovable fixtures ought to be considered with other facts bearing on the issue. We believe the court's charge on this subject was correct.

The foregoing is sufficient to indicate our opinion on the questions in the case. It is not necessary to say more. We conclude the judgment of the lower court should be reversed, and the cause remanded, and it is so ordered. Reversed and remanded.

DEAVER v. STATE ex rel. TRIPP.¹

(Court of Civil Appeals of Texas. Dec. 7, 1901.)

SCHOOL ELECTIONS—SELECTION OF OFFICERS—RATIFICATION—OATH—RETURN—QUO WARRANTO—INTEREST IN CONTROVERSY.

1. 2 *Sayles' Ann. Civ. St. art. 3953a*, provides that, if the officers appointed to hold an election for trustees of a public school district fail to do so, the electors present at the time for opening the polls may select persons to act in their place. At the time for holding an election the officers appointed failed to appear, and a third party, appointed without authority by the county judge to hold the election, selected two others to assist him as clerks. No one protested against the election, which was honestly had, all legal votes presented having been received, and the proper return made. *Held* to be such a ratification by the voters of the acts of such officers as to be equivalent to an election of them by the electors present.

2. The fact that such officers are not sworn does not render the election void.

3. Under 2 *Sayles' Ann. Civ. St. art. 3953a*, providing that the returns of elections for school trustees shall be made to the county superintendent, such returns are properly made to a county judge who is ex officio such superintendent.

4. Where an information in quo warranto against one holding office as school trustee is presented by one having no interest in the controversy, the district judge, in his discretion, may refuse to allow the information to be filed, and, if filed, on such fact appearing, he should refuse to remove the respondent.

Appeal from district court, Taylor county; N. R. Lindsay, Judge.

Proceeding in quo warranto by the state of Texas, on the relation of W. F. Tripp, against J. H. Deaver. From a judgment ousting the respondent from the office of school trustee, he appeals. Reversed.

Cunningham & Wilson, for appellant. J. M. Wagstaff and T. A. Bledsoe, for appellee.

¹ Rchearing denied January 13, 1902.

HUNTER, J. This is a proceeding in the nature of quo warranto, instituted July 22, 1901, by the county attorney, by leave of the district judge, in the name of the state of Texas, by W. F. Tripp, as relator, to remove J. H. Deaver from the office of trustee of public school district No. 9, Taylor county, for the reasons that the persons who held the election—I. S. Thurmond, D. A. Shaw, and J. F. Robinson—were not appointed by the commissioners' court, nor selected by the voters present at the election; that they were not sworn; nor was their return of the election made to the commissioners' court, but was made to the county judge of Taylor county. Respondent, Deaver, answered by a general denial, not guilty, and specially that, while the voters at said election did not formally elect officers to hold the election, yet they voted and acquiesced in and recognized said persons as officers of said election; that said election was fairly held without fraud; that respondent received a majority of the votes cast; that he was qualified to hold the office, and had taken the oath required by law, and was performing the duties thereof; that the irregularities in the election complained of did not render the election void. The case was submitted to the court without a jury upon an agreed statement of facts, which is contained in the record, and is substantially as follows: At the February term of the commissioners' court of Taylor county, 1901, T. B. Cross, J. H. Deaver, and J. A. Buchee were appointed by said court to hold all elections required by law in said school district for the year 1901. This election was required to be held on the first Saturday in April, 1901, for two school trustees; that on said day the said Cross, Deaver, and Buchee failed to hold said election, but on the morning of that day, at Buffalo Gap,—the proper place for holding said election,—some of the electors of said district had assembled, and among them T. B. Cross, who declined to hold the election, and suggested that the voters present be called together, and select officers from among themselves to hold the election, when I. S. Thurmond stated that he had been appointed by the county judge to hold the election, and he intended to do so. Thereupon he selected D. A. Shaw and J. F. Robinson to assist him as clerks, and they then held the election. Neither Thurmond, Shaw, nor Robinson were sworn as election officers, but 36 electors voted, and it does not appear that any one protested against these persons holding the election, nor that anybody was prevented from voting, nor that any illegal votes were cast, nor that any one stayed away or refused to vote because these persons were holding the election; but that, presumptively, all voted who were present and desired to vote, and thus acquiesced in the selection of these three persons to hold the election, only Mr. Cross suggested that it would not be a legal election unless the

voters selected the officers to hold the election. The county judge did appoint Thurmond a few days before the election to hold it, and gave him a writing to that effect; but, while Thurmond believed this appointment conferred authority on him to hold the election, it was void, as there was no law authorizing the county judge to make such appointment. The election was fairly and honestly held, and resulted in the election of J. H. Deaver, the respondent, as one of the trustees. There were about 150 voters in the district, but none were denied the right to vote who offered to do so. The county had no superintendent of schools, and the return of the election was made to the county judge, who declared respondent duly elected trustee of the district, and entered his name on his books as such, and the respondent took the oath of office required by law, and duly entered upon the duties of his office in April, 1901. The result of the election was certified to by Thurmond as "manager of election," and by Robinson and Shaw as "clerks," and the ballot box, poll list, and tally sheet were returned to the county judge. Their certificate, on its face, did not show by what authority they held the election. It was made at the foot of the tally sheet, and was in the following form: "We certify this is a correct return of election held at Buffalo Gap for 2 school trustees for district No. 9. I. S. Thurmond, Manager of Election. J. F. Robinson, Clerk. D. A. Shaw, Clerk." The court held the election void, and rendered judgment ousting the respondent from said office, and from that judgment this appeal was taken.

We think the court erred in holding this election void. To sustain the judgment of the district court, counsel for the state rely upon the following proposition: "The pretended election held by Thurmond, Shaw, and Robinson was absolutely void, because neither one of the parties attempting to hold the election had any authority or color of authority to do so, and were neither de facto nor de jure officers." *State v. Taylor* (N. C.) 12 S. E. 1006, 12 L. R. A. 202, 23 Am. St. Rep. 51; *Land Co. v. Laigle*, 59 Tex. 344; *Blencourt v. Parker*, 27 Tex. 562, 563. The insistence is that because Thurmond asserted that he acted under a written appointment from the county judge, which the law did not authorize, he was neither a de facto nor de jure officer, but was a usurper, and so were the clerks. The agreed facts show, and this court finds, that the election was fairly and honestly held. There is not even a charge or suspicion of fraud against it. No candidate is complaining against it, only the state upon the relation of a disinterested citizen of the free school district; in other words, no private interests or rights have been affected by it one way or the other. It does not appear whether the relator was present, or whether he participated in the election, or not. It does appear that he was

not a candidate for trustee. The state—the general public—is not interested in such controversies as this, where evenhanded justice is done, and no fraud or injury of any character is shown or charged. The statute simply provides that if the officers, or either of them, appointed by the commissioners' court to hold the election, fail or refuse to do so, then the electors present, when the time comes for opening the polls, "may select of their number a person or persons to act in the place of those absent or refusing to act." 2 Sayles' Ann. Civ. St. art. 3953a. The manner of selecting is left entirely with the electors. If, then, these three men opened the polls and held the election, and the electors who were there and desired to vote participated in the election, they, by that act of voting, selected those who were holding the election for them as the officers of the election, and they ratified their acts in holding it; and it would, in that case, make no difference who appointed Thurmond, but the power which can legally appoint can ratify and make good an illegal appointment. In this case, we think, the ratification was complete. It is not necessary to state whether they were de facto or de jure officers. The ratification of their acts made the election good and valid, and it related back to the beginning of the election, and constituted valid authority for holding it. The fact that they were not sworn did not render the election void. 2 Sayles' Ann. Civ. St. art. 3953a; McCrary, Elect. § 216; Hunnicutt v. State, 75 Tex. 233, 12 S. W. 106; Sanders v. Lacks (Mo.) 43 S. W. 653; McKinney v. O'Conner, 26 Tex. 5. The returns were properly made to the county judge, as he was ex officio county superintendent. 2 Sayles' Ann. Civ. St. art. 3953a.

It was in the discretion of the district judge to refuse to allow the information in this case to be filed, and, when filed, upon hearing to remove the respondent, as the relator showed no interest in the controversy. The court, upon such a state of facts, should have refused to remove the respondent, and dismissed the information. Where the election for school trustees has been held on the proper day and at the proper place, and by ballot, and was fairly and honestly held, so that the people had the opportunity to express their wishes by their ballots as to who they wanted for trustees, and no one has been deprived of his right to vote and have his vote counted, and no illegal votes have been allowed, nor other fraud or illegality been practiced, the election should be sustained by the courts in the interest of public peace and harmony, regardless of such irregularities as are shown here. State v. Hoff, 88 Tex. 297, 31 S. W. 290.

The judgment of the district court is therefore reversed, and the information herein dismissed, at the costs of the relator both in this court and in the district court.

HALSTEAD v. MUSTION.

(Supreme Court of Missouri, Division No. 2.
Jan. 17, 1902.)

FRAUDULENT CONVEYANCES—DEED TO WIFE—PRESUMPTION—DEFAULT JUDGMENT—SUFFICIENCY OF SERVICE—APPEAL.

1. Though a recital in an entry of judgment that the defendant was duly served may be overthrown by other parts of the record of equal dignity and importing equal verity, the question of jurisdiction must be determined from the whole record, and not from fragmentary portions thereof.

2. A default judgment against W. D. M. was sustained, though the sheriff's return showed service of summons on P. M., where the court found that W. D. M. was duly served, and the whole record was not introduced to impeach the finding, and where it appeared from the amended returns of service that P. M. and W. D. M. were the same person.

3. In the absence of any pleading or proof that land acquired by a wife during coverture was paid for out of her own means, it is presumed that it was paid for with money of her husband.

4. A deed to a wife of land bought with her insolvent husband's money is fraudulent in law as against an existing and prior creditor of the husband, and the land is subject to sale for his debt.

5. Though the supreme court is disposed to defer to the judgment of the trial court where evidence is to be weighed or the credibility of witnesses determined, the trial court can have no advantage where the whole record is documentary except the proof of uncontested facts.

Appeal from circuit court, Howell county; W. N. Evans, Judge.

Suit by John Halstead against Jane A. Mustion. Judgment for defendant, and plaintiff appeals. Reversed.

This is a suit in equity to have the defendant, Jane A. Mustion, declared a trustee for her husband, W. D. Mustion, as to certain lands in Howell county, in this state, alleged to have been purchased by the husband with his own money, and conveyed to the wife, with intent to hinder, delay, and defraud the creditors of her said husband; and to decree that the title to the same passed to plaintiff by virtue of an execution sale of said lands under a judgment of the circuit court of Howell county against her said husband, and a sheriff's deed to plaintiff by the sheriff in pursuance of said sale. The answer was a general denial. On the part of plaintiff the evidence consisted of the record of a judgment of the circuit court of Howell county in favor of Stillman Sessions against W. D. Mustion and P. P. Dobozy, at the November term, 1888, of said court, for the sum of \$567.35, together with the costs of suit, which judgment was founded upon a promissory note for \$800, dated January 15, 1887, and bearing interest at the rate of 10 per cent. per annum. Execution issued on this judgment, and a return of nulla bona on April 6, 1890. On November 7, 1893, Sessions duly assigned this judgment on the margin of the judgment to John Halstead, for value received. Afterwards Halstead

brought suit on this judgment, returnable to the October term, 1894, of the circuit court of Howell county. The action was against W. D. Mustion and P. P. Dobozy. The sheriff's return on the summons was in these words: "Executed the within writ in the county of Howell on the 29th day of September, A. D. 1894, by delivering a copy of the summons and petition to Pone Mustion and summons to P. P. Dobozy." The suit was subsequently dismissed as to Dobozy. Afterwards, at the November term, 1894, judgment by default and for want of an answer was rendered against defendant W. D. Mustion, the record reciting that "it appeared to the satisfaction of the court that defendant had been served with process from this court more than fifteen days before the first day of this term of this court, and, failing to appear or plead to this cause, makes default." Thereupon judgment was rendered against him for \$751.60 and costs, and execution awarded therefor. Execution issued, and at the June term, 1895, the sheriff, after due notice, sold the lands in suit to John Halstead, and executed and delivered to him a sheriff's deed, which is in due form, and recorded in the recorder's office of Howell county, in Book 50, pages 358 and 359; and thereafter this suit in equity was brought on August 17, 1895, returnable to the October term, 1895, of said Howell circuit court. Plaintiff introduced the files showing the pleadings, writs, and service, and entries of the judgments above set out. He also introduced evidence that defendant, Jane Mustion, was the wife of W. D. Mustion, and had been since about the year 1860. He also offered in evidence that W. D. Mustion was insolvent, and then read in evidence a warranty deed from William L. Owings and wife to Jane Mustion to the land in suit, acknowledged March 1, 1894, and recorded the same day. This was all the evidence on part of plaintiff, and defendant introduced no evidence, and submitted the case to the court as upon a demurrer to the evidence, and the court thereupon rendered judgment for defendant, and, after ineffectual motions for new trial and in arrest, plaintiff appealed to this court.

James Orchard, for appellant. A. H. Livingston and H. D. Green, for respondent.

GANTT, J. (after stating the facts). Since the filing of the transcript in this court, plaintiff moved this court for leave to the ex-sheriff of Howell county to amend his return on the summons in the case of Halstead against Mustion and Dobozy, which was granted, and thereupon the said sheriff, F. L. Herrin, made his amended return on the said writ of summons, whereby it appears that said summons was duly served on said W. D. Mustion, and that Pone Mustion, by which name said defendant was served on the 29th of September, 1894, is one and the same person with W. D. Mustion. The

respondent insists that the circuit court properly dismissed the bill, for the reason that there is no evidence in the record to show that Pone Mustion and W. D. Mustion are one and the same person, and that the judgment against W. D. Mustion on service had on Pone Mustion is absolutely void. If the court based its judgment on this view, it was in error. Independently of the amendment which we have allowed to be made by the sheriff who served the writ pending the appeal in this court, which shows that Pone Mustion and W. D. Mustion are one and the same person, we have the finding of the circuit court that the defendant W. D. Mustion had been duly served with process 15 days before the first day of the term of the court to which the summons was returnable. Now, while it is the settled law in this state that a recital in an entry of judgment that the defendant had been duly served with process may be overthrown by other parts of the record of equal dignity and importing equal verity (*Cloud v. Inhabitants of Town of Pierce City*, 86 Mo. 357), the question of jurisdiction must be decided by the whole record; and accordingly, in *Cloud v. Inhabitants of Town of Pierce City*, the statement of Judge Lewis in *Rumfelt v. O'Brien*, 57 Mo. 569, "that nothing is here to show that the several fragments exhibited in evidence constituted the whole record of the Union Bank Case," was expressly held not to conflict with what was said in the *Cloud Case*, and so it was again ruled in *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74. In this case, while plaintiffs introduced certain files and entries in the case of *Halstead v. Mustion*, no effort was made to show that these documents constituted the whole record. Moreover, the record introduced shows service upon Pone Mustion. Non constat but he was W. D. Mustion by a different name, and, for aught that appears to the contrary, the circuit court might have heard testimony to prove that Pone Mustion was but another name for the defendant W. D. Mustion, as the fact now appears by the amended return of the officer. We do not think the finding of the court that W. D. Mustion was duly served was rebutted, or that the judgment should be held void, even if the return had not been amended; but the amendment removes all doubt on the subject, and the judgment was valid.

2. Can the court's decree be sustained on other grounds? The case made was this: Judgments against the husband, W. D. Mustion; nulla bona returns; proof of insolvency, and a deed during coverture to the wife, and sale of the lands under judgment and execution against the husband. No evidence of any kind was offered by the defendant to show she had purchased the lands in suit with her own means. In the absence of any pleading or proof that she paid for this land out of her own means, it is presumed in law that this property thus acquired during

coverture was purchased and paid for with the money of her husband. *Patton v. Bragg*, 113 Mo. 601, 20 S. W. 1069, 35 Am. St. Rep. 730; *Sloan v. Torrey*, 78 Mo. 625; *Seltz v. Mitchell*, 94 U. S. 580, 24 L. Ed. 179; *Well v. Simmons*, 66 Mo. 620; *Hoffman v. Nolte*, 127 Mo. 120, 29 S. W. 1006. The presumption being that the land was bought with the insolvent husband's money, the deed, as to plaintiff, who was an existing and prior creditor, was fraudulent in law. *Patton v. Bragg*, supra; *Jordan v. Buschmeyer*, 97 Mo. 94, 10 S. W. 616. If, then, the conveyance was fraudulent in law, it necessarily follows that it was the property of the husband, W. D. Mustion, and subject to sale for his debts and the judgment of plaintiff against him. *Miller v. Leeper*, 120 Mo. 466, 25 S. W. 378; *Garrett v. Wagner*, 125 Mo. 450, 28 S. W. 762. Now, while this court is disposed to defer to the judgments of the circuit court in cases where evidence is to be weighed and the credibility of witnesses is to be determined, in this case there is no room for conceding to the trial court any advantage over this court. The whole record is documentary, except to the proof of coverture when the deed was made to Mrs. Mustion and the insolvency of her husband,—two facts that stand conceded. But one conclusion can be reached under the well-settled presumptions of law, and that is that the land was purchased with the husband's money, and the deed taken to the wife to defraud his creditors. It follows that the sheriff's deed conveyed the equitable title of the land to plaintiff, and Mrs. Mustion holds the legal title in trust for him, and is entitled to a decree as prayed.

The judgment of the circuit court is reversed, and remanded, with directions to award a new trial, and proceed in accordance with the views herein expressed. All concur.

MARX et al. v. HART (HARKNESS et al. Garnishees).¹

(Supreme Court of Missouri, Division No. 2. Dec. 17, 1901.)

GARNISHMENT—SERVICE OF PROCESS—JURISDICTION—APPEAL BY GARNISHEE—BANKRUPTCY—DISCHARGE OF PRINCIPAL DEBTOR—CONSTITUTIONAL LAW—STATUTES—RETROSPECTIVE OPERATION—CONSTITUTIONAL QUESTION—JURISDICTION.

1. Acts 1891, p. 170, provides that mortgages or pledges of personal property shall be invalid when it appears that the pledgee has received or exacted usurious interest; and Const. art. 2, § 15, forbids the passage of any statute having a retrospective effect. In attachment in a circuit court, plaintiffs garnished one holding property of defendant as security for a note of defendant given prior to the act of 1891, and contended that the garnishees had exacted usurious interest, and had taken a new agreement for such interest subsequent to the act of 1891; but the court refused to charge, at the request of the garnishees, that the act did not render the note usurious, and

that there was no evidence of payment of usurious interest. *Held*, that a constitutional question was fairly raised, and an appeal to the supreme court, rather than to the Kansas City court of appeals, was proper.

2. Bankr. Act July 1, 1898, establishing a uniform system of bankruptcy, provides in section 16 that the liability of a person who is a co-debtor with, or guarantor, or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt. *Held*, that a garnishee, not being a co-debtor, guarantor, or in any manner a surety, the statute does not apply to him.

3. Where a judgment has been rendered against a garnishee, which under the statute is a lien on his real estate, fixing his liability for the value of goods of the principal debtor attached in his hands, a subsequent discharge in bankruptcy of the principal debtor does not operate to discharge the garnishee.

4. Rev. St. 1899, § 388, subd. 4, enacts that in attachment, where the property is not accessible, the officer shall declare to the person in possession thereof that he attaches the same, and summons such person as garnishee. The return of an officer in attachment, where the property was inaccessible, recited that the officer delivered a copy of the summons of garnishment, which he made a part of his return, and in such copy notified the garnishee that he attached in his hands all debts and personal property due the defendant. *Held*, that the return showed a sufficient compliance with the statute, inasmuch as the same does not require an oral declaration by the officer.

5. Rev. St. 1899, § 3436, provides that notice of garnishment as provided by the statute, served on a garnishee, shall have the effect of attaching property of the defendant in the garnishee's possession; and section 388, subd. 4, declares that where, in attachment, the property is not accessible, the officer shall declare to the person in possession of the same that he attaches the same, and summons him as a garnishee. *Held*, that where, in attachment, the officer follows the steps pointed out in section 388, the plaintiff, while not obtaining a lien on the specific property, obtains a lien giving him a right to hold the garnishee responsible for its value.

6. Where a firm in the possession of goods belonging to another is summoned as a garnishee, and the partner having all the property in his possession is served with garnishment process, it is competent for the other partner by his voluntary appearance to waive service of process on him, and give jurisdiction of himself personally.

7. Where plaintiff garnished a firm having possession of goods belonging to defendant, pledged as security for a loan, and it was in issue whether usurious interest had been exacted for the loan, making the pledge invalid under Acts 1891, p. 170, and one of the partners made a deposition before a notary, and the shorthand notes, after being transcribed, were interlined by the witness before he signed the same, for which reason the notary refused to certify them and made another transcript, which was lost, a contention that it was not proper to permit the notary to testify as to the witness' declaration in regard to the rate of interest charged, on the ground that the corrected statement made by the witness could not be contradicted by the notary, was without merit, since the proof was of an admission by an adverse party.

8. Rev. St. 1899, § 3710, declares that in actions for the enforcement of liens on personal property, pledged or mortgaged, or in any case where the validity of such lien is drawn in question, proof that the party holding such lien has exacted usurious interest shall render any mortgage or pledge invalid. Section 388

¹ Motion to transfer to court in banc denied January 17, 1902.

declares that where, in attachment, the goods are not accessible, the officer shall declare to the person in possession that he attaches the same, and summons such person as garnishee. *Held*, that where, in attachment, property held as security for a debt of defendant is proceeded against under section 338, a contention that the plaintiff, because the property was not taken into the possession of the officer, is not in a position to avail himself of the exaction of usury, is without merit.

9. Acts 1891, p. 170, provides that, where any pledgee or mortgagee of personal property shall receive or exact usurious interest, the pledge or mortgage shall be invalid. *Held*, that where a note given before the passage of the act was secured by a pledge or collateral, and the issue was whether usurious interest had been taken on the note subsequent to the passage of the act, and the pledgee was permitted to explain entries in his books in order to show that no such interest had been taken, and the court instructed that usury should be found only if usurious interest had been exacted after the passage of the act, a verdict of the jury in favor of plaintiff must be held to amount to a finding that usurious interest was taken after the taking effect of the statute, and hence a contention that a retroactive effect was given to the statute was without merit.

10. Where a pledgee holding jewelry as security for a loan was garnished, and, in order to obviate the necessity of naming each piece of jewelry in the verdict, it was stipulated that it should be sufficient for the jury to designate the goods in the hands of the garnishees as the diamonds and jewelry described in the note to secure which the jewelry had been pledged, the garnishee could not claim that the verdict was improper, in that a separate valuation of each article was not made.

11. Rev. St. 1899, § 3452, provides that if, in garnishment, it appear that the garnishee has property of the defendant's in his possession, the court or jury shall find all the property, and the value thereof, and that, unless the garnishee discharges himself by paying over or delivering the same, the court shall enter up judgment against the garnishee for the value as found in money, and that execution may issue to enforce the judgment. In garnishment, by agreement of the parties the verdict did not find the value of each article of jewelry in the hands of the garnishee, but found the value of the entire lot. The garnishees turned over a part of the property, and judgment was entered directing that the same be sold, the proceeds credited on the execution, and the balance collected from the garnishees. *Held*, that the judgment was proper.

Appeal from circuit court, Jackson county; E. L. Scarritt, Judge.

Action by David Marx and others against E. Hart. Lamon V. Harkness and another were garnished. Judgment for plaintiffs, and the garnishees appeal. Affirmed.

On June 22, 1894, plaintiffs sued out a writ of attachment against the defendant E. Hart in the circuit court of Jackson county. On the succeeding day the sheriff served the following summons and notice of garnishment on Lamon V. Harkness and Lamon D. H. Russell, a member of the firm of Harkness & Russell, and known in the record as "Exhibit A":

"In the Circuit Court of Jackson County, at Kansas City, Missouri. October Term, 1894. David Marx, Millard Veit, and Sol H. Veit, Partners Doing Business under the Firm Name and Style of Marx, Veit & Co.,

Plaintiffs, vs. E. Hart, Doing Business under the Firm Name and Style of Hart Jewelry Company, Defendant. (No. 20,961.) To Lamon V. Harkness and Lamon D. H. Russell, Doing Business as Harkness & Russell, Garnishees: You are hereby notified that I attach in your hands all debts due by you to the above-named defendant, E. Hart, doing business under the firm name and style of Hart Jewelry Co., together with all personal property, money, rights, credits, bills, notes, drafts, checks, or other choses in action of the said defendant in your possession or charge or under your control at the time of the service of this garnishment, or which may come into your possession or charge or under your control or be owing by you between that time and the time of filing your answer, or so much thereof as will satisfy the sum of eighteen hundred seventeen (\$1,817) dollars, with interest and cost of suit; and you are hereby summoned to be and appear before the honorable circuit court of Jackson county, at Kansas City, Missouri, on the first day of the next term thereof,—it being the 8th day of October, A. D. 1894,—then and there to answer such allegations and interrogations as may be exhibited by David Marx et al., the above-named plaintiffs. Given under my hand at office in Kansas City, Missouri, this 23d day of June, 1894. John B. O'Neill, Sheriff, by —, Deputy."

On the back of the writ of attachment said sheriff made the following return:

"Executed the within writ in Jackson county, Missouri, on the 23d day of June, 1894, by delivering a copy of the summons of garnishee hereto attached, marked 'Exhibit A,' and made a part of this return, to Lamon D. H. Russell, of the firm of Harkness & Russell, by declaring to him that I did attach in his hands all debts due by him to the within-named defendant, E. Hart. John P. O'Neill, Sheriff, by W. H. Colgan, Deputy."

On June 22, 1894, a summons of garnishment was issued by said sheriff, directed to the garnishee L. D. H. Russell, as follows:

"Exhibit C. Summons of Garnishee. In the Circuit Court of Jackson County, at Kansas City, Missouri. October Term, 1894. David Marx, Millard Veit, and Sol Veit, Partners Doing Business under the Firm Name and Style of Marx, Veit & Co., Plaintiffs, vs. E. Hart, Doing Business under Firm Name and Style Hart Jewelry Company, Defendant. (No. 20,961.) To Lamon D. H. Russell, Garnishee: You are hereby notified that I attach in your hands all debts due by you to the above-named defendant, E. Hart, doing business under firm name and style Hart Jewelry Company, together with all personal property, money, rights, credits, bonds, bills, notes, drafts, checks, or other choses in action of the said defendant in your possession or charge or under your control at the time of the service of the garnishment, or which may come into your possession or charge or under your control or be owing by you be-

tween that time and the time of filing your answer, or so much thereof as will satisfy the sum of eighteen hundred seventeen (\$1,817) dollars, with interest and cost of suit; and you are hereby summoned to be and appear before the honorable circuit court of Jackson county, at Kansas City, Missouri, on the first day of the next term thereof,—it being the 8th day of October, A. D. 1894,—then and there to answer such allegations and interrogatories as may be exhibited by David Marx, Miller Veit, and Sol Veit, partners doing business under the firm name and style of Marx, Veit & Co., the above-named plaintiffs. Given under my hand at office in Kansas City, Missouri, this 22d day of June, 1894. John P. O'Neill, Sheriff, by ———, Deputy."

On the back of the writ of attachment said sheriff made the following return:

"And further executed this writ in Jackson county, Missouri, on the 23d day of June, 1894, by delivering a copy of the summons of garnishee hereto attached, marked 'Exhibit C,' and made a part of this return, to Lamont D. H. Russell, by declaring to him that I did attach in his hands all debts due by him to the within-named defendant, E. Hart. John P. O'Neill, by F. W. Klaber, Deputy."

On October 10, 1894, plaintiffs filed interrogatories to the garnishees as follows:

"In the Circuit Court of Jackson County, Missouri, at Kansas City. October Term, 1894. David Marx et al., Plaintiffs, vs. E. Hart, Defendant. Lamont V. Harkness & Lamont D. H. Russell, partners as Harkness & Russell, Garnishees: At the time of the garnishment upon you in the above-entitled cause, had you in your possession or under your control any goods, wares, merchandise, property, or effects, or any bills, notes, accounts, choses in action, belonging to defendant? Have you since had, or have you now, any of the above-described articles in your possession or under your control? Second. At the time of the service of the garnishment upon you in the above-entitled cause, were you indebted in any manner to the above-named defendant? Have you since then become indebted to him or are you now indebted to him in any sum? Third. At the time of the service of the garnishment upon you in the above-entitled cause, or since then, or did you have, and have you now, in your possession or under your control, any goods, wares, merchandise, bills, notes, or accounts belonging to defendant? If so, state fully what the property consisted of, and by virtue of what, if any, claim, and what manner, you control or hold possession of such property."

On October 17, 1894, the garnishees filed their answer to said interrogatories, as follows:

"In the Circuit Court of Jackson County, Missouri, at Kansas City. October Term, 1894. David Marx, Millard Veit, Sol Veit, Plaintiffs, vs. E. Hart, Defendant.

"Lamont V. Harkness & Lamont D. H. Russell, Garnishees. Now come the said garnishees, and, for their answers to the interrogatories propounded to them by the plaintiffs in the above-entitled action, say: In answer to the first interrogatory, the garnishees state that at the time of the garnishment upon them, since that time, or now, they did not have in their possession or under their control any goods, wares, merchandise, property, or effects, or any bills, notes, accounts, choses in action, in which the defendant had any legal interest. In answer to the second interrogatory, the garnishees state that at the time of the service of the garnishment upon them, since then, or now, they were not indebted in any manner to the said defendant. In answer to the third interrogatory, the garnishees state that at the time of the service of the garnishment upon them, since then, or now, they did not have in their possession or under their control any goods, wares, merchandise, bills, notes, or accounts in which defendant had any legal interest. Wherefore the garnishees pray that they may be discharged from all liability by reason of said garnishment, and that they may be allowed a sum sufficient to indemnify them for their time and expenses and reasonable attorney's fees in attending and answering said garnishment.

"State of Missouri, County of Jackson—ss.: L. D. H. Russell, one of said garnishees, being duly sworn, on oath says that he believes the statements contained in the foregoing answer are true. L. D. H. Russell.

"Subscribed and sworn to before me this 17th day of October, 1894. My commission expires May 5, 1898. [Seal] Chas. A. Sperry, Notary Public."

On November 16, 1895, plaintiffs filed their amended denial of the answer of the garnishees, as follows:

"In the Circuit Court of Jackson County, Missouri, at Kansas City. David Marx et al., Plaintiffs, vs. E. Hart, Defendant. L. V. Harkness and L. D. H. Russell, Doing Business as Harkness & Russell, Garnishees. Now come plaintiffs in the above-entitled cause, and for their amended denial to the answer of the garnishees, L. V. Harkness and L. D. H. Russell, doing business as Harkness & Russell, deny each and every allegation and statement in said garnishees' answer contained. Plaintiffs, further answering, state that, prior to the issuing of the writ of garnishment in the above-entitled cause on said garnishees, they (the garnishees) received into their possession four thousand (\$4,000) dollars' worth of diamonds, jewelry, and merchandise belonging to defendant, as security for a large alleged indebtedness due the garnishees from the defendant. Plaintiffs, further replying, state that the garnishees and defendants hereto, prior to the issuing of the attachment herein, entered into a conspiracy for the purpose of defrauding the creditors of the defendant;

that it was agreed and understood by and between the defendant and garnishees that the defendant should purchase goods on credit, and thereafter transfer said goods to said garnishees. Plaintiffs further state that the goods now in possession of garnishees were transferred to them by defendant for the purpose of hindering, delaying, and defrauding the creditors of defendant, and were accepted by the garnishees for the purpose of assisting the defendant in his purpose to defraud, hinder, and delay his creditors. Plaintiffs further state that the defendant for the past five years was wholly insolvent, and was purchasing large quantities of goods on credit, with the intention never to pay for such goods, all of which was known to the garnishees, and participated in by them. Wherefore plaintiffs state that the garnishees have in their possession four thousand (\$4,000) dollars' worth of goods belonging to defendant. Wherefore plaintiffs ask for judgment against the garnishees for the amount of their claim, with interest and costs.

"Second Count. Plaintiffs, for a second denial to garnishees' answer herein, state that prior to the issuing of the writ of attachment in the above-entitled cause the defendant became indebted to the garnishees in a large sum of money, to wit, ten thousand (\$10,000) dollars; that as security for such large indebtedness the defendant transferred to garnishees five thousand (\$5,000) dollars' worth of diamonds, jewelry, and watches, and defendant secured garnishees with other merchandise, including a large number of pledges upon which defendant had loaned money to the amount of twenty-five hundred (\$2,500) dollars; that the garnishees, for any and all indebtedness to them, and for the money loaned by them to defendant, charged, exacted, and received from the defendant usurious interest, to wit, the sum of two (2) per cent. per month; that said garnishees had in their possession said large amount of goods, wares, and merchandise as security for said indebtedness upon which garnishees charged usurious interest; that the sheriff of Jackson county tried to levy on said goods, but the garnishees concealed the same so that a levy could not be made on them. Wherefore plaintiffs state that the garnishees have no lien on the goods so pledged with them for any indebtedness of the defendant to them on account of having charged said usurious interest, to wit, two (2) per cent. per month. Wherefore plaintiffs pray for judgment against the garnishees for the value of said goods, and for the amount of their claim against the defendant, with interest and costs."

On November 18, 1896, garnishees filed their reply to the denial of plaintiffs, as follows:

"In the Circuit Court of Jackson County, Missouri, at Kansas City. Division No. 1. David Marx, Millard Velt, and Sol H. Velt, Plaintiffs, vs. E. Hart, Defendant. L. V.

Harkness and L. D. H. Russell, Garnishees. (No. 20,961.) Reply of Garnishees. Now come the garnishees, Harkness & Russell, and, for reply to the denial of plaintiffs of the answer of these garnishees, deny each and every allegation in said denial contained. Wherefore these garnishees pray to be dismissed with their costs."

The cause came on for trial at the October, 1897, term, of said court. Under the evidence and instructions of the court, the jury returned the following verdict:

"We, the jury, find the issues for the plaintiffs; and we further find that the garnishees, Harkness & Russell, at the time of the service of the writ of garnishment on them had in their possession money or property and effects belonging to defendant Hart as follows: Diamonds, watches, and jewelry, as described in the \$1,825 note in evidence; and the value thereof is \$3,500. George Price, Foreman."

Motions for new trial and in arrest of judgment were filed December 7, 1897, in due time, and overruled August 8, 1898, and the garnishees duly excepted, and leave was given them to file a bill of exceptions at the next regular term of the court.

Upon the verdict against the garnishees the court rendered judgment as follows on December 8, 1897:

"Wherefore it is ordered, adjudged, and decreed by the court that unless said garnishees, Harkness & Russell, pay over or deliver to the sheriff said property so found to be in their possession by the aforesaid verdict of the jury, or pay over the value thereof within ten (10) days from this date, or execute their bond for the payment or delivery thereof within said time, then the court will enter up judgment against said garnishees for the proper amount or value as found in money, and award executions to enforce such judgment."

On December 13, 1897, the following order was made by the court:

"David Marx et al., Plaintiffs, vs. E. Hart, Defendant. Harkness & Russell, Garnishees. (No. 20,961.) Now on this day come said garnishees, by their attorney, and ask the court for an extension of time in which to discharge themselves as per order of this court made on December 3, 1897. Whereupon the court doth order that the time given said garnishees to comply with the order of this court be extended until on or before January 15, 1898."

On January 15, 1898, the time for compliance was again extended for 30 days. The motion for new trial having been overruled on August 7, 1898, on the 22d of August, 1898, plaintiffs filed their motion for judgment because the garnishees had failed to discharge themselves as ordered by the court; and the court, having heard the same, rendered the following judgment:

"October 8, 1898. Now on this day come plaintiffs, by their attorney, and the gar-

nishees, by their attorney, and the application filed by plaintiffs for a judgment against the garnishees on account of the garnishees failing to discharge themselves as ordered by the court coming on for hearing, and the court, having heard and fully considered the evidence introduced by both plaintiffs and garnishees, does hereby order and adjudge that said motion for judgment against the garnishees be, and hereby is, sustained, to which ruling and action of the court the garnishees except; and the court finds that the plaintiffs have judgment against defendant, amounting at this time to the sum of two thousand two hundred and forty-four and $\frac{78}{100}$ dollars (\$2,244.78), and the costs due the plaintiffs now accrued in said attachment suit, in the sum of twenty-six dollars (\$26). Wherefore it is ordered and adjudged that plaintiffs have judgment against the garnishees for the sum of twenty-two hundred and forty-four and $\frac{78}{100}$ dollars (\$2,244.78), and interest from date, and said sum of \$26, costs of said attachment suit, and the costs of this garnishment proceedings. It is further ordered that the goods and property deposited by the garnishees with the sheriff be sold by the said sheriff under the execution issued in this cause against defendant, as such goods are directed to be sold by law under executions, and that the amount realized from such sale be credited on the judgment obtained by plaintiffs against the defendant, and that execution be issued against the garnishees to recover the balance, if any, due plaintiffs from defendant on their said judgment. And come now said garnishees, by attorney, and file herein their motion for a new trial of this cause, and motion in arrest of judgment herein, which said motions are now, by consent of parties, taken up and submitted to the court, and the court, being duly advised in the premises, doth overrule said motions, to which ruling of the court said garnishees duly excepted at the time. The court grants and allows said garnishees until on or before the 15th day of December, A. D. 1898, to prepare and file their bill of exceptions."

Said garnishees in due time filed their affidavit for appeal, and an appeal was granted. Since the transcript was filed in this court a certificate of the discharge of E. Hart in bankruptcy by the district court of the United States for the Western district of Missouri has been filed in this court, and a motion to transfer the cause to the Kansas City court of appeals.

L. A. Laughlin, for appellants. I. J. Ringolsky, for respondents.

GANTT, J. (after stating the facts). 1. No doubt can exist that, if jurisdiction of this appeal is to be determined by the amount involved, then it should have been lodged in the Kansas City court of appeals; but the garnishees in their motion for new trial insisted that the action of the circuit

court in giving plaintiffs' instructions Nos. 1 and 2, and in refusing their instruction No. 1, violated section 15 of article 2 of the constitution of Missouri, and thus raised a constitutional question, which gave this court jurisdiction of the appeal. The relevancy of the constitutional provision prohibiting the passage of ex post facto laws arose in this way: On the 13th day of August, 1889, E. Hart gave his note for \$1,020, payable to Fred J. Kast, bearing interest at 10 per cent. per annum, which note was indorsed to the garnishees. In 1891 the general assembly passed a new interest and usury law (Acts 1891, p. 170), whereby mortgages or pledges of personal property were rendered invalid and illegal when it should appear that the party holding such lien "has received or exacted usurious interest." In 1894 Hart mortgaged or pledged certain jewelry and personal property to garnishees to secure them this note for \$1,020 and all other indebtedness. On the trial plaintiffs, the attaching creditors, contended that there was evidence that the garnishees exacted and received usurious interest on this \$1,020, and took a new agreement to pay usury thereon subsequent to the act of 1891; and garnishees insisted there was no evidence that they exacted or received usurious interest on this note, and, whatever effect that act might have on the other notes secured by the mortgage, it did not render the note of 1889 usurious, and prayed the court to so instruct, in effect, that there was no evidence of payment of usurious interest on said note, but the court declined to do so. Whatever our conclusion may be on a full investigation of the record, we think the constitutional question was fairly raised, and hence we must deny the motion to transfer to the Kansas City court of appeals.

2. The transcript was filed in this court February 7, 1899. Subsequently, on February 11, 1899, Hart, the defendant in the attachment, was adjudged a bankrupt, and on October 30, 1899, was discharged from all debts and claims which existed and were provable against his estate on February 11, 1899. Afterwards, on January 4, 1900, the garnishees herein filed the certificate of said discharge in this court, and moved this court to discharge the garnishees, the appellants herein, because by operation of law the judgment against Hart was discharged, and, as this garnishment is an auxiliary proceeding to enforce that judgment, it is likewise discharged. That it is a proper practice to file a plea of discharge in bankruptcy in this court when the same is granted after the appeal is perfected was decided in *Haggerty v. Morrison*, 59 Mo. 324, and the bankrupt may avail himself of it in this way. But the question whether the garnishees against whom a judgment had been rendered prior to the adjudication of the defendant's bankruptcy can invoke the protection of that discharge is another proposition. Section 16 of

the bankruptcy act of July 1, 1896, establishing a uniform system of bankruptcy in the United States, expressly provides that "the liability of a person who is a co-debtor with, or guarantor, or in any manner a surety for, a bankrupt, shall not be altered by the discharge of such bankrupt." A similar provision was incorporated in the bankrupt act of 1867, § 33 (Rev. St. U. S. 1878, § 5118); and in *Hill v. Harding*, 130 U. S. 690, 9 Sup. Ct. 725, 32 L. Ed. 1083, it was held that if an attachment of property in an action in a state court is dissolved by the defendant's entering into a recognizance, with sureties, to pay the amount of the judgment that may be obtained, and the defendant, after verdict against him, obtains his discharge in bankruptcy upon proceedings commenced more than four months after the attachment, the bankrupt act does not prevent the state court from rendering judgment against him on the verdict with a perpetual stay of execution, so as to leave the plaintiff at liberty to proceed against the sureties. If the bond was executed before the commencement of proceedings in bankruptcy, the discharge protects him from liability to the obligees, so that, in an action on the bond against him and his sureties, the judgment recovered must be accompanied with a perpetual stay of execution against him, but does not prevent the judgment from being rendered generally against them. Now the garnishees here are neither co-debtors nor guarantors, or in any manner sureties for the bankrupt defendant. They were simply mortgagees or pledgees of certain personal property of his to secure debts due them by him. We must look elsewhere to determine their liability, or their right to be discharged by reason of his discharge. Plaintiffs began their action by attachment June 22, 1894. The garnishees were summoned June 23, 1894. On January 28, 1895, the attachment against defendant was sustained, and final judgment rendered against him. Garnishees filed their answer October 17, 1894, denying they had any property in their possession belonging to defendant. On December 3, 1897, plaintiffs recovered judgment against them; and the jury by their verdict found they had goods of the value of \$3,500 belonging to defendant in their possession, and they were ordered to turn the said property into court. They turned over a part, and the sheriff was directed to sell them; and, as the court found they had failed to turn over all, it rendered a general judgment against them, with an order to credit the amount the goods turned over should sell for, and collect the balance of garnishees. From this final judgment they appealed, and gave a supersedeas bond. The reason advanced by the garnishees for their motion for a discharge is based upon the proposition that a judgment in garnishment is dependent upon the judgment in the principal case. If the latter is void, reversed, or satisfied, the garnishment judgment

shares the same fate. The two cases cited from this court (*France v. Evans*, 90 Mo. 74, 2 S. W. 141, and *McCloon v. Beattie*, 46 Mo. 391) decide that when no jurisdiction is obtained over the defendant the garnishee may plead such a want of jurisdiction for his own protection, although he may be indifferent between the parties; and to this statement of the law we can see no objection, as the garnishee is entitled to be protected against a subsequent demand by the defendant. To the same effect is *Hopkins v. Huff*, 67 Mo. App. 394. In *Smith v. Railroad Co.*, 49 Mo. App. 54, it was held that, where the judgment sustaining an attachment was reversed, a judgment against a garnishee under those proceedings must likewise be reversed. And to the same effect are *Rowlett v. Lane*, 43 Tex. 274; *Withington v. Southworth*, 28 Mich. 381. And so it has been held under statutes which make the judgment against a garnishee dependent upon sustaining the attachment, or where the garnishee is summoned after judgment and it is subsequently reversed. *Mitchell v. Watson*, 9 Fla. 160; *Clough v. Buck*, 6 Neb. 343. But here we have a final judgment unappealed. No want of jurisdiction over either defendant or garnishees, and no satisfaction of the judgment, but simply a discharge of the defendant in bankruptcy after a final judgment against the garnishees. The affirmance of this judgment will not increase or diminish the assets of the bankrupt, so that the only question is, does the bankrupt act discharge the lien of this judgment under these circumstances? We have seen that the discharge of the principal in bankruptcy does not discharge his sureties in the bond to dissolve the attachment, but the debt remains as to the sureties, though extinguished as to the principal. It is obviously not satisfied, in the meaning of the cases cited, nor has the process become functus officio as to them. We think the question must be solved upon the principle that, where the jurisdiction of a court and the right of a plaintiff to prosecute his suit have once attached, that right cannot be arrested and taken away by proceedings in any other court. "It is abundantly established by the courts of last resort in this country, federal and state, that when the jurisdiction of a state court to enforce mechanics' liens has attached, that jurisdiction will not be divested by proceedings in bankruptcy instituted subsequently thereto." *Seibel v. Simeon*, 62 Mo. 255, and cases cited. In this case the jurisdiction of the circuit court of Jackson county had fully attached and ripened into a general judgment against the garnishees herein, which judgment, under our statutes, was a lien upon the real estate of the garnishees, and fixed their liability for the value of the goods of defendant attached in their hands long prior to the adjudication and discharge in bankruptcy, and they had given their appeal bond to stay that judgment. In our opinion, the subsequent pr

ceedings in bankruptcy did not divest the jurisdiction of the circuit court to enforce the rights which had accrued to plaintiff by these garnishment proceedings. *Gluck & B. Rec.* § 30, p. 66; *Heldritter v. Oil Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729.

While it is objected for the first time in the motion in arrest that the court did not obtain jurisdiction over the garnishees and the subject-matter of the action, we think the point is not well taken. It is true that, when goods and chattels belonging to the defendant are to be attached, the officer shall take them into his possession, if accessible, and, if not accessible, he shall declare to the person in possession thereof that he attaches the same in his hands, and summons such person as garnishee (subdivision 4, § 388, Rev. St. 1899); but we think the return of the officer in this case was substantially what the statute requires. He returns that he delivered a copy of the summons of garnishment, marked "Exhibit A," in Jackson county, Mo., on June 23, 1894, to Lamon D. H. Russell, which copy he makes a part of his return. In that written notice he notified (i. e., "declared to") said garnishees that he attached in their hands all debts due by them to the defendant E. Hart, together with all personal property, money, etc. The mere fact that he did not repeat the formula again in his return, but made it a part of his return, does not vitiate it in the least. The return is not open to the criticism made in the various cases cited from this state. There is nothing in the statute which makes a written declaration of less efficacy than an oral declaration. The effect of the written notice, by our statute, was to attach all the personal property, etc., of the defendant in the garnishee's possession. Section 3436, Rev. St. 1899. By that service of the writ of attachment, the plaintiffs, while not obtaining a full and clear lien upon the specific property in their hands as against third persons, did obtain such a lien as against garnishees as gave plaintiffs the right to hold the garnishees personally liable for its value. *Drake, Attachm.* (4th Ed.) § 453; *McGarry v. Coal Co.*, 93 Mo. 241, 6 S. W. 81, 3 Am. St. Rep. 522; *Johnson v. Foster* (Ark.) 65 S. W. 105. And as already said, this lien was not divested by the subsequent proceeding adjudging Hart a bankrupt, or his discharge. *Bankr. Act* July 1, 1898 (30 U. S. Stat. c. 541, § 67, par. "c"). It follows that the motion to discharge the garnishees because of the bankruptcy of Hart must be denied.

3. There is no merit in the point that Harkness was not served. His partner, who had all the property in his possession, was served; and Harkness voluntarily entered his appearance, and throughout the proceedings made common cause with his copartner, who had been served; but he was absent in Europe all the time, and could not be served. By the service of the notice of garnishment upon the partner who had the posses-

sion of the goods within the jurisdiction of the court, the court obtained jurisdiction of the res, and it was entirely competent for Harkness to waive the summons and give jurisdiction over himself personally. *Fletcher v. Wear*, 81 Mo. 530; *Scott v. Hill*, 3 Mo. 88, 22 Am. Dec. 402; *Coffin Co. v. Rubelman*, 15 Mo. App. 280.

4. It is assigned as error that the court erred in admitting the testimony of Diamond as to certain statements of Russell, one of the garnishees, as to the rate of interest which his firm charged Hart on the loans secured by the pledge or chattel mortgage under which they claimed the personal property which plaintiffs seek to subject to their debt against Hart by the garnishment proceeding. It appears that in the original attachment suit against Hart notice was given by plaintiffs to take depositions, and Russell was summoned and testified before Diamond, who was the notary. By agreement the testimony was taken in shorthand, and, when written out, was handed to Russell to sign. He took it and made many interlineations, and then had his own stenographer copy it, and then signed it. Diamond refused to certify it in this shape, but made a longhand copy of his stenographic notes, and filed that as the deposition. This last paper was lost without fault of plaintiffs, and on the trial they proved the loss, and then offered proof of a declaration by Russell at the time of the taking of the depositions that Russell said they charged Hart 2 per cent. a month on all loans made by their firm to him. To this garnishees objected because they insisted that the deposition filed by Russell after he had corrected it contained his statement on that subject, and could not be contradicted by Diamond. The offer was to prove an admission by an adverse party to the suit, and we think it was competent, and no error was committed in admitting it. *Bogle v. Nolan*, 96 Mo. 90, 91, 9 S. W. 14.

5. Again, error is predicated on the refusal of the peremptory instruction asked by garnishees for a verdict in their favor. Two propositions are advanced to support this assignment: First, that plaintiffs could not attack the validity of the collateral note held by the garnishees, for usury; second, by refusing this instruction this court gave a retroactive effect to the usury law of 1891, in violation of section 15 of the bill of rights of 1875.

The first of these contentions is based upon the assumption that an attaching creditor proceeding by garnishment is a stranger, and cannot attack a pledge for usury, or, at best, is only a general creditor, and as such cannot invoke section 3710, Rev. St. 1899. That section is in these words: "Sec. 3710. In actions for the enforcement of liens upon personal property pledged or mortgaged to secure indebtedness, or to maintain or secure possession of property so pledged or mortgaged, or in any other case when the valid-

ity of such lien is drawn in question, proof upon trial that the party holding or claiming to hold any such lien has received or exacted usurious interest for such indebtedness shall render any mortgage or pledge of personal property or any lien whatsoever thereon given to secure such indebtedness invalid and illegal." The usury does not extinguish the debt, but the statute destroys the lien or mortgage given to secure it. *Clothing Co. v. Corl*, 155 Mo. 149, 55 S. W. 1017. In *Rubber Co. v. Wilson*, 55 Mo. App. 656, it was first ruled that an attaching creditor stood in such privity with the mortgagor in a mortgage to secure an indebtedness tainted with usury that he could attack the same for usury. That ruling was approved and adopted by this court in *Coleman v. Cole*, 158 Mo. 253, 59 S. W. 106, in which it was said, "The plea of usury is a privilege personal to the debtor, or his privies in blood, contract, or representation; and an attaching creditor of the mortgagor is a privy in representation with the mortgagor, and hence can interpose the defense." With these decisions confronting them, garnishees concede that when the sheriff actually takes the mortgaged property into his possession, by seizing it under the writ, the creditor may avail himself of the usury to defeat the mortgage; but they contend that an attaching creditor who attaches the property in the hands of the usurious mortgagee or pledgee stands in the position of a mere stranger, or at most a general creditor, and has no such right. The distinction is not sound. When the sheriff served the notice of garnishment on garnishees that he attached in their hands all property belonging to defendant, the process of enforcing the attachment against the mortgaged property was begun, and plaintiff stood, as to the garnishees, lienors on that property, albeit it was not a lien upon specific property, but still such a lien as gave them a right to hold garnishees personally liable for it or its value. *McGarry v. Coal Co.*, 93 Mo. 241, 6 S. W. 81, 3 Am. St. Rep. 522. And no sound reason can be given why an attaching creditor who has fastened his attachment upon property in the hands of a usurious pledgee or mortgagee by a proper service of garnishment, and declaring to him that he attached in his hands the property of defendant, should not have the same right to attack a mortgage for usury as one who succeeded in having the sheriff actually seize it. We cannot assent to the proposition that such an attaching creditor is no more than a stranger to such usurious mortgage, or is only a general creditor. He has rights superior to either, and, we think, falls within the protection of the statute. Did the court give the statute a retroactive effect? This insistence is bottomed upon the claim of counsel that there was no evidence that any usurious interest was paid on the \$1,020 note made by Hart and wife to Fred Kast, and by him indorsed to garnishees, after January 1, 1890.

The usury act took effect April 21st, 1891. They argue, therefore, that conceding usurious interest was paid on this \$1,020 before the usury act of 1891 went into effect, but not afterwards, said act cannot apply to mortgages or pledges made after its passage to secure notes upon which usurious interest has been paid previous to its enactment. Their further contention along this line is that as, by the terms of the \$1,825 note, it is applicable "to any other note or claim held by the said Harkness & Russell," the collateral described in the \$1,825 note was pledged to secure the \$1,020 note held by them, and although all the other notes held by garnishees on Hart were tainted with usury, as the evidence amply established, still the pledges would be good as to the \$1,020 note, and therefore the collateral was incumbered with a trust, and not subject to garnishment. That the circuit court did not intend to give a retrospective effect to the usury act is plainly deducible from its instructions; for in both plaintiffs' instruction No. 1 and garnishees' fourth instruction it required the jury to find that the garnishees received or exacted usurious interest on the \$1,020 note after June 22, 1891, the date when the usury law went into operation. It is evident that, if such a construction was put upon the act of 1891 as would give it a retroactive effect, it grew out of the mistake of the court that there was evidence that the garnishees had exacted or received usurious interest after the law went into effect, when in fact none was exacted or paid. It will be observed that garnishees submitted to the jury, in their fourth instruction, whether usurious interest was exacted or received after June 22, 1891. *Neosho City Water Co. v. City of Neosho*, 136 Mo. 507, 38 S. W. 89. While Russell testified at one time that he had not received any usurious interest on the \$1,020 note, he admitted that "he probably did, that Hart said he did, and that he afterwards corrected it, or attempted to correct it"; and Diamond testified that he said he charged Hart 2 per cent. per month on all his indebtedness, which included this particular note. Again, he says the \$1,825 note was made up of interest and charges for services, etc. The jury were the triors of the fact. They were not bound to accept Russell's testimony as true, or to reject Diamond's evidence as false. They heard Russell's effort to explain the entries in his books made in his own handwriting, and, directed as they were to find usury only if they found garnishees had exacted it after June 22, 1891, their verdict must be held to have found they did exact or receive it after June 22, 1891; and, if so, then there was no retroactive effect given to the statute. Their finding is conclusive on this point in an action at law, where there was substantial evidence on which to base it. Particularly is this true in investigating whether a transaction is usurious or not. As said in *Krelohm v. Yancey*, 154 Mo. 96, 55 S. W. 206: "The real inquiry in

every case is whether there has been a borrowing and lending at a greater rate of interest than the law allows; and this becomes purely a question of fact to be determined by all the circumstances of the particular case. The courts will follow them through all their shifts and devices, and ascertain the true character and design of the transaction." The testimony of Russell lacked that candor and consistency which tends to convince a jury of its credibility.

6. Objection is made to the form of the verdict and judgment, because each item of the jewelry was not separately valued. To obviate the necessity of naming each piece of jewelry in the verdict, counsel on both sides stipulated that it should be sufficient for the jury to designate the goods in the hands of the garnishees as "the diamonds, watches, and jewelry described in the \$1,825 note in evidence." Accordingly the court gave the eighth instruction for plaintiffs, as follows: "(8) The court instructs the jury that in this case you have nothing to do with the amount of indebtedness of Hart to plaintiffs, and if you find a verdict for the plaintiffs and against the garnishees, Harkness & Russell, your verdict may be in the following form: 'We, the jury, find the issues for the plaintiffs; and we further find that the garnishees, Harkness & Russell, at the time of the service of the writ of garnishment on them, had in their possession money or property and effects belonging to defendant, Hart, as follows: Diamonds, watches, and jewelry, as described in the \$1,825 note in evidence; and the value thereof is \$——. —, Foreman.' And if you find for the garnishees, Harkness & Russell, your verdict may be in the following form: 'We, the jury, find the issues in favor of the garnishees, Harkness & Russell. —, Foreman.'" At the request of garnishees, the court gave the following instruction: "(3) The court instructs the jury that the plaintiffs cannot recover in this action, if at all, except for the market value of the goods pledged as collateral to secure the note for \$1,825, dated June 1, 1894, introduced in evidence, as such market value was on June 23, 1894, at the time of the service of this garnishment." Counsel at no time asked for a separate valuation of each article, and the jury returned a verdict for plaintiffs in the form given them by the court, and valued the whole at \$3,500. The court ordered all of the said goods and jewelry to be turned into court. Garnishees turned in a part, but failed to turn over the balance; and thereupon the court entered judgment, as provided in section 3452, Rev. St. 1890, against the garnishees for the amount of the judgment against defendant, and directed a sale of the goods turned over to sheriff, and that the proceeds be credited on the execution, and the balance, if any, collected out of the garnishees. We see no objection to the verdict, especially since garnishees made no effort to have a separate valuation of each

article. This is a civil case, and it was incumbent on the garnishees to have the separate valuation, if they desired it. As the jury had found these goods were the property of defendant, and subject to the attachment, two courses were open: The garnishees could have turned over all the goods described in the verdict and discharged themselves, or the court could enforce its order, as it did, to which we see no objection, and certainly nothing of which the garnishees can complain.

After a full investigation, we find no reversible error, and the judgment is affirmed.

SHERWOOD, P. J., and BURGESS, J., concur.

CONNOLLY v. ST. JOSEPH PRESS PRINTING CO.¹

(Supreme Court of Missouri, Division No. 1.
Dec. 17, 1901.)

MASTER AND SERVANT—ASSUMED RISK—CONTRIBUTORY NEGLIGENCE—OBVIOUS DANGER.

1. In an action by an employé for personal injuries the evidence showed that the defect in the machinery by which he was injured was not necessarily obvious to him, and it was not his duty to search for it, and such defect was not manifest to him in the ordinary discharge of his duty; and there was evidence that he did not know of any defect till a week before the accident, when it was repaired, and he was assured by the foreman that the machine was all right. *Held* it was insufficient to show that he assumed the risk.

2. After repair of machinery and assurance by defendant's foreman that it was all right, plaintiff was not guilty of contributory negligence in continuing in the performance of his duties.

Appeal from circuit court, Buchanan county; A. M. Woodson, Judge.

Action by Edward A. Connolly against the St. Joseph Press Printing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Brown & Dolman, for appellant. Thos. F. Ryan and J. W. Boyd, for respondent.

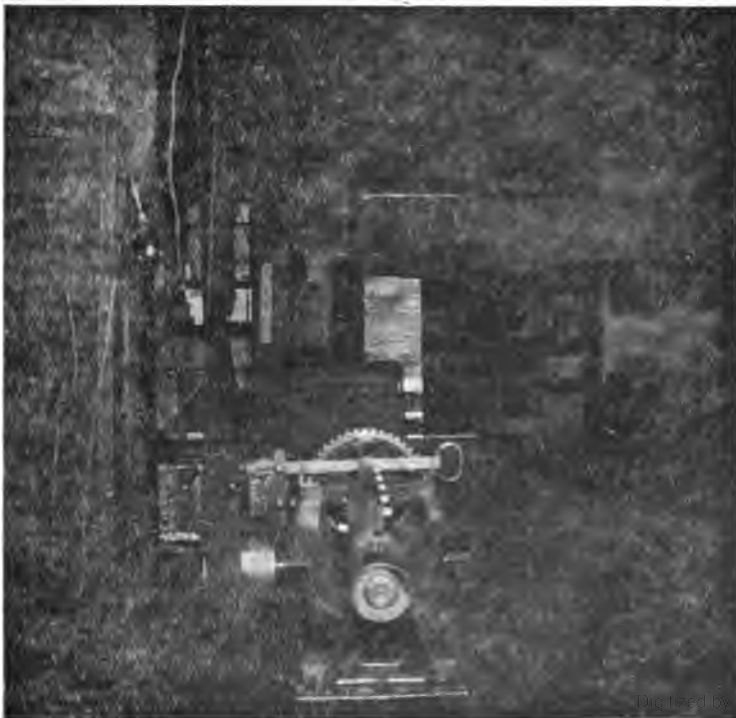
BRACE, P. J. This is an appeal by the defendant from a judgment of the Buchanan circuit court in favor of the plaintiff for the sum of \$5,000 in an action for personal injuries. The only errors assigned for reversal are the refusal of the court to sustain a demurrer to the evidence and to give two instructions asked for by the defendant. The court gave seven instructions for the defendant, presenting its side of the case very favorably, and it is only necessary to say, in regard to these refused instructions, that they contained nothing to which the defendant was entitled that was not included in the instructions given. The only real question in the case is whether the court erred in submitting the case to the jury. The cause of

¹ Rehearing denied January 18, 1902.

action stated in the petition is, in substance: "That the defendant owned and operated a printing plant, in which the plaintiff was one of its employes. That among other instruments and machinery used and operated in its business was a machine known as a 'shaver,' with a knife attached to a spindle for trimming and shaving stereotype plates, which had a certain lever and spring, and brake or shoe and grooves, and fasteners or clutches, that acted upon a belt and pulley, and other appliances of said machine, which, when in proper repair and condition, would stop and hold said spindle to which said knife was attached, so that the stereotype plate could be safely removed by the employé in charge. That on and for a long time prior to the 29th of October, 1898, the defendant had negligently permitted this lever, spring, and brake or shoe and the grooves, fasteners, and other appliances to become and remain worn and defective, so that they would not hold the spindle, which would revolve when it ought to remain stationary, which condition had been known to the defendant for months, and was not known to plaintiff. That at said date, and while said machine was in this condition, the plaintiff, in the discharge of his duty as such employé, attempted to take out a plate which had been shaved, when the knife suddenly revolved on account of said defects, cutting off his right hand and two fingers of his left hand." The answer was a general denial, a plea of contributory negligence, and risk assumed.

The following picture shows the machine upon which the injury occurred: '

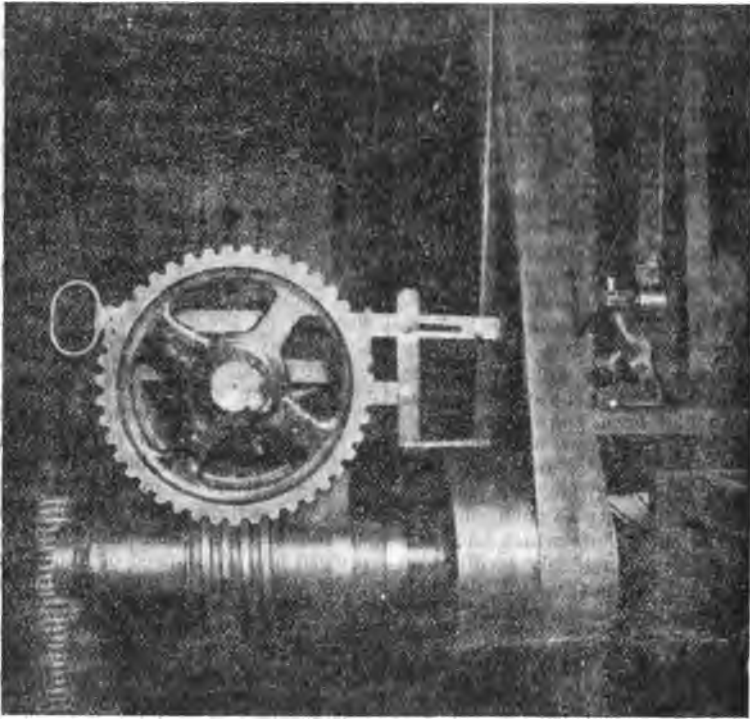
The bed consists of a sector of something less than half a hollow cylinder about two feet long and one foot internal diameter, lying horizontally on its foundation with the concave surface up. Along the center of the circle of which this concave surface forms a part, and extending the length of the bed, extends a spindle of great diameter bearings at each end, carrying a knife its entire length, and extending out so far from the spindle or shaft that when it revolves the edge of the knife describes a circle about half an inch inside the concave surface of the bed. The stereotype plate is cast about 17 inches wide and 20 inches long, and is curved to nearly a half circle, so that it exactly fits the concave surface of the bed. The operator stands on the side of the machine at the right of the picture, and facing it. He puts the curved plate in the bed of the machine, takes hold of the ring-shaped handle at the end of a long steel bar at his right and pulls it. Two pins are seen on the other end of the bar, one on each side of the belt which comes down from a shaft above. As he pulls out the bar, the farther pin pulls the belt from a loose pulley, on which it seems to be running in the picture, to the tight pulley, which appears naked in the picture. The knife slowly revolves toward him at a speed of about eight revolutions per minute. The edge enters the bed on the side toward him, and passes out on the outer side, shaving the plate as it goes. The instant it leaves the plate on the back side, he shoves in the bar, the handle of which he has been holding, the pin nearest him forces



the belt to the loose pulley, the knife stops, and he takes the finished plate, and removes it from the machine.

The parts of the machine which produce these movements are shown by the following picture:

ment which shifts the belt from the tight to the loose pulley. Next to the teeth of the wheel on each side may be seen a small standard with a slot, through which the shifting bar passes, and by which it is held steadily in its place. At the bottom of the slot



They consist of a belt coming down from its line shaft above so as to pass over two pulleys, a tight and a loose one, situated side by side on a screw shaft, the screw of which engages the teeth of a large gear wheel keyed to the end of the knife shaft, which is out of sight beyond the wheel, and the long horizontal shifting bar, which pushes the belt to the loose pulley to stop the machine, in which position it appears in the picture, and pulls it to the pulley which is keyed tight to the screw shaft to start it. The riveted end of the pin that pushes the belt to the loose pulley can be plainly seen when it passes through the bar at the edge of the belt. The pin which pulls the belt to the tight pulley is hidden by the shadow of the ascending portion of the belt. At the outer end of this lever is shown a horizontal slot passing through it. At the end of this slot nearest the operator appears a vertical lever, near the upper end of which a bolt is fixed, which passes loosely through this slot. Following this lever downward in the picture, we come to its fulcrum, which appears as the riveted head of a pin or bolt, and farther down is the brake shoe, which appears as it presses on the top of the tight pulley. This is for the purpose of stopping the revolution of the screw suddenly, with the same move-

ment which shifts the belt from the tight to the loose pulley. Next to the teeth of the wheel on each side may be seen a small standard with a slot, through which the shifting bar passes, and by which it is held steadily in its place. At the bottom of the slot

next the operator is a spring, which continually presses the bar upward against the top of the slot, and on the top of the bar are two notches into which the material at the top of the slot is pressed when the bar reaches the right place in starting and stopping, and which are intended to hold it so that the belt will not shift with its own movement. In starting the machine the operator takes hold of the ring-like handle, presses downward so as to disengage the notch in the top of the bar, and pulls it toward him, pulling the belt to the tight pulley. When the outer end of the horizontal slot in the bar strikes the bolt in the top of the brake lever, it raises the brake from the pulley, and the screw revolves. The other notch in the top of the bar engages itself, and holds it in position when the operator releases it. To stop the machine this operation is reversed.

Zumwalt, Snowden, and Shoemaker, stereotypers, who had worked in the defendant's plant, and had served this machine in the same line of duty as did the plaintiff, and who were introduced as witnesses in his behalf, testified that for several years prior to the accident the spindle or shaft carrying the knife would at times revolve when the bar of the shifter was shoved back or in, and the spindle should have been stationary;

but they seem to have had very vague ideas, if any, of the cause of this occasional eccentric movement. The following extracts from the testimony of the plaintiff show his version of the accident: "Q. Did you ever work at that machine? A. Yes, sir. Q. Under whose direction? A. Under Mr. Louis Connolly's. Q. About how long did you work at that machine before you were injured? How many years? A. A little over three years. Q. Who else used that machine? A. Why, Mr. Louis Connolly himself, and other men that worked there with us. Q. Tell the jury whether, in putting in and taking out a plate out of that machine, it is necessary to stop the spindle to which the knife is attached? A. Yes, sir; it is necessary to stop it. Q. How do you do that? A. By working the belt shifter, reversing the belt from the tight pulley to the loose one. Q. During the time you were working the machine, did the shifter work the belt and stop the spindle while you operated it? A. Yes, sir. Q. Now, what night or morning was it that you were injured? A. Saturday morning, the 29th day of October. Q. About what time in the morning? A. Between fifteen minutes of three, if my knowledge serves me right. Q. How many plates had been shaved on that machine up to that time, that night,—about how many? A. Well, there may have been about—I think that was the eleventh plate. About ten plates before that. Q. Who used the machine to shave the plates that night before you were hurt? A. I did, and Mr. Connolly, the foreman. Q. About how many plates did you shave that night? A. Possibly six or eight. Q. Now, during that night, up to the time that you were injured, in operating that machine, did you notice any defect in it? A. No, sir. Q. Connected with that machine? A. No, sir. Q. Did you operate the machine the night before? A. Yes, sir. Q. Did you notice any defect in the machine the night before? A. No, sir. Q. Did you know of any defect in that machine at the time you were injured that would make it dangerous for you to attempt to put a plate in or take it out, as you were attempting to do? A. No, sir. Q. What do you know, if anything, about any repairs being made on that machine a short time prior to your being hurt? A. I know of some repairs being made on it, but as to what the repairs were I don't know. Q. Who was it that repaired it? A. Mr. White, the machinist. Q. How many days before you were hurt? A. A week or ten days previous to my injuries. Q. What did Mr. Connolly say to you and the other helpers about the machine being safe after the machine was repaired? A. He had told me the machine was repaired. Q. What did he say to you about the machine being safe to use after it was repaired? A. He said the machine was fixed, and was all right. Q. Did you then, in using that machine after, tell the jury whether you relied on his state-

ment as to the condition of that machine? A. Yes, sir; he being the foreman— * * * Q. Did you notice or have any knowledge of any defect in that machine the night you were operating it? A. No, sir. * * * Q. Now, at the time you were injured, you say that it was about three o'clock in the morning? A. Somewhere between fifteen minutes to three and three o'clock. Q. Who put the plate in that you were attempting to take out? A. Mr. Louis Connolly, the foreman. Q. At that time of night, tell the jury whether you were required to work rapidly or not? A. Yes, sir. Q. Are you a machinist, or have you any knowledge of machinery? A. Not any at all; no, sir. Q. What, if anything, have you had to do with the adjusting of the belt of that machine? A. Never had anything to do with it. Q. Did you make any repairs on that machine at any time, to your knowledge? A. No, sir; not to my knowledge. Q. Who did the oiling of that machine? A. I did a great deal of the time. Q. Did you oil that machine the night you were hurt? A. Yes, sir. Q. Now, you say that Mr. Louis Connolly put the plate in? A. Yes, sir. Q. What were you doing at the time? A. I was just after taking a plate from the machine, and sitting it on the floor. Q. Why didn't Mr. Connolly take the plate out? A. He put the plate in, and shaved it, and was called away by Mr. Castles for some other work, and I attempted to take the plate out, when I was caught. Q. How long had the machine been stopped, after Mr. Connolly put the plate in, before you attempted to take it out? A. Oh, two or three minutes. Q. Now, tell the jury just how you went to take that plate out, and how you were injured. A. Well, I set a plate on the floor, and went back to the shaving machine to remove the plate that Mr. Connolly, the foreman, had placed in there; and I had my hand hold on it,—and I had my hand hold,—and I put my right hand over the edge of the box in this manner (indicating). You have to take the plates with the ends of your fingers this way (indicating), and work the plate down about two inches about, or two and one-half inches, from the end of the box towards the left hand, and then you get hold with the left hand in this manner (indicating), when the blade comes around on my right hand, and cuts it off, and I attempted to save my arm, and I lost two fingers of the left hand, too. * * * Q. What was the position of the knife or the lever and shifter and belting, so far as you can tell, at the time you went to take the plate out? A. The lever was shoved back, and the knife stopped, probably, oh, about ten or twelve inches from the edge of the box. Q. How long would it take the knife to go the distance from where it was stopped to where it would reach your hand at the point where you caught the plate? A. About two seconds. * * * Q. Where did it strike your arm? A. About above the wrist." And

on cross-examination he further testified: "Q. And you never knew that the knife was moving until it caught your hand? A. No, sir; I was paying attention and taking my plate out, when she come around and caught me. Q. So that you say you never heard anything about the machinery having been out of order this time you saw it revolving; there was nobody spoke about its being out of order at all? A. Before that? Q. No, at that time. A. Not to my knowledge; only when it was repaired. Q. Only when it was repaired? A. Yes, sir. * * * Q. Never heard of it at all? A. Not of the machine starting away until I saw it myself. Q. Now, when was it you saw it yourself? A. About a week or ten days before I was hurt, as I said before. Q. About a week or ten days before you were hurt? A. Yes, sir. Q. What were the circumstances? Just tell the jury how that happened at that time. A. Well, I don't know exactly what night in the week it was. When I come in, I oiled the machine, and after oiling the machine it is always necessary to start up,—after we oiled the machinery; and I oiled the machine, and went and started the motor. Ours was electric power there. And as I come out and passed by the machine I saw the knife revolve, and I called Mr. Connolly's attention to it, and he called Mr. White's attention to it (the machinist), and he come down and repaired the machine. What he repaired I don't know. I was busy doing some job work. That he shut off the power I know."

The actual defects in the machine are disclosed by the following extracts from the testimony of Mr. Motter, an expert machinist, who observed the machine before and examined it after the accident: "Q. Can you describe that machine? A. Yes. Q. You are familiar with it, and know it? A. Yes, sir. Q. Describe it to the jury in a general way. A. Well, this machine they call the shaver is a heavy cast-iron frame in the shape of a trough, and that carries a shaft, belting, and knife that revolves in this trough. At one end of the shaft that bears the knife there is a large gear wheel,—I judge about ten inches,—that engages in a worm shaft below; and that shaft carries two pulleys,—a tight and a loose pulley,—which are controlled by a belt shifter and a brake shoe. * * * Q. How close do the two pulleys run together, the tight pulley and the loose pulley? * * * A. I judge about one-sixteenth of an inch. Q. What was there on the guides or claws or spindle that engaged the belts? A. At the times I saw the machine there had been some kind of babbitt or stereotype metal put onto it. Q. Put on what? A. On the forks or prongs that engage the belt,—on the belt shifter. Q. Now, how thick was it on? A. Well, I would judge there was about an inch or an inch and a half. * * * Q. What was the purpose of putting that metal on there? A. So that the shifters will, in a measure, properly guide the belt. The trou-

ble is that the shifters, as they are there, themselves are too wide for the belt. Should have been a five-inch belt, and they have a four inch belt. So they have to put this on to make it fit the belt. Q. What effect does this stereotyping metal have on rubbing the belt? A. Every time the laces come around, where the two ends of the belt meet, has the effect of striking it, and wearing on the belt shifter. Q. Has it had any effect in reference to wearing the metal? A. Yes, it wears grooves in that soft metal. Q. Now, what was the depth of the groove that was worn in there? A. There was one on the east prong that is about a half inch in depth, and the other on the same prong is about a quarter of an inch. Q. What effect does the belt striking in and running into that groove and striking it there,—what effect does it have upon the shifter, or upon the likelihood of throwing the belt from the loose to the tight pulley? A. Well, in this particular machine it has a good deal of effect, for the simple reason that the notch that should hold that belt shifter in place is badly worn, and this striking of the fork of that belt shifter is very liable to disengage the shifter handle or lever, probably allowing the belt to run over onto the tight pulley. Q. To what extent would that belt have to go from the loose pulley to the tight pulley in order to turn that machinery, the shafting upon which the knife is on? A. Well, it would only have to touch that tight pulley, provided, though, that the brake shoe was not engaged. If the brake shoe was engaged, why then it would have to bear pretty heavily on that tight pulley. Q. What kind of a brake shoe is there on that—that brake shoe—at that time? * * * A. It is a triangular piece that is engaged with the shifting bar at one end and at the other end there is a leather or felt shoe that presses down on the tight pulley. Q. For what purpose does it press on the tight pulley? A. To make an absolute stop to the machine. Q. When the lever is shoved back, does it have that action, if it is in proper condition? A. Yes, sir; it would, if it was in proper condition. Q. What is the multiplication of power given to that machine by means of that worm and gear wheel? A. Well, I didn't figure that out, but, judging from experience with that class of machines, it is about forty times. One pound pressure on the tight pulley would be equivalent to forty pounds pressure at the knife. It is multiplied about forty times in that screw. Q. About what would you judge would be the revolution of the knife itself? * * * A. I think about eight revolutions a minute is its speed. Q. With the belt running as you saw it there, before Connolly was hurt, upon that pulley, with the groove in that metal, as you saw it worn in that metal, to what extent would that permit the belt to be cast from the loose pulley to the tight pulley? * * * A. Provided that the shifter was where it ought to be? Q.

As you saw the machine there then? A. Why, I would think about one-quarter of an inch on the tight pulley. Q. Would that be sufficient, in the condition you saw the brake that night, to revolve the spindle upon which the knife was on? A. Yes, sir; with much force. Q. Now, Mr. Motter, you spoke about the notch in the lever? A. Yes, sir. Q. Being beveled or worn so it could not properly hold in its place. I show you this photograph. Indicate on the lever at the point where you speak about. (Hands witness a photograph.) A. At the point where this notch is? Q. Where the notch was the night you saw it there that it was worn out? A. I saw it as they were operating the machine. That notch should be right at the handhold to engage that yoke. Q. Is that the notch that you speak about that was not square, but worn round when you saw it? A. Yes, sir. Q. What effect was that notch being worn round, in your opinion as a mechanic, so far as holding that brake lever in its place? A. Well, I might be a little peculiar in my opinion, but I would call it literally worthless, and very dangerous. * * * Q. Now, I will add to that, with the belt and the clutches in the condition in which you have spoken? A. Well, that notch is for the purpose of holding the shifter in its place. If it was worn so bad that there was no notch, it would not hold the shifter, but, as it is worn, the greater the liability not to hold in its place; and at the time I saw it, it was much worn."

In passing upon a demurrer to the evidence not only the truth of the facts shown, but every inference of fact which the evidence warrants, and which the jury with propriety might make, must be made in favor of the plaintiffs. *Young v. City of Webb City*, 150 Mo. 333, 51 S. W. 709; *Alcorn v. Railroad Co.*, 108 Mo. 81, 18 S. W. 188; *Tuohey v. Frulin*, 96 Mo. 104, 8 S. W. 784; *Buesching v. Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Wilson v. Board of Education*, 63 Mo. 137; *Harris v. Railway Co.*, 89 Mo. 233, 1 S. W. 325, 58 Am. Rep. 111. The duties of the plaintiff in connection with the machine were to put the stereotype plate in the curved bed of the machine, start the spindle to revolving by pulling out the bar of the shifter, and, when the edge of the knife left the plate on the back side, to stop the further revolution of the spindle by pushing in the shifting bar, and take out the shaved plate, and to oil the machine when necessary. He was no machinist. The defects in the machine pointed out by the expert machinist were not necessarily obvious to him in the discharge of these duties, and it was not his duty to search for them. Neither was the danger from these defects manifest to him in the ordinary discharge of his duties. Hence this case is not within the principle of the long line of cases cited by counsel for the defendant in support of their contention that the

risk was assumed by the plaintiff, of which *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113, *Lucey v. Oil Co.*, 129 Mo. 32, 31 S. W. 340, and *Roberts v. Telegraph Co.*, 66 S. W. 155, are examples. "An unavoidable inference" does not arise from the uncontroverted facts in this case that the plaintiff either knew the defects of the machine, or knew the continuous danger arising from these defects. On the contrary, there was evidence tending to prove that he did not know of these defects, or that there was anything the matter with the machine, until about a week or 10 days before the accident, when he observed for the first time that the spindle was revolving, although the shifting bar was pushed in, and the belt ought to have been completely on the loose pulley, and the spindle stationary. This condition of the machine he immediately communicated to the foreman, who called in the machinist of the concern; repairs were made, and he was assured by the foreman that the machine was all right. By thereafter continuing in the discharge of his duties at the machine until he was injured, he neither assumed the risk of such injury nor was guilty of negligence contributing thereto. *Conroy v. Iron Works*, 62 Mo. 35; *Keegan v. Kavanaugh*, Id. 230; *Dale v. Railway Co.*, 63 Mo. 455; *Huhn v. Railway Co.*, 92 Mo. 440, 4 S. W. 937; *Stephens v. Railroad Co.*, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; *Soeder v. Railway Co.*, 100 Mo. 673, 13 S. W. 714, 18 Am. St. Rep. 724; *Shortel v. City of St. Joseph*, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317; *Nicholds v. Glass Co.*, 126 Mo. 55, 28 S. W. 991; *Settle v. Railway Co.*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; *Bradley v. Railway Co.*, 132 Mo. 293, 39 S. W. 763; *Doyle v. Trust Co.*, 140 Mo. 1, 41 S. W. 255; *Duerst v. Stamp Co.* (Mo. Sup.) 63 S. W. 827. Our views on this subject have been so often expressed that a reiteration of them in this case is unnecessary.

The circuit court committed no error in submitting the case to the jury, and its judgment is affirmed. All concur.

IN RE POUND'S ESTATE.

POUND et al. v. CASSITY.¹

(Supreme Court of Missouri, Division No. 1.
Dec. 17, 1901.)

EXECUTORS—PARTIAL DISTRIBUTION—REFUNDING BONDS.

1. Rev. St. 1899, § 230, provides that no executor shall be compelled to make distribution within two years from the date of the letters, unless bond be given by the legatees or distributees to refund to pay any debts against the estate; and section 240 enacts that if, on any settlement, it appear that there is sufficient money to satisfy all the demands against the estate, the court shall order the payment of legacies and distribution of shares. *Held*, that

¹ Rehearing denied January 13, 1902.

section 240 is to be construed in connection with section 239, and a refunding bond must be given where distribution is made within two years after the date of the letters.

2. Where an executor, within two years after the date of his letters, without any order of the court, and without requiring any refunding bond, distributed sums to the legatees, and subsequently the court, under Rev. St. 1899, § 240, made an order for distribution,—it appearing that the debts were paid,—the executor could not refuse to comply with the order of distribution because no refunding bond had been given by the legatees.

Appeal from circuit court, Linn county; Jno. P. Butler, Judge.

Motion by James S. Pound and others, as assignees of the right of the widow of Presley Pound, deceased, to a child's share in the personal estate, for a partial distribution by Armstrong Cassity, as executor of the decedent. From a judgment of the circuit court affirming a judgment of the probate court granting the motion, defendant appeals. Affirmed.

This is a motion by the assignees of the right of the widow of Presley Pound to a child's share in the personal estate for an order of partial distribution. The probate court ordered the distribution. The executor appealed to the circuit court, where a like order was entered, and the executor appealed to this court.

The facts are these: On December 6, 1897, the will of Presley Pound, deceased, was admitted to probate. On the 22d of December, 1897, the widow renounced the will, and elected to take dower in the real estate, and a child's share in the personal property. The court allowed and the executor paid the widow \$400 as her absolute property, as provided by section 106, Rev. St. 1899. On the 26th of April, 1898, the widow conveyed and assigned her dower in the real estate and her share in the personal property to James S. and John M. Pound. On the 14th of February, 1899, the executor filed his first annual settlement, which showed that the assets collected amounted to \$32,986, and that the disbursements amounted to \$23,154.03, leaving a balance in his hands of \$9,831.97. The deceased left six children by a former marriage, to wit, Sarah Hawkins, P. B. Pound, J. S. Pound, J. M. Pound, Josephine Cassity, the wife of the executor, and Martha Mathews, and the widow of the second marriage, Mary M. Pound. The \$23,154.03 disbursements included the following sums paid by the executor to the children and widow: To Sarah Hawkins, the sum of \$4,153.93; to P. B. Pound, the sum of \$4,153.93; to J. S. Pound, the sum of \$4,153.93; to Josephine Cassity, the sum of \$4,203.18; to J. M. Pound, the sum of \$2,228.50; to Mary M. Pound, widow, the sum of \$400; and to Martha Mathews, nothing; making the total distribution to the widow and legatees, \$19,293.47. The probate court found that a portion of the \$9,831.97, balance on

hand, could be distributed without prejudice to any one, as contemplated by section 239, Rev. St. 1899, and accordingly ordered the executor to retain \$966, and to distribute the \$8,865.97 of the \$9,831.97 balance on hand as follows: "To J. M. Pound and J. S. Pound, assignees of Mary M. Pound, widow, the sum of \$3,618.49; to Martha Mathews, legatee, the specific legacy of twenty-five dollars (\$25); to Sarah Hawkins, legatee, the sum of \$663.26; to P. B. Pound, legatee, the sum of \$663.26; to J. S. Pound, legatee, the sum of \$663.26; to Josephine Cassity, legatee, the sum of \$614.01; to J. M. Pound, legatee, the sum of \$2,588.69. It is further ordered that the executor deliver to Martha Mathews all the notes and evidences of debt, of every kind, due by her to said estate, now in his possession." When the case was tried in the circuit court the evidence developed the fact that the executor had paid the children the amounts specified in the settlement as a part of their legacies before the expiration of two years from the date of his letters, and did not require a refunding bond from them, but that he had paid the widow nothing, except the \$400, because he did not think she was entitled to anything, and that he had never demanded a refunding bond from her. It also appeared that all the known debts of the estate had been paid, and that there were no more expenses to be incurred, except the cost of administration, and that the executor was receiving the rent of the real estate in addition to the \$566 he was ordered to retain. The circuit court rendered judgment similar to that rendered by the probate court, and the executor appealed.

O. C. Bigger, H. Lander, and E. R. Stephens, for appellant. A. W. Mullins, for respondents.

MARSHALL, J. (after stating the facts) The defendant contends that the order of partial distribution is premature, and that under section 238, Rev. St. 1899 (section 239, Rev. St. 1899), he could not be compelled to make distribution within two years after the date of his letters unless a refunding bond is given to him by the distributees. Section 238, Rev. St. 1899, provides that executors cannot be compelled to pay legacies until one year after the date of the letters, unless the legacies would be perishable or subject to injury if retained one year. Section 239 provides that no executor shall be compelled to pay legacies or make distribution within two years from the date of the letters, unless bond and security be given by the legatee or distributee to refund his due proportion of any debt which may afterwards be established against the estate, and the costs attending the recovery thereof. Section 240 provides that, "if upon any settlement it appear that there is sufficient money to satisfy all the demands against the estate, the court shall order the payment of legacies and distribution of

shares, as in the case of debts, except that the specific legacies shall be first satisfied." Sections 238 and 240 are the same as they have always been since 1825; and section 239 is the same, except that prior to the revision of 1865 the period was three years, instead of two, and except, further, that it contained the words "unless ordered to do so by the court," which were left out of the law by the revision of 1879 (section 244, Rev. St. 1879). Under the law as it was in 1848, it was held in *State v. Stephenson*, 12 Mo., loc. cit. 182, that an executor could be compelled to make distribution after the expiration of one year, and before the expiration of three years, without requiring a refunding bond from the distributee, if the court ordered it to be done. The cause of action under consideration in the case of *State v. Grigsby*, 92 Mo. 419, 5 S. W. 39, arose before either of the above-noted changes were made in the law; the will having been probated in October, 1856, while the suit on the bond was not begun until 1884, so that more than three years had elapsed before any attempt was made by the legatees or distributees to enforce distribution. But while this is true, and while it is also true that case did not involve a construction of the power of the probate court under section 239 as it then was, nor under section 240 as it always has been, still what was so aptly said in that case is pertinent here. *Brace, J.*, delivering the opinion of the court in that case, said: "Under the law at the time this estate was being administered, legatees could not demand their legacies within one year after the grant of letters testamentary, nor could the executors be compelled to pay legacies within three years after the grant of letters, unless ordered by the county [probate] court to do so, unless the legatees gave a refunding bond. Rev. St. 1855, §§ 1, 2, art. 6, c. 2. But 'if, upon any settlement, it appear that there is sufficient money to satisfy all the demands against an estate, the court shall order payment of legacies, and distributive shares, as in case of debts, except that specific legacies shall be first satisfied.' *Id.* § 3. This statute has remained unchanged since 1825, except that in 1865 the period of three years was changed to two years; and it was held as early as 1836, in an action brought against the sureties on an administration bond, that the jurisdiction of the county court to enforce distribution was not exclusive, but that the distributee had his right of action against the sureties on the bond of the administrator when all the debts were paid, demands barred, and the administrator had assets subject to distribution. *State v. Rankin*, 4 Mo. 427. And in a long line of decisions since it has been held that a distributee of an estate, after the debts were all paid, had his right of action on the statutory bond, whether final settlement by the representative, or order of distribution by the

probate court, had been made or not. *State v. Campbell*, 10 Mo. 725; *State v. Stephenson*, 12 Mo. 179; *State v. Morton*, 18 Mo. 53; *State v. Matson*, 44 Mo. 305; *State v. Thornton*, 56 Mo. 325; *Morehouse v. Ware*, 78 Mo. 100. Whilst there is not entire uniformity in the decisions as to the time when the distributee's right of action accrues, yet all the cases will be found within the limit of this rule,—that when the assets of the estate in the hands of the representative can be required for no other purpose than the discharge of the claims of the distributees or legatees, and their right to those assets has become fixed by law, a right of action accrues to such distributees or legatees, on the bond, for the failure of the executor or administrator to account for and distribute those assets. In case of an executor having assets in his hands when all the debts of the estate have been paid, when all demands against it are barred by the lapse of time, when the time allowed by law for contesting the will has expired, when specific legacies have been paid, when all other trusts of the will have been discharged, and those assets are solely applicable to the discharge of residuary legacies, the right of the residuary legatee to institute an action on the bond of the executor accrues, for failure of such executor to discharge such legacies to the extent of the assets in his hands applicable thereto. In other words, when the sole duty of the executor is to pay over to the residuary legatees the assets in his hands, and he fails to do so, the trust under which he theretofore held the assets of the estate may be regarded as discontinued, his further holding being inconsistent with the rights of the beneficiaries of that trust; and their right of action at law upon the bond for his breach of duty is complete. This is a salutary principle, tending alike to conserve the interests of the beneficiaries of an estate, and to protect the sureties of an executor from risks not contemplated when they incurred their legal obligations."

The change in section 239 made in the revision of 1879 by omitting the words "unless ordered to do so by the court" was material; for, as interpreted by this court, the probate court had power under the old law to order a partial distribution before the expiration of the time when demands against the estate would be barred, without requiring a refunding bond, whereas now the law is express that no executor shall be compelled to make distribution within two years after the date of his letters, unless a refunding bond is given. It is true, section 240, Rev. St. 1899, provides, as has always been the law, that if, upon any settlement, it appears that there is sufficient money to satisfy all the demands against an estate, the court shall order the payment of legacies and distribution of shares. No time is here limited after the date of the letters, but the court has the

power whenever it appears from any settlement (the first, second, final, or other) that there is money enough to pay all demands. Of course, it could not be known absolutely before the expiration of two years how many demands might be presented; and therefore this section must be construed in connection with section 230, Rev. St. 1899, which requires a refunding bond of the distributee if distribution is made within two years after the date of the letters. So construed, the two sections harmonize, and they could not be made to harmonize under any other construction.

The letters in this case were dated December 6, 1897. The order of distribution was made by the probate court on February 18, 1899, which was within two years after the date of the letters. The executor, therefore, was entitled to demand a refunding bond before paying the legacies or making distribution; and if he had done so, and it had not been given, his position would have been impregnable. But he did not place his refusal upon any such ground. He did not object to the order of the court because it did not require a refunding bond as a condition precedent to the right of the legatees or distributees to demand the payment of their distributive shares, and he never demanded any bond from the widow or assignees, or from any of the legatees. On the contrary, he paid large sums to the legatees prior to his first settlement, within two years after the date of his letters, without any order of the court, and without requiring a refunding bond; and all through this case he has taken the position that he would not pay the widow anything beyond the \$400 already paid, because he did not think she was entitled to any share of the personal estate. This being true, it does not lie in his mouth now to say that the order was not obeyed because no refunding bond was given. In fact, he does not say so now in express terms. He only says the order was premature. The court had full power, under section 240, Rev. St. 1899, to make the order when it did; and as the executor did not stand on his rights under section 230, and demand a refunding bond, but, on the contrary, denied wholly the right of the widow to any share in the personal property, his position is untenable, and the judgment of the trial court was right.

There is nothing in this record to show that any part of the \$3,835.97 ordered distributed consisted of rents collected after the death of the decedent, and therefore there is no merit in the contention that the widow had not assigned that part to the claimants, nor that the widow had no interest in the rents arising out of the real estate.

The judgment of the circuit court is right, and it is affirmed; and interest at the rate of 6 per cent. per annum is added to the allowance in favor of the claimants, to be paid by the executor individually, as also all the costs. All concur.

HOOD et al. v. MAXWELL et al.¹

(Court of Appeals of Kentucky. Jan. 16, 1902.)

WILLS—INTEREST ON LEGACY—TAXES PAID BY ADMINISTRATOR—SUIT TO SETTLE DECEDENT'S ESTATE—ATTORNEY'S FEES—PROOF OF CLAIMS.

1. It was error to allow interest on a legacy from a date prior to the lapse of a year from testator's death.

2. In an action by a legatee to settle testator's estate, the personal representative was entitled to credit by taxes paid by her which accrued after the action was instituted.

3. In such an action, the services of plaintiff's attorneys being rendered solely for the benefit of their client, it was error to allow them a fee to be paid out of the estate.

4. The administratrix with the will annexed was not entitled to the allowance of a claim asserted by her against testatrix until she had filed her affidavit, together with that of some one else, proving the claim.

Appeal from circuit court, Marion county. "Not to be officially reported."

Action by Cora Maxwell and others against Mrs. J. Ann Hood and others for a settlement of the estate of Lizzie Chandler, deceased. Judgment settling the estate, and Mrs. J. Ann Hood and others appeal. Reversed.

H. P. Cooper, for appellants. John R. Thomas, Thomas Worswick, and S. A. Russell, for appellees.

PAYNTER, J. In October, 1893, Miss Lizzie Chandler died testate. She devised \$1,000 in trust for the use and benefit of Cora Chandler, née Maxwell, and at her death the \$1,000 was to be paid to appellant and Joseph E. Shelby. The balance of the estate was also devised to the appellant and Shelby, except the use of a house and lot was given to Mahala Mercer during her life. The appellant qualified as the administratrix of the estate. R. A. Burton was named as trustee of Cora Maxwell, but he failed to qualify, and another was appointed. This action was instituted by Cora Maxwell to have the \$1,000 which had been devised to her paid over to her trustee. The appellant resisted the payment of the \$1,000, claiming that after the payment of the debts of the testatrix there was nothing with which to pay the bequest. To determine this would require a settlement of her accounts as administratrix, as she had not filed an inventory of the estate or made a settlement of her accounts with the county court. The statement which she made of the estate showed that she had paid all debts of the estate, except she asserted claims amounting to several hundred dollars against the estate, which she claims had not been paid, and claimed that she should be paid, out of the estate, before the \$1,000 should be set apart for the use and benefit of Cora Maxwell. It would not be profitable to review the various debts which she claims to have paid for the

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

estate, nor to discuss the various items involved.

The court charged the estate with the interest on the \$1,000 bequest from the date the will was probated. There was no provision in the will as to when it should be paid. Under section 2065, Ky. St., it did not draw interest for one year after testatrix's death. The court erred in allowing interest for the year following the death of testatrix.

The record shows that the administratrix paid for the estate \$122.70 taxes which accrued after the institution of the action, and she should have been reimbursed that sum.

The court allowed the attorneys of Cora Maxwell \$175, to be taxed as costs, to be paid out of the estate. This was error, as they rendered the services solely for their client in the prosecution of this action. The action was not prosecuted for the benefit of the creditors of the estate. There were no creditors of the estate at the time the action was instituted, unless it was the appellant Mrs. Hood. In *Miller v. Swan*, 91 Ky. 86, 14 S. W. 964, it was held that when a suit to settle an estate was prosecuted for the sole creditor of the estate, and the attorney for the administrator was acting for the creditor, no attorney's fee should be charged against the estate. That she was one was denied by the appellees. The court erred in only allowing the administratrix for her services in administering the estate the sum of \$75. It should have allowed the \$150 claimed by her.

We will not discuss the question as to whether or not the statute of limitations barred Mrs. Hood's right to assert her claim for rents collected by testatrix and converted to her use, nor as to her claim to one-half of the proceeds of certain lands sold by the testatrix, which were jointly owned by her and the appellant, as this record fails to show that the proof of the claim which the statute requires was ever made. The court was not authorized to adjudge that she should be paid the claim until she had filed her affidavit, together with that of some one else, proving the claim. The other proof in the case cannot obviate the necessity of statutory proof of the claim.

The judgment is reversed for proceedings consistent with this opinion.

TOUSEY et al. v. STITES et al.¹

(Court of Appeals of Kentucky. Jan. 15, 1902.)

INTOXICATING LIQUORS—LOCAL OPTION—VALIDITY OF VOTE.

An election under the local option law in a magisterial district having resulted in a vote against the sale of liquor, an election held within three years thereafter in a precinct forming part of the district was void.

Appeal from circuit court, Breckinridge county.

"Not to be officially reported."

Contest between J. H. Stites and others and T. C. Tousey and others of an election under the local option law. Judgment for contestants, and contestees appeal. Affirmed.

D. R. Murray, for appellants.

WHITE, J. On December 19, 1899, an election was held in the Cloverport magisterial district of Breckinridge county, composed of four election precincts, on the question of local option, as provided by the statute. The result of that election was that a majority voted against the sale of spirituous liquors. The validity of that election was contested, and upon appeal to this court the election was held to be valid. *Tousey v. De Huy*, 62 S. W. 1118. In April, 1900, an election was held in election precinct No. 2 of the Cloverport magisterial district on the question of local option, which resulted in a majority voting in favor of the sale of spirituous liquors. The appellees, Stites et al., contested this election on the ground that it was illegal and void, because prohibited by the statute; three years not having elapsed since the previous election in the magisterial district of which precinct No. 2 is a part. There is no dispute as to the facts, and the question presented was purely legal; that is, did the vote in the magisterial district prevent a vote in the voting precinct within three years? The circuit court decided that the April election was illegal and void, because prohibited, and the contestees have appealed.

Counsel for appellants here, as did the learned trial judge, rely on the case of *Com. v. Bottoms* (decided June 13, 1900) 57 S. W. 493, to sustain his position. That opinion was delivered after mature consideration by the whole court,—being the second one filed,—and must be regarded as the law and decisive of this case. Counsel seem to so regard it, and the opinion of the lower court is based entirely on that opinion. As counsel for appellants contends that the opinion in the *Bottoms* Case means one thing, and the trial court adjudged that it meant the opposite, it is necessary to discuss that opinion. The question presented in the *Bottoms* Case was similar to the one here. There the vote was first taken in the entire county, and subsequently in a town within the county. We held that the vote in the town was illegal, because three years had not elapsed since the first vote; that, if the smaller division desired to vote separately on the question of local option, it could have done so at the same time, or prior to the vote of the whole county, but that it could not do so after the vote of the county had been taken, till the expiration of three years. It is unnecessary to repeat the reasoning in that case, but we are of opinion that the same rule applies where the vote is taken in the

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first instance in a magisterial district, and the subsequent vote is asked in a subdivision of that district. The precinct might, as provided by law, have had a separate vote for itself before or on the day the vote was taken in the district; and, as that was not asked or had, there could be no vote in that magisterial district, or any subdivision thereof, for three years from December 19, 1899. The vote in April, 1900, was therefore prohibited, and the election is illegal and void. Judgment affirmed.

HEMMINGWAY et al. v. TONG.¹

(Court of Appeals of Kentucky. Jan. 15, 1902.)

VENDOR AND PURCHASER—VENDOR'S LIEN—STATUTE OF LIMITATIONS.

An action to enforce a vendor's lien was barred after the lapse of 15 years from the time the lien debt was created, as the sum recited in the deed as the consideration became due at once without demand, no time being fixed for its payment; and this is true though the deed was not recorded, as that fact did not hinder the collection of the purchase money.

Appeal from circuit court, Daviess county. "Not to be officially reported."

Action by M. Hemmingway and others against O. H. Tong to enforce a lien on land. Judgment for defendant, and plaintiffs appeal. Affirmed.

J. R. Hays and Eli H. Brown, for appellants. Geo. W. Jolly and Clark & Watkins, for appellee.

WHITE, J. This action was brought by the appellants, who seek to enforce a lien on certain lands owned by appellee that had been conveyed by appellants to McMurtry in the year 1876. The action was brought in 1899, and among other defenses presented is that of limitation; more than 15 years having elapsed since the creation of the lien debt by McMurtry before the institution of this action. A reply to the plea of limitation was filed. The allegations of the reply are that the deed executed by appellants to McMurtry was not recorded till 1899, and that by the contract or deed creating the lien no time was fixed for the payment thereof, and thus it is alleged that the statute has no application. The court sustained a demurrer to this reply, and, upon failure to plead further, dismissed the action; hence this appeal.

We are of opinion that the right of action was barred by limitation, and by the reply no avoidance of the plea is presented. The fact that no time is fixed for the payment of the sum recited in the deed does not stop the statute till a demand is made. When no time is fixed in a recitation that a sum is due or payable, it will be held that it is due and payable when created, and limitation will begin from date, as there is nothing post-

poning the right of action to some time in the future. Nor does the fact that the deed was not put to record affect the question.

Appellants were not prevented or hindered in collecting the sums due by reason of the fact that the deed had not been recorded. We think it clear that the right of action to enforce the lien was barred by the statute pleaded.

There is no error, and the judgment is affirmed.

GREEN'S ADM'R v. IRVINE.¹

(Court of Appeals of Kentucky. Jan. 16, 1902.)

VENDOR AND PURCHASER—REVERSION TO VENDOR INURING TO BENEFIT OF PURCHASER—STATUTE OF LIMITATIONS—APPLICATION OF STATUTE ON DEMURRER.

1. Where a deed embraced two small parcels which the grantor had previously conveyed to toll road companies for toll houses, with a stipulation that they should revert to the grantor when they should cease to be used for that purpose, the title thereto passed to the grantee, subject to their use by the toll road companies, and when those companies ceased to use them they reverted to him, and not to the heirs of the grantor.

2. It was proper to sustain a demurrer to the petition in an action seeking relief from a mistake in a deed, where the action was not brought until after the lapse of more than 10 years from the execution of the deed, it appearing from the allegations of the petition that no plea could be available to defeat the operation of the statute as a bar.

Appeal from circuit court, Madison county. "Not to be officially reported."

Action by W. R. Green's administrator against Elizabeth Irvine. Judgment for defendant, and plaintiff appeals. Affirmed.

O. H. Breck, for appellant. R. W. Miller and J. Tevis Cobb, for appellee.

PAYNTER, C. J. W. R. Green died testate in 1879. He left certain real estate, out of which dower was allotted to his widow, and a certain part of the land left by decedent, containing about 112 acres, was decreed to be, and was, sold. J. Stone Walker became the purchaser, and the court, through its commissioner, made him a deed for the land on the 19th day of December, 1881. Subsequently, he sold and conveyed it to the husband of the appellee, who devised it to her. Within the boundary conveyed to Walker there were two parcels of land containing one-half acre each, on which were situated toll houses. These parcels of land had been conveyed by the testator, Green, to toll companies, to be used by them so long as used for conducting toll road business. In about 1895 the toll companies ceased to operate the turnpikes, and under the terms of the agreement the land reverted.

The question here is as to whether Walker acquired a title to the property subject to the use of the turnpike companies; if he did

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not, then the land reverts to Green's heirs or devisees. As we have said, the commissioner's deed to Walker purports to vest him with the title of the entire boundary described in his deed, which includes the toll-house lots. If it was not intended that it should embrace the lots, then there was a mistake in its execution. The effort made by this proceeding to correct the mistake was not commenced for 18 years after it was made. The pleadings show these facts, and also show that nothing could be pleaded to prevent the application of the 10-year statute of limitation. Such a state of facts as shown in this proceeding bars the recovery, and no plea could be available to prevent its operation as a bar. When this is the case it is proper for a court to sustain a demurrer to the pleadings which seek relief against a mistake, as was done in this case.

The judgment is affirmed.

HUNDLEY et al. v. SINGLETON, County Supt. of Schools, et al.¹

(Court of Appeals of Kentucky. Jan. 16, 1902.)

SCHOOLS AND SCHOOL DISTRICTS—ORDER DEFINING BOUNDARY OF TAX DISTRICT—FAILURE TO CANVASS VOTE ON TAX—SLIGHT IRREGULARITIES DISREGARDED.

1. The fact that an order of the county judge establishing a graded common-school district, and ordering a vote to be taken on the question whether a tax should be levied to establish such a school, embraced in the district property situated more than $2\frac{1}{2}$ miles from the site of the proposed school house, did not invalidate the vote taken, in the absence of anything to show that persons residing outside the $2\frac{1}{2}$ -mile limit voted at the election, or that the votes of such persons, if cast, determined the result of the election.

2. The fact that the order defining the boundary of the district describes one of the lines as beginning at P.'s, without indicating whether P.'s land is included or excluded, does not render it void for uncertainty, as P.'s land is thereby excluded.

3. In the absence of an averment that a majority of those voting at the election did not vote against the tax, the vote is not rendered void by the failure of the county canvassing board to canvass the vote and certify the result, as that may yet be done; and, therefore, in an action to enjoin the collection of the tax, the court did not abuse its discretion in refusing to permit the filing of an amended petition alleging the failure to canvass the vote, the question being purely technical.

4. Under Ky. St. § 4466, authorizing a petition containing a description of the boundary of a proposed graded common-school district to be presented to the county judge, and providing that the district may be established "as agreed on by the county judge and the petitioners," it is not necessary to state in the order which the county judge makes that such an agreement was made, as that will be presumed.

5. Slight irregularities will not vitiate an election to take the sense of the voters of a district as to the imposition of a local tax, a substantial compliance even with a mandatory statute being sufficient.

Appeal from circuit court, Lincoln county.

"Not to be officially reported."

Action by J. S. Hundley and others against G. Singleton, county superintendent of schools, and others, for an injunction. Judgment for defendants, and plaintiffs appeal. Affirmed.

Hill & McRoberts and J. B. Paxton, for appellants. W. G. Welch, for appellees.

PAYNTER, J. The necessary number of taxpayers presented a petition to the county judge of Lincoln county, asking him to establish a graded common-school district, consisting of the city of Stanford and contiguous territory. He made an order establishing the district, and ordered a vote to be taken upon the question as to whether a tax should be levied to pay the expenses of establishing and maintaining a graded common school. A majority of the qualified voters seem to have voted in favor thereof. Certain taxpayers instituted this action, seeking to enjoin the collection of the tax upon the grounds (1) that the new district was never agreed upon by the county judge and the petitioners; (2) that the district as fixed by the county judge embraces land and taxpayers more than $2\frac{1}{2}$ miles from the site of the proposed school house designated in the petition; (3) that the district embraces a part of a common-school district, whose trustees did not, in writing, approve the petition; (4) that the boundary of the district is too vague and uncertain; (5) that the election returns were never canvassed and certified by the county election commissioners. According to the averments of the petition, some residences or property in the boundary of the district are situated more than $2\frac{1}{2}$ miles from the site of the proposed school house. There is no averment that any of the persons living outside of the $2\frac{1}{2}$ -mile limit voted at the election held for the purpose of determining whether or not the tax should be levied. Neither is there any averment that their votes could have affected the result of the election. The mere fact that the petitioners or county judge by a mistake may have included taxpayers or property in the district outside of the $2\frac{1}{2}$ -mile limit could not have the effect of invalidating the establishment of the district. Neither could that fact invalidate the election, unless taxpayers so included voted, and their votes determined the result of the election. No tax can be collected on property situated outside of the $2\frac{1}{2}$ -mile limit.

The language of the order defining the boundary of the district shows that it is not to embrace any of the property in school district No. 59. Therefore it was not necessary to have the order approved by the majority of the trustees of that district.

We do not think that the boundary defining the district is so vague and uncertain as to render invalid the establishment of the district. It is claimed that, in describing the

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line at E. T. Pence's and John Miller's, they are not, in terms, either included or excluded from the boundary. Under a well-recognized rule of interpretation, both are excluded.

The court refused to allow that part of the second amended petition to be filed by which it was sought to raise the question that the result of the election as returned by the officers had not been canvassed by the county canvassing board. The court gave as a reason for doing so that no explanation was given why the averments were not made in the previous pleadings. The question is purely technical, as it was never averred that a majority of those voting at the election did not vote in favor of the tax. In *Mullins v. McNeill* (Ky.) 59 S. W. 849, the court held that the vote to levy a tax for school purposes should be canvassed and the result certified by the county canvassing board. The court also held that, where that was not done, it could be thereafter done, and proper orders made. As nothing has been averred to show that this cannot be done in this case, the court did not abuse its discretion in refusing to allow the amended petition to be filed. Referring to the first ground relied upon to invalidate the election, it may be said that section 4408, Ky. St., authorizes a petition containing a description of the boundary of the proposed graded common-school district to be presented to the county judge, and the district can be established "as agreed on by the county judge and the petitioners." It is not necessary to state in the order which the county judge makes that such an agreement was made. There is nothing in the statutes which would prevent the petitioners from withdrawing their petition before the county judge acts upon it, and, not having done so, the conclusive presumption should be indulged that an agreement was reached by the county judge and the petitioners before the order was made, and that it conforms to the agreement. Slight irregularities should not vitiate the election. A substantial compliance even with a mandatory statute should be held to be sufficient. Mr. Cooley, in his work on Taxation (2d Ed. p. 337), says: "In voting the tax the people will be acting in their political capacity, and their action is to be favorably construed, and not to be overruled or set aside by judicial or any other authority, so long as they keep in the limits of the power bestowed upon them. Technical defects and irregularities should be overlooked, so long as the substance of a good vote sufficiently appears, for the obvious reason that such business is largely and of necessity in the hands of plain people, who are unskilled in the technicalities of law, and unaccustomed to critical or even accurate use of language. A strict construction of their doings would inevitably be mischievous, and would defeat the collection of the revenue in very many cases. It will be found, therefore, that the courts sustain such action wherever sufficient appears to

make plain the intent of the voters, provided the intent is warranted by the law."

The judgment is affirmed.

FARMERS' & DROVERS' BANK et al. v. GERMAN INS. BANK.¹

(Court of Appeals of Kentucky. Jan. 23, 1902.)

MORTGAGES—RECITAL IN DEED OF GRANTEE'S ASSUMPTION OF MORTGAGE—NOTICE TO SUBSEQUENT MORTGAGEE.

Where a deed recited that the grantee assumed a mortgage theretofore executed to him by the grantor, one to whom he subsequently executed a mortgage on the property was charged with notice of the fact, which inquiry would have disclosed, that the mortgage was executed to secure certain coupon bonds which were still outstanding in the hands of a third person, and therefore the holder of those bonds is entitled to priority over the subsequent mortgagee.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Actions by the Farmers' & Drovers' Bank and the German Insurance Bank against W. H. Klissendorff to enforce certain mortgage liens. Judgment as to priority of liens, and the Farmers' & Drovers' Bank and another appeal. Affirmed.

Simrall & Doolan and Hazelrigg & Chennault, for appellants. O. A. Wehle, for appellee.

WHITE, J. The facts of this case seem to be agreed. So far as important to a decision herein, they are as follows: On June 8, 1893, Martha J. Maxcy executed and delivered to W. H. Klissendorff, who was her son, three coupon bonds of \$1,100 each, and a mortgage on certain real estate to secure the payment of said bonds and interest. The mortgage is in form a deed of trust, and contains this clause: "And the said second party [Klissendorff] also signs this deed and accepts the trust imposed thereby, and any party having equity under this deed may in his own name and right cause proceedings to be had to enforce the same: provided that, when the terms of this mortgage shall have been fully complied with, the trustee shall, at the cost of the said first party, release the same." The bonds executed to Klissendorff were sold to appellee, the German Insurance Bank. These bonds were due in three years. In May, 1896, just before the maturity of the bonds, Mrs. Maxcy sold and conveyed the land to Klissendorff, in fee, for a consideration of \$5,300,—\$2,000 in cash, and the assumption of the bonds secured by the mortgage. The language of the deed is, "in consideration of the sum of fifty-three hundred dollars, as follows: thirty-three hundred dollars (\$3,300) in the assumption of a mortgage by said second party [Klissendorff] made by said first party [Maxcy] to said sec-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ond party June 8, 1893, and recorded in Deed Book 414, page 379, Jeff. county clerk's office." On August 8, 1896, Klissendorff borrowed of the appellant Farmers' & Drovers' Bank the sum of \$6,900, and, to secure payment thereof, executed a mortgage on the real estate deeded by Mrs. Maxcy to him. These several instruments were all signed, acknowledged, delivered, and recorded within proper time. The debts due appellant and appellee not being paid, suits were instituted to foreclose the liens, and the question presented is as to priority. It is not pretended that appellant had any actual knowledge of the existence of the mortgage and lien of appellee, or in fact knew that appellee had ever owned the bonds. If appellant is chargeable with notice at all, it is by reason of the record. On the other hand, it is not pretended that there was ever any assignment of record or any indorsement of record showing that appellee was the owner of the bonds, or had any interest in or rights under the mortgage or deed of trust to Klissendorff. There was no indorsement on the record of the deed of trust at all,—no satisfaction or assignment thereof. On hearing in the court below, the appellee was given preference, and hence this appeal.

While much might be written as to the duties, obligations, and rights in general of a mortgagee, the question here is one of notice. If the recital in the deed to Klissendorff is sufficient to put a mortgagee on inquiry, and to give him constructive notice that the deed of trust of June, 1893, was unsatisfied, then appellant must be charged with notice of a prior lien. The language of the deed is that Klissendorff "assumes" a mortgage executed by the vendor to himself by a certain instrument of record. That instrument shows that Klissendorff was made a trustee for the benefit of any holder of the bonds. The bonds that Klissendorff assumes to pay by the deed were due in about 30 days. If it was intended to satisfy the mortgage and pay off the bonds the use of the word "assume" is out of place. The consideration would have been so much cash, or so much cash and the satisfaction of the mortgage. The words "in the assumption of a mortgage" could scarcely have been used unless the debt had an existence which was to continue beyond the execution and delivery of the deed containing such words. We are of opinion that the words are suggestive that Klissendorff agreed to pay to some person the outstanding and unsatisfied bonds secured by the mortgage. This agreement was to be performed in the future. An agreement to pay oneself is of itself a satisfaction of the debt payable to himself. It is this doctrine that appellant insists relieved it of duty to investigate whether the mortgage had been satisfied. On the contrary, we are of the opinion that this agreement to assume or pay a debt originally payable to oneself is suggestive that an assignment had

been made of the debt, and that the grantee, assuming to pay, did not then own the debt,—was not then the payee. True, appellee might have, by taking an assignment of record of the bonds and rights thereunder, given notice unquestionable of its ownership or rights. Its failure so to do but endangered loss if Klissendorff had actually indorsed a release or satisfaction of record, as was held in *Insurance Co. v. Hall* (Ky.) 50 S. W. 254. But that case is not presented. There was no release. Appellant may have construed the recitations of the deed as a satisfaction and release of the trust deed, but if it did so the construction was not authorized, but, on the contrary, was a notice that Klissendorff was not in May, 1896, the owner of the mortgage bonds he therein assumed to pay. We are clearly of opinion that the record gave notice of the lien of the bonds held by appellee, and, the mortgage lien of appellant being given with this constructive notice, the lien of appellee, being older, is superior. It has been repeatedly held by this court that, if there appear of record sufficient facts to put a person of ordinary business prudence on inquiry, he is chargeable with notice of the facts that an inquiry would disclose. This is so universal as to need no citation of authority. This conclusion reached comports with the judgment of the court below. Judgment affirmed.

WITT et al. v. HUGHES.¹

(Court of Appeals of Kentucky. Jan. 24, 1902.)

HIGHWAYS—PRESUMPTION FROM LONG USE BY PUBLIC—ERECTION AND REMOVAL OF GATES.

1. A road which has been used by the public for more than 20 years, and as far back as the memory of the witnesses runs, must be regarded as a public highway.

2. Under Ky. St. § 4297, providing that "the county court may, after the occupant of the premises upon which gates shall be erected across a road, has had ten days' previous notice of the proceeding, order the county supervisor of roads to have the gates repaired, removed or abolished (if the public good requires it) at the expense of the occupier of the land," the fact that the travel on a road justified its being macadamized is sufficient to show that it should not be obstructed by a gate; and therefore the court should order the removal of the obstruction, as the only cost to the landowner will be that of additional fencing, costing not exceeding \$45, which is insufficient to outweigh the public inconvenience.

Appeal from circuit court, Madison county. "Not to be officially reported."

Motion by J. H. Witt and others against W. A. Hughes to compel defendant to remove a gate from a public highway. Judgment for defendant, and plaintiffs appeal. Reversed.

Grant E. Lilly, for appellants.

HOBSON, J. In the year 1891 appellee, by a proceeding in the Madison county court

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

under the statute (see Ky. St. § 4289), was allowed to erect gates across the road leading from the Kirksville pike, in Madison county, across the Kentucky river, to a pike in Jessamine county, which leads to Nicholasville. On June 4, 1900, appellants entered a motion in the county court, on proper notice, under section 4297, Ky. St., for the removal of the gates. The county court sustained a demurrer to the motion, and dismissed the proceeding. Appellants appealed to the circuit court, which overruled the demurrer, but on final hearing held that under the testimony the gate in contest ought not to be removed, from the fact that the removal would work great injury to appellee, without any special benefit to the public. During the pendency of the proceeding two of the gates were removed by a consent order, leaving only one gate to be litigated.

The statute provides: "The county court may, after the occupant of the premises upon which gates shall be erected across a road, has had ten days' previous notice of the proceeding, order the county supervisor of roads to have the gates repaired, removed or abolished (if the public good requires it) at the expense of the occupier of the land; but the order shall allow the occupant reasonable time to repair, remove or abolish the gates, and to remove or change his fences so as not to endanger the crop or other property of the occupant." Section 4297, Ky. St.

No order of the county court establishing the road is shown in the record; but for more than 20 years, and as far back as the memory of the witnesses runs, it was an open way, traveled by the public. For 10 years previous to the erection of the gates, appellant Witt was the surveyor of it. His grandfather had been the surveyor for several years before he was appointed. The long use of the road by the public leaves no doubt that it must be regarded a public highway. Appellee recognized this in his proceeding in the county court to establish the gates. Since this proceeding the road has been macadamized, or made a pike. There is a ferry across the river, which is licensed, and the ferryman has a new boat to accommodate the increased travel on the road. The gates are an inconvenience to the public travel. They are often tied, and are hard to open and shut. If the gate in contest is removed, appellee will have to build 40 or 50 panels of fence, at a cost of 85 or 90 cents a panel. While the evidence is not very clear as to the amount of travel on this pike, except that the ferriage amounts to about \$100 a year, we think it evident from the proof that the gate is a serious inconvenience to the traveling public; and the fact that the travel on the road justified its being macadamized is sufficient to show that it should not be obstructed by a gate. The cost to appellee of building 40 or 50 panels of fence at a cost of 85 or 90 cents a panel is

insufficient to overbalance the public inconvenience; for a gate is, of necessity, an obstruction to travel. All must stop to open and shut it; there is more or less danger from teams while the driver is opening and shutting it; persons on horseback have often to get down; and the mud or water about the gate in bad weather is very objectionable, especially to old persons or ladies traveling alone. Appellee should be allowed a reasonable time to remove or abolish the gate and to remove or change his fences, so as not to endanger his crop or other property.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

LITTLE v. STROW et al.¹

(Court of Appeals of Kentucky. Jan. 24, 1902.)

SHERIFFS—EXCEPTIONS TO SHERIFF'S REPORT OF SETTLEMENT OF TAXES COLLECTED—ACTION TO SURCHARGE SETTLEMENT—SHERIFF'S COMMISSIONS FOR COLLECTION OF TAXES.

1. Under Ky. St. § 4146, providing that the report of settlement made with a sheriff by the commissioner of the court "shall be filed in the county court clerk's office and be subject to exceptions by the sheriff or county attorney, who shall represent the commonwealth and county, and the county court shall try and determine such exceptions," no person except the sheriff or the county attorney can file exceptions to the sheriff's settlement; and therefore the remedy of any other person is a suit in equity to surcharge the settlement.

2. As all taxes levied by a county constitute one fund, and must be taken in the aggregate in estimating the commission due the sheriff for collecting, the sheriff is only entitled to a commission of 10 per cent. upon the first \$5,000 of the gross county taxes collected by him, including a tax levied by the county court to pay a subscription of a district in the county in aid of a railroad.

Appeal from circuit court, Marshall county.
"To be officially reported."

Action by T. J. Strow and others against J. H. Little to recover money paid. Judgment for plaintiffs, and defendant appeals. Affirmed.

Reed, Greer, Oliver & Reed, for appellant.
L. P. Palmer, for appellees.

BURNAM, J. By virtue of a provision of the charter of the Paducah & Tennessee Railroad Company, civil district No. 6 in Marshall county, which embraces the city of Benton and a small contiguous territory outside of the city, subscribed for 150 shares of the capital stock of the railroad company, and issued bonds in payment thereof. The railroad charter provided that, if any civil district in any county should subscribe to the capital stock of the railroad company, the county court in which such subscription was made by any civil district should make an

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annual levy on the taxpayers of the district, and on all property liable to taxation under the revenue laws of the state, sufficient to pay the interest on the bonds as it matured, and the cost of collecting the same, and should appoint a collector, and have the tax collected and applied to the payment of the interest on the bonds; and, when the bonds became due and payable, they should in like manner levy and have collected a tax to pay the bonds themselves, and the cost of collecting the tax. By virtue of this provision of the railroad charter an annual tax was levied by the county court of Marshall county to meet the interest on the bonds, and accumulate a redemption fund for the payment of the bonds at maturity, during the years 1895, 1896, and 1897. During these years the appellant, J. H. Little, was the sheriff of Marshall county, and collected the tax so levied upon the property and taxpayers of district No. 6, amounting in the aggregate to \$3,635.06. During the same years he collected the ordinary county levy and revenue proper from the whole county, which aggregated \$31,882.46; and for each of these years he made a settlement with the commissioner appointed for the purpose by the fiscal court of Marshall county, as provided by section 4146 of the Kentucky Statutes. In these settlements he was allowed by the commissioner for collecting the county revenue proper 10 per cent. upon the first \$5,000, and 4 per cent. upon the residue; and he was further allowed a commission of 10 per cent. upon the entire amount collected upon the tax levy upon district No. 6, as the aggregate amount of the tax was less than \$5,000,—both the sheriff and commissioner treating the district tax as wholly distinct from the county levy. In June, 1899, appellees, citizens and taxpayers of civil district No. 6, instituted this suit against the sheriff, seeking to recover for the use and benefit of the district the difference between 4 and 10 per cent. upon the gross amount collected by appellant for the three years, which they allege was allowed by the commissioner of the fiscal court in violation of law. The defendant admitted that he had collected, as sheriff, the tax levied by the county court upon civil district No. 6, as charged, and that he had been allowed, as compensation upon the gross amount so collected, in addition to the fees authorized by section 1729 of the Kentucky Statutes for the collection of the county revenue, 10 per cent. upon the amount of tax so collected by him for each year, and claims that this tax was a wholly separate and distinct levy from the original county revenue, and was properly so considered in the settlements made by him with the commissioner of the fiscal court, and that he was entitled to the compensation allowed. He also pleads as an additional defense that, when the report of settlement made by him was filed by the commissioner in the county clerk's office, appellees appeared and filed exceptions to so

much of his allowance as exceeded 4 per cent. upon the gross amount collected by him, which exceptions were heard and overruled by the county court, and that appellees prosecuted an appeal from the judgment of the county court overruling these exceptions to the Marshall circuit court, and that they thereafter dismissed this appeal on their own motion, without prejudice; and it is contended for appellant that the law afforded to appellees two remedies to correct the alleged errors complained of: One was to file exceptions to that part of the settlement which they complained of, and to have them tried, and, if not satisfied with the judgment of the county court, to appeal to the circuit court; and the other remedy was not to appear in the county court at all, but to institute a suit in equity to surcharge and correct the errors complained of; but that both remedies did not exist, and, having elected to proceed by exceptions filed in the county court, they were estopped from resorting to a bill in equity. And to support this contention we are referred to the cases of *Bell v. Henshaw's Ex'rs*, 91 Ky. 432, 15 S. W. 3, and *Turley's Adm'r v. Barnes* (Ky.) 44 S. W. 446.

We will first consider the last defense. Both of the cases referred to were decided under section 978 of the Kentucky Statutes, which provides that "from all judgments and orders of the county court in the settlement of the accounts of personal representatives, assignees, guardians, trustees, curators and other fiduciaries, appeals may be taken to the circuit court." This section has no application to the settlements made by sheriffs. They are regulated by the provisions of section 4146, and this section is materially different from section 978. It provides that the report of settlements made with sheriffs by the commissioner of the court "shall be filed in the county court clerk's office and be subjected to exceptions by the sheriff or county attorney, who shall represent the commonwealth and county, and the county court shall try and determine such exceptions. An appeal may be prosecuted by either party from the judgment of the county court in the same manner as provided by law in appeals from judgments of the quarterly court. Or actions may be instituted in any court of competent jurisdiction to correct the settlement." Under this statute nobody can file exceptions to the settlements made by sheriffs, except the sheriff or the county attorney; but the statute provides that even if the county attorney shall file such exceptions, and they are heard and determined in the county court, he may appeal from the judgment to the circuit court, or action may be instituted in any court of competent jurisdiction to correct the settlement by any party in interest. It is clear that under this statute appellees had no right to go into the county court and except to the sheriff's settlements. Their only remedy was to institute a suit in equity to correct

and surcharge the items objected to. We are therefore of the opinion that the proceedings in the county court constitute no bar to the prosecution of this suit.

We will now consider the other ground of defense relied on. "The sheriff by virtue of his office is the collector of all state, county and district taxes, unless the payment thereof is by law specially directed to be made to some other officer." See section 4129 of the Statutes. It has been frequently decided by this court that all tax levied by the county constitutes one fund, and must be taken in the aggregate in estimating the commission due a sheriff. This includes taxes levied to pay the subscription of a district in a county in aid of a railroad. See *Anderson v. Thompson*, 73 Ky. 132; *County Court v. Chenault* (Ky.) 47 S. W. 457; *Pendleton Co. v. McMillin* (Ky.) 48 S. W. 154. It follows that appellant was only entitled to a commission of 10 per cent. upon the first \$5,000 of the gross county taxes collected by him, including that levied by the county court to pay the railroad tax due by the district. The trial court has very properly apportioned the 10 per cent. commission upon the first \$5,000 between the taxes collected by appellant from the whole county and that collected from district No. 6.

Perceiving no error in the judgment appealed from, it must be affirmed.

O'DANIEL et al. v. SMITH.¹

(Court of Appeals of Kentucky. Jan. 22, 1902.)

MALICIOUS PROSECUTION—EVIDENCE—CROSS-EXAMINATION—PEREMPTORY INSTRUCTION.

1. In an action against husband and wife to recover damages for the malicious prosecution of plaintiff on the charge of unlawfully taking and carrying away a lot of blacksmith's tools from the wife's farm, defendants should have been permitted to prove by plaintiff on cross-examination that he had, during the summer before the taking of the tools, committed other depredations of like character on the wife's farm, by removing live stock and other personal property used thereon by defendants and their tenant.

2. A witness for plaintiff having testified that he had directed plaintiff to take possession of the tools, and that a few days after they were taken he permitted defendants' tenant to take some of them back, and, being asked upon cross-examination if defendants' tenant had not paid him money before he would let him have any of the tools, admitted the payment of the money, but stated that it was for rent, defendants should have been permitted to test the accuracy of the statement by asking him for what time the rent was paid.

3. Defendants should have been permitted to prove by this witness that the tools were bought with money realized from farming operations while he was carrying on the farm for the wife and her mother.

4. The defendant husband, who instituted the prosecution, should have been permitted to testify that he knew that plaintiff had during the previous summer, without his consent and in his absence, carried away from the farm di-

vers articles belonging to the wife, and should also have been permitted to state the information he had received before instituting the prosecution, through inquiries made by him, as to the taking of the tools, and that, in relating to counsel the information he had received, he acted in good faith for the protection of his rights.

5. It appearing without dispute that plaintiff, without the knowledge or consent of either of the defendants, removed from the possession of their tenant certain tools belonging to defendant wife, by the direction of one who had no shadow of authority to give such orders, and with whom, as plaintiff knew, defendants were having bitter litigation, and that defendants had previously been subjected to similar depredations at his instance, and that defendant husband, before suing out the warrant, laid the facts before a competent attorney, who advised the prosecution as the only remedy to prevent similar trespasses in the future, and there being no proof tending to impeach his good faith, the court should have given a peremptory instruction for defendants; it being the duty of the judge in such actions to determine the issue and apply the law where the facts are uncontradicted.

Appeal from circuit court, Marion county.

"Not to be officially reported."

Action by John Smith against Mary D. O'Daniel and husband to recover damages for malicious prosecution. Judgment for plaintiff, and defendants appeal. Reversed.

H. W. Rives, for appellants. Ben Spalding, for appellee.

BURNAM, J. The appellee, John Smith, instituted this suit against the appellants, O'Daniel and wife, to recover damages upon the ground that appellant had maliciously and without probable cause had him arrested and tried for unlawfully taking and carrying away a lot of blacksmith tools belonging to the appellant Mary; a trial before the judge of the Marion county court having resulted in the acquittal of plaintiff. The trial resulted in a verdict in favor of appellee for \$200, which we are asked to reverse—First, because of numerous errors to appellants' prejudice in the rejection of material testimony; and, second, because the court refused to direct the jury to find a verdict for the defendant.

We will first consider the errors in the rejection of the testimony: Upon the cross-examination of appellee, he was asked if he had not during the summer of 1899, before taking the blacksmith tools, committed other depredations of similar character upon appellant's farm, by removing live stock and other personal property used thereon by O'Daniel and his tenant, to which question the plaintiff objected, and the court sustained the objection. This was clearly error. Lafayette Baxter was also introduced as a witness for the plaintiff. He testified that he had directed John and Dick Smith to take possession of the tools, and that a few days after they were taken he allowed appellant's tenant, Taylor, to take some of them back. He was asked upon cross-examination if Taylor had not paid him \$3.25 before he would let him have any of the tools. In re-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

sponse to this question the witness answered that it was a lie, and, when shown a receipt give by him to Taylor for \$3.25, said that it was for rent. The defendant thereupon asked him for what time the rent was paid. Plaintiff objected, and the court sustained the objection; remarking in the presence of the jury that the witness had said that it was for rent, and that it was not necessary to inquire further on that line. This was error. The defendant had a right to test the accuracy of the witness' statement by cross-examination. He was also asked if the blacksmith tools had not been bought with money realized in farming operations while he was carrying on the farm for Mary O'Daniel and her mother. The court erroneously sustained an exception to this question, and refused to permit the defendant to prove that the blacksmith tools in question were the property of the defendant; having been bought with her money arising from the operations on the farm. When the appellant O'Daniel was on the stand, he was asked if he knew that plaintiff, Smith, had during the summer of 1899, without his consent and in his absence, carried away from the farm divers articles belonging to his wife, to which plaintiff objected, and the court sustained the objection. This was error. The court also refused to permit him to state to the jury what inquiries he had made, and from whom he received information, before instituting the prosecution, and what he had been told, and by whom, with regard to the taking of the tools, and that, in relating to counsel the information which he had received, he acted in good faith for the protection of his rights, in all of which the court erred, as the testimony was clearly competent, and tended to show that he had acted prudently and with probable cause.

The undisputed facts disclosed by the testimony are that the appellee, without the knowledge or consent of either of the appellants, removed from the possession of their tenant certain blacksmith tools belonging to Mary O'Daniel, by the direction of one Baxter, who had no shadow of authority to give such orders. It also clearly appears that appellants had been subjected to several similar depredations at the instigation of the same party, with whom they were at that time conducting an acrimonious litigation, and that appellee knew this fact; that O'Daniel, before suing out the warrant for appellee's arrest, had laid the facts before a competent attorney, who advised the course pursued, upon the ground that appellee was insolvent, and the only remedy of appellants to prevent similar trespasses in the future was to resort to the criminal law. There is absolutely no proof to impeach his good faith in the matter. There is not a particle of testimony that Mary O'Daniel had anything to do with swearing out the warrant, or setting on foot the prosecution

against appellee. In an action for malicious prosecution, where the facts are uncontradicted, it is the duty of the judge to determine the issue and apply the law; and, under facts of this case, we are of the opinion that a peremptory instruction should have gone. See *Meyer v. Railway Co. (Ky.)* 33 S. W. 98; *Moore v. Large (Ky.)* 46 S. W. 508; 1 Hill. Rem. p. 438; Newell, Mal. Pros. pp. 267, 269.

For the reasons indicated, the judgment is reversed, and cause remanded for proceedings not inconsistent with this opinion.

ALBANY CHRISTIAN CHURCH et al. v. WILBORN.¹

(Court of Appeals of Kentucky. Jan. 22, 1902.)

NUISANCE—PRIVATE STABLE NEAR CHURCH—INJUNCTION.

The erection of a private stable near a church will not be enjoined as a nuisance, as the stable is not a nuisance in itself, and may or may not become so according to circumstances.

Appeal from circuit court, Clinton county. "To be officially reported."

Action by the Albany Christian Church and another against E. R. Wilborn for an injunction. Judgment for defendant, and plaintiffs appeal. Affirmed.

L. C. Winfrey, J. N. Sharp, and J. A. Brents, for appellants. E. Bertram, for appellee.

HOBSON, J. Appellee, Wilborn, is the owner of a lot in the town of Albany adjoining on the north the lot on which the Christian Church stands. He proposed to build on his lot, 27 feet from the church, a private stable, 45 feet long, 32 feet wide, and 14 feet high to the plates. Appellant Perkins owns a lot on the south side of the church, on which is a stable 41 feet from the church; and between it and the church is his privy. Perkins also owns residences on the opposite side of the street. The church and Perkins brought this suit to enjoin appellee from erecting his stable, on the ground that the use of the stable would create an offensive odor, which would impair the use of the church property for purposes of worship; that in warm weather it would cause an accumulation of flies, which would disturb the congregation; that it would increase the hazard from fire to the church building, which was a wooden structure; that the stable would front on the street, and would cause an obstruction of the sidewalk, from the placing of wagon bodies, vehicles, wheels, etc., in front of it; and that the noise from the stock, and the feeding of them, would disturb the congregation; and that these things would greatly impair the value of

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Perkins' property on the opposite side of the street. The defendant filed an answer in which he controverted the allegations of the petition, and, in addition, alleged affirmatively that he proposed building the stable for his private use; that he kept only one milch cow and his team, which would not be in the stable more than one-third of the time; that he was stripping all of the cracks, making it almost air-tight and with solid doors; putting up separate stalls for each animal, so that no noise could be made by the stock; that he would put in a plank floor, and keep the stable clean, and the sidewalk free of obstruction; that there would be no lights kept or used in the stable, and that it was his purpose to keep it so that there would be no noise, odors, or disturbance from flies. The affirmative allegations of the answer were not controverted. Proof was taken on both sides, and on final hearing the learned circuit judge dismissed the petition.

The proof shows that appellee is a teamster by trade; that he runs several wagons, in which he hauls for others, keeping from 4 to 10 horses and mules. He had had a smaller stable on this lot for some years, which he tore down when he began the erection of the one in contest.

In 1 High, Inj. § 742, the rule is thus stated: "When the injury complained of is not per se a nuisance, but may or may not become so according to circumstances, and when it is uncertain, indefinite, or contingent, or productive of only possible injury, equity will not interfere. Thus the erection of a wharf, a railroad bridge, a planing mill, a livery stable, or a turpentine distillery will not be enjoined where the injury is only a possible and contingent one." In *Dargan v. Waddill*, 31 N. C. 244, 49 Am. Dec. 421, Chief Justice Ruffin said: "It is true that a stable in a town is not, like a slaughter house or a sty, necessarily and prima facie a nuisance. There must be places in towns for keeping the horses of the people living in them or resorting thither, and, if they do not annoy others, they are both harmless and useful erections. But on the contrary, if they be so built, so kept, or so used as to destroy the comfort of persons owning and occupying adjoining premises, and impair their value as places of habitation, stables do thereby become nuisances." In *Kirkman v. Handy*, 11 Humph. 406, 54 Am. Dec. 45, the court said (refusing to grant an injunction in a case of this character): "We have been referred to no case in which a stable of any sort, whether public or private, wherever situated, has been held to be, ipso facto, a nuisance." In *St. James' Church v. Arrington*, 36 Ala. 546, 76 Am. Dec. 332,—a case not unlike this,—the court said: "A private stable near a church does not belong to the class of erections which are unavoidably and in themselves nuisances. That it may become a nuisance is, no doubt, true; but the question whether or not it will prove to be one de-

pends in a great measure upon its proximity to the church, the manner in which it shall be built, the number of horses placed in it, and the degree of care with which it may be kept. * * * Whenever it is legally ascertained that it has become a nuisance, a court of equity will protect by injunction any party injured thereby. But as in the present case it is yet uncertain, and remains to be ascertained from future events, whether or not the erection will become a nuisance, there is no ground for an injunction arresting the further progress of the building, or its appropriation to the use intended." To same effect, see *Kelser v. Lovett*, 85 Ind. 240, 44 Am. Rep. 10, and cases cited. This subject was fully investigated by this court in *Pfingst v. Senn*, 94 Ky. 558, 23 S. W. 358, 21 L. R. A. 569; and it was there held that an injunction will not be granted against a threatened nuisance when the thing complained of is not such per se, but may or may not become so according to circumstances, and in this case a number of previous cases are collected. The private barn or stable which appellee was proposing to erect was not a nuisance in itself. It was unobjectionable, unless it was so kept as to cause annoyance or discomfort to the adjoining proprietors. If appellee kept in his barn stock in such numbers or in such manner as to inflict damage upon appellants, he would be liable; but he cannot for this reason be enjoined from the erection of a building which might never be a source of injury to any one. Judgment affirmed.

REISER v. SOUTHERN PLANING MILL & LUMBER CO.¹

(Court of Appeals of Kentucky. Jan. 24, 1902.)

APPEALS—STATUTE OF LIMITATIONS—COMPUTATION OF TIME.

In an ordinary action the limitation of two years as to the granting of an appeal runs only from the time the motion for new trial was overruled, as any appeal prosecuted prior to that time would not present for review any error occurring on the trial.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action between Victor O. Reiser and the Southern Planing Mill & Lumber Company. From the judgment, Reiser appeals. Motion to dismiss overruled.

Matt O'Doherty and Bennett H. Young, for appellant. Fred Forcht, Jr., for appellee.

GUFFY, C. J. The appellee in this case pleads the statute of limitation against this appeal, and alleges that the judgment was rendered December 8, 1899, and that the suit was in behalf of the appellant, and more than two years had elapsed next after

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the right first accrued to the appellant before the granting of the appeal, wherefore it prays that the appeal be dismissed. The appeal was granted by the clerk of this court December 16, 1901. The reply of the appellant alleges that the judgment was rendered December 8, 1899, but that within three days from the rendition of said judgment the appellant, who was the plaintiff in the court below, entered a motion in said court for a new trial, and filed grounds in support thereof, as shown by the records herein, and the said motion was duly assigned for hearing to December 20, 1899, and was on said date duly heard and submitted to the court, and said motion was thereafter, on January 6th, overruled by the court; that said motion so made and entered suspended the said judgment until the 6th of January, 1900, and that said judgment did not become operative or in force until said date; that the appellant's right to appeal therefrom did not accrue to him until said motion was disposed of as aforesaid, and appellant filed and prosecuted this appeal herein within two years from said date. It is further alleged that the appellant was then, and is still, an infant under the age of 21 years. To this reply the appellee entered a demurrer, and this motion is submitted upon the demurrer. It is insisted for appellee that the right to appeal accrued to appellant upon the rendition of the judgment on December 8, 1899. It is further insisted that the Code of Practice, which says that an appeal must be taken within two years from the time the right to appeal first accrued, means that an appeal must be taken within two years from the rendition of the judgment, and that the rendition of the judgment dates from the return of the verdict by the jury, or the judgment rendered in the action. Numerous authorities are cited by appellee in support of its contention, but we fail to see that any of them decides the precise question now before the court. It is true that the appellant might have prosecuted an appeal from the judgment without filing grounds or entering a motion for a new trial, but the entire proceedings of the court could not have been brought before this court for a review without a motion and grounds for a new trial, and the decision thereon. It is well settled that a motion for a new trial suspends the judgment, and during the pendency of such motion there is neither in fact nor in law a judgment existing from which an appeal could be prosecuted,—in other words, there is, in law, no judgment in force. If appellant, after entering his motion for a new trial, had prosecuted an appeal, we apprehend that his appeal would, upon motion, have necessarily been dismissed, as there would have been no final order from which he could prosecute an appeal. It would be a very harsh and unreasonable rule to require the appellant to prosecute an appeal which could be considered only as to wheth-

er the judgment was supported by the pleadings, when various other errors might exist upon which he could only rely after first filing grounds for a new trial and preparing a bill of exceptions. There is nothing in this case to indicate that the appellant was at all responsible for any delay in having the motion for a new trial disposed of. In fact, it was not unreasonably delayed. Our conclusion is that appellant was entitled to prosecute an appeal within two years from the date upon which his motion for a new trial was overruled.

The demurrer to the reply is overruled, and motion to dismiss the appeal is also overruled.

BENNETT et al. v. MORGAN et al.¹

(Court of Appeals of Kentucky. Jan. 23, 1902.)

RELIGIOUS SOCIETIES—DOCTRINES OF PRIMITIVE BAPTIST CHURCH—DEPARTURE FROM FAITH—RIGHT OF MAJORITY TO CONTROL—INTEREST OF EXPELLED MEMBERS IN CHURCH PROPERTY.

1. The doctrines of "absolute predestination" and of "limited predestination" are both taught, in substance, in churches of good standing in the associations of the Primitive Baptist Church, and, as there is no unanimity upon the subject in the teachings of those recognized as learned in the doctrine of the church, the teaching of either of these doctrines is not a departure from the faith as understood in 1846, at the time church property was conveyed for the purposes of a church of that denomination.

2. Ky. St. §§ 320-322, inclusive, providing for the appointment of trustees by religious societies to hold the title to church property, and providing that in case of a schism or division "the trustees shall permit each party to use the church and appurtenances for divine worship a part of the time, proportioned to the members of each party," do not apply where the church property is still held by the trustees or the heirs of the trustees to whom the title was first conveyed or devised as a charity; and therefore, where, in such a case, the majority had control by the terms of the organization, and there was no right of appeal from their decision, their action in expelling the minority from membership is binding on the courts, and the expelled members have no interest in the church property.

3. Independent of statute, a committee appointed by a church for that purpose may bring suit to enjoin trespasses upon the church property.

Appeal from circuit court, Graves county.
"To be officially reported."

Action by W. D. Morgan and others against J. D. Bennett and others for an injunction. Judgment for plaintiffs, and defendants appeal. Affirmed.

Robbins & Thomas, for appellants. D. G. Park and H. J. Moorman, for appellees.

DU RELLE, J. In 1824 a Primitive Baptist Church called "Bethel Church" was organized in Graves county, and there seems to have been no trouble in the church until

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the events which led to the present litigation. In February, 1845, the church resolved to move, and build a meeting house upon land to be donated by L. B. Stark. The deed for the land recites that Stark, for the great love he has for the Baptist cause, conveys the land in question by warranty deed to three persons named as commissioners of the Bethel Church, and their successors, holding forth the apostolic doctrine, to wit, personal election, predestination, baptism by immersion, etc., to have and to hold so long as they shall see cause to occupy the aforesaid lot as a church; and, if they remove, the land therein conveyed to revert to his heirs. Upon the organization an abstract of principles, rules of decorum, and a church covenant were adopted, and seem to have remained unchanged. The Bethel Church was originally a member of the Bethel Association. In October, 1891, six churches belonging to that association were granted letters of dismission, as they wished to organize a new association. A new organization was organized, called the "Philetic Association." Bethel Church remained in the Bethel Association. The churches forming the Philetic Association had substantially the same abstract of principles and rules of decorum as those in use in Bethel Church. In October, 1894, at a meeting of the Bethel Association at the Church of Concord, petitionary letters of correspondence being called for, one was presented from the Philetic Association, and a motion that the Philetic Association be received into correspondence was lost. It is not material to consider whether there had been any dissension in the church before Elder R. S. Kirkland became pastor of the Bethel Church. Some four or five years before the events under consideration, Elder R. S. Kirkland and his brother, John V. Kirkland, began preaching in the church. Elder Kirkland was a member of a church which belonged to the Philetic Association at the time he became pastor of Bethel Church. There had been some trouble between Elder Kirkland and Elder Boaz upon doctrinal points. At a church meeting on the Saturday before the fourth Sunday in October, 1894, it was agreed unanimously that the church was at peace, and would commune the next day, which was the regular communion Sunday; but, when preparation was made for communion after service on Sunday, Mr. Caverder, a member of the church, stated that the church was not in condition to commune. A committee was appointed to investigate the reason why communion services should not be held. At a meeting held on the Saturday before the fourth Sunday in November, the committee reported "that the reason that the church could not commune was that some of the members thought that it was not order for the church to commune with members of the Philetic Association, Bethel Church being a member of the Bethel Association, and these two associations not being

in correspondence, and the pastor, R. S. Kirkland, being a member of a church in the Philetic Association." A motion to refer the point of order to the church was carried by a large majority. All of the members present appear to have participated. It was voted by a large majority of the church that, notwithstanding this objection, it was in order for the church to commune. Some 18 of the members who had voted in the negative refused to abide by the action of the church or commune. After laboring with the minority, the majority—some 45 in number—adopted a motion preferring charges against the 18 for treating the church with contempt and for breaking the church covenant. Section 8 of the rules of decorum provides: "A majority shall govern in all cases, except in the reception and dismission of members. In this case a unanimity is necessary, which shall be sought for by forbearance and labor in love and tenderness, which ought to terminate in submission to the majority in the fear of God." The church covenant contains a stipulation: "To be governed by proper discipline agreeable to God's word, * * * and not absent ourselves from the Lord's supper without a lawful excuse, * * * and not irregularly to depart from the fellowship of the church." The 18 members who had refused to abide the decision of the majority were thereupon, by a unanimous vote of those voting, excluded from the church. Some or all of them appear to have declared nonfellowship with the doctrine which they claimed had been preached in that church by Elder Kirkland. Whether this was before or after the vote of exclusion is a matter of conflict, and is not particularly material. They appear to have organized as a church, obtained a church book, and adopted a vote excluding from the church the majority who had theretofore excluded them. The minority appear to have had possession of the key to the church. The majority changed the lock. It was claimed that the minority used an axe in obtaining entrance. The majority appointed a committee to institute proceedings to put a stop to what they considered trespasses upon the church property. That committee instituted this suit to enjoin the appellants from further interference, claiming that appellees—the majority—were the Bethel Church. The minority answered, denying the material averments of the petition; claiming that the majority had ceased to believe in the doctrines held by the church at the date the property was acquired, or to follow its practices or usages; that the minority and their associates were the true Bethel Primitive Baptist Church, and that in church session they had excluded the majority for their heresy. They prayed to be quieted in their title and possession; or, if that could not be done, for a sale and division of the property. It will be observed that neither party to the controversy set up any claim that there was a schism in the church.

The original trustees were all dead, and no trustees had ever been appointed under the statutes.

An immense mass of testimony was taken upon the various doctrinal points, in which it was claimed there had been a departure upon the part of the majority from the true principles of the Primitive Baptist Church; especially the doctrine upon the subject of predestination. The majority, or Kirkland faction, believe and teach limited predestination; while the minority, or Boaz faction, hold steadfastly to absolute predestination. As stated in the brief of counsel for the minority, the distinction is this: "Absolute predestination means that 'God foreknew and predestined all things whatsoever that may come to pass, whether with reference to the material universe or the salvation of souls,'—that is, God predestinated all things which happen. He foreknew and predestinated that President McKinley should be assassinated in Buffalo, and that your honors should sit in judgment in this settlement of the rights of these litigants; as well as he predestinated who should or should not be saved in heaven. Limited predestination means that God predestinated all things whatsoever which come to pass with reference to the salvation of souls only, and it repudiates the idea that God predestinated the happening of things in this material world." The weight of the testimony upon this question seems to be that both these doctrines were taught, in substance, in churches of good standing in the associations of the Primitive Baptist Church, and that there was no such unanimity upon the subject in the various authorities cited, or in the teachings of those recognized as learned in the doctrine of the church, as would justify us in holding that there had been, by either the majority or the minority, a departure from the faith as understood at the time the church property was conveyed for the purposes of Bethel Church, holding forth the apostolic doctrine, to wit, personal election, predestination, baptism by immersion, etc. So the trial court adjudged, and awarded an injunction against the minority interfering in any manner with the majority in the exclusive use of the property as a church.

After the acts of exclusion upon each side, it is claimed that the Bethel Association declined to hold correspondence with Bethel Church as managed by the majority, but recognized the church organized by the minority as the Bethel Church. On the other hand, it appears from the overwhelming testimony upon both sides that each Primitive Baptist church is complete in itself; has power to choose its own ministers, and adopt its own rules and regulations; that it is in fact a little republic, and from the judgment of the majority there is no appeal. This statement is, of course, subject to the limitation, as to property rights, that, if there has been radical departure from the doctrine for which

the charitable use was established, the courts will intervene for the protection of the use in accordance with the terms of the grant. This limitation, as we have seen, does not apply in this case. It follows, therefore, that as appellees were undoubtedly the majority, undoubtedly excluded appellants, the minority, from membership in the church, and as, by the terms of the organization, the majority had control, and their decision is unappealable, the courts cannot intervene, unless the case comes within the act of 1814 (2 Morehead & B. Ky. St. 1347), as carried through the various revisions of the statutes, and substantially re-enacted in Ky. St. § 320 et seq. The purpose and effect of that statute is perhaps nowhere better stated than in the opinion by Chief Justice Robertson in *Shannon v. Frost*, 3 B. Mon. 256: "After a careful examination of this statute, we concur with the court below in the opinion that it has no application to or bearing on the case now before us. The chief object of the enactment seems to have been to prescribe a mode for transmitting to new trustees the legal title to church property after the death or removal of the trustees to whom it had been originally conveyed, and to vest such appointees with all the powers of their predecessors, qualified, as to the former, by the provisos. The act does not, in either letter or purpose, apply to a church or the trustees of a church, when the church property is still held by the trustees or the heirs of the trustees to whom the title was first conveyed or devised as a charity." To the same effect, see the opinion of Judge Breck in *Hadden v. Chorn*, 8 B. Mon. 78, and that of Judge Simpson in *Berryman v. Reese*, 11 B. Mon. 287. This doctrine was expressly recognized by Judge Pryor in his opinion in *Ransom v. Rogers* (Oct. 2, 1884), the syllabus of which is given in 6 Ky. Law Rep. 290, though in that case it was held that the church, by its voluntary action, had undertaken to act under chapter 13 of the General Statutes, and had thereby become subject to the conditions expressed in the act. As the statute does not apply, the conclusion stated by Judge Robertson in the case of *Shannon v. Frost*, supra,—a case strikingly similar in many respects to the case at bar,—is completely applicable: "This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or exclusion. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it, and these we must decide as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church. We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for, whether

right or wrong, the act of excommunication must, as to the fact of membership, be law to this court. For every judicial purpose in this case, therefore, we must consider the persons who were expelled by a vote of the church as no longer members of that church, or entitled to any rights or privileges incidental to or resulting from membership therein. As the conveyance from Crittenden was to the use of the Baptist Church as an organized body of professing Christians in Frankfort, every member of that church has a beneficial interest in the property thus conveyed so long as he or she shall continue to be a member, but no longer. It is only as a constituent element of the aggregated body or church that any person can acquire or hold, as a cestui que trust, any interest in the property thus dedicated to that church. *Curd v. Wallace*, 7 Dana, 195, 82 Am. Dec. 85. Such is the effect of this conveyance to congregational uses, and such the civil law of our state; and upon this foundation alone must our decision rest. The judicial eye of the civil authority of this land of religious liberty cannot penetrate the veil of the church, nor can the arm of this court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excluded members. When they became members they did so on the condition of continuing or not, as themselves and their church might determine. In that respect they voluntarily subjected themselves to the ecclesiastical power, and cannot invoke the supervision or control of that jurisdiction by this or any other civil tribunal." See, also, *Gibson v. Armstrong*, 7 B. Mon. 481; *Haddon v. Chorn*, 8 B. Mon. 75; *Cahill v. Biggar*, Id. 213; *Berryman v. Reese*, 11 B. Mon. 287; and *Iglehart v. Rowe* (Ky.) 47 S. W. 575. See, also, the elaborate opinion of Judge Lurton, March 5, 1892, in the Primitive Baptist Church case of *Nance v. Busby* (Tenn. Sup.) 18 S. W. 874. That the action can be maintained by the committee is, we think, clear, notwithstanding the apparent appeal of the act of 1835 (*Loughborough, Ky. St. p. 499*) authorizing the appointment of a committee for such purpose; for this right is recognized to exist, independent of the statute of 1835, in *Berryman v. Reese*, 11 B. Mon. 288, and in *Haddon v. Chorn*, supra, citing *Beatty v. Kurtz*, 2 Pet. 560, 7 L. Ed. 521.

For the reasons given, the judgment is affirmed.

LORD v. NEW YORK LIFE INS. CO. et al.
(Supreme Court of Texas. Feb. 8, 1902.)

LIFE INSURANCE—GIFT—EVIDENCE—QUESTION FOR JURY—SUFFICIENCY—DECLARATIONS OF INSURED.

1. A brother, who stood in loco parentis to his sister, educating and supporting her, made repeated declarations, both before and after his marriage, that he had provided for her, in case of his death, by insurance, and that a certain policy payable to his estate was for her;

saying, "It is hers," and "It is Kate's." The only property owned by her, which was shares in a corporation, was in his custody, with power of attorney to manage it. At one time he had delivered a package of papers to a third party, to be cared for, stating that in this was a policy for his sister. Subsequently he took possession of the package, and after his death the policy was in the custody of bankers. Held, that the evidence was sufficient, as a matter of law, to support a finding in favor of the sister.

2. In an action to procure payment on a life insurance policy by one claiming it as a gift from the insured, the declarations of the insured were competent to prove both the gift and the delivery.

Certificate of dissent from court of civil appeals of First supreme judicial district.

Action by Kate Lord against the New York Life Insurance Company and Margaret G. Lord to compel the payment to plaintiff of a policy of insurance. There was a judgment of the court of civil appeals (85 S. W. 699) affirming a judgment in plaintiff's favor. Case certified to this court. Decision in plaintiff's favor.

Mart H. Royston and Kleberg & Neethe, for appellant. Pruit & Smith, R. W. Flournoy, and Wm. B. Lockhart, for appellee Kate Lord. Harris & Harris, for appellee New York Life Ins. Co.

BROWN, J. In the above-entitled cause on appeal from the district court of Galveston county for the Tenth judicial district to the court of civil appeals for the First supreme judicial district judgment was rendered on the 7th day of November, 1901, affirming the judgment of the court below. From said judgment Associate Justice Pleasants dissented, and upon the motion of the appellant the point of dissent is certified to the supreme court for decision:

"The controversy was as to the ownership of the proceeds of a policy of insurance for \$10,000 upon the life of Richard Lord, deceased, issued by the New York Life Insurance Company. Upon its face the policy is payable to the executors, administrators, or assigns of the insured. Richard Lord died September 8, 1900, leaving a will, in which he devised all his property of whatever character to his wife, Margaret G. Lord. Kate Lord, a sister of the deceased, claimed the policy of insurance as a gift from her brother, and brought this suit against the insurance company and Margaret G. Lord to require the proceeds to be paid to her. The insurance company admits liability upon the policy for the sum of \$14,428, and offers to pay the money to whichever of the parties the court shall adjudge is entitled to it. A trial by jury in the court below resulted in a judgment in favor of the plaintiff, Kate Lord, against the insurance company, for the amount above stated. From that judgment Margaret G. Lord has appealed.

"Richard Lord and the defendant Margaret G. Lord were married June 29, 1899. He was about 43 years of age at the time of his marriage; and his sister, the plaintiff,

was then about 27 years of age. When Kate Lord was about 12 or 13 years old, her mother died. Not long after the death of the mother, their father went to South America, where he died within a short time. After the death of her mother, and until his death, Kate Lord was supported entirely by her brother, Richard Lord. She had no property except an interest in some shares of mining stock, inherited from her father, and it yielded no income. The relations between the brother and sister were of the most affectionate nature, and he provided liberally for her support and education. After she left school, she lived with him until his marriage, and until his death had permission to draw against his bank account. At his death Richard Lord left but little property except some policies of life insurance. These policies were all contained in a box, which was locked, and left by him in the custody of Adoue & Lobit, bankers in Galveston, in whose possession it was at the time of his death. Among the policies were two payable to the wife, amounting to \$20,000; an accident policy for \$5,000, payable, in case of death, to Kate Lord; and three policies payable to the estate of the deceased, one of which was the one in controversy. All of them were issued after the marriage of Richard Lord and the defendant Margaret G. Lord, except the one claimed in this suit by the plaintiff, Kate Lord. It bears date October 31, 1894, and was the only insurance Lord ever had upon his life prior to his marriage. The policy is set out at page 62 of the transcript, and either party, if it is deemed necessary, may file with this certificate a copy thereof. It is on the 20 years' accumulation plan, and, among other benefits at the option of the insured, it had a cash surrender value at the end of the period, and entitled the insured to procure loans during the period.

"The plaintiff introduced several witnesses as to declarations made by Richard Lord in his lifetime to show that he had given her the policy in suit. Emma J. McLellan testified that some time in 1894, before the issuance of the policy, Richard Lord told her that he would leave his sister provided for with life insurance; and in 1896 he said that he had taken out this policy for her, that he was not a man to save money, and that he had left her provided for in life insurance. Charles Vidor, an insurance agent, testified that he was well acquainted and intimate with Lord; that five or six years ago he had asked Lord why he did not take out a life policy, and that Lord replied that he had a policy for \$10,000, and that was all he wanted, as he only had his sister to care for; that the policy was for the benefit of his sister, and that he did not care to have any more. Louis Wortham, also an insurance agent, had a conversation with Lord in 1899, prior to his marriage, and also in 1896 or 1897, with reference to insurance. They were friends, and

their relations were intimate. The witness said that Lord told him that he had a policy in the New York Life for the benefit of his sister, of whom he spoke as 'Kitty'; that the policy was here. A. A. Green, Jr., testified that he was a life insurance manager, and knew Richard Lord in his lifetime quite well; that in August, 1898, he had solicited him for insurance; that he said that he had one policy for \$10,000 in the New York Life Insurance Company; that that policy was his sister Kitty's, and that he would like to have \$10,000 additional insurance if he could stand the examination. Witness wrote his application, but the company applied to declined to issue the policy. This witness also testified: 'When I came to ask him to whom he wanted this policy payable, he said: "This policy in the New York Life is Katie's. * * * You know I am educating a girl. * * * Just make that payable to myself, and I will arrange for that."' James Irwin, also an insurance agent, testified that Lord applied to him for insurance in December, 1899, about six months after his marriage; that the witness asked him if he had any insurance, and he answered, 'Yes,' he had some for his sister 'Katie.' Witness suggested that he ought to take out some insurance for his wife, and he said, 'If I thought you could get me through, I would.' Witness submitted Lord's name to the company represented by him, and it wrote the \$20,000 for the benefit of the wife. Nell P. Anderson testified that he resided in Ft. Worth, and was a general agent for McFadden Bros. in the cotton business; that Richard Lord had been in the employ of the firm from about 1891 or 1892 until his death, and that he had known him since 1887 or 1888. They were in business touch with each other every year, but Lord's office would be changed from year to year. The witness said: 'I think it was in 1894,—the latter part of that year, * * * Mr. Lord gave me some valuable papers in a sealed envelope, to be cared for for him; asking me if I could take care of them in my safe. I told him, "Yes," I would put them in my private till. When he handed them to me, he says, "In this is a policy for my sister, Kate."' Witness kept the papers for about a year, when Lord called for them, and he delivered them to him. The attention of the witness was not directed to any other paper in the package, and the matter was never mentioned again. It appeared from the evidence that Lord was a man of good business qualifications, and understood the effect of the language of the policy, and knew what would be necessary to make it payable to his sister.

"In affirming the judgment of the court below, this court sustained the verdict of the jury, and held that there was sufficient legal evidence to support the finding of the jury that Richard Lord gave the policy of insurance to his sister, and that actual delivery thereof might be implied from the evidence.

Associate Justice Pleasants dissented from the conclusion of the majority upon the ground that the evidence was insufficient in law to sustain the finding of the jury that the policy was given by Richard Lord to the appellee. The question is therefore certified to the supreme court for decision whether or not there was any evidence legally sufficient to support the verdict of the jury that Richard Lord had given the policy to his sister, Kate Lord."

In order to sustain the judgment of the trial court and the majority of the court of civil appeals, the evidence must be sufficient to justify the finding that Richard Lord gave the policy of insurance in controversy in this suit to his sister, Kate, and delivered it to her in such manner as to pass the title thereto so that he had no control over the title thereafter. Whether or not there was such a delivery was a question of fact to be tried by the jury, and was capable of proof in the same manner and by the same character of evidence as would establish the gift itself, or any other issuable fact in the case. The declarations of Richard Lord introduced in evidence were competent to prove both the gift and the delivery. *Thornt. Gifts*, § 230; *Hansell v. Bryan*, 19 Ga. 167; *Sprouse v. Littlejohn*, 22 S. C. 358. The appellant cites as authority to the contrary of this proposition the case of *Chambers v. McCreery*, 45 C. C. A. 322, 106 Fed. 368. That case holds squarely that the delivery of a gift cannot be proved by the declarations of the donor, but no authority is cited in support of that proposition, and we have found none agreeing with it. We see no reason why the fact of delivery could not be as well proved by a declaration as the fact of gift itself, or any other fact about which a party had made a declaration against his own interest. The declarations made by Richard Lord being admissible and admitted in evidence, the question arises, what probative force are they entitled to? To Louis Wortham, insurance agent, Lord stated the policy in this suit "is hers," meaning Miss Kate Lord; and, speaking to Mr. Green of this policy, said, "It is Kate's." These statements were equivalent to saying the policy was the property of his sister, Kate, from which the jury might infer that Richard Lord had given it to his sister, and that he had actually delivered it into her possession, or done that which was equivalent to such act of delivery, and every other act necessary to transfer it to her. It could not be true that it belonged to his sister, Kate,—or, in the language used, that it was hers; or Kate's, as stated by one witness,—unless Lord had given it to her, and had actually delivered it, because the right of property could not have passed without such act of delivery. 2 *Tayl. Ev.* § 800; 1 *Greenl. Ev.* (16th Ed.) § 563-1; *Hancock v. Lumber Co.*, 65 Tex. 225; *Stevens v. Masterson*, 90 Tex. 417, 39 S. W. 292, 921; *Howard v. Per-*

ry, 7 Tex. 259; *Hunt v. Hunt*, 119 Mass. 474; *Kelly v. Maness*, 123 N. C. 236, 31 S. E. 490; *Sprouse v. Littlejohn*, 22 S. C. 358; *Hansell v. Bryan*, 19 Ga. 167. In *Howard v. Perry* it was necessary for the plaintiff to prove that the certificate by which the land was located had been presented to the land board and approved, or suit filed, and judgment of approval entered; and the court said: "It appears that the plaintiffs admitted on the trial that it was a good certificate. By this it must have been intended that it was a certificate which had been duly recommended; for otherwise it could not have been said to be a 'good' certificate. No other sensible meaning can be attached to the word 'good,' as here employed, than that it was used to denote a certificate which was good in law in contradistinction to such as are deemed fraudulent and void." The supreme court of South Carolina, in passing upon a similar question, said: "It is true that delivery must be proved, but this is a question of fact for the jury, and, inasmuch as there can be no complete and legal gift without delivery, the very use of the term 'gift,' or 'I have given,' may sometimes be intended to include the delivery; and where, therefore, such declarations have been used by the donor, and they are admitted by the court as competent, we think it ought to be left to the jury to say whether the gift has been proved, including the delivery, and it ought not to be laid down as a rule of law to govern the jury that such declarations in themselves are insufficient to prove the gift." *Sprouse v. Littlejohn*, supra. In the case of *Chevallier v. Wilson*, 1 Tex. 161, the supreme court held that the declaration of the donor that she had given the property in question to the donee was not sufficient to sustain the judgment, but in that case the court was acting with power to review the facts as well as the law, and the question now presented was not before that court. The following language shows that the supreme court decided the case on the preponderance of the evidence: "We have heretofore considered the claim of the petitioners on the acknowledgment of Mrs. Wadlington that she had given the property to her daughter, and have seen the effect of such acknowledgment counteracted by all the facts of the case. This, however, was but the evidence of one of the witnesses; and the question must be decided, not on his, but on the testimony of the others, which goes only to the extent that the mother intended the slave for her daughter, at her (the mother's) death." It has been frequently said by judges in delivering opinions upon questions of parol gifts that the evidence must be clear and satisfactory, and it has not been unfrequently the case that they have refused to sustain judgments based upon evidence as strong as that presented in this case; but those decisions are made upon the weight of all the evidence, and are

the results of the influence the testimony had upon the mind of the court. They are therefore not authority in the determination of the question submitted. The rule by which this court must be governed is, "if the testimony is of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it," that there was no evidence of delivery, the question must be answered in the negative. The converse of that proposition is just as true, —if, upon the evidence in the record, ordinary minds might differ as to the conclusion to be drawn upon the issue of delivery, the answer must be in the affirmative. We are of opinion that the evidence in this case is not of the character which would have justified the district judge in taking the question from the jury; in other words, the evidence was sufficient to raise an issue of fact whether there had been an actual delivery of the policy or not.

We answer that the facts certified present sufficient evidence as a matter of law to support the finding of the jury that Richard Lord did give the policy to his sister, Kate Lord.

GRAVES v. KINNEY et al.

(Supreme Court of Texas. Jan. 31, 1902.)

VENDOR'S LIEN—APPEARANCE—BONA FIDE INDORSEE.

The owner of a homestead, to raise money, prepared a deed to a pretended purchaser, reciting a cash consideration and note for the balance, and induced his wife to execute the deed by causing her to believe the transaction was an actual sale. The deed was delivered to the grantee named therein and recorded, and he executed the note to the husband. Plaintiff received the note as indorsee for value, before maturity, without notice that the transaction was other than appeared on the face of the papers. *Held*, that plaintiff was entitled to a lien to secure the note, though, as between the immediate parties to the original transaction, there was no vendor's lien.

Error from court of civil appeals of Third supreme judicial district.

Action by D. P. Kinney against Elizabeth J. Graves and others. From a judgment of the court of civil appeals (64 S. W. 1094) affirming a judgment of the district court in favor of plaintiff, defendant Elizabeth J. Graves brings error. Affirmed.

W. M. Walton and A. S. Phelps, for plaintiff in error. Moore & Moore and M. O. Granberry, for defendant in error Kinney. D. W. Doom and D. H. Doom, for defendant in error Richardson.

WILLIAMS, J. As appears from the conclusions of the trial judge, the place in controversy was the homestead of I. B. and Elizabeth J. Graves, and they were in possession of it as such throughout the transactions in question. I. B. Graves and M. H. McLaurin, in order to raise money for purposes of their own upon the security of the

homestead, agreed upon a plan by which Graves and wife were to make a deed to McLaurin for the place, and the latter was to execute his note to Graves, pretending for part of the purchase money. A deed was prepared for signature by Graves and wife, reciting as its consideration a cash payment of \$1,700 and a note for \$1,100, and purporting to convey the property to McLaurin. This was presented to Mrs. Graves for execution, and she was induced to believe that it was intended, according to its purport, to effect a real sale of the property. She at first objected, but, upon the promise of her husband that the proceeds should be invested in another home, finally assented, and executed and acknowledged the deed, still believing that the transaction was a real sale for the recited consideration. No money was paid by McLaurin, nor was there any purpose on his and Graves' part to make a real sale and purchase; their scheme being to raise money upon the note. The deed, properly executed and acknowledged, was delivered to McLaurin and placed of record, and the note recited in it was executed to Graves. Graves assigned the note to J. P. Richardson for full value before its maturity; Richardson having no notice of the true nature of the transaction between Graves and wife and McLaurin, or that it was not truly represented by the papers executed. Defendant in error Kinney acquired the note after maturity from Richardson, and brought this suit against McLaurin, Graves and wife, and Richardson to recover the amount due upon it, and to foreclose the lien upon the property. Mrs. Graves set up the facts of the transaction as stated to defeat the lien asserted. Kinney and Richardson pleaded that the latter acquired the note and lien under the deed to McLaurin before maturity of the note, for a valuable consideration, without notice. The plaintiff recovered under this plea in the district court, and the judgment was affirmed by the court of civil appeals.

The transaction, being in the form of a sale, but in reality an attempt on the part of Graves to incumber the homestead to secure the payment of money, was a "pretended sale." It involved a "condition of defeasance"; for, under the arrangement between Graves and McLaurin, payment of the note would have put an end to the pretended conveyance. It therefore comes within the provision of section 50, art. 16, of the constitution, that "all pretended sales of the homestead involving any condition of defeasance shall be void." The understanding of the wife that she was making a sale could not give such effect to the transaction really consummated between Graves and McLaurin, because (1) her husband never joined in a sale; and (2) the sale to which she assented was never consummated. *Cole v. Bammel*, 62 Tex. 108. It is plain, therefore, that no right to the property ever vested in Mc

Laurin, and no lien upon it, good against Mrs. Graves, as between the parties, ever arose. But to the purchaser of the note the papers executed by all the parties presented a transaction in which there was a regular and lawful sale of the homestead, in which the cash installment of the purchase money had been paid, and the remainder was secured by the note, with a valid lien on the property; and the question is whether the court, in ascertaining his rights, should look behind the evidence of their rights which the other parties had thus created, and upon which he acted, or should, in his favor, hold them to the transaction as they had made it appear to be. The decisions of this court have, it seems to us, settled the question in favor of the purchaser. *Hurt v. Cooper*, 63 Tex. 362; *Heidenheimer v. Stewart*, 65 Tex. 321; *Love v. Breedlove*, 75 Tex. 649, 13 S. W. 222; *Eylar v. Eylar*, 60 Tex. 815. In these cases, transactions which fell as completely within the constitutional provisions as that involved in this case were passed upon; and it was held that a purchaser of a note given for purchase money in an apparent sale of the homestead, or a purchaser or subsequent mortgagee of the property itself, was entitled to protection against the claim of the wife that the transaction was really an attempt to mortgage the property under the form of a sale. It seems, from the Reports, that in all of the cases cited the wife knew the true nature of the transactions when she executed the deeds upon which the purchaser relied; and it is argued (and we were at first somewhat impressed with the view) that this fact, in principle, distinguished this case from those. If the former decisions rested upon the doctrine of estoppel of the married women by their fraudulent conduct, the question might be open whether or not an estoppel could arise from such an act on Mrs. Graves' part as this case discloses. But the opinions, except one, proceed exclusively upon the principles of law existing in favor of bona fide purchasers; and in the excepted case (*Heidenheimer v. Stewart*) both that doctrine and that of estoppel are stated in the opinion. The original record in that case shows, however, that the sole ground relied on to defeat the claim of homestead was that of bona fide purchase; no estoppel being pleaded or claimed in the briefs. The transactions in those cases were, upon the real facts, as completely without effect between the parties as the one under review, but the rights of the purchaser were held to depend upon the facts as the parties had made them appear to him. Obviously, the state of the wife's knowledge when she executed the deed cannot affect the question of the good faith vel non of the purchaser, when he knew nothing of it beyond the evidence afforded by the deed; and, accordingly, we find no allusion to such an element in any of the opinions. The doctrine of these cases is that purchasers have

the right to rely upon evidences, created by the owners of homesteads, of lawful and regular sales thereof, and that evidence that the parties did not intend what their acts represented is ineffectual against such purchasers.

The judgments of the courts below were in accordance with this rule, and must be affirmed. Affirmed.

DALLAS COUNTY v. CLUB LAND & CATTLE CO. et al.

(Supreme Court of Texas. Jan. 30, 1902.)

SCHOOL LANDS—CONVEYANCE—APPLICATION OF PROCEEDS—CONDITIONS OF RECOVERY—ADMINISTRATORS—COVENANTS OF WARRANTY.

1. Under Const. 1876, art. 7, § 6, giving a county power to sell and dispose of its school lands in the manner provided by the commissioners' court, and declaring that the proceeds shall be held in trust for the public schools, and invested in United States or state bonds, the commissioners cannot convey school lands to a surveyor in payment of his services in subdividing such lands for sale.

2. Where county commissioners convey a portion of county school lands, the proceeds of which are to be held in trust for the public schools in consideration of the grantee's services in subdividing the whole tract, in a suit against a subsequent grantee to recover such portion it is not incumbent on the county, as such trustee, to pay the defendant the value of such grantee's services, as the claim therefor was not chargeable against the trust fund.

3. An administrator cannot bind his estate by a covenant of warranty.

4. Where an administrator recites in a deed that he does not bind himself personally, and makes covenant of warranty in his capacity of administrator, he cannot be held liable personally on such covenant.

Error to court of civil appeals of Second supreme judicial district.

Action by Dallas county against the Club Land & Cattle Company and another. From a judgment of the court of civil appeals (64 S. W. 872) reversing a judgment to plaintiff, it brings error. Reversed in part and affirmed in part.

G. G. Wright and K. R. Craig, for plaintiff in error. Matlock, Miller & Dycus, for defendant in error Club Land & Cattle Co. Capps & Cantey and Theodore Mack, for defendant in error R. B. Bishop.

GAINES, C. J. This was an action of trespass to try title, brought by Dallas county against the Club Land & Cattle Company to recover a tract of about 700 acres of land, and was tried by the court without a jury. The trial judge filed his conclusions of fact, and the cause was appealed without a statement of facts. From the judge's findings the following facts appear: Some time before the 9th day of June, 1879, the commissioners' court of Dallas county entered into a contract with John Henry Brown, in which Brown agreed to survey, subdivide, map, and classify for the purposes of sale

the school lands of the county, and the court promised to pay him for the work \$250 in money, and to convey to him a portion of the land. Brown complied with the contract on his part, and the court, on the day named above, paid him the money consideration, as promised, and caused to be conveyed to him that portion of the county school lands which is now in controversy in this suit. Brown sold and conveyed the land, and the title, such as he had, passed by a regular chain of conveyances to one E. W. Harrold. Harrold died, and R. B. Bishop became the administrator of his estate. The administrator obtained an order of the county court to sell this land, as well as other lands of the estate, and agreed upon a sale of the tract in controversy to one Carver, who was acting solely for the Club Land & Cattle Company. The sale was reported and approved, and thereafter the purchase money was paid, and a deed of conveyance executed by the administrator to Carver. But before the deed was executed Carver became apprised of the alleged defect in the title, and presumably for that reason the following stipulation was inserted therein: "I do not bind myself personally, and I make this covenant of warranty in my capacity as administrator, so far as I have the power and authority to do, and no further." It would seem that the deed contained a covenant of warranty; but, if so, it does not appear from the conclusions of fact, nor do we deem it a matter of any importance. The trial judge, in his findings, also found the following facts: "That Bishop, at the time of the delivery of the deed of date October 21, 1898, to Carver, promised him (Carver) that he would perfect the title to the land sued for, and secure a good deed from Dallas county to said land; that this assurance and promise was made by Bishop acting as administrator, and was not made by him as an individual, or for the purpose of binding himself personally so to do; that he (Bishop) knew that the estate which he represented had no title to the land sued for by plaintiff herein, and that Carver would not have accepted the title to the land but for the promise of the administrator to perfect the title; that Bishop made efforts to procure a title from Dallas county, but failed to do so." After the execution of the deed to him, Carver conveyed the land by a special warranty deed to the Club Land & Cattle Company. It was also found that Brown's services in subdividing and classifying the land were of the reasonable value of \$750, and, as before stated, \$250 had been paid him in money. R. B. Bishop was vouched in as a party defendant by the Club Land & Cattle Company, and a recovery was asked against Bishop, both as an individual and in his capacity as administrator, upon the warranty contained in the deed, and upon his verbal promise in the event the plaintiff should prevail in its suit. The land and cattle company also prayed that in the event

of a recovery by the plaintiff he should have a judgment for the unpaid balance of the value of Brown's services, and that the recovery should be made upon condition of the payment to it of such balance. The court gave judgment for the plaintiff for the land and rents, and denied any recovery for the unpaid balance of Brown's services, and also adjudged a recovery in behalf of the Club Land & Cattle Company against Bishop as administrator for the purchase money paid to him for the land. The Club Land & Cattle Company and Bishop both appealed, and upon the appeal the court of civil appeals (64 S. W. 872) reversed the judgment against the Club Land & Cattle Company in so far as it denied such company a recovery for the balance it found to be due for Brown's services, but affirmed the judgment in favor of Dallas county for the land in controversy, and gave the Club Land & Cattle Company judgment against plaintiff for such unpaid balance. But it also reversed the judgment in favor of the Club Land & Cattle Company against Bishop as administrator, and adjudged that it should take nothing against him either individually or as administrator.

As between Dallas county and the defendant company, the first question is: Did the commissioners' court of the county have the power to convey a part of its school lands for the services of Brown in subdividing and classifying them for the purpose of putting them on the market for sale? The date of the acquisition of the lands by the company does not appear from the conclusions of fact. But it does appear that the contract with Brown was entered into in June, 1879, at which time the constitution of 1876 was in force. Therefore the contract was subject to its limitations. So far as we are aware, no statute has ever been passed, either by the congress of the republic or the legislature of the state, which provided the manner in which the county school lands should be sold, except the act of November 1, 1866. Laws 1866, p. 74. That act authorized the "police courts," as the county boards were then called, to sell the school lands of their respective counties upon being empowered to do so by the voters of the counties, and directed specifically the manner of sale. It also provided that expenses of the sale should be paid out of the interest arising from the proceeds of the sale. Original section 6 of article 7 of the constitution of 1876, in so far as it bears upon the questions in this case, reads as follows: "All lands heretofore or hereafter granted to the several counties of this state for education or schools are of right the property of said counties, respectively, to which they were granted, and title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell or dispose of its lands in whole or in part

in manner to be provided by the commissioners' court of the county. * * * Said lands, and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein; said proceeds to be invested in bonds of the state of Texas, or of the United States, and only the interest thereon to be used and expended annually." This clearly supersedes and repeals the act of 1866, for the reason that the act prescribes the manner of making the sale, and makes the power dependent upon a popular vote, while the constitution gives the absolute power of sale to the commissioners' court, and leaves them free to provide the manner of sale. The determination of the case must, therefore, depend upon the construction of the language just quoted. We have no decisions which have an important bearing upon the question. In the case of *Tomlinson v. Hopkins Co.*, 57 Tex. 572, it was held that the commissioners' court could not contract to give a surveyor a part of the land to be acquired as a compensation for his services in locating and surveying the land. The ground upon which the decision was based was that the statutes under which the lands were acquired prescribed that the expenses of locating the certificates should be paid out of the county treasury. Pasch. Dig. arts. 3464, 3465, 3474-3476. In *Pulliam v. Runnels Co.*, 79 Tex. 363, 15 S. W. 277, a similar ruling was made with reference to lands located for the counties under the provisions of articles 4032 and 4033 of the Revised Statutes of 1879. In view of the express provisions of the statutes upon which these decisions are based, the question there presented is clearly distinguishable from that presented in this case. But they forcibly illustrate the policy of our legislation with reference to the school lands of the counties, and throw some light upon the meaning of the provision of the constitution on that subject. Here the question is not as to the power of the commissioners' court to pay for locating the certificates by a conveyance of a part of the land, but it is as to the power to convey a part of the land already located in payment for services in subdividing them for the purpose of placing them upon the market for sale in separate parcels. In *Pulliam v. Runnels Co.*, cited above, it is, in effect, held that the commissioners' court are not authorized to dispose of the lands otherwise than by sale or lease. It would seem, therefore, that the conveyance of the land for any other consideration than that of money would be unauthorized. But it is plausibly argued, in substance, that a conveyance of a tract of land at its market value in payment of a proper service for the benefit of the fund is the same, in effect, as if the land had been sold, and the proceeds applied to the payment of such services; and that, therefore, no substantial reason exists why the conveyance in this case should not be

valid. It would seem that if the county, as the trustee of the special school fund, had incurred a debt which was properly chargeable against the fund, its commissioners' court might sell a part of the land directly to the creditor in discharge of the debt. But we are of opinion that a debt created by a county as an expense incurred in selling school lands cannot be charged either against the lands themselves or the proceeds of their sale. The declaration in section 6 of article 7 of the constitution is that "said lands, and the proceeds thereof when sold, shall be held alone as a trust for the benefit of the public schools therein." The difficulty of construction grows out of the indefiniteness of the meaning of the word "proceeds." If by the word is meant the gross proceeds, then we think it means that no part thereof could be used for the purpose of paying the expenses of the sale; for the section also provides, in effect, that the proceeds previously mentioned shall be invested in certain securities as a permanent fund for the use of the schools of the county, and that the interest only is to be annually expended. If net proceeds is meant,—that is, what remains of the gross proceeds after paying the expenses of the sale,—then it would seem that the expenses of the sale were properly payable out of the purchase money of the land itself. But, in view of the policy of the law as evinced by the previous legislation upon the subject and of the language of the section itself, we are of opinion that by "proceeds," as used in the section under consideration, is meant the entire proceeds, and not the net proceeds. The acts of the congress of the republic, as was held in *Tomlinson v. Hopkins Co.*, supra, required the counties to pay the expense of locating the certificates out of their ordinary funds; and the act of March 13, 1875, which granted four leagues of land for educational purposes to certain counties which had not theretofore received school lands, placed such counties upon the same footing with those which had previously acquired such lands, and provided that the counties should pay no fees in the general land office. The act of November 1, 1866, which provided for a sale of the county school lands, expressly made the expenses of the sale payable out of the interest upon the proceeds. This legislation tends to show that the policy was to preserve the entire lands and their entire proceeds intact as a permanent school fund for the use of the public schools of the county. The words "said lands," as used in section 6, evidently mean all the lands. The provision embraces as well all lands that might thereafter be granted as well as those which had been previously acquired, and it would seem to have been contemplated that in case of future grants all the lands which were granted to a county should become its permanent special school fund, and that no part should be

given for the expenses of locating and surveying them. In other words, it was intended that such expenses should be paid by the county from its general fund. If such was the intent as to the lands themselves, it is to be inferred that there was a like intention as to the proceeds,—that the entire proceeds should be held, and that the county should pay the expenses of a sale, if any, out of its own proper funds. But, in any event, the word "proceeds" in the section we are considering, is not restricted by any other words which qualify its meaning, and should, therefore, be applied in its broadest sense, unless the context or the reason of the provision should show that it was used in a less enlarged sense. The dim light of the context in this case tends rather to show that it was intended to mean the gross proceeds; that is, the entire purchase money. As to the reason of the provision, it may be urged that, since the county is made a mere trustee, it is unreasonable to suppose that it was intended to charge it in its individual capacity with the expense of administering the trust fund. The answer is that while, in legal contemplation, the county is but a trustee, and the school fund the beneficiary, the county has an important interest in the maintenance of public schools within its limits; and that it is not unreasonable that the framers of the constitution should have deemed it politic to make the expense of administering a fund set apart for the support of public schools in the county a charge upon its general revenues. Since the lands are the gift of the state for the special benefit of the educational interests of the county, it is not a hardship to require the county administration to bear the expense of converting the land into money. Our conclusion is that the commissioners' court of Dallas county did not have the power to convey the land in controversy to John Henry Brown in payment of his services in subdividing the county school lands for sale, and that the district court and the court of civil appeals did not err in so holding.

The next question is, was the Club Land & Cattle Company entitled to any recovery against Dallas county? Undoubtedly, John Henry Brown had a just claim against the county for the unpaid balance of the value of his services in subdividing the land. But we think it follows from what has already been said that this was a claim against the county proper, and not against it as trustee of its school lands. If it had been a claim properly chargeable upon the trust fund, we think it would follow from the previous decisions of this court that the county could not recover the land without first reimbursing the defendant company for Brown's services. But the distinction between Dallas county in its ordinary corporate capacity and Dallas county as trustee must be kept in mind. Brown's services, while rendered for the benefit of the trust fund, were rendered

at the instance of the county; and it was the duty of the county, under the law, to discharge the debt from its general revenue, and it was not a debt against the fund. The claim against the county was barred by the statute of limitations. The county, as trustee, was entitled to recover the land free of any incumbrance, the claim of Brown's services not being chargeable against the trust fund. We conclude upon this branch of the case that the ruling of the trial court upon this point was correct, and that the court of civil appeals erred in reversing the judgment in that particular.

Was Bishop bound, either individually or as administrator, upon either the warranty in the deed or upon his oral promise? The written warranty expressly declares, in effect, that he does not bind himself personally, and the trial judge found in his conclusions of fact, as we have seen, that the oral promise was made by him in his fiduciary capacity, and not with the intention to bind himself personally. We think it clear that an administrator cannot bind the estate by his covenant of warranty. *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Able v. Chandler*, 12 Tex. 88, 62 Am. Dec. 518; *Ward v. Williams*, 45 Tex. 617. His duty is to sell just such title as the estate has, and his deed can have no other effect. The policy of the law is to require an estate to be administered and the administration closed with as little delay as may be practicable. To permit the administrator to bind the estate by a warranty in his deed would be to impose a new contingent liability upon it, and to delay indefinitely the close of the administration. Was Bishop bound individually? It has been frequently held that an administrator, in contracting with reference to the business of an estate, has bound himself personally for the performance of the contract, though he may, in the body of the instrument, have described himself as administrator, or may have signed it as such. Probably in most, if not in all, of such cases, he was without power to bind the estate. When the terms of a contract admit of two constructions, one of which would give it effect and the other would make it void, the courts adopt the former construction. But at last it is a mere rule of construction, and it has no place in a case like this, in which the party has stipulated in express terms that he is not to be personally bound. *Thayer v. Wendell*, 1 Gall. 37, Fed. Cas. No. 13,873. The opinion of Judge Story in *Thayer v. Wendell*, supra, has been cited, and the principles there announced applied, in the following cases: *Mitchell v. Hazen*, 4 Conn. 514, 10 Am. Dec. 169, and *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82; though in both cases there was held to be a personal liability, it not being shown that the party did not intend to bind himself in his individual capacity. See, also, remarks in *Shontz v. Brown*, 27 Pa. 133, and *Long v. Rodman*,

58 Ind. 62, where the proper limitation of the doctrine of personal liability in such cases is announced. What we have just said applies also to Bishop's oral promise, though we concur with the court of civil appeals in holding that that was merged in the written contract. We conclude that Bishop was liable neither as administrator nor personally upon either the promise or warranty.

The judgment of the court of civil appeals, in so far as it allows a recovery against Dallas county, is reversed, and judgment is here rendered that the Club Land & Cattle Company take nothing as to its counterclaim against the county; but in all other respects, save as to costs, the judgment of that court is affirmed. The Club Land & Cattle Company will pay the costs of all the courts.

Ex parte POWELL.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

MUNICIPAL CORPORATIONS—ORDINANCES—STATE LAWS—POOL SELLING ON HORSE RACES.

Beaumont City Charter, § 38 (Sp. Laws 1899, p. 159), provides that the city may, by ordinance, exercise such powers as may be necessary under the state law to suppress gambling houses, lotteries, and pool selling. Section 85 provides that nothing contained in the act shall be construed to suspend any of the penal laws of the state, and that the council may pass any ordinance, within the limitations of the act, not in conflict with such penal laws. Acts 26th Leg. (Sp. Sess.) p. 51, subd. 18, provides for a state tax levy upon selling pools on horse races; and Beaumont City Charter, § 71, authorizes the city council to levy a similar city tax. *Held*, that the city had no power to prohibit pool selling on horse races, since such prohibition would be in conflict with the penal laws of the state.

Habeas corpus by L. K. Powell against the marshal of the city of Beaumont to obtain a release from arrest under a city ordinance. Relator discharged.

W. H. Pope and Watts, Chester & Ellison, for relator. Smith, Crawford & Sonfield, W. L. Douglass, W. R. Blain, City Atty., and Robt. A. John, Asst. Atty. Gen., for respondent.

HENDERSON, J. This is an original proceeding by habeas corpus, the writ having been granted by this court. Relator was arrested by the city marshal of Beaumont, under section 1 of an ordinance of that city prohibiting what is called a "turf exchange," which is defined in said ordinance as the selling of pools on horse racing. The same prohibits the sale of pools on horse racing within the limits of the city of Beaumont, and makes the person violating such ordinance guilty of an offense subject to a fine of not less than \$100, nor more than \$200, and each day is made a separate offense. The complaint charged relator with violating this ordinance, and he was arrested on a

warrant therefor, and sued out the writ of habeas corpus, as before stated. Relator claims that horse racing is not an offense, within this state, nor is betting thereon, and, consequently, neither is pool selling on horse races; that is, as we understand it, a place where bets are made cannot be made an offense by municipal ordinance in the absence of an express or clearly-implied grant of power in the charter authorizing the mayor and council to create the same an offense; and he contends there is no such authority for the ordinance. He further contends, if there was such grant of power by the legislature, it would be violative of section 28 of article 1 of the bill of rights, which provides that no power of suspending laws in this state shall be exercised, except by the legislature. The city contends that the charter grants the power to the city council to pass such an ordinance, and that this is not inhibited by said section of the bill of rights. We quote the portions of the charter invoked on behalf of the city, as follows: Section 33 of the charter (Sp. Laws 1899, p. 159) provides: "The city of Beaumont shall have the right by ordinance duly passed by the city council, to exercise such powers as may be necessary under the state law, for the following purposes." Among other things, "to suppress gambling houses, and to punish keepers of gambling houses and pool-sellers, and all persons who play at cards, or games of any kind, and punish persons who sell lottery tickets, and who advertise lottery drawings or schemes, or the results of the drawing of lotteries." And again, toward the close of said section: "And generally, to make and establish all rules, regulations, by-laws and ordinances which may contribute and promote the better administration of the officers of said city, as well as for the maintenance of the peace and tranquillity of said city, and for the protection of the persons and property of its inhabitants." Section 85 reads: "Nothing herein contained shall ever be construed to in any manner suspend, modify, or abridge any penal laws of this state, but the penal laws of this state shall ever be in full force and effect, and in no manner repealed or suspended by any provision of this act; but the council may enact any ordinance within the limitations herein provided not in conflict with the penal laws of this state." Id. p. 177.

We understand it to be conceded that horse racing is legal, and betting thereon is lawful, in this state. *Dunman v. Strother*, 1 Tex. 91, 46 Am. Dec. 97; *Walker v. Armstrong*, 54 Tex. 615. Moreover, pools, or the sale of bets on horse racing, are legalized by the occupation tax act of 1897 (Acts 25th Leg. [Sp. Sess.] p. 51, subd. 18), which provides, "From any person or persons who shall sell pools on horse races or other contests, five dollars for each and every day they may so sell said pools." In this connection, section 71 of the charter of the city of

Beaumont authorizes the city council to levy and collect an occupation tax on all occupations taxed by the state, the tax to be one-half the occupation tax levied by the state. Now, the question presented is, the occupation of pool selling being one authorized by the general laws of the state, and from which it derives a revenue, does the charter granted by the legislature to the city of Beaumont authorize the municipal council of said city to prohibit the pursuit of said occupation within the city limits? We understand the authorities to hold that the municipality can only exercise such powers as are granted it by the sovereign power; that is, the state. In construing these powers, the courts will adopt a strict, rather than a liberal, construction; and the doctrine is that only such powers and rights can be exercised under charters as are clearly comprehended within the words of the grant, or derived therefrom by necessary implication; and, of course, such a rule will not be relaxed where the purpose is to repeal a state law. *Flood v. State*, 19 Tex. App. 584; *Ex parte Garza*, 28 Tex. App. 382, 13 S. W. 779, 19 Am. St. Rep. 845; *Ex parte Robinson*, 30 Tex. App. 493, 17 S. W. 1067. Now, to hold that the provisions of the charter heretofore referred to and copied would authorize the city council of Beaumont to repeal the state law within its limits, and to make a vacation, elsewhere lawful, unlawful therein, would require us to reject at the very outset a clause in the beginning of section 33 of the charter, to the effect that the city could pass the following ordinances under the state law; that is, as we understand it, in consonance or in accordance with state laws. It is evident that, if the city is authorized to suppress pool selling on horse races by the subsequent language used, it must do so not in consonance with, but in contravention of, the state law on the subject. Now, it will be noted that the inhibition of pool selling is not selling pools on horse racing, but the prohibition is in general terms. A pool has been defined to be the combination of stakes, the money derived from which goes to the winner. *Com. v. Ferry*, 146 Mass. 203, 15 N. E. 484. A pool seller is one who sells pools on any event,—as horse races, boat races, elections, etc. A pool ticket is a ticket entitling the holder to a share in the proceeds of a pool. And a pool room is one in which pools on races, etc., are sold. *Cent. Dict.* Now, we understand, if there is an apparent conflict in the authority granted and the state law on the subject, it is our duty to reconcile that conflict, if it can be done, and to apply the law to those things which the municipality can prohibit without the repeal of the state law on the subject. As it is evident there are many things on which pools can be sold besides horse races, the authority granted would only relate to such pools as are not authorized under the laws of this state. This would be giving

due weight to the authority of the council to inhibit certain things in accordance with the law of the state, and especially is this construction manifest by the connection in which the pool selling is prohibited, because we find it in connection with a number of things which are illegal under the laws of the state, as gambling, etc. We do not deem it necessary to go further, and endeavor to enlarge the powers of the municipality under the "general welfare" clause of said section, which has been invoked, because, if it is a correct principle that the power to enact the law must be clearly expressed or necessarily implied in the charter, we do not believe it would be a safe or sound doctrine to invoke the authority claimed under a general power to do anything which may appear to the council to be for the peace and good order of the municipality. A special authority granted in the preceding part of the section could not be thus enlarged. Nor, in the view we have taken, do we deem it necessary to discuss the power of the legislature to authorize the mayor and city council of Beaumont to suspend a state law under section 28 of the bill of rights. The charter itself inhibits the suspension or nullification of any penal statute of the state. Section 85 of the charter. And whether the grant of authority by the legislature to the municipality to make something an offense within the city limits which can be legally pursued outside the city limits is violative of said section of the constitution it is not necessary for us to here determine.

Because, in our opinion, there is no grant of power or authority in the charter to prohibit pool selling on horse races, the relator is ordered discharged from custody.

FARRIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1902.)

CRIMINAL LAW—HEARSAY EVIDENCE.

In a prosecution for theft, testimony by a witness for the state, offered to show the owner's want of consent to the taking of the stolen property, that he testified as a prosecuting witness on the examining trial, is incompetent, because hearsay; not showing any act on the part of the third person indicating his want of consent, but merely that the state called him.

Appeal from district court, Nueces county; Stanley Welch, Judge.

Harriet Farris was convicted of crime, and appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft of money over the value of \$50, and her punishment assessed at confinement in the penitentiary for a term of two years.

On the trial appellant reserved the following bill of exceptions: "The state's witness

Mike Niland, being upon the stand, was permitted, over the objections of defendant, to testify to the following facts, to wit: That Giacomo Duplech had testified as a witness in the examining trial of this cause, and at the time said Giacomo Duplech testified before said examining court he testified as a prosecuting witness. And defendant, at the time it was offered, objected to said testimony for the reason following, to wit: Because the said Giacomo Duplech was an absent witness in this case, and because he was the owner of the property alleged to have been stolen, and the witness Niland was introduced as a witness for the state, and the evidence adduced from him, which is complained of, was for the purpose of proving the want of the consent of the owner to the taking of said property; and because said witness had no legal right to testify as to what or how the absent witness testified upon the examining trial in this case; because said testimony deprived defendant of the right of being confronted with the witness against her; and because said testimony was not the best evidence as to whether Giacomo Duplech had testified upon the examining trial or not. Therefore this evidence should not have been admitted, as it was incompetent testimony, calculated to injure, and did injure, defendant in the eyes of the jury which convicted her. And the court overruled defendant's objections to said testimony, and permitted it to go to the jury as evidence, to which defendant then and there excepted." It has been held in a number of decisions rendered by this court that circumstantial evidence can be resorted to for the purpose of showing the want of consent on the part of the prosecutor to the taking of the alleged stolen property. See cases cited in White's Ann. Pen. Code, § 1508. Some of the cases hold that circumstantial evidence cannot be resorted to where positive evidence is accessible. *Jackson v. State*, 7 Tex. App. 363; *Stewart v. State*, 9 Tex. App. 321. But this doctrine seems to be modified by later decisions. *Hoskins v. State* (Tex. Cr. App.) 43 S. W. 1003. However, we do not understand that, because want of consent can be proved by circumstances where positive testimony is not attainable, this would authorize the introduction of hearsay evidence. True, in *Stewart v. State*, 9 Tex. App. 321, and *Schultz v. State*, 20 Tex. App. 310, hearsay evidence was introduced on this subject, but it was without objection. *West v. State*, 32 Tex. 651; *Davis v. State*, 37 Tex. 227. It occurs to us that the testimony here offered was hearsay. It does not show any act on the part of Giacomo Duplech, but merely what the state did; that is, that the attorney representing the state in the examining trial called said Duplech as a witness for the prosecution. While it might be inferred from this that said Duplech was not consenting to the taking of his property, yet

this inference would be predicated not upon his act, even, but that of some one else. Besides, it was not shown here, so far as the bill is concerned, that Duplech was not accessible to the process of the court. We do not think the testimony was admissible. The question of consent vel non became a material one, inasmuch as the appellant controverted this on the trial, and testified to the effect that she had the consent of Duplech. True, the circumstances narrated by state's witness strongly tended to show that the property was taken without the consent of Duplech, and we would not be understood as holding that these circumstances are not sufficient to show want of consent. But these facts being controverted, it may be that the jury were influenced in their verdict by the hearsay testimony that was admitted over appellant's objection.

For the error discussed, the judgment is reversed, and the cause remanded.

THORN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1902.)

CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS.

Where the record does not contain a statement of facts or bill of exceptions, neither the evidence nor the charge of the court will be reviewed.

Appeal from district court, Angelina county; Tom C. Davis, Judge.

Will Thorn was convicted of rape, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of 25 years; hence this appeal.

The record is without statement of facts or bill of exceptions. Therefore the criticisms of the rulings of the court with reference to testimony and charge of the court cannot be intelligently revised. As the record appears, the judgment should be affirmed, and it is so ordered.

MILLARD v. STATE.¹

(Court of Criminal Appeals of Texas. Dec. 11, 1901.)

HOMICIDE—APPEAL—RECORD—STATEMENT OF FACTS—EVIDENCE—HARMLESS ERROR.

1. Where the record on appeal discloses that the term at which defendant was convicted adjourned October 24, 1901, and that the statement of facts was filed November 4, 1901, so that the 10 days allowed had expired on November 3d, the statement will be stricken on motion.

2. On prosecution for murder, it was error to permit a witness to testify that the wife

¹ Motion for rehearing dismissed January 15, 1902.

of the deceased had come to witness' house and told him that deceased had been beating her, and that, as soon as her uncle (defendant) returned, he would kill deceased; it not appearing that the statements were in the presence or hearing of defendant, or made with his knowledge or consent.

3. The statement of facts not being in the record, so that the testimony is not before the appellate court, it cannot say that the admission of such evidence was prejudicial error.

Appeal from district court, Nacogdoches county; Tom C. Davis, Judge.

Cal Millard was convicted of murder, and appeals. Affirmed.

W. H. Dial, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 15 years' confinement in the penitentiary; hence this appeal.

The assistant attorney general has filed a motion to strike out the statement of facts on the ground that it was filed after the expiration of the 10 days allowed by the court. An examination of the record discloses that the term of the court at which this conviction was had adjourned on the 24th day of October, 1901, and that the statement of facts was filed November 4, 1901. The 10 days expired on November 3, 1901. So that the motion of the state appears to be well taken. We, therefore, cannot consider the statement of facts as a part of the record.

There is but one bill of exceptions that requires notice. On the trial, appellant introduced Maggie Davidson, wife of deceased. On cross-examination the state was permitted to ask her the following question: "Did you not state to Mr. Baker, at his house, about two weeks before Bee Davidson was killed, that Bee Davidson had been whipping you, and, as soon as your uncle Cal came back, he would kill Davidson?" The witness answered that she had made no such statement. The court then permitted the state to introduce Baker, and prove by him that Maggie Davidson came to witness' house, and told him that her husband (Davidson) had been whipping her, and that, as soon as her uncle Cal came back, he (Cal) would kill Davidson. All this testimony was objected to on the ground that the same was not shown to have been in the presence or hearing of defendant, and was said without his knowledge or consent, and was not in rebuttal of anything brought out in the trial of defendant, and because it related to a matter collateral to the issue, and was the statement of an opinion, and not of a fact. The court appends to this bill an explanation that Maggie Davidson was the wife of deceased, and a niece of defendant, and that she testified that she knew of no trouble or misunderstanding between deceased and defendant; that their relations had been perfectly friendly, and that she had never heard defendant make any threats against deceased;

ed; that he (defendant) had been a frequent visitor at deceased's house; and that defendant had left at deceased's house a portion of his clothes, of which he (deceased) had no knowledge. We fail to see the admissibility of any of this testimony. Certainly that portion of it to the effect that Maggie Davidson should have said that, as soon as her uncle Cal came back, he would kill Bee, was inadmissible. *Drake v. State*, 29 Tex. App. 285, 15 S. W. 725; *Cogdell v. State*, 63 S. W. 645, 2 Tex. Ot. Rep. 900. However, the question presents itself, is it shown that the illegal testimony was injurious to appellant? The statement of facts is not before us, and, for aught that appears, the jury may have been fully authorized to find appellant guilty of murder in the first degree. At any rate, the testimony not being before us, we are not in a condition to say that the error in the admission of this testimony appears injurious or hurtful to appellant.

No error appearing in the record requiring a reversal, the judgment is affirmed.

CLEMENTS v. STATE.¹

(Court of Criminal Appeals of Texas. Dec. 11, 1901.)

THEFT OF CATTLE—SECONDARY EVIDENCE—TESTIMONY BEFORE GRAND JURY—NECESSITY OF IDENTIFICATION OF CATTLE.

1. On a prosecution for theft of cattle, evidence that defendant had told witness he had purchased them and had a bill of sale for them, and that he drew an instrument from his pocket and handed it to witness, who looked at it and returned it, is not secondary evidence of the contents of the bill requiring notice to defendant to produce.

2. Had such evidence been secondary, the defendant could not object thereto on appeal, where he did not offer the bill on the trial, or request an opportunity to produce it if he did not have it in his possession.

3. On a prosecution for the theft of cattle belonging to an unknown owner, evidence of the testimony of witnesses before the grand jury, and of the grand jurors, as to what was done by the grand jury to ascertain the ownership or nonownership of the alleged stolen cattle was proper.

4. On a prosecution for the theft of cattle belonging to an unknown owner, it is not necessary to prove that prior to the alleged theft the cattle were known as the property of an unknown owner, and identified as such; *White's Ann. Code Cr. Proc. art. 445*, providing generally that, where ownership is unknown, it shall be so alleged.

Appeal from district court, Baylor county; S. I. Newton, Judge.

Jesse Clements was convicted of the theft of cattle, and he appeals. Affirmed.

Dalton & Britain, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft of cattle, his punishment assessed at confinement in the penitentiary for a term of two years, and prosecutes this appeal.

Appellant complains of the action of the court in permitting the witness Rambo to

¹ Rehearing denied January 29, 1902.

testify that defendant told him he had gotten the cattle from his uncle Bill Mills, and that he had a bill of sale for them, and drew an instrument from his pocket and handed it to witness to look at, and witness looked at it, and handed it back to defendant. The objection urged to this testimony is that it indicated there was better testimony, to wit, the written bill of sale, and the defendant had received no notice to produce the same. The bill does not disclose the contents of said bill of sale, unless it be conceded that the statement the bill of sale contained was the same statement made by appellant to Rambo. We understand the state only proposed to use and did use the declaration made by appellant to Rambo, who looked at the bill of sale. It is not stated that he even read the bill of sale, or that he looked at its contents. He appears to have handed it back immediately to appellant. If the witness had made an improper statement as to the bill of sale, appellant had the opportunity to introduce the bill of sale himself; or if it was claimed that he did not then have the bill of sale, but desired to have an opportunity to produce it, and had made such a motion, his contention here might be entitled to some consideration.

The introduction of the testimony of witnesses before the grand jury, and of grand jurors, as to what was done by the grand jury to ascertain the ownership or nonownership of the alleged stolen cattle, was entirely proper, and was in response to the allegations in the indictment. See White's Ann. Pen. Code, § 1507, subd. 2, for authorities.

This was a case of circumstantial evidence, and the court did not err in giving a charge on that subject. We fail to find in the record any testimony indicating that Rambo was an accomplice, and the court did not err in not instructing the jury on that subject.

We do not understand the testimony shows that appellant relied on the purchase of the cattle from Jim Morgan or Jim Miller. If he had offered proof on this subject, then he could have claimed an instruction. The state's proof merely showed that he had told the witness he had gotten the cattle from Morgan or Miller, but that he subsequently came back to the witness and corrected this, and stated that he got the cattle from his uncle Bill Mills. And the charge of the court as to this explanation of purchase from Mills or his wife was all appellant was entitled to, under the proof.

Appellant insists that the proof here is not sufficient to authorize a conviction for the theft of cattle belonging to an unknown owner, inasmuch as no such cattle were shown to be in that section, and no cattle belonging to an unknown owner were missed, and refers to *Melton v. State* (Tex. Cr. App.) 56 S. W. 67, and *Dawson v. State* (Tex. Cr. App.) 61 S. W. 489. This is not like the case of *Melton v. State*, in which there was proof as to the identity of the animal alleg-

ed to have been stolen. The animal was known in the community, and the state claimed it to be the property of an unknown owner, whereas appellant claimed it as one of Youngblood's cattle, that he was authorized to gather. Here there was no pretense that ownership of the animals was known, or their identity known. Dawson's Case is more like the case at bar. But that went off on other propositions than any involved in this case. In that case it was held that, where the state alleged that the ownership of the animals was unknown, it was incumbent on the state to prove this allegation. We also held that under an indictment of that character it was not competent to prove that certain parties in the neighborhood had lost cattle. It was further held that, where there was no evidence to show that the animals found in defendant's possession belonged to an unknown owner, the conviction could not be sustained. In this case the state offered evidence, under the allegations of the indictment, to show that the ownership of the alleged stolen animals was unknown, and, further, that appellant had no such animals of his own. It also showed the circumstances under which appellant procured the calves whose ownership was unknown, and that he claimed at the time that he got them from his uncle Bill Mills. The main fact here was, did appellant steal the cattle whose ownership was unknown? In our opinion, the circumstances adduced in evidence clearly establish this fact, and the jury were amply authorized to find the verdict they did.

There appearing no error in the record, the judgment is affirmed.

On Rehearing.

(Jan. 29, 1902.)

The judgment was affirmed at the Tyler term, 1901, and now comes before us on motion for rehearing. Appellant urgently insists that this case comes under the doctrine announced in the Dawson Case (Tex. Cr. App.) 61 S. W. 489, and that, under the ruling in that case, this judgment should be reversed. His insistence is that there was no animal known in that community as an estray or the property of some unknown owner, and that no such animal was shown to have been missed. In the original opinion in this case we endeavored to lay down what we understood was involved in the decision of the Dawson Case. However, there are some expressions in that case which would indicate that, in the view of the court, the alleged stolen animal must prior to the theft be known as the property of some unknown owner, and identified as such. We do not believe that such expressions were necessary to the decision of that case; but, if they were, we do not understand that to be the law, and such expressions not in harmony with this opinion are hereby overruled. The statute relating to theft of property belonging

to unknown owners is general in its terms, and comprehends the property of all unknown owners. White's Ann. Code Cr. Proc. art. 445; White's Ann. Pen. Code, § 1483, subd. 3; Id. § 1507, subd. 2. Where an indictment alleges that property was stolen from an unknown owner, the unknown ownership must be proved as any other issue in the case. As was said in Dawson's Case: "It is permissible, under our statute, for the grand jury to make diligent inquiry as to the true owner of cattle, and, not being able to find the owner after such inquiry, to allege in the indictment that said cattle were taken, being then and there the property of an owner unknown to the grand jury. But this does not absolve the state from proving that there were cattle belonging to an unknown owner, nor does it absolve the state from proving the usual and customary requisites, to wit: It must be proved that defendant took the animal; that the animal belonged to an unknown owner; that it was taken without the knowledge, will, or consent of said unknown owner, and with the intent to appropriate it to the use and benefit of the party so taking." Now, whether the animal was known in the community at the time as an estray or an animal belonging to some unknown owner, and this was the animal alleged to have been stolen, as was the condition in Melton's Case (Tex. Cr. App.) 56 S. W. 67, or whether the animal shown to have been stolen was not previously known in the community, or on some account the state was not able to identify the animal as the property of any person, would make no difference. In either event, the state not being able to identify the property as belonging to a known owner, it would be the property of an unknown owner, and would be covered by our statute authorizing the allegation that it was the property of an unknown owner.

The motion for rehearing is accordingly overruled.

BURNS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1901.)

CRIMINAL LAW—HORSE THEFT—APPEAL—RECORD—EVIDENCE—EXCEPTIONS.

Grounds of motion for new trial relating to rulings of the court on the admissibility of evidence cannot be considered on appeal, where no bill of exceptions was reserved, presenting the matter.

On Rehearing.

1. The objection that, as a certain party was a particeps criminis, his wife could not testify against defendant, was not well taken, where such party was not indicted.

2. Error in refusing evidence to show that a state's witness had been confined in jail at a certain time was harmless, where various crimes charged against the witness were proven.

3. The district attorney objected to defendant's offer to prove, stating that his sole purpose was to get the effect of such question and the evidence before the jury, though de-

fendant knew the court would rule the question out; and the court said, "I presume so, but I cannot prevent defendant's counsel from asking the questions." Defendant had persisted in asking the question after it had been ruled out. *Held*, that there was no error prejudicial to defendant.

4. On a prosecution for horse theft, it was not error to permit the prosecuting attorney to ask the defendant the following question: "If you had stolen that mare, would you have gone on the stand and testified that you stole her?"

5. In a prosecution for horse theft, there was no error in refusing to permit defendant to introduce an indictment filed during the progress of the trial, and charging defendant with receiving the animal in controversy, knowing it to have been stolen.

Appeal from district court, Jefferson county; S. P. West, Judge.

Frank Burns was convicted of horse theft, and appeals. Affirmed.

Brockman & Kahn, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of horse theft, and his punishment assessed at five years' confinement in the penitentiary.

The first 13 grounds of the motion for new trial relate to the rulings of the court on the admissibility of testimony, which cannot be considered, as no bill of exceptions was reserved, presenting this matter.

The only bill of exceptions states that the verdict of the jury is contrary to the law and the evidence, in that it fails to connect defendant either by direct or circumstantial evidence sufficient to overcome the presumption of innocence. It was not necessary to present this by bill, as the ground of the motion for new trial fully covered this exception. However, we are of opinion that the evidence is amply sufficient to sustain the verdict.

Appellant also complains that the court erred in its charge, in submitting the issue of principals, and in defining principals, and in charging on the law of circumstantial evidence. Neither of these exceptions is well taken. The charge is the usual one given on circumstantial evidence, and the law of principals is clearly announced, as contained in our statutes.

The motion for new trial covers 16 pages of the transcript. We have carefully and patiently examined each and every assignment of appellant, and do not think any of them present matters authorizing the reversal of this case.

No error appearing in the record, the judgment is affirmed.

DAVIDSON, P. J., absent.

On Rehearing.

(Jan. 29, 1902.)

The judgment was affirmed at the Tyler term. Appellant's motion for certiorari having been granted, and the record perfected, it is now before us on motion for rehearing.

The second bill of exceptions complains that the court permitted the wife of J. N. Eastwood to testify. The objection is that Eastwood was a *particeps criminis*, and consequently his wife was disqualified. Eastwood was not indicted. There is no error in the ruling of the court.

The third bill complains that defendant's witness J. B. Parker being upon the stand, and having testified that the state's witness J. N. Eastwood had been confined in the jail of Harris county in the year 1894, and said Eastwood having denied same, defendant proposed to prove by said Parker that witness, as deputy sheriff of Harris county, knew said Eastwood at the time inquired about, and that he was confined in the jail of Harris county in the year 1894 on a charge of cattle theft; defendant's object being to contradict the testimony of the witness Eastwood, and attack his general credibility. Concede the ruling of the court to be erroneous; it clearly becomes harmless, when viewed in the light of this record, which shows various crimes charged against Eastwood to have been proved.

Bill No. 4 complains that defendant was not permitted to prove what Tom McDonald had stated to another witness. This would be pure hearsay.

The fifth bill complains that appellant offered to prove by Fitz that Tom McDonald had had a conversation with witness, and had made statements to witness, since this prosecution began, concerning who stole the Cyrus mare,—the one in controversy,—to which the district attorney objected, stating that the sole purpose of defendant's counsel in asking said question was to get the effect of said question, and the evidence it implied, before the jury, when counsel knew the court would rule the question out, whereupon the court remarked, "I presume so, but I cannot prevent defendant's counsel from asking the questions." In the light of the circumstances under which this testimony was attempted to be introduced, we do not think there was any error calculated to injure the rights of appellant, as the bill shows that appellant had persisted in asking the question after it had been ruled out.

Bill No. 6 also complains of the court's refusal to permit statements made by Tom McDonald to other witnesses to be admitted. There was no error in refusing to permit the introduction of this character of testimony.

The seventh bill complains that defendant was not permitted to testify that Rose and Tom McDonald told him that Rose had turned the proceeds of the Cyrus mare over to Tom McDonald. All of this was clearly hearsay.

The eighth bill complains that defendant was not permitted to prove that J. N. Eastwood did not purchase the hack in evidence from him, but purchased it from Frank Rose, and that he gave Rose \$10 for it; that

he gave Rose \$5, or at least so told defendant, and gave defendant \$5 for Rose. This testimony is hearsay, irrelevant and immaterial.

Bill No. 9 complains that the court erred in permitting the prosecuting attorney to ask the defendant the following question: "If you had stolen that mare, would you have gone on the stand and have testified that you stole her?" There was no error in permitting the asking of this question.

Bill No. 10 complains of the failure of the court to admit the following testimony: Defendant offered in evidence the indictment against this defendant found by the grand jury of Jefferson county after this trial began, and which indictment was filed during the progress of this trial, charging appellant with receiving the animal in controversy, knowing it to have been stolen. There was no error in the court's refusal to permit the introduction of this indictment.

We have carefully reviewed appellant's assignments of error and all of the bill of exceptions, and find no reversible error. The motion for rehearing is accordingly overruled.

Ex parte SHEPPARD.

(Court of Criminal Appeals of Texas. Jan. 15, 1902.)

WITNESSES—PROSECUTION FOR FELONY—ATTACHMENT—RELEASE ON PERSONAL RECOGNIZANCE.

White's Ann. Code Cr. Proc. art. 524a, provides that, where a witness resides in the county of the prosecution, whether he has disobeyed a subpoena or not, the clerk shall, on the filing of an affidavit that his testimony is material, and that he is about to move out of the county, issue an attachment for such witness, "provided that in misdemeanor cases where the witness makes oath that he cannot give security, the officer executing the attachment shall take his personal bond." Article 536 declares that witnesses may be required to enter into recognizances to appear and testify, "but if it shall appear to the court that any witness is unable to give security on such recognizance he shall be recognized without security." Article 537 prescribes that, where it appears to the satisfaction of the court that the personal recognizance will insure attendance, no security need be required, "but no bail shall be taken by any officer without security." Laws 1897, p. 59, § 6, provides that if the subpoena be returnable at some future date the officer shall have authority to take a sufficient bail bond of such witness, which "shall be signed by the witness and his sureties." Section 7 recites that the court issuing the subpoena may direct the amount of the bond, but, if not directed, the officer may fix the amount, "and in either case shall require good and sufficient security." *Held*, that in both felonies and misdemeanors, as well under White's Ann. Code Cr. Proc. art. 524a, as in other cases, where the witness is brought before the court, and it appears to the court's satisfaction that he is unable to give security for his attendance, it is the duty of the court to accept his personal recognizance.

Appeal from district court, Hopkins county; H. C. Connor, Judge. Google

Habeas corpus proceeding on the relation of Edith Sheppard, confined in jail as a material witness in a criminal prosecution. Judgment reducing the bond required for the discharge of witness, but refusing to take her personal recognizance, and she appeals. Reversed.

W. R. Harris & Son, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. This is an appeal in a habeas corpus proceeding. The record discloses that relator Edith Sheppard was a witness in the case of the State of Texas against Cook, charged with a felony; said case pending in the district court of Hopkins county. A short time prior to the 25th of October, 1901, the district attorney made an affidavit under article 524a, White's Ann. Code Cr. Proc., to the effect that said witness was a material witness in the case against Cook, and that he had good reason to believe and does believe that said witness is about to move out of said Hopkins county. Thereupon the clerk of said court issued a writ of attachment. The sheriff arrested her, and has since confined her in jail under said writ, in default of bail required of her in the sum of \$150, conditioned for her appearance as a witness before the district court of Hopkins county. She sued out a writ of habeas corpus before the judge of the district court, who reduced her bond to \$100, but refused to take the personal recognizance of said witness on proof of her poverty, and relator has prosecuted an appeal to this court.

Article 524a, White's Ann. Code Cr. Proc., provides: "When a witness resides in the county of the prosecution, whether he has disobeyed a subpoena or not, either in term time or vacation, upon the filing of an affidavit with the clerk by the defendant or state's counsel, that he has good reason to believe and does believe that such witness is a material witness and is about to move out of the county, it shall be the duty of the clerk to forthwith issue an attachment for such witness: provided, that in misdemeanor cases when the witness makes oath that he cannot give surety, the officer executing the attachment shall take his personal bond." Other articles of the procedure on this subject are as follows: Article 536 provides: "Witnesses on behalf of the state or defendant may, at the request of either party, be required to enter into recognizance in an amount to be fixed by the court to appear and testify in a criminal action; but if it shall appear to the court that any witness is unable to give security upon such recognizance he shall be recognized without security." Article 537 provides: "When it appears to the satisfaction of the court that personal recognizance of the witness will insure his attendance, no security need be required of him; but no bail shall be taken by any officer without security." The procedure with reference to securing the attend-

ance of witnesses was amended by the act of the 25th legislature at its called session, and provides for the issuance of subpoenas. Sections 6 and 7 of said act relate to bail, and are as follows:

"Sec. 6. If the subpoena be returnable at some future date, the officer shall have authority to take a good and sufficient bail bond of such witness, for his appearance under said subpoena, which bond shall be returned with such subpoena, and shall be made payable to the state of Texas, in the amount in which the witness and his surety shall be bound, and conditioned for the appearance of the witness at the time and before the court, magistrate or grand jury named in said subpoena, and shall be signed by the witness and his sureties; but if said witness refuse to give bond he shall be kept in custody until such time as he shall start in obedience of said subpoena, when he shall be, upon affidavit being made, provided with funds necessary to appear in obedience of said subpoena.

"Sec. 7. The court or magistrate issuing said subpoena may direct therein the amount of the bond to be required, but in case the amount is not specified, the officer may fix the amount, and in either case shall require good and sufficient security, to be approved by himself."

Laws 1897, p. 59.

From these various articles the question is presented as to the proper construction of article 524a, White's Ann. Code Cr. Proc., it being contended that only in misdemeanor cases can the witness be enlarged on his personal recognizance on making oath of his inability to give security for his attendance at court; and that in felony cases, where the affidavit is made under said article, the witness is bound to give good and sufficient security for his attendance. It will be seen under article 537, supra, that outside of term time the officer with process is not authorized to take bail of a witness without security. But the same article provides, when it appears to the satisfaction of the court that the personal recognizance of a witness will secure his attendance, that no security will be required of him. Section 6 of the amended act of 1897 does not seem to enlarge the officer's authority to take bond without security. However, article 536 provides in general terms, if it shall be made to appear to the court that any witness is unable to give security for his attendance, he shall be recognized without security. We think that article 524a is to be construed in pari materia with the articles above cited, and that in all cases, as well under article 524a as in other cases, where the witness is brought before the court, and it appears to the satisfaction of the court that such witness is unable to give security for his attendance, it is the duty of the court to take the personal recognizance of such witness. It will be seen that the affidavit required by him

under article 524a is not predicated on the idea that the witness is evading or intending to evade the process of the court, but simply that the district attorney believes the witness is material, and that he or she intends to remove out of the county. Now, it would operate a great hardship if, under such circumstances, a witness is to be imprisoned indefinitely, when other witnesses who may have actually evaded process or have been in default as witnesses are brought before the court, and they are permitted to be enlarged on their personal security. Besides this, the court is not without authority to compel the attendance of witnesses who may have disobeyed process by the infliction of penalties for such disobedience. Moreover, we hold that, although the officer executing the process out of term time is not permitted to take bond without security under the provisions of articles 524a, 537, when the witness shall appear before the court by writ of habeas corpus, and traverse the allegations in the affidavit of the district attorney, then it becomes a question of fact for the court to determine whether or not such allegations are true; and if he be satisfied that the witness was not about to remove from the county, or did not intend to remove from the county, he should instruct the officer to take a nominal bond of said witness, or, if unable to give personal security, take the personal bond of witness.

The judgment is accordingly reversed, and relator is ordered discharged from custody on her personal recognizance, if she is unable to give security.

WIGG v. DOOLEY.

(Court of Civil Appeals of Texas. Jan. 29, 1902.)

ACTIONS—COMMENCEMENT—SERVICE OF PROCESS—DELAY—LIMITATIONS.

Under Rev. St. art. 1177, providing that a suit is commenced by filing the petition, where, in an action on an account, the petition is filed two days less than two years after the account is due, and defendant is notified thereof by telephone, and requests that no further costs be made, promising to come soon and settle the claim, a delay of 52 days, awaiting defendant's action, before serving the citation, is not so unreasonable as to admit the bar of two years' limitations.

Appeal from McLennan county court; G. B. Gerald, Judge.

Action by William B. Dooley against C. S. Wigg. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. E. Yeager, for appellant.

KEY, J. Suit upon a verified account. Judgment for the plaintiff, and defendant appeals. The main question relied on for reversal is the contention that the plaintiff's cause of action was barred by limitation. The debt matured January 10, 1899, and the plaintiff filed his petition January 8, 1901. This lacked two days of being two years

after the maturity of the debt. In order to stop the running of the statute of limitation, the law required the plaintiff to bring suit within two years from the accrual of his cause of action. Suits are commenced in the district and county courts by filing a petition. Rev. St. art. 1177. But it has been held that the petition must be filed with a bona fide intention that citation shall at once be issued and served upon the defendant. *Ricker v. Shoemaker*, 81 Tex. 22, 16 S. W. 645. The rule announced in the case cited is, no doubt, correct as a general proposition, but we are satisfied that circumstances may exist which will excuse the plaintiff for failing to have the citation served at once, and justify him in delaying such service for a reasonable length of time; and, no doubt, it was upon this theory that the case at bar was decided. The citation was issued the same day the petition was filed, but at the request of the plaintiff's attorney it was not served until the 1st day of March, 1901. The testimony shows that at the time the suit was filed the defendant was in correspondence with the plaintiff, who lived in another county, with a view to a settlement or compromise of the debt; that when the suit was filed one of the plaintiff's attorneys notified the defendant by telephone, and the defendant expressed a desire to prevent further cost,—stated, in effect, that he wanted further time to hear from the plaintiff in response to a letter written by him, and promised to call at the attorney's office and confer with him further in reference to the matter. This he failed to do, and after waiting until about the last of February the attorney instructed the deputy sheriff, in whose hands the citation had been placed, to serve the same upon the defendant. Under these circumstances, we think the court was justified in the conclusion that the delay in serving the citation was not caused by negligence on the part of the plaintiff or his attorneys, but was attributable to the fact that the latter had granted the defendant's implied request to take no further steps in the suit until he could hear from the plaintiff.

Some other questions are presented in appellant's brief, but they are believed to be without merit.

Judgment affirmed.

NARD v. BAKER.

(Court of Civil Appeals of Texas. Jan. 11, 1902.)

SCHOOL LANDS—PRICE—APPLICATION—AWARD.

Plaintiff settled on and applied to purchase school land as dry grazing land, at \$1 per acre. The land was awarded to him. The commissioner afterwards canceled the award on the ground that the land was leased to defendant's grantor. Defendant then applied for the section at the same price, and it was awarded to him, though he was never a bona fide settler thereon. Plaintiff continued to reside

thereon, and subsequently applied to purchase as agricultural land, at \$2 per acre, tendering the cash payment, and obligation for the balance, which application was rejected. The land was originally classified as agricultural land, and price fixed at \$2 per acre, but subsequently classified as grazing land. The commissioner, however, did not change the price. *Held*, that both applications for the land at \$1 per acre, and the awards made thereon, were void, and plaintiff is entitled to the section on his second application.

Appeal from district court, Roberts county; B. M. Baker, Judge.

Action by A. H. Baker against J. A. Nard. From a judgment for plaintiff, defendant appeals. Affirmed.

H. E. Hoover and Hendricks & Coffee, for appellant. Plemons & Veale, for appellee.

HUNTER, J. This was an action of trespass to try title brought by Baker against Nard to recover section 6, block Y, certificate No. 1/16, issued to Morrison and Cummings, public free school lands lying in Hutchinson county. The defendant answered by plea of not guilty. The case was tried by a jury, who found a verdict in favor of the plaintiff, and from a judgment rendered thereon this appeal is taken.

The facts are substantially as follows: On July 13, 1900, Baker applied to the commissioner of the general land office to purchase the section, describing it as "section 6, block Y, certificate No. 1/16, M. & C. Ry., classified as dry grazing land," and offered \$1 per acre, paid the cash, and executed his obligation to the state for the balance, as required by law. The commissioner awarded and sold the land to him on said application on the 13th day of January, 1900, but on the 26th day of April, 1900, canceled the sale because the land had been previously leased to J. M. Coburn, who filed affidavits with the commissioner that he had on said section \$200 worth of improvements. We find that Coburn never had \$200 worth of improvements on said land. In June, 1899, Coburn sold his improvements on said section to the defendant, Nard, who settled on it, and on the 8th day of February, 1900, applied to purchase the same at \$1 per acre, and it was on that day awarded and sold to him by the commissioner. On the 14th day of January, 1901, Baker, still residing on the land, made a second application to purchase it, at \$2 per acre; and this time described it correctly in his application, but in his obligation still described it as "M. & C. Ry. [Co.]" land. This application was rejected by the commissioner. The land was classified as "agricultural," and appraised at \$2 per acre by the commissioner in 1887, and in 1897 it was reclassified by the commissioners' court of Roberts county, to which Hutchinson was attached for judicial purposes, as dry grazing land, but not reappraised. The clerk of the county court, however, understood the letter of the commissioner informing him of the reclassification to fix the ap-

praised value at \$1 per acre, and so entered all the unsold lands of the county at that classification and price, and they have so remained on the records ever since. There is evidence sufficient to prove that Nard's application was made in collusion with Coburn, in whose pasture the section lies, and that he was not an actual, bona fide settler on the land, for the purpose of making it his home. The evidence was sufficient to establish that Baker was an actual, bona fide settler on the land at the time he made each application, and he paid to the state each time the proper sum of money based upon his bid, and filed the proper obligation for the balance, but the sum paid to the treasurer on the first bid was returned to him by order of the commissioner when the first sale to him was canceled. In this suit he claimed under both purchases.

The majority of the court are of opinion that the second application of Baker was good, and upon that the judgment must be sustained, because the original appraisement of the commissioner at \$2 per acre stood as the price of the land until changed by the commissioner, and that the second classification did not change the price thus originally fixed upon it at \$2 per acre; and they hold that the clerk had no authority to place the price at \$1 per acre on his records, as he did, and that therefore the land was on the market, not at \$1 per acre, but at \$2, and consequently Baker's first application and Nard's should both have been rejected by the commissioner, and that the award and sale in each instance was unauthorized and void.

I am of opinion, however, that, while the clerk was not authorized to put the price on his records at \$1, yet, having done so, and Baker having made his application to purchase at the price shown on the clerk's records, and the commissioner having awarded it to him at that price, it amounted in law to a ratification by the commissioner of the clerk's act and record, and the sale to Baker in the first instance was valid. The commissioner, having power to fix the price at \$1 or more, had the power to ratify the price fixed by the clerk at \$1, and this ratification is proved by his awards and sales of the land to both Baker and Nard at that price. The ratification would relate back to the time when the clerk made the record. This view, I think, is correct in principle, and I have no doubt but there are hundreds of sections of land in Roberts and in Hutchinson and Gray counties (which are attached to Roberts for judicial purposes) that have been awarded and sold by the commissioner by that record and at that price, and to hold as the majority have done will result in much confusion of titles, and distress to many of the people of those counties.

We are all agreed, however, that the judgment in this case should be affirmed, as we have found no material error in the proceedings, and it is ordered accordingly.

GOODWIN v. HARRISON.

(Court of Civil Appeals of Texas. Jan. 11, 1902.)

COURTS—JUDICIAL NOTICE—COUNTY CLERK—SIGNATURE—ACTIONS—IDENTITY.

1. In an action to foreclose the lien of a judgment in a county where an abstract of the judgment rendered in another county is filed, the court will take judicial notice of who was clerk of the county in which the court is sitting at the time of filing of such abstract and of his official signature to the certificate thereto.

2. Where, in an action to foreclose the lien of a judgment rendered in another county, no issue as to the validity of such judgment was raised in the trial court, and a judgment in an action of the same title has been reversed in the appellate court, that court cannot take judicial notice that it is the same action.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Action by W. M. Harrison against R. Goodwin and others. From a judgment for plaintiff, defendant Goodwin appeals. Affirmed.

G. A. McCall, for appellant. A. G. Boyle and W. H. Penix, for appellee.

HUNTER, J. This suit was brought by Harrison against the appellant and others to foreclose a judgment lien on a tract of land in Parker county. The judgment was rendered in the county court of Palo Pinto county, and a proper abstract thereof was filed with the clerk of the county court of Parker county, and the certificate of the latter written thereon was as follows: "This abstract was filed for record on the 1st day of Feb., 1901, at 4 o'clock, and recorded Feb. 12, 1901, at 10 o'clock a. m. J. E. Hodges, County Clerk." The learned district judge found as a fact that Hodges was clerk of the county court of Parker county when he made the certificate. The objections urged by appellant to the certificate were not made when it was offered in evidence, but it is contended that there was no evidence of a valid judgment lien, because the certificate did not show that the judgment had been duly abstracted in Parker county. We think the objection made to the sufficiency of the evidence was good unless the district court was required to take judicial notice that J. E. Hodges was the clerk of the county court of Parker county at the time he made the certificate. We have been unable to find any authority directly in point, but from cases presenting analogous questions we have reached the conclusion that the district court should take judicial notice of who is the clerk of the county court of the county in which it is sitting and trying the cause. He is a public officer of the county, and his name and official position is notorious to everybody in the county. He signs and certifies transcripts from the probate court to the district court, and certifies copies of records and deeds to be used in evidence in that

court, and does many other official acts which come under review in that court, and is as well known as the sheriff or constables of the county who serve and make returns on the processes of that court. We think, therefore, that the court should take judicial notice of who the clerk of the county court is or was when the certificate read in evidence was made; the date of the certificate showing that it was made during the current term of office. *McCarty v. Johnson*, 20 Tex. Civ. App. 184, 49 S. W. 1008; *State v. Seibert* (Mo.) 32 S. W. 670; *White v. Rankin* (Ala.) 8 South. 118; *Martin v. O. Aultman & Co.* (Wis.) 49 N. W. 749; *Harris v. Buehler* (Del. Super.) 40 Atl. 733; *Hertig v. People* (Ill.) 42 N. E. 879, 50 Am. St. Rep. 162.

The judgment of the county court of Palo Pinto county which was thus abstracted, it is contended, was afterwards brought before this court upon writ of error, and held to be void for want of jurisdiction over the amount in controversy in that court, and we are asked now to take judicial notice of that fact. No issue as to the validity of this judgment was made in the court below, and no evidence offered as to the identity of the two judgments, and we know of no authority for extending the principle of judicial notice that far, and have been cited to none.

We adopt the conclusions of fact as found by the district court and its conclusions of law on other issues presented, overrule all the assignments of error, and order that the judgment be affirmed.

PATTERSON v. SOUTHERN PAC. CO.
et al.¹

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

RAILROADS—PASSENGER—BRIDGE TOLL—ILLEGAL EXACTION—DAMAGES—RESISTANCE TO ENHANCE—EVIDENCE.

1. Where a passenger on a railroad knows that a toll of 50 cents will be illegally exacted on crossing a certain bridge, which will be reached at midnight, and has the means and opportunity to pay such toll before retiring, and refuses to avail himself of such opportunity, and, on being awakened and the toll demanded, refuses to pay, and, for the sole purpose of enhancing the damages, persists in his refusal until force is used on his person, he is not entitled to enhanced damages for such added indignities.

2. Plaintiff, a passenger on a railroad, traveling on a mileage book which stated in plain letters that it was not good over a certain bridge, stated to the conductor when his mileage was taken up that he would not pay the fare of 50 cents charged for crossing over such bridge, and that he could afford to be put off the train, if the company could stand it. He was not molested on that trip, but on his return, the next night, when the train was stopped at the bridge for the bridge conductor to collect tolls, the toll was demanded and refused, and the bridge conductor testified that he told plaintiff if he did not pay he would have to be put off. He said, "Why don't you

¹ Rehearing denied January 29, 1902, and writ of error denied by supreme court.

do it?" The conductor then said, "If you want me to take hold of you,—which seems evident,—I can do that," and then laid his hand on plaintiff's shoulder. He said, "That is all I want," and paid the toll, taking a receipt. *Held*, that the evidence was sufficient to justify submitting to the jury the question whether plaintiff's resistance until the assault was made was for the purpose of enhancing his damages.

3. Where the failure to award certain damages to plaintiff, who appeals from an inadequate judgment in his favor, could not possibly have resulted from the giving of an erroneous instruction, the error was harmless.

Error from district court, El Paso county; A. M. Walthall, Judge.

Action by Millard Patterson against the Southern Pacific Company and others. From a judgment for plaintiff for a part, only, of his demand, he brings error. *Affirmed*.

C. N. Buckler and Peyton F. Edwards, for plaintiff in error. Beall & Kemp, for defendants in error.

JAMES, C. J. The nature of this action is fully shown in the opinions delivered on previous appeals. 27 S. W. 194; 46 S. W. 848. The issues at present before the court are few, and we shall not attempt any statement, except as the assignments are discussed. At the last trial, verdict was for plaintiff (now plaintiff in error) for \$1 actual and \$240 exemplary damages.

The first and second assignments are as follows:

"First Assignment of Error. The court erred in that part of its charge wherein it instructed the jury that, if the conductor demanded the fifty cents from the plaintiff in the daytime, that it was plaintiff's duty to have paid it, and that, not having paid it in the daytime, he could not recover for inconvenience caused by the fifty cents having been demanded and collected in the night, after he and his wife had retired to bed, because the demand and collecting of the fifty cents in the daytime would have been as unlawful and unjustifiable as it was when demanded and collected in the nighttime, and, whether demanded in the daytime or in the nighttime, plaintiff had the legal right to refuse to pay it, and was under no obligation to pay it during the day in order to keep from being disturbed in the night by a demand for the fifty cents.

"Second Assignment of Error. The court further erred in that part of its charge wherein it instructed the jury that, if plaintiff resisted the payment of said fifty cents for the purpose of enhancing his damages, that he could not recover for the assault, inconvenience, mental pain, and suffering or humiliation, because there was no testimony justifying the court in submitting any such issue to the jury, and said portion of said charge was calculated to mislead the jury, as shown by their verdict, wherein they allowed the plaintiff one dollar actual damages, thus showing that they allowed him nothing on account of the assault, mental

suffering, inconvenience, and humiliation caused by the unjustifiable demand and collection of the fifty cents from him at midnight, after he and his wife had retired for the night."

The fragment of the charge which plaintiff in error sets out in his brief as the part complained of is as follows:

"If, however, you should believe from the evidence that the conductor of said train, in the daytime, and on the day before said train reached said Pecos Bridge, or before said O'Rourke demanded of plaintiff the payment of said sum of fifty cents bridge fare, informed plaintiff that he would have to pay fifty cents bridge fare before crossing said bridge, and that, as an accommodation to him (plaintiff), he, the train conductor, would receive said sum, and pay same over to the bridge conductor, and thus relieve plaintiff of being disturbed after he should have retired for the night, and that plaintiff refused to pay said fare, but afterwards retired for the night, with his wife, in said berth, and that the said O'Rourke, in awakening plaintiff after he had retired, did so solely for the purpose of requesting the plaintiff to pay said fare, and that the plaintiff at the time had the opportunity and the means to pay the same, and that the plaintiff refused to pay the said fifty cents bridge fare solely for the purpose of causing the said O'Rourke to enforce from him the collection of the same, and that, in refusing to pay said bridge fare, plaintiff was prompted or induced by a motive to enhance or contribute to his injuries, then and in that event, if you so believe such was the purpose and motive of plaintiff, you will not be authorized to include in your estimate of damages, if any, any assault, inconvenience, mental pain, suffering, or humiliation, if any, he suffered, occasioned, contributed to, or brought about by plaintiff's purpose and motive aforesaid."

The court first charged the jury that the demand of 50 cents for crossing the bridge was unlawful.

That portion of the charge which preceded the above quotation, in the same paragraph, practically instructed the jury to find for plaintiff, under the evidence, such actual damages as he sustained, and in so doing they might consider the assault, if any, the inconvenience, mental pain, suffering, and humiliation, if any, suffered by plaintiff on account of the conduct of the conductors. The part above quoted was a qualification of the instruction with respect to the matter of assault, inconvenience, etc., and thereby the jury were told upon what state of facts plaintiff would not be entitled to recover as to such particular matters. The rule stated by the court in this connection was in accordance with the decision of the court in the former appeals. Besides the authorities there cited, we may add *Railroad Co. v. Barlow*, 30 S. E. 733, 69 Am. St. Rep. 166. There can be no reason why the principle

should be limited to cases where a person boards a train with the purpose of getting himself put off, or with the purpose of having the employee resort to proceedings to that end.

The paragraph of the charge containing what appellant quotes is concluded by these words: "But if you should believe from a preponderance of the evidence that plaintiff, in refusing to pay said train conductor and the said O'Rourke the sum of fifty cents as bridge fare, did so with the knowledge that the same was unlawful, extortionate, and unjust, and under the belief that the unlawful demand or exaction would be abandoned, with no purpose on the part of plaintiff except to resist as long and as far as practicable the unlawful conduct and demands of the said O'Rourke, you will find for the plaintiff such actual damages as will compensate him for the injuries sustained, as hereinbefore directed."

The first proposition under these assignments seeks to bring into question again the correctness of the doctrine denying plaintiff the right to recover for inconvenience, humiliation, etc., which he may have willingly occasioned and brought upon himself for the purpose of enhancing his damages. Upon this question we adhere to what we have already held, being convinced that the rule is correct.

The second proposition is that there was no evidence to justify its application in this case. Although plaintiff's 1,000-mile ticket stated in plain letters upon its face, "Not good over Pecos Bridge," plaintiff, on going from El Paso to San Antonio, intended to resist payment of the bridge fare, and announced to the conductor when his mileage was taken up that he would not pay such fare, and he could act upon that conclusion, and that he could afford to be put off the train, if the company could stand it. However, he was not molested at the bridge that night. On his return trip to El Paso, when the conductor took his fare, the latter told him that he would have to pay 50 cents fare over Pecos Bridge. Plaintiff replied that he had heard that before, and would not submit to such an outrage. They continued to talk about it; the conductor offering to receive the 50 cents and turn it in to the bridge conductor during the night, so that plaintiff, who was on the sleeper, would not be disturbed. Plaintiff testified that when he first spoke to the conductor he determined that he would let himself be put off, because he had made up his mind about the obligation to pay the 50 cents. About midnight the train arrived at the bridge, and stopped, so that the bridge conductor might collect the fares. Plaintiff was awakened by the bridge conductor, and refused to pay. Plaintiff had the train conductor called, and asked his protection. He had instructions not to interfere. Some time was consumed in a discussion of the matter, and in demands and

refusals to pay; and the bridge conductor finally said he would compel plaintiff to get off the train, and took hold of him. Plaintiff said he then discovered that the conductor was in earnest, and asked him for a receipt, and paid the 50 cents. The conductor's version of the finale was that he told plaintiff that if he did not pay he would have to put him off. "He said, 'Why don't you do it?' I said, 'If you want me to take hold of you,—which seems evident,—I can do that.' He was in bed, but leaning on his elbow. He had the curtains slightly separated. I reached in and laid my hand on his shoulder. He said, 'That is all I want,' and paid the fare, taking a receipt." Plaintiff stated that he had a motion to argue in Colorado City on the following Tuesday, and could not have gotten there in time unless he went through on that train. It seems to us that, while there may have been testimony and inferences which would have warranted the jury in finding that plaintiff went to these extremes expecting and believing that the conductors would finally relent and forego the exaction, this is equally true with regard to a finding that plaintiff did not so believe; that he had no idea of allowing himself to be put off, but intended all along to submit to the exaction, and brought on the proceedings of which he complains in order to aggravate his case for damages. The proposition is therefore not sustained.

The third assignment complained of the seventh paragraph of the charge, reading:

"The jury are instructed that the contract of carriage read in evidence did not entitle plaintiff to free transportation over the Pecos Bridge, and the plaintiff is bound by every provision of said contract, whether he read it or not."

Why this paragraph was inserted in the charge, is not clear to us. Plaintiff does not appear to have contended that he was entitled to free transportation, and the testimony indicates that his regular fare to defendant over the space covered by the bridge was included in what was taken from his mileage ticket. But we fail to see how, in view of the charges and the verdict, plaintiff was injured. The jury were peremptorily told that the demand made on plaintiff was unlawful. The evidence was such that the effect of this instruction was practically that plaintiff should recover, and the verdict, also, was in plaintiff's favor. The paragraph complained of was not in the way of plaintiff's recovery for the fare exacted and interest thereon, nor for exemplary damages, for he was awarded both. He evidently was denied damages for the assault, annoyance, humiliation, etc.; and, while we can see no possible connection between this result and the paragraph in question, it can be plainly attributed, and, in our judgment, must necessarily be attributed, to that portion of the court's charge which informed

the jury under what circumstances these matters should not be taken into consideration.

The fourth assignment is that the verdict is inadequate in amount. We overrule this assignment.

Judgment affirmed.

NEILL, J., disqualified.

WHITE v. SAN MIGUEL et al.

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

GARNISHMENT—CONTROVERTING AFFIDAVIT—DISMISSAL—PREJUDICE.

Under Sayles' Ann. Civ. St. art. 245, providing that, if plaintiff is not satisfied with the garnishee's answer, he may controvert it by affidavit, where the garnishee admits his indebtedness either to defendant or to a third person, and asks the court to determine the matter, there is no necessity for a controverting affidavit, and plaintiff cannot complain of the court's dismissing it, and rendering judgment on the evidence.

Appeal from district court, Maverick county; I. L. Martin, Judge.

Action by J. B. White against S. J. Blocker in which T. San Miguel was summoned as garnishee. From a judgment striking out a controverting affidavit of plaintiff, he appeals. Affirmed.

J. R. Sanford and W. C. Douglas, for appellant. F. Vandervoort, for appellees.

FLY, J. Appellant sued S. J. Blocker for \$526.85, and obtained a writ of garnishment against T. San Miguel, under subdivision 2, art. 217, Sayles' Ann. Civ. St. The garnishee answered, setting up certain facts as to how he had become indebted to Blocker for cattle, and also alleging that his contract with Blocker required the payment of the money to the Border National Bank, and stating that he owed \$420 on the cattle either to Blocker or the bank, and he prayed that the latter be made a party to the suit, and that it be determined to whom the money was due. The bank answered, claiming the money. Appellant filed a controverting affidavit claiming that the answers were incorrect on several grounds. This affidavit was, at the instance of the garnishee and bank, stricken out. There is no statement of facts, and the case is before this court on two assignments of error, which complain of the action of the court in sustaining the exceptions to the controverting affidavit. In article 227, Sayles' Ann. Civ. St., it is provided that, if it appears from the answer of the garnishee that he is not indebted to the defendant, and has none of the latter's effects in his possession, and the answer is not controverted, the court shall discharge the garnishee. In article 245 it is provided that, if the plaintiff is not satisfied with the answer of the garnishee, he may controvert the same by affidavit stating he has good reason to believe and does believe that the answer of the garnishee is in-

correct, stating in what particular he believes the same is incorrect. In the controverting affidavit there was no statement of the matters in which the answer of the garnishee was incorrect, but merely argumentative deductions as to the effect of statements in the answer. However, if the affidavit was improperly dismissed, no injury appears to have been sustained by appellant. There was no denial upon the part of the garnishee as to his indebtedness, but he admitted that he owed Blocker or the bank, and for his protection asked the court to determine the matter. There was, therefore, no necessity for the controverting affidavit. If it had not been stricken out, appellant would have been in no better position to show that it was Blocker to whom the garnishee was indebted than he was under his affidavit for garnishment. There is no complaint that any testimony offered by appellant was excluded, and, on the other hand, the judgment recites that evidence was heard, and on that evidence the judgment was rendered. Had the court, after striking out the controverting affidavit, discharged the garnishee without hearing the testimony, there would have arisen cause for complaint; but there is nothing in the record that indicates that appellant lost any right by the affidavit being dismissed.

The judgment is affirmed.

TEXAS & P. RY. CO. v. UTLEY.¹

(Court of Civil Appeals of Texas. Dec. 21, 1901.)

RAILROADS—EMPLOYE—HAZARDOUS EMPLOYMENT—WARNING—ASSUMPTION OF RISK—CHARGE—EVIDENCE.

1. Plaintiff, while employed by defendant railroad company in crushing rock, was ordered by his foreman to assist in placing a derailed car on the track. While so engaged, the car lurched, and threw plaintiff down, injuring him. He knew nothing of the hazards of such work, and received no warning from the foreman, who knew of his ignorance. Held, that defendant's foreman was negligent in failing to give warning to plaintiff, such work being extrahazardous as to him.

2. The fact that the workman went voluntarily on request does not release the company's foreman of the duty of giving warning as to the hazards.

3. Where a workman assisting in raising a derailed car was injured by the lurching of the car, caused by the giving way of a jackscrew, which was out of his sight, but in view of the foreman, who gave no warning, the question of the negligence of the foreman was for the jury.

4. Where the right to recover is not predicated on the hazards of using a jackscrew, it is not error to refuse to charge that, if the work of handling a jackscrew in raising a car was not one of extraordinary danger, then no duty of warning existed, and, if the use of the jackscrew was extrahazardous, and plaintiff and the foreman had equal knowledge of the fact, the defendant would not be liable.

Appeal from district court, Parker county; J. W. Patterson, Judge.

¹ Rehearing denied January 25, 1902, and writ of error denied by supreme court.

Action by John B. Utley against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. G. Bidwell, for appellant. Stevenson & Ritchie, for appellee.

CONNER, C. J. This is an appeal from a judgment in appellee's favor for \$545 as damages for injuries sustained by him while at work replacing a derailed car. As grounds of recovery appellee alleged, in substance, that at the time he was in the employ of appellant as one of a gang of men engaged in crushing rock with a rock crusher; that in accord with the direction of his foreman, W. T. Brannon, he, with others of his gang, assisted the section men, of whom Marlon Glenn was foreman, in replacing upon the railway track said derailed car; that such work was extrahazardous, which was unknown to appellee at the time, by reason of his inexperience, and of which he was given no warning; that the day was very cold, and by direction of said foreman a fire had been built on the side of the steep dump where the accident occurred, on the lower side of which an iron rod had been driven in the ground to keep the fire in place, which rod, by reason of its projection and proximity, was dangerous; that while engaged on the south side of said car in raising the east end thereof with a jackscrew the car suddenly careened around to the south, knocked appellee off, and down said dump, and on said iron rod, whereby he was injured as set forth in his petition. It was also alleged that said foreman was negligent in failing to "watch the progress of raising said car, the effect of the working lever of the jackscrews," and in failing to give warning of the danger.

We think the court properly overruled the demurrers urged to the petition. The principal objections thereto, in effect, seem to be that it does not appear that the danger to be guarded against was unusual and extraordinary, or that appellee objected to doing the work, or that any concealed danger existed in using the jackscrew, or that any necessity existed for the foreman to look out for appellee's safety and provide therefor. The work of replacing the displaced car was alleged to be extrahazardous. From the allegations of the petition the dangers involved in the extra work were certainly beyond those of his regular employment, the risks of which alone he assumed by his contract of service in the first instance. As to appellee the danger attending the work of replacing the car was extra extrahazardous, and in case of his known inexperience and ignorance, as alleged, it was the duty of the master to notify him of all such dangers as were not apparent. *Coal Co. v. Haenni* (Ill.) 35 N. E. 162; *Railroad Co. v. Renz* (Tex. Civ. App.) 59 S. W. 280; *Same v. Hughes* (Tex. Civ. App.) 54 S. W. 264, and authorities therein cited. The fact, under the circumstances alleged, that he

voluntarily undertook the work upon the request of his foreman, in no degree lessened the duty of the master. Appellee was not a mere intruder, and in his inexperience and ignorance he was entitled to the exercise of at least ordinary care on the part of the foreman by warning, by supervisory watchfulness and direction, if need be, as the work progressed, and otherwise to guard him from danger. Nor was it necessary, as insisted, that appellee allege a concealed danger in the use of the jackscrew. This was but a circumstance attending the employment of appellee at the time, and illustrating the manner in which the car was being replaced, but of which no complaint is made in the petition. What we have said also applies in a measure to assignments questioning the action of the court in giving and refusing charges and in overruling appellant's motion for a new trial.

There was evidence tending to support the material allegations of appellee's petition, including the averments that the work of replacing the wrecked car was attended with dangers unknown to appellee by reason of inexperience, of all which said foreman had knowledge, and that appellee was placed at such work without having been warned of such danger. The immediate cause of the accident does not seem very clear. W. T. Brannon, the foreman of the rock crushers, testified: "I had been working on the north side, and parties on the south side asked me to hold up on the north side, and I walked around the end [east end] of the car. Just before I came up to the jackscrew [at which appellee was at work], the car slued. * * * The car did not turn over. I reckon the front end of it moved about twelve inches, or something near that, and then it stopped on the track. The jack on the north side gave way, or the dirt gave way under it, and it caused the car slue south. * * * I superintended the fixing of the jack on the north side. The jack there was put on the ground on the edge of the dump, and that is the jack that gave way. The dirt was frozen on top, and when the weight came on the jack the frozen earth gave way, and that caused the car to careen to the south. * * * I don't know how much one of these cars would weigh, but I expect it is several tons; some twenty or thirty thousand pounds, I reckon. * * * If I had been standing around there by the north jackscrew, watching the men work that screw, I could have seen [or "might have seen," as he says in another place] whether or not the frozen ground was giving way." Marlon Glenn, the section foreman, testified: "The north jack was not right on the edge of that dump. * * * We put one piece of timber under the jack. Up to that time [of the accident] we had not made a crib by which to raise the car up, but I think we did afterwards. I don't remember about that. I think when we got the car on we built a crib on each side. If we had done that at

first, the car would not have careened. It didn't fall the next time we jacked it up. * * * I don't know whether the king pin was out or not. I don't think the car could have slipped to one side unless the king pin was out or was broken. I don't remember whether the king pin was out or broken at that time. I don't remember about putting in another king pin." We think the evidence stated authorized the submission of the issues of negligence in failing to warn appellee of the extra hazard involved in the labor undertaken, and of negligence on the part of said foreman in failing to exercise due supervisory care to guard against danger to those engaged in the work, and it is also sufficient to sustain the verdict on such issues. Appellant requested the court to charge the jury to the effect that if they found "that the work of handling a jackscrew in raising a car was not one of great, unusual, and extraordinary danger," then no duty of warning existed; also that if the jury should find the use of the jackscrew was extrahazardous, and "plaintiff and the foreman had equal knowledge of the fact," the defendant would not be liable. We think it quite evident that these charges were properly rejected. The right of recovery was predicated upon other grounds, and the charge requested would have been manifestly misleading and erroneous under the facts of the case.

It is also insisted, in substance, that the court was in error in submitting the cause, and in overruling the motion for new trial, in that the evidence shows that the danger involved was not extraordinary, and that the accident was due to the giving way of the frozen ground, the danger of which was as apparent to appellee as to the foreman in charge of the work. In addition to what we have heretofore said, we add that it was not necessary to appellee's right of recovery that the work undertaken was "extraordinarily dangerous." The evidence supports the conclusion that as to appellee it was "extrahazardous," and clearly indicates that appellee was without knowledge thereof, and without warning. If the accident was attributable alone to the failure of the frozen ground to support the jackscrew on the north side, the evidence clearly shows appellee's position and duty was such as that he could not observe the conditions on that side.

We think the judgment should be affirmed, and it is so ordered.

BOONE v. HERALD NEWS CO. et al.¹

(Court of Civil Appeals of Texas. Dec. 18, 1901.)

LIBEL — SHERIFF — FALSE IMPRISONMENT — PERSON INTENDED — BURDEN OF PROOF — APPEAL — ASSIGNMENT OF ERROR.

1. A newspaper article stated that efforts were being made to secure the release of a prisoner, who was said to be confined in the county jail without any commitment or other

legal paper; that he was sent in by a justice, in charge of a constable, who asked that he be held for trial, and since then had been a prisoner, no one seeming to know why he was there. *Held*, that the article charged false imprisonment, and was libelous per se.

2. A newspaper article charged that a person was unlawfully received and held a prisoner in the county jail. Plaintiff was sheriff of the county, but the jail was actually in charge of guards, one of whom received the prisoner. Plaintiff sued for libel, and alleged by innuendo that the charge was directed against him. *Held*, that the burden was on plaintiff to prove that the libel was aimed at him.

3. An assignment of error that "the court erred in not giving to the jury special charge No. 5 asked by the plaintiff, which was refused," followed by a copy of the charge, not being a proposition in itself, and not being followed by any proposition pointing out the error of which complaint is made, will be considered on appeal as waived.

Appeal from district court, El Paso county; J. M. Goggin, Judge.

Action by James H. Boone against the Herald News Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. M. Dean and R. V. Bowden, for appellant. Turney & Burges and Edwards & Edwards, for appellees.

FLY, J. This is a suit for damages against the Herald News Company, a private corporation, Hughes D. Slater, Henry L. Capell, and James A. Smith, alleged to have accrued by the publication of a libelous article in a newspaper known as the "El Paso Daily Herald." A trial by jury resulted in a verdict for appellees. The suit was based upon the following article published in the Daily Herald: "Wants His Liberty. Prisoner at the County Jail Wants to Get Out. An effort will be made this afternoon to effect the release of Arcario Alva, who it is alleged had been confined in the county jail since September 18th without any commitment or other legal papers authorizing his imprisonment. Alva was sent in from the smelter by Justice Downs. A constable brought him to jail, and asked that he be held for trial. Since that he has been a prisoner. The boy's mother, it is said, came here a week or so ago from Chihuahua, expecting to find her son at work and at liberty. She found him in jail, though no one seemed to know why he was there. She appealed to friends, and they will endeavor to get him out." The statements by innuendo were made to apply to appellant, who was sheriff and jailer of El Paso county, and it was set out that they were libelous per se in that they charged appellant with the crime of false imprisonment. The court instructed the jury that the publication was libelous per se.

It appears from the facts that appellant was sheriff of El Paso county, and had no regular jailer; but it was further in proof that the jail was actually in charge of guards, and that one of them received the

¹ Writ of error denied by supreme court.

prisoner spoken of in the publication, and made the entries as to how he came to be imprisoned in the register provided for that purpose. The libelous article stated that the prisoner was sent to the jail by a justice of the peace in charge of a constable. We are of the opinion that the article was correctly construed by the court to be libelous *per se*. If the charges in the published article were true, the person who unlawfully arrested and detained the prisoner was guilty of false imprisonment, which, under the penal statutes of Texas, is punishable by fine and imprisonment, and rendered appellant subject to removal from office; and the publication of such a charge is libelous, and the law will presume that it injured the reputation of the party against whom it was directed. *George Knapp & Co. v. Campbell* (Tex. Civ. App.) 36 S. W. 765; *Belo v. Fuller*, 84 Tex. 451, 19 S. W. 616, 31 Am. St. Rep. 75; *Cotulla v. Kerr*, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819. Although the publication was libelous, the burden rested upon appellant to establish that he was meant as the object of the libel, and it was a question of fact to be determined by the jury as to whether the libel was aimed at him. *Newell, Defam.* p. 767. The jury was justified in finding that the publication was not aimed at the sheriff.

The second assignment of error is as follows: "The court erred in not giving to the jury special charge No. 5 asked by the plaintiff, which was refused,"—followed by a copy of the charge. The assignment is not a proposition in itself, and is not followed by any proposition pointing out the error of which complaint is made, and under the rules must be considered as waived. *Railway Co. v. Cole*, 8 Tex. Civ. App. 635, 28 S. W. 391; *Railway Co. v. Higgins*, 22 Tex. Civ. App. 430, 55 S. W. 744; *Cooper v. Hiner*, 91 Tex. 658, 45 S. W. 554.

The third, fourth, fifth, and sixth assignments of error are subject to the same objections that apply to the second assignment.

The judgment is affirmed.

On Motion for Rehearing.

(Jan. 29, 1902.)

This court did not, as contended by appellant, lose sight of the fact that the sheriff testified that when at home he visited the jail daily, and exercised authority over it; and it also kept in mind that the prisoner was not delivered to the sheriff in person, and that others were in actual charge of the jail; and that a jury could, from these facts, and others in proof, find that appellee had no reference to the sheriff in its publication. If the proof had shown that appellant alone had charge of the jail, then the publication could have referred to no one else; but he was only in charge through his deputies, and while this, in law, might make him responsible, it could not fix and deter-

mine who was meant by appellees in the publication. No person was mentioned by name, and the publication is made to apply to appellant in the petition only through innuendo, and it is a question of fact, and not of law, as to whom the language applied. Suppose there were, as shown, several persons superintending the jail, and it was not known who was actually in charge, it could not certainly be maintained that every one must, as a matter of law, know that the sheriff was the responsible party. In this case the uncertainty as to who was responsible for the unlawful detention of the prisoner was intensified by the fact that the jail was used for the detention of federal as well as state prisoners. It is insisted by appellant that this court erred in not considering his second, third, fourth, fifth, and sixth assignments of error, and insists that the case of *Agency Co. v. McClelland*, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105, sustains the assignments, and requires consideration of them. The decision does hold that such assignments are sufficient, but it does not hold that they must be considered when they are not propositions in themselves, and are not followed by propositions. An assignment of error may be a sufficient basis for a proposition, and yet not be a proposition, and it will not be considered unless it was followed by a proposition. As said in the case cited: "An assignment may be brief, and yet specific; and brevity in such a case is commendable, and accords with good practice. The reasons by which allegations of error are sought to be sustained find their proper place in the propositions, statements, and authorities required to be set forth in the brief under and in support of the respective assignments." It is required in rule 30 for the courts of civil appeals that "each point under each one of the assignments relied upon shall be stated in the shape of a proposition, unless the assignment itself is in the shape of a proposition to be maintained, and then it will be sufficient to copy the assignment." 31 S. W. vii. The supreme court holds that courts of civil appeals have the authority to disregard assignments of error not propositions within themselves, nor followed by propositions. *Cooper v. Hiner*, 91 Tex. 658, 45 S. W. 554. In the case of *Railway Co. v. Higgins*, 22 Tex. Civ. App. 430, 55 S. W. 744, the assignments were almost identical with the second, fourth, fifth, and sixth assignments of error, and they were not considered. A writ of error was refused. Under the heading "Third Assignment of Error" are copied two assignments of error numbered in the record tenth and fourteenth. The tenth is similar to the second, fourth, fifth, and sixth assignments of error. The fourteenth is: "The court erred in that part of the eighth paragraph of its charges to the jury which requires the jury, before they can give a verdict against defendant Hughes D. Slater, to find that at the time of the pub-

lication complained of he was in the actual personal exercise of his authority over the columns of said paper." Why it was error to so charge does not appear in the assignment of error, and there is no proposition that gives the explanation. *Kruegel v. Berry*, 75 Tex. 230, 9 S. W. 863.

The motion for rehearing is overruled.

ABILENE COTTON OIL CO. v. BRISCOE et al.

(Court of Civil Appeals of Texas. Nov. 30, 1901.)

NEGLIGENCE—PERSONAL INJURY—FENCING ROAD—GUARD—WARNING—EVI- DENCE—CHARGE—APPEAL.

1. Defendant, owning land adjoining a school-house lot, where protracted meetings were being held every night, constructed a barbed-wire fence inclosing its ground, and crossing a road used by the public in entering the school grounds. The fence was built across the road late in the afternoon, and, the night being dark, defendant's manager remained at the fence to warn people of the danger until the preaching commenced, when he went away, leaving no light or other signal of warning. Plaintiff's son, going to the meeting on horseback, not knowing of the fence, ran into it, killing his horse and receiving permanent injuries. *Held*, that a finding that defendant was negligent was justified.

2. Where defendant, in inclosing its grounds with a barbed-wire fence, built over onto the adjoining grounds, and across a frequently traveled road, whereby plaintiff, in traveling such road, was injured, the fact that its manager believed the fence was on defendant's ground was immaterial.

3. Where plaintiff's son was injured in the nighttime by riding against a barbed-wire fence built across a road by defendant, and the complaint alleged that the fence was so negligently built, and that on account of the darkness, and his not knowing or having been warned of the fence, the son came in contact therewith,—the evidence being that there was nothing to warn him of the danger,—a charge which would permit the jury to find that defendant was negligent in leaving the fence unguarded and without warning was within the issues.

4. Where, in an action for injuries resulting from riding against a barbed-wire fence built by defendant across a road, evidence that defendant left the fence unguarded and without warning is admitted without objection, defendant cannot object to an instruction on its negligence in that respect being given to the jury, on the ground that such negligence is not pleaded.

5. In an action for injuries from building a barbed-wire fence over a public thoroughfare, and leaving it unguarded and without warning signal on a dark night, the admission of oral evidence as to the title to the ground on which the fence was built was harmless error, though the title was not in issue; other testimony showing that the ground was in possession and control of persons other than defendant.

6. Where plaintiff's son was injured by riding against a barbed-wire fence built across a road by defendant, it was not error to admit evidence that defendant's agents knew that the fence was not on defendant's land.

7. Where plaintiff's son was injured by riding against a barbed-wire fence built across a road by defendant, it was not error to refuse to charge that, if defendant exercised care to

prevent injury to persons who might be reasonably expected to pass along such road that night, plaintiff could not recover.

8. Assignments of error for failure of the court to charge on certain phases of a case cannot be sustained, where there was no request to so charge.

Appeal from district court, Taylor county; N. R. Lindsey, Judge.

Action by William Briscoe, for himself and his minor son I. J. Briscoe, against the Abilene Cotton Oil Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

West, Smith & Chapman, Bowyer & Tillett, and Hardwicke & Hardwicke, for appellant. J. M. Wagstaff and D. G. Hill, for appellees.

HUNTER, J. This suit was brought by William Briscoe against appellant, for himself and as next friend of his 20 year old son, I. J. Briscoe, for personal injuries inflicted on the latter, whereby he was permanently injured, and has suffered and will suffer great bodily pain and mental anguish, and for the loss of a horse which was killed, and for time lost by the minor from the service of his father, and for drugs and doctor's bills in curing him. Plaintiff alleged that on September 11, 1900, defendant negligently constructed a barbed-wire fence across a traveled road or passway running across a two-acre tract of land alleged to belong to, under control of, and used by the trustees of a public school in Jones county; that such school house was used for school, and religious and other public gatherings, both day and night, and said passway and road was generally and commonly used by the public to approach the school house, all of which, it is alleged, the defendant well knew; that on the night in question, to wit, September 11, 1900, said I. J. Briscoe was approaching said school house where religious services were being held, and that the horse he was riding came in contact with said fence, and I. J. Briscoe was thrown against the fence, whereby the horse was killed, and I. J. Briscoe seriously and permanently injured,—William Briscoe's damages for doctor's and drug bills, loss of son's services for about 10 months, and the value of the horse, being laid at \$710, while those of the son were laid at \$25,000. The defendant pleaded a general denial and contributory negligence, in that young Briscoe was riding a fractious and untractable horse at a rapid rate of speed in the nighttime, and was heedless, negligent, and careless, and thus contributed to his injury by his own negligence. The jury found a verdict for William Briscoe individually for \$385, and for "I. J. Briscoe on account of mental and physical suffering \$2,000, and the further sum of \$4,000 as actual damages on account of permanent injuries." Judgment of the court was rendered accordingly, and this appeal is from that judgment.

The record discloses the following facts: The oil mill and gins, wood yard, ginners'

¹ Rehearing denied January 25, 1902, and writ of error denied by supreme court.

residence, and seed house belonging to the appellant company were situated on the east side of an uninclosed lot of land, covering about three or four acres. The public school house, which was also used as a church or meeting house for the neighborhood, was situated on the west side of said lot. A public road led into these grounds from the northeast, by which people came to the cotton gin, and also to the school house and church. This three or four acre space seems to have been surrounded by other people's fences, except on the north, where the road came in,—the road or lane being about 26 feet wide,—and this road was the only way in to these grounds. The appellant owned the east side of the grounds, and the trustees of the school district owned, or at least had control and use of, the west two acres. There was a dividing line between the two lots, but it seems not to have been clearly defined, and the wood piles of appellant extended across the line into the school lot some 50 or 60 feet. It became necessary for appellant to fence its grounds on account of the depredations of cattle upon the premises. So, on the 11th day of September, 1900, the manager of the appellant company caused a barbed-wire fence to be constructed around its premises, so as to inclose all of its wood piles, as well as its other property there; and in constructing this fence, in order to inclose the wood piles, it was necessary to cross the road that was publicly traveled by people going to and coming away from the school or church house. A protracted meeting of some religious society was going on in a tent close by the school house at the time, and meetings were being held there every night, at which the neighbors for miles around were attending, and the manager of appellant knew these facts. The fence was built late in the afternoon of the 11th, and the manager, knowing the danger threatened to persons riding or driving in to church, as the night was dark, guarded it himself until about 8:30 o'clock, so as to turn people away from it; but as the singing services were over, and preaching had begun, he concluded that all had arrived who would come that night, and left it unguarded, with no light or other danger signal to warn people who might come along the road. The young Briscoe came galloping onto the grounds on horseback about 9 o'clock, going to the meeting, ran into the fence, killed his horse, and seriously and permanently injured himself. It was dark, and he did not see the fence, and did not know it was there. There was some controversy as to whether the manager of appellant knew that the road where the boy was injured was on the school-house lot. There is evidence tending to show that he believed it was on the appellant's lot. But the view we take of the case renders this fact immaterial. The facts show, however, that it was on the school-house lot. The evi-

dence was sufficient to warrant the jury in finding the appellant guilty of negligence in constructing this dangerous kind of fence across the road, whether it was on appellant's or the school-house lot, when no danger signals were displayed, or other sufficient mode of warning the public adopted. The amount of damages is not excessive, as the young man will be a cripple for life,—so the doctors testify,—and the verdict is fully sustained by the evidence. The plea of contributory negligence was not proved.

The first assignment of error complains of the exclusion of the evidence of the appellant's manager that he believed while building the fence that he was placing it on appellant's lot. There was no error in excluding this evidence; for, if we concede that the road was all on appellant's lot, it was in constant use then by the public, and he knew it, and it would have been negligence, under the facts stated, to have put it there when he did, without, on that night, at least, placing danger signals on it, or by some other means, to warn the public away. This answers, also, the second and third assignments of error, because, whether it belonged to the school trustees or to Williams, the fencing of it with barbed wire without warnings, under the circumstances, would have been negligence in anybody.

The fourth assignment is more serious. It complains of the charge of the court given as follows: "A failure to exercise such care and prudence in performing an act as an ordinarily careful and prudent man would exercise under the same or like circumstances and conditions is ordinarily negligence; and in this case, if you find from the evidence that the defendant, the Abilene Cotton Oil Company, in constructing said fence on said land and across said road or passway, if it did so, failed, under the facts and circumstances in evidence before you, to exercise such care and prudence as an ordinarily careful and prudent man would have exercised under the same or like circumstances, then such failure on defendant's part would constitute negligence." Under this assignment the able counsel of appellant submits this proposition: "The court should not submit an issue not raised by the pleadings, and in this case the plaintiffs have declared upon an affirmative act only, and, not declaring on negligence arising by reason of an act of omission, the court, in its charge, authorized a recovery if omission was shown, when no act of omission was charged. The evidence showed the character of fence, its manner of construction, and want of warning, etc. The jury was authorized to find for plaintiff on such grounds, when such were not alleged." The allegation in plaintiff's petition is as follows: "That on or about the 11th day of September, 1900, the defendant, said corporation, and John Guitar, well knowing that the said road was used by the public for access to said

school building, and well knowing that the said open ground was used and controlled by the trustees of said public school, and that it was open, and left open for the use and benefit of the general public, recklessly, negligently, carelessly, and knowingly constructed a barbed-wire fence, well knowing the danger to the traveling public therefrom, on, over and across said open space on said school grounds, and extended said fence west to near said school house, and inclosed a large portion of said school grounds, and obstructed the road leading to said school house, and left no road to approach said school house, except a very narrow passway, that was grown up in timber, on the north line of said open space; that when said fence was built, and said road obstructed, protracted religious services were going on each night at said school house, which fact was well known to defendants; that defendants were warned and commanded and ordered not to build said fence, and not to obstruct said road and school ground; that defendants built said fence in order to care for and protect the property of defendants, and it was built for the use and profit and benefit of defendant corporation; that defendants knew and had knowledge of the extreme danger of said wire fence to the public and to the plaintiff when said fence was constructed by them." This allegation, it will be observed, does not, in terms, complain of the defendants' failure to display danger signals, or otherwise warn the public of the danger of coming in contact with the fence, but simply that they recklessly, negligently, and carelessly constructed the fence, etc. But following this allegation we find it in the same connection alleged "that, on the night after the construction of said fence, I. J. Briscoe was lawfully going to church, riding his horse, and arrived near Delk School House a short time after dark, and was traveling the said road leading to the said school house at a moderate rate of speed, when, on account of the darkness, and his not having been warned of the fence, and having no knowledge of its being built, his horse came in contact with said wire fence," etc. This latter allegation, "and his not having been warned of the fence, and having no knowledge of its being built," even if we adopt the appellant's contention that the general allegation of negligence in constructing the fence is not sufficient, we interpret to mean that no danger signals were displayed, or other warnings given by the appellant to warn the injured party or the public of the dangerous obstruction placed across the highway, and, by reason of the reckless building and the failure to warn, the injury occurred. At all events, we have concluded that the charge was warranted by the allegation. The evidence of failure to display danger signals or guard the fence sufficiently was abundant, and no question of want of allegation to support the evidence was made, so that it seems that appellant considered the allegation suffi-

cient to admit such evidence; and, if it is sufficient for the one purpose, it must be held so for the other.

The fifth assignment of error complains of the admission of oral evidence to prove that the trustees of the school district owned the school-house lot over which the road was located. The title to the lot was not an issue in the case, but there was no material error, if error at all, in admitting the evidence, as the bill of exceptions shows that the same witness testified that the school trustees were in possession of and used and controlled the school house and lot where the road lay; and this was undisputed, and answered every purpose in this case which ownership would have done.

There was no error in admitting the evidence complained of in the sixth assignment. It only tended to establish that the appellant's agents knew that the road was on the school-house lot; and while we consider it of little importance, under the circumstances of this case, who owned the land where the road ran, it certainly was not error to prove that the appellant knew it belonged to the school trustees.

The seventh assignment complains of the court's refusal to give the following charge: "The jury are instructed that although you believe from the evidence that the defendant company, in erecting the fence in question, under the facts and circumstances existing in this case, owed a duty to those who attended the services conducted that night on said property, nevertheless, if you find that defendant company, by its agent, exercised ordinary care to prevent injury to persons who might be reasonably expected to attend said services, and during the time persons might be reasonably expected to pass along said fence in going to said services, then plaintiff cannot recover." This charge was properly refused. If the obstruction of the public way is dangerous, the party who places it there must warn and protect people against coming in contact therewith at all times, whether they might be reasonably expected to attend services and pass along there or not. He has no more right to injure the people who pass along there at unreasonable hours by such dangerous obstructions than he has those who pass only at reasonable hours.

There is no merit in the eighth assignment, as already shown. The ninth is answered by our remarks relating to the seventh. The tenth complains of a charge which was declared to be correct by the court of civil appeals in *Railway Co. v. Weigers*, 54 S. W. 912, and we therefore overrule the tenth. The eleventh and twelfth complain of the court's failure to charge the jury on certain phases of the case. Counsel should have requested such charges, if deemed important. The thirteenth, fourteenth, and fifteenth are without merit. In fact, there are 18 more such assignments, making a total of 33; and

while we have examined them separately and carefully, we find no material error in any of them, and no question raised which it would be profitable to discuss.

The judgment is therefore affirmed.

CROSS et ux. v. KENNEDY.¹

(Court of Civil Appeals of Texas. Jan. 29, 1902.)

VENDOR'S LIEN—WAIVER—AGREEMENT—NOTE—DEED—EVIDENCE—CHARGE.

1. Where, in an action on a note given as part of the purchase price of land, and to foreclose a vendor's lien therefor, there is evidence that at the time the note was given it was agreed that there should be no lien on the land, it was error to charge that a vendor's lien existed, without any contract therefor, if any part of the purchase money remained unpaid, and to refuse to charge that such lien existed unless it was intended by the parties that there should be no lien, or the lien was understood to be waived.

2. Where a deed was executed contemporaneously with a note for the purchase price of land, and there was evidence of a waiver of a vendor's lien subsequent to the giving of the note, an instruction that if the vendor agreed to waive his lien, "whether at the time of the execution of said deed or afterwards," no lien would exist, did not cure a refusal to instruct that if it appeared from the evidence that it was intended by the parties that no lien should exist, or that the lien was understood to be waived, an implied lien would not arise, as the jury might have understood the charge given as applying only to the waiver of a lien already existing, and not to a state of facts showing that no lien ever arose.

3. In an action on a note given for the purchase price of land, and to foreclose a vendor's lien which defendant claimed was waived, it was error for the court to reiterate in its charge that "it was not necessary that there should be any contract, verbal or in writing, in order to create a vendor's lien," and that "the burden of proof rested on defendants to show a waiver of the lien," and thereby give undue prominence to such propositions.

4. Where two notes were given for the purchase money of land, and the deed reserved a lien as to one note, and there was evidence that it was agreed there should be no lien as to the other, it was error to charge that the failure to retain a lien in the deed or note was not sufficient to authorize a finding that the lien was waived, without adding that such failure was a circumstance that might be considered, with the testimony, in determining whether or not there was an agreement to waive such lien.

Appeal from district court, Milam county; J. C. Scott, Judge.

Action by W. J. Kennedy against D. T. Cross and wife. From a judgment for plaintiff, defendants appeal. Reversed.

A. W. Gibson and Hefley, McBride & Watson, for appellants. Henderson, Streetman & Freeman, for appellee.

KEY, J. Appellee, Kennedy, sued appellants, D. T. Cross and his wife, and sought a personal judgment against the former upon a promissory note, and a foreclosure of a vendor's lien upon 130 acres of land against both defendants. The only controversy in

the court below was in reference to the lien, which controversy was decided in favor of the plaintiff, and the defendants have appealed.

Among other things, the court charged the jury as follows: "Where one person conveys real estate to another, and all or a part of the consideration remains unpaid, the law implies a vendor's lien to secure the payment of said unpaid purchase money; and it is not necessary that there should be any lien retained in the conveyance or in the note, or that there should be any contract, verbal or written, retaining such vendor's lien. If all or a part of the purchase money remains unpaid, the vendor's lien exists, under the law, to secure the payment of said money." The court also refused the following special instruction requested by the defendants: "An implied vendor's lien is such as arises by operation of the law in favor of the vendor of the land, as against the vendee, to secure the former in the payment of the consideration which the latter owes him for the land. Ordinarily, where one party sells land to another, and makes him a deed, an implied lien arises, independent of any agreement between the parties, to secure the vendor in the payment of any unpaid part of the purchase money, unless it appear from the evidence that it was intended between the parties that no lien should exist, or that the lien was understood between the parties to be waived."

Appellants assign error upon the action of the court in giving the first charge quoted, and in refusing to give the second; and, in our opinion, the assignment is well taken. The testimony given by the defendant D. T. Cross tended to show that at the time the two notes, for \$250 each, were executed, and in lieu of which the note in suit was afterwards given, there was an agreement, express or implied, between Cross, on the one hand, and an agent representing the plaintiff, on the other, that no lien should exist upon the land to secure the payment of the two notes referred to; and, in view of this testimony, the charge given by the court was misleading, because it omitted a very important proposition of law embodied in the latter part of the refused instruction, and beginning with the word "unless." The court should have embodied this proposition in the main charge, or given the requested instruction. It is true that in another portion of the charge the court informed the jury that no lien would exist upon the land if the plaintiff agreed to waive his vendor's lien, "whether at the time of the execution of said deed or afterwards," and instructed them, if such waiver was shown, to find for the defendants; but we do not think the latter instruction stated the law as clearly and specifically as the defendants had the right to have it stated. There was testimony tending to show a subsequent waiver of the lien, and it was also shown that the deed

¹ Writ of error denied for want of jurisdiction.

was not executed by the plaintiff at the time the defendant executed the note; and, with the testimony in this condition, we think the jury may have understood the charge on the subject of waiver as applying only to a lien that once existed, and not to a state of facts tending to show that by agreement of the parties no such lien ever existed.

We are also of the opinion that the court in its charge reiterated certain propositions of law that should not have been stated more than once. For instance, in two separate paragraphs the charge informed the jury that it was not necessary that there should be any contract, verbal or in writing, in order to create a vendor's lien, and, likewise in two separate paragraphs, announced the proposition that the burden of proof rested upon the defendants to show a waiver of the lien. By repeating a correct principle of law, the judge may give it undue prominence, and thereby indicate to the jury that, in his opinion, one party has the advantage of the other on the evidence relating to the question of law referred to. *Hays v. Hays*, 66 Tex. 607, 1 S. W. 895. In reference to the burden of proof, without declaring a simple charge on that subject to be reversible error, the supreme court has attempted to discourage the practice of giving such instructions, and has declared that, as a general rule, "they are more likely to mislead, than to give a jury a correct view of their duties." *Stooksbury v. Swan*, 85 Tex. 568, 22 S. W. 963. However, since that case was decided this court has refused a reversal merely because the trial court instructed upon the burden of proof; but, when such an instruction is repeated, we think it is giving too much prominence to a matter which might with propriety be entirely omitted from the charge.

Further objection is urged to the charge of the court because it told the jury that the failure to retain a lien in the deed or note was not of itself sufficient evidence to authorize a finding that the vendor's lien was waived. It is contended that this charge was upon the weight of evidence, and therefore prohibited by statute. The court had already instructed the jury that the law implies a vendor's lien to secure the payment of unpaid purchase money for land, and that it was not necessary that the lien should be retained in the conveyance or in the note; and, while it is true that the mere failure to do so would not operate as a waiver of the lien, the court should not have so instructed the jury, without the further statement that in this case such failure was a circumstance that might be considered by them, in connection with the other testimony, in determining whether or not there was an agreement between the parties, made at the time the note was executed, to the effect that no lien should exist upon the land. The deed executed by the plaintiff to the defendant, which the testimony showed was prepared at the

same time that the note was, retained an express lien to secure another purchase-money note, the payment of which the defendant Cross assumed as part of the consideration for the conveyance referred to. When, as in this case, a defendant assumes more than one obligation for the purchase money of land, and an express lien is retained to secure the payment of one, and no such lien is retained as to the other, and the defendant's testimony tends to show that it was agreed or understood between the parties at the time of the transaction that no lien was to exist to secure the payment of the second note, we think the fact of the omission of the lien from the written instruments is a circumstance tending to corroborate the defendant's testimony.

We rule against appellants on the other points presented in their brief.

For the error indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

NORTON v. MADDOX et al.

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

GARNISHMENT—ISSUES — INTERVENER — EVIDENCE—OBJECTION—HARMLESS ERROR—IMPEACHMENT—JUDGMENT — SETTING ASIDE—DISCRETION—REVIEW.

1. Where, in a proceeding in garnishment, an intervener agrees with plaintiffs in claiming that money deposited with the garnishee by another was the property of the judgment debtor, from whom the intervener claims by assignment, such intervener is not prejudiced by the admission of evidence to prove such fact.

2. Where the intervener in a proceeding in garnishment, claiming money deposited in a bank for the benefit of the judgment debtor under an assignment from such debtor, did not object to testimony of a third person that soon after the death of the depositor such debtor told the depositor's widow that \$700 of the money was hers, permitting such widow to testify to the same statement over the intervener's objection is not ground for reversal.

3. Where, in a proceeding in garnishment to reach a certain bank deposit, the judgment debtor testified that he assigned all of his interest in the money to the intervener at a certain time, testimony that after such time the debtor said the money was his was admissible to impeach such testimony.

4. Where parts of a deposition are excluded, but the parts admitted are clear and positive as to all material facts which would be shown by the parts excluded, the error, if any, in such exclusion is harmless.

5. The setting aside of an interlocutory judgment by default during the term at which it is entered is a matter resting within the sound discretion of the trial court, and is not subject to review.

6. An assignee of a bank deposit, whose title is fraudulent toward the depositor's creditors, cannot complain of the action of the court in vacating an interlocutory order entered on default, by which the claim of another person to the fund was adversely determined.

7. Where a garnishing creditor alleges that the bank deposit garnished was made by the debtor for the fraudulent purpose of defeating his wife's claim to alimony in a contemplated divorce suit, the court's refusal to sustain

exceptions to such allegation is harmless error toward the debtor's assignee.

8. An omission to correctly indorse the name of a pleading is not prejudicial error.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Proceeding in garnishment by Maddox & Wren, as judgment creditors of R. L. Summerlin, against the Frost National Bank, garnishee, and J. R. Norton, intervener. From a judgment for plaintiffs on issues framed, the intervener appeals. Affirmed.

Ed Haltom, for appellant. Geo. C. Altgelt and Jas. Raley, for appellees.

NEILL, J. On the 20th day of September, 1900, Maddox & Wren, as judgment creditors of R. L. Summerlin, sued out a writ of garnishment against the Frost National Bank, requiring it to answer what effects, if any, it had in its hands, of Summerlin, etc. The bank having by its answer denied any indebtedness to him, or having any of his effects in its possession, the garnishers on the 26th day of November controverted the answer by alleging that when the writ was served E. M. Booker had on deposit with the garnishee in his own name the sum of \$2,298, which belonged to Summerlin, and was placed there by him in Booker's name for the purpose of hindering and delaying his (Summerlin's) creditors, of whom were the garnishers, in the collection of their debts; that said sum of money was also deposited with said bank in that manner in contemplation of an anticipated divorce suit, for the fraudulent purpose of preventing Summerlin's wife from obtaining any part of it in the divorce proceedings. In their pleading controverting the answer of the garnishee, Maddox & Wren alleged it had come to their knowledge that J. R. Norton asserted a claim to some interest in said fund by assignment from Summerlin, and prayed that he and Mary C. Booker, executrix of estate of E. M. Booker, deceased, be cited to appear and set up whatever claim either might have to said fund. Norton, having been cited, answered that on and prior to the 1st day of January, 1900, E. M. Booker, being indebted to Summerlin in the sum of \$3,359.13 for money loaned, drew two checks on the Frost National Bank, for \$1,500 each, payable to him, and also executed and delivered to Summerlin his promissory note, payable to the latter's order "one year or sooner," for the sum of \$358.13, in settlement of said indebtedness; that, to meet said checks, Booker had placed in said bank the sum of \$3,000,—it being intended by Booker that the checks should operate as an assignment of his interest in the deposit to the extent of the sum for which they were drawn; that on the same day Summerlin, being indebted to him (Norton) in the sum of about \$3,200, assigned the checks and note mentioned in settlement of so much indebtedness, and that the checks and note, at the request of Sum-

merlin, were delivered to him by Booker; and that by reason of the premises he is the owner of this fund so deposited, and is entitled to recover the same. Mary C. Booker, administratrix of E. M. Booker, deceased, having by her attorney waived service, an interlocutory judgment by default was entered against her in Norton's favor, which was afterwards, at the same term, set aside on her motion. She then answered, claiming \$700 of the fund deposited by her husband with the bank, which amount she averred had been drawn by Summerlin from her husband with the understanding that it should be deducted from the money due on the checks. The case was, upon the request of appellant, submitted to the jury on special issues; and upon their findings judgment was entered in favor of appellees Maddox & Wren against the Frost National Bank for \$1,948.74, after allowing the bank \$75 as an attorney's fee, and in favor of appellee Mary C. Booker, administratrix of E. M. Booker, deceased, against the bank, for \$653.20, and that appellant, Norton, is entitled to no part of the fund claimed by him.

Conclusions of Fact.

It is undisputed that R. L. Summerlin is, and was on the 1st day of January, 1900, indebted to the garnishers, Maddox & Wren, on a judgment rendered in the district court of Bexar county on the 6th of December, 1892, for the sum of \$3,596.99; that executions were duly issued on said judgment within one year from its rendition, and returned, "No property found"; that R. L. Summerlin is, and has been ever since the judgment was rendered, wholly insolvent. On the 20th day of September, 1900, when the writ of garnishment was served on the Frost National Bank, there was on deposit with the bank in the name of E. M. Booker, then deceased, the sum of \$2,298. When this money was placed on deposit it belonged to, and was the property of, R. L. Summerlin. At that time (January 1, 1900) E. M. Booker drew two checks on the bank, for \$1,500 each, in favor of R. L. Summerlin; the amount of the deposit then being equal to the aggregate of the sums specified in the checks. These checks were afterwards indorsed by Summerlin to Norton. The jury, upon special issues submitted at appellant's request, found the following facts: (1) That \$653.20 of the money so deposited is the property of Mary C. Booker, administratrix of E. M. Booker, deceased; (2) that R. L. Summerlin was not indebted to appellant, J. R. Norton, at the time the former indorsed said checks to the latter; (3) that such indorsement of the checks was a device on the part of Summerlin to shield the money from his creditors; (4) that R. L. Summerlin was not justly indebted to Norton in any amount when the checks were indorsed by the former to the latter; (5) that Summerlin made the transfer of the checks to Norton to hin-

der or delay his (Summerlin's) creditors; and (6) that Norton knew such purpose on the part of Summerlin, or had notice of facts sufficient to put him upon inquiry. While the evidence upon which these findings of the jury is based is conflicting,—that of Summerlin and appellant being directly contrary to them,—yet there are cogent circumstances tending to overcome their testimony and to sustain the verdict; and we believe the evidence is reasonably sufficient to sustain each of the jury's findings.

Conclusions of Law.

1. Since appellant's contention is that the money deposited on the 1st of January, 1900, in the Frost National Bank by E. M. Booker was in fact the property of Summerlin, which, under his pleadings, was a fact necessary to be established before he could recover any part of the fund, we are unable to perceive how he could have been prejudiced by the evidence complained of in the first and second assignments of error; for such evidence only tended to prove such fact.

2. The evidence of Mary C. Booker to the effect "that R. L. Summerlin came to see her right after her husband's death, and told her that \$700 of the money was hers," was testified to, without objection on the part of appellant, by the witness Geo. H. Noonan. Hence, if it should be conceded that appellant's objection to this part of Mrs. Booker's testimony was well taken, it would not be a ground for a reversal of the judgment. *Letcher v. Morrison*, 79 Tex. 240, 14 S. W. 1010.

3. Mr. Summerlin having testified that he had "assigned all interest in the money held by E. M. Booker to J. R. Norton," it was admissible for the purpose of impeaching such testimony to prove by Mrs. Booker that in the conversation with her after her husband's death he stated that the balance of the money in the bank (\$2,100), after allowing her \$700, was his. This evidence of Mrs. Booker was evidently offered as impeaching testimony, and, such being the purpose, that it was hearsay was not a sound objection to its introduction. *Railway Co. v. Jackson*, 98 Tex. 286, 54 S. W. 1023.

4. If it was error to sustain the objection to the question and answer contained in the depositions of Mr. Summerlin, as is complained of in the fourth assignment, such error was harmless. For the testimony of the witness, as it appears in the statement of facts, is clear and emphatic that he had no interest in the fund deposited by Booker in the bank after his indorsement of the checks to appellant. This was all that could have been shown by the excluded interrogatory and answer.

5. We deem it unnecessary to consider or pass upon the correctness of this proposition, "Where a person holds money in a bank as

trustee for another, and gives his check to the owner of the fund for the money he so holds, the drawing and delivery of the check operate as a complete assignment of the fund, as against the drawer of the check," asserted under appellant's seventh and eighth assignments of error. If it should be conceded that the proposition is abstractly correct, it would, under the facts found by the jury, be of no avail to appellant. It would only establish that upon the execution of the checks Summerlin became the legal, as well as the equitable, owner of the money deposited by Booker. This would not relieve the fund from being garnished by Summerlin's creditors. On the contrary, it would make its liability to such process the more apparent. If, then, as the jury found, Summerlin was not indebted to Norton when the checks were indorsed to him, and such indorsement was a mere device to shield the money from the former's creditors, the fund would likewise be subject to seizure for Summerlin's debts. This is true notwithstanding appellant's second proposition under these assignments (that, "where the payee of a check drawn upon a trust fund by the trustee indorses and delivers the same to a third person for value, such third person becomes the owner, pro tanto, of the fund upon which the check is drawn") may be abstractly correct. The facts found by the jury do not tally with the proposition. Our conclusions of fact dispose of appellant's contention that the verdict is without evidence to support it, adversely to him.

6. The setting aside of the interlocutory judgment by default against Mrs. Booker during the term at which it was entered was a matter resting within the sound discretion of the trial court, and is not subject to review on appeal, where it does not appear that such discretion was abused. Besides, as appellant was a fraudulent assignee of the fund, and could not hold it against creditors of his assignor, he suffered no wrong by the action of the court in vacating the interlocutory order. No injury could have been done appellant by the refusal of the court to sustain exceptions to that part of appellees' pleadings where it was alleged that the money in controversy was deposited by Summerlin in the name of another, in contemplation of an anticipated divorce suit, for the fraudulent purpose of preventing his wife from obtaining any of it. Nor could he have been prejudiced by the omission of appellees to correctly indorse the name of a pleading.

7. Under the facts developed upon the trial of this case, we think it was proper for the court to allow the bank an attorney's fee, to be charged against the fund in its deposit.

There is no error requiring a reversal of the judgment, and it is affirmed.

KNIPPA v. STEWART IRON WORKS et al.
(Court of Civil Appeals of Texas. Jan. 8, 1902.)

COUNTY COMMISSIONERS — CLAIM AGAINST COUNTY—ASSIGNMENT—POWER TO TAKE.

Under Rev. St. art. 1535, requiring each member of the county commissioners' court to take oath that he will not be directly or indirectly interested in any contract with or claim against the county, except for his fees of office; and page 322, art. 1537, subds. 7, 8, making it the duty of such court to provide and keep in repair court houses and jails, and to audit and settle all accounts against the county,—a commissioner cannot take and enforce an assignment of the claim of a contractor against the county, to accrue on an unfinished contract to build a jail.

Appeal from district court, Uvalde county; L. L. Martin, Judge.

Action by the Stewart Iron Works against Uvalde county, defendant, and George Knippa, intervener. From a judgment for plaintiff, the intervener appeals. Affirmed.

Tarleton & Bass, for appellant. P. H. Swearingen and O. Ellis, for appellee.

NEILL, J. This suit was instituted by the Stewart Iron Works, a foreign corporation, against Uvalde county, Tex., to recover the sum of \$1,000, alleged to be due the company upon an original contract between it and the county to erect a county jail for the latter. By its answer the county admitted the contract upon which plaintiff's demand arose against it, and that a balance of \$1,000 due thereon was unpaid. But it alleged that appellant, George Knippa, had filed with the county an order from one J. H. Affleck (a subcontractor of plaintiff) on it for said sum of money. The county alleged that it did not know to whom the money belonged, but averred its readiness and willingness to pay the same to the proper party. After this answer was filed, the appellant, by leave of the court, intervened and claimed the right to the money by reason of an alleged assignment to him for that amount by the subcontractor, J. H. Affleck, and prayed judgment for said sum. By a supplemental petition the Stewart Iron Works pleaded: (1) That Affleck had been paid in full for all the work and labor performed by him on the jail building; that he abandoned his contract before the building was completed; and that plaintiff and Affleck's sureties were compelled to complete the work contracted to be done by Affleck, at a heavy loss. (2) That neither plaintiff nor the sureties of said subcontractor ever authorized the creation of debts by Affleck in the performance of its contract, or assumed their payment. (3) That intervener, George Knippa, was county commissioner of precinct No. 1 of Uvalde county, and a member of the county commissioners' court of said county, at the date of the contract between plaintiff and the defendant for the building of said county jail; that intervener continued in said office during the en-

tire period of the erection of said jail building; and that he was a member of the court at the date of its acceptance by said commissioners' court, and long afterwards, and was an active participant in all the business of the court in relation to the building of said jail; that, therefore, the transaction between Knippa and Affleck, out of which intervener's claim originated, was in direct violation of his oath of office, prohibited by the laws of the state, and in contravention of public policy, and void. The court, after hearing the evidence, peremptorily instructed the jury to return a verdict for plaintiff against the county of Uvalde for the sum of \$1,000, and that intervener take nothing. From the judgment entered upon a verdict returned in obedience to this charge, Mr. Knippa has appealed to this court.

Conclusions of Fact.

The Stewart Iron Works, a corporation created by the state of Ohio, on the 5th day of April, 1899, had, and ever since has had, a permit to transact business in the state of Texas. On that day it entered into a written contract with Uvalde county by which it agreed to build and complete a county jail for said county, according to certain plans and specifications therein mentioned, in consideration of the sum of \$11,150, to be paid by said county. By said contract the jail building was to be completed within six months from said date, the contractor agreeing to pay a forfeit or penalty of \$10 per day as liquidated damages for each and every day said building should remain uncompleted after the expiration of six months from the date thereof. The county agreed to pay said sum of \$11,150 as follows: (1) \$2,500 on completion of the foundation of the building to the water-table line; (2) \$2,500 upon the completion of the first story of the building to the second-floor line; (3) \$2,500 upon completion of the building up to roof line; and (4) \$2,650 upon the entire completion and equipment of said building, and its acceptance by the county commissioners' court of Uvalde county. For the faithful performance of its contract, the Stewart Iron Works executed its bond, payable to the county judge of said county, in the sum of \$10,000, which bond was approved by the commissioners' court on the 18th day of April, 1899. On the 8th day of June, 1899, the Stewart Iron Works entered into a contract with J. H. Affleck by which the latter agreed to build said jail for it; plaintiff agreeing to furnish the iron and steel to be used in the construction of the building, and Affleck to furnish all other material, and to erect and complete said building within the period of three months from the date of said contract, and to forfeit the sum of \$10 per day as liquidated damages for each and every day said building should remain uncompleted on and after the expiration of said period of three months. The plaintiff agreed to pay Affleck the sum of

\$6,250 for erecting and completing said building in accordance with the terms of the contract between it and the county, which amount of money was to be paid in installments as follows: (1) \$2,000 upon completion of the foundation of said building to water-table line; (2) \$1,500 on completion of first story up to second-floor line; (3) \$1,400 on completion of said building to roof line; (4) \$1,350 upon entire completion and equipment of said building, and its acceptance by the county commissioners' court of Uvalde county. By this contract Affleck was required to give a bond to plaintiff in the sum of \$5,000 for the faithful performance of his contract. This bond was given by Affleck, with the American Surety Company as surety; and by agreement between Affleck and the surety company, made with the approval of plaintiff, \$1,000 of the first payment to become due Affleck on his contract was to be paid to the surety company as an indemnity fund, in addition to the premium paid the company for becoming Affleck's surety. On the 7th day of July, 1899, this contract between plaintiff and Affleck was received by, and filed with, the county commissioners' court, together with a letter from plaintiff, of date June 20, 1899, which authorized the county commissioners' court to pay J. H. Affleck the amount stipulated in said contract, "on condition that he fulfill in all particulars the terms of said contract; said payments to be made in such installments and at such times as is stated in said contract," etc.—and requiring the county to take receipts for payments, etc.

Affleck completed the foundation of the building to the water-table line on the 27th of July, 1899, and was paid by the county \$1,000 therefor; the other \$1,000 due under the terms of the contract having been paid on his order to the American Surety Company, to indemnify it as surety on his bond. On the 19th day of August, Affleck completed the building to the floor of the second story, and was paid by the county the sum of \$1,500; the same being the full amount then due him on said contract. On the 23d of September, 1899, Affleck completed the building to the roof line, and was paid by the county the sum of \$1,400; it being the full payment of the third installment then due him on his contract. At that time some of the roofing, neither the extent nor value of which is shown, had been done. After that time Affleck did no other work towards the construction or completion of the building. But on the 2d day of December, 1899, he assigned all of his rights and equity in his contract with plaintiff to the American Surety Company, the surety on his bond; reciting in the assignment and transfer "that he had failed to complete said building within the time specified in his contract, and that it was impossible for him to complete the same." He also assigned and transferred to said surety company all claims against the coun-

ty, and all contracts made by him for labor or material for said building, in consideration of the company's completing the building, and authorized it to collect any and all moneys due him, or that might become due him, by any and all persons or corporations. And he surrendered to said company any and all equities that he might have in said contract, and authorized the county of Uvalde to cancel any and all unpaid orders given by him on it, and instructed the county to pay all balances due or thereafter to become due on said contract to the American Surety Company. On September 30, 1899, after he had received his third payment, and had abandoned work on the jail building, Affleck gave appellant, Knippa, a written order on the county clerk of Uvalde county, which is as follows: "Uvalde, Texas, Sept. 30th, 1899. Hy. J. Bowles, Esq., County Clerk Uvalde County, Uvalde, Tex.—Sir: You are hereby instructed to issue to George Knippa warrant on the county treasurer of Uvalde county for the sum of one thousand dollars (\$1,000), deducting the same from warrant to be issued to me for next payment due me by Uvalde county on account of jail contract. This order is given for money furnished me by George Knippa to pay for material and labor in constructing the Uvalde county jail, and shall constitute a mechanic's lien on said jail. J. H. Affleck, Subcontractor and Builder. Witness: W. W. Collier and F. J. Rheiner." This order was never presented to or approved by the county commissioners' court, but was filed in the county clerk's office and recorded in the mechanics' liens record. Intervener having on the 30th of September, 1899, signed as surety for Affleck a note made by him to the Uvalde National Bank for \$1,000, the proceeds of which note, less the bank discount, being placed to the credit of Affleck, to be paid by the bank on vouchers for labor and material used in the construction of said jail, and the note having been renewed several times, it was finally taken up or paid by intervener, and the order was given him by Affleck in consideration therefor. The evidence shows the proceeds of the note received from the bank were appropriated to such payments of labor and material actually furnished by Affleck in building the jail. When intervener became Affleck's surety on the note, the latter was notoriously insolvent, and owed Knippa \$80 on account, which has never been paid; and there is evidence tending to show that by going on the note he expected to collect such indebtedness. Upon this point, however, the evidence is conflicting, and we make no finding.

After Affleck abandoned the work, George Eichlitz, of San Antonio, took charge of it, and paid the men until the jail was finished. It does not positively appear for whom he was acting, but all payments were made by the county directly to the Stewart Iron Works without protest from the American

Surety Company. The jail was completed and accepted by the county commissioners' court on the 19th of March, 1900. The surety company, in compromising the penalty for delay in completing the building, paid the county \$500 in full settlement therefor. At the time of the settlement the county withheld \$1,000 due on the contract with the Stewart Iron Works to await adjustment of the controversy between it and intervener. On the date of said settlement Knippa filed and presented in said court a sworn account in the following words, to wit: "Uvalde, Texas, March 19th, 1900. J. H. Affleck, Sub-contractor, and the Stewart Iron Works of Cincinnati, Ohio. September 30th, 1899. To George Knippa, Dr.: For money advanced for material and labor in constructing the Uvalde county jail, \$1,000,"—in consequence of which the \$1,000 involved in this suit was withheld from appellee, and a bond of \$2,000 was required of Knippa to indemnify the county.

Intervener, George Knippa, was a member of the county commissioners' court of Uvalde county (being commissioner of precinct No. 1 of said county) at the date of the contract between it and the Stewart Iron Works, and during the entire period of building said jail, and the acceptance of the same, and the settlement with the county.

With the exception of the money paid to Affleck, the \$1,000 paid on his order to the surety company, and the \$1,000 involved in this suit, the Stewart Iron Works has been paid the amount of money agreed upon in the contract as the consideration for the completion of said jail.

The testimony upon which these findings were made is uncontradicted, and establishes them beyond controversy.

Conclusions of Law.

It is contended by appellant, Knippa, that, after the abandonment of the work on the jail by Affleck, his surety, the American Surety Company, took up said work and completed the building according to the plans and specifications, and that the work thus done by the surety company in completing the building inured to the benefit of appellant, to the extent of the order given by Affleck on the county clerk for \$1,000 to be paid out of the next payment due said Affleck on said jail contract. On the other hand, it is contended by the Stewart Iron Works that Affleck could convey no greater right to the fund appropriated by the county to build the jail than he himself possessed under the contract with plaintiff; that the liability of a surety is strictissimi juris, and cannot be extended by implication or construction; and that, as there was no privity between the surety on Affleck's bond and Knippa, the surety was not in any way bound to pay the debts of Affleck contracted in constructing said building. From the view we take of this case, we deem it un-

necessary to consider and determine the questions involved in these contentions, for it may be, if a proper decision of this case depended upon a solution of them, that it should have been submitted to the jury. Upon this, however, we express no opinion.

It is seen from the evidence that appellant, George Knippa, was member of the county commissioners' court of Uvalde county from the date of the contract between the county and the Stewart Iron Works, and continued as such officer during the entire period of building the jail, and until the acceptance of the same by the county. As such commissioner he was required to take an oath that he would not be directly or indirectly interested in any contract with or claim against the county, except such warrants as might issue to him as fees of office. Article 1535, Rev. St. The duties of the county commissioners' court, of which he was a member, were to provide and keep in repair court houses, jails, etc., and to audit and settle all accounts against the county, and direct their payment. Subdivisions 7, 8, art. 1537, p. 322, Rev. St. The subject-matter of this suit is \$1,000 due from Uvalde county, the commissioners' court of which appellant was a member at the time he claims he was, by contract with Affleck, entitled to receive said sum of money from the county. However honest appellant may have been in his intentions, the contract by virtue of which he claims that he is entitled to the money is in derogation of the statute, and contrary to the spirit, if not the letter, of his official oath. His pecuniary interest would have been directly opposed to the interest of the county, in the event of a rejection of the work contracted for, and his private pecuniary interest might have induced him to act in violation of his duty as county commissioner. Contracts in their nature calculated to influence the action of public officers, and the effect of which is to influence them one way or the other, are against public policy and void. *Robinson v. Patterson*, 71 Mich. 149, 39 N. W. 24, and authorities cited; *Me-guire v. Corwine*, 101 U. S. 108, 25 L. Ed. 890; *Rigby v. State*, 27 Tex. App. 55, 10 S. W. 760; *Brown v. Bank*, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206. Therefore, in view of this well-established principle of law, when applied to the undisputed facts, we are of the opinion that the court did not err in peremptorily instructing the jury to return a verdict against appellant.

The judgment is affirmed.

RISCHE v. TEXAS TRANSP. CO.¹
(Court of Civil Appeals of Texas. Dec. 18, 1901.)

STREET RAILROADS—TRANSPORTATION OF FREIGHT—ABUTTING PROPERTY—INJUNCTION—IRREPARABLE INJURY—DAMAGES.

1. Under Const. art. 1, § 17, providing that no person's property shall be taken or dam-

¹ Writ of error denied by supreme court.

aged for a public use without adequate compensation, and, when taken, such compensation shall be first paid, the legislature may authorize acts for the public good that may result in damage to the individual without requiring as a condition precedent that damages be first paid.

2. Where a corporation has obtained a charter under Rev. St. tit. 21, c. 2, authorizing the incorporation of street railway companies for transportation of freight and the sanction of the municipal authorities for the construction of the road, an abutting property owner cannot restrain such use of the street, or declare it a nuisance, though he owned the fee, and granted the land to the city for street purposes alone.

3. Where an abutting property owner seeks to restrain a street railway company incorporated for transportation of freight from operating its road because it is using heavy electric motors and hauling large quantities of freight, rendering access to his premises dangerous and inconvenient, and endangering the lives of his family and other persons using the street, the injunction is properly denied on the ground that the injury is not irreparable.

4. The operation of a street railway for the transportation of freight, being a commercial railway, and subjecting the street to an additional servitude, entitles an abutting owner to damages for any injury inflicted on his property, not suffered in common with other property along the route.

Appeal from district court, Bexar county; John H. Clark, Judge.

Action by Ernest Rische against the Texas Transportation Company. From a judgment in favor of defendant, plaintiff appeals. Modified.

T. D. Cobbs and Denman, Franklin & McGown, for appellant. Newton & Ward, for appellee.

FLY, J. This suit was originally instituted against the city of San Antonio, Otto Koehler, Otto Wahrmund, Oscar Bergstrom, John J. Stevens, the San Antonio Brewing Association, the Lone Star Brewery, and the Texas Transportation Company, but in an amended petition all of the defendants were dismissed from the suit except the last named. The object of the suit was to recover damages for the building and operating of a street railway for freight purposes on a certain street on which the property of appellant abuts, and to enjoin the further operation of the railway. Appellee filed general and special exceptions to the petition, which were sustained by the court, and, appellant declining to amend, it was adjudged that he take nothing by his suit and pay all costs. Appellant alleged, in substance, that he was the owner of certain lots in the city of San Antonio, at the corner of Grand avenue and River avenue, and fronting on both streets; that in September, 1897, appellee constructed on said streets a street freight railway, and is operating the same, and that this was done by virtue of a charter obtained from the state of Texas, and under an ordinance duly enacted by the city of San Antonio granting a franchise to appellee to operate such railway. It was further alleged that heavy iron T rails were used in

constructing the track; that there is another railway track on said streets, and two trolley wires; that heavy electric motors have been placed on the track in question, and are being operated in transporting large refrigerator cars used by railroad companies for transporting beer; that appellee runs from four to six trains daily, which are composed of from three to fifteen cars in addition to the motor car; that such use is an additional servitude on said streets, and is a continuing nuisance and trespass; that in the construction of the road appellee has not occupied the center of the street, but has constructed its track within six feet of appellant's sidewalk, thereby rendering access to his residence dangerous and inconvenient, and appellant has been forced thereby to abandon the front entrance to his house; that the cars make great noise, and jar and shake his house, and the cars are run so rapidly as to endanger the lives of his family and other persons using the streets. Damages were prayed for, and an injunction against the further operation of the road.

It has been held by this court, and the ruling approved by the supreme court, that the railway being operated by appellee is for public purposes. *Mangan v. Transportation Co.* (Tex. Civ. App.) 44 S. W. 999. The constitution of Texas (article 1, § 17) provides that "no person's property shall be taken, damaged, or destroyed for, or applied to public use, without adequate compensation being made, unless by consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money." At the time this constitutional provision was adopted the rule seemed to be that the word "taken," as used in constitutions in this connection, should be confined to an actual taking of property, and that damages incurred by the owner of property indirectly or consequentially could not be recovered. The constitutional provision was undoubtedly enacted to meet this construction. *Railroad Co. v. Eddins*, 60 Tex. 656; *Railway Co. v. Fuller*, 63 Tex. 467; *Railway Co. v. Meadows*, 73 Tex. 32, 11 S. W. 145, 3 L. R. A. 565. It follows from the constitutional provision that, if the use of the streets by appellee for the purpose of transporting freight from one point to another in the city of San Antonio imposes an additional servitude on the streets,—that is, puts them to a use not contemplated in their dedication and construction,—appellant is entitled to compensation for any damages that he may have sustained by such use of the streets; and if there was a "taking" of his property, as contemplated by the constitution, appellee should, in the absence of condemnation proceedings and compensation paid or secured, be restrained from such use of the streets. Whatever may be the enlarged scope given in definitions by courts to the word "taken" when used in constitutions in connection with the

taking of private property for public uses, the constitution of Texas has in the provision hereinbefore copied confined it to its ordinary use, and it must be held to mean an actual "taking" in the physical sense of the word, damages arising from anything else than an actual taking being fully provided for in the section quoted. Keeping in view that the makers of the constitution were using the word "taken" in the sense of an actual physical appropriation, it is clear that when it provides that compensation shall be made or secured before the property is taken it has no reference to a case where property is damaged or destroyed, and one who has merely damaged property without actually appropriating it cannot be restrained from the use causing the damage because he had not made arrangements for compensation before the use was begun. What we have said would seem to be in conflict with some expressions in the case of *Railway Co. v. Fuller*, 63 Tex. 409, where it was held that operating a railroad along a street was a "taking," and that, whether taken, damaged, or destroyed, compensation must be first made. These expressions were not necessary to the proper decision of the case before the court, and consequently cannot be binding as a precedent. No injunction was sought, the injured party merely suing for damages. The expressions referred to in the *Fuller* Case appear to be in conflict with the case of *Railroad Co. v. Odum*, 53 Tex. 353, where it is held that "the regulation or enlargement of the use of the street, the property of the state, is not a taking of property within the meaning of the constitution of 1869, although the lot owner may thereby suffer incidental inconvenience or injury." The constitution of 1876 used the word "taken" in the sense that it was used in former constitutions and as defined by judicial interpretation, and then provided for damages not expressed in former constitutions. It is clear that neither the legislature nor city council could authorize the taking of private property in any other than the constitutional way, but the legislature has the power to authorize acts for the public good that might result in damage to the individual without requiring as a condition precedent that all damages should be first paid. The legislature, having the power to do so, has granted the right to obtain charters to operate street railways for the carriage of passengers or freight, and, appellee having obtained a charter under authority of the statute, and the city of San Antonio, to whom exclusive control of the streets has been given by its charter, having given permission to appellee to lay its track and operate cars on certain streets, it is acting under lawful authority, and, having built its road properly, it cannot be a public nuisance, and an injunction should not be granted. There is no allegation that appellant owned the fee in the street, the only allegation on this point being the argu-

mentative one that appellant owned the fee to the center of the street because he owned the abutting property, which does not follow. If he had alleged, however, that he owned the fee, and had granted the land to the city for street purposes alone, it would not alter the case presented by the record. The street is a public highway, and, no matter who owns the fee, the public easement is superior to the right of the individual. As said in *Halsey v. Railway Co.*, 20 Atl. 859, by the court of chancery of New Jersey: "Lands taken for streets are taken for all time, and, if taken upon compensation, compensation is made to the owner once for all. * * * The authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such a taking of private property from the owner of the adjacent land as is prohibited by the constitution." It is not denied that appellee was authorized by its charter to operate a railroad for the transportation of freight, but, on the other hand, it is alleged that the charter for such purpose was granted under title 21, c. 2, of the Revised Statutes of Texas, and that an ordinance was duly enacted by the city of San Antonio granting a franchise to build such road, and that by virtue of such charter and such ordinance the road was built. The legislature having the power to grant such charter, and the city being empowered to pass such ordinance, the injunction prayed for was properly denied.

The injunction was also properly denied because the injury was not shown to be irreparable, and, if any case at all was made out by the allegations, it was only a right to recover damages, and not one to demand compensation. As said by the supreme court of the United States in *D. M. Osborne & Co. v. Missouri Pac. R. Co.*, 147 U. S. 248, 13 Sup. Ct. 290, 37 L. Ed. 155: "Where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damages in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid on the progress of a public work." There is no law in Texas for condemnation proceedings except in cases where lands are actually taken by railroads, and it cannot with force be contended that condemnation proceedings should be resorted to before the street could be used for the purposes intended. There being no provision for condemnation, it would seem clear that it is a case where the only way open to appellee was pursued, and appellant would be relegated to a suit for any damages he may have sustained. The question, then, arises as to whether appellant is entitled to damages arising on account of the construction and operation of the railway. If the railway in ques-

tion can be classed as a street railway in contradistinction to a commercial railway, then, under the general doctrine of the courts of this and most of the other states of the Union, appellant would not be entitled to damages on the ground that streets can be legitimately used by street railways, whatever the motive power, if they are properly constructed. *Railway Co. v. Limburger*, 88 Tex. 79, 30 S. W. 533, 58 Am. St. Rep. 780; *Lewis, Em. Dom.* § 115h; *Halsey v. Railway Co. (N. J. Ch.)* 20 Atl. 859; *Rafferty v. Traction Co. (Pa.)* 23 Atl. 884, 30 Am. St. Rep. 763; *Nichols v. Railroad Co. (Mich.)* 49 N. W. 533, 16 L. R. A. 371. The question, then, arises, what is a street railway, and can the railway of appellee be placed in that class? It was first held that street cars drawn by horses, and used for the transportation of passengers from one part of a city to another, did not constitute an additional servitude on the streets. They were distinguished from steam railways in the rails and construction of the track, the speed at which they run, the noise and vibration produced, the smoke and steam emitted, the danger of frightening horses, the danger to life, and the size and weight of cars and locomotives. When the steam motor and electric cars were invented all the reasons given why horse railways were not an additional servitude to streets were ignored except that they must be carriers of passengers, and not of freight, from one point to another in a city. In one instance, at least, this last reason has been discarded, and it has been held that the streets can be used by railways whatever be the motive power, and for the carriage of both freight and passengers. *Montgomery v. Railway Co.*, 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89. The weight of authority, however, is that a street passenger railroad, laid on the surface or established grade of a street, is a legitimate use, while all other railroads are not. *Lewis, Em. Dom.* § 115i; *Elliott, R. R.* §§ 6, 557; *Funk v. Railroad Co. (Minn.)* 63 N. W. 1099, 20 L. R. A. 208, 52 Am. St. Rep. 608. There has been no direct adjudication of this matter in this state, but there are several cases where damages have been allowed which have resulted from the construction of railroads along streets, and this could have been done only on the theory that they were an additional servitude to the street. *Railroad Co. v. Eddins*, 60 Tex. 656; *Same v. Bock*, 63 Tex. 245; *Railway Co. v. Meadows*, 73 Tex. 32, 11 S. W. 145, 3 L. R. A. 565; *Same v. Fuller*, 63 Tex. 467; *Same v. Jennings*, 76 Tex. 373, 13 S. W. 270, 8 L. R. A. 180. The railroads in question in the cases cited were steam railroads, but, as we have shown, this would not distinguish them from street railways, which may be operated by any motive power, and the decisions must be justified on the ground that the roads were the carriers of freight, which is all that distinguishes the commercial railway from the street railway.

We conclude, therefore, that, as the railway of appellee was constructed and operated as a freight railway, it must be classed as a commercial railway, and, if an injury has been inflicted on the property of appellant, not suffered in common with other property along the route, he would be entitled under the constitution to damages. The allegations in the petition show damages to appellant's property not suffered in common with other property, and would, if proven, entitle him to damages.

The judgment sustaining exceptions to that part of the petition asking for an injunction will be affirmed, but will be reversed as to the exceptions sustained to the suit for damages, and will be remanded for a trial on that part of the petition.

On Motion for Rehearing.

(Jan. 29, 1902.)

In the case of *Aycock v. Association*, 63 S. W. 953, the identical points involved in this suit were passed upon by this court, and it was held that, "the use of the streets being one authorized by law, and consistent with the purposes for which streets exist, plaintiffs were not entitled to have such use restrained by injunction, or declared a nuisance." The supreme court refused a writ in the case, and must necessarily have been of the opinion that the language above quoted was the law. The street railway against which an injunction was sought in that case is the one against which it is sought in this case. It is immaterial whether appellee has any authority to exercise the power of eminent domain or not. If it had all the power with which it is possible to invest any railroad corporation, it could not condemn a street, but must enter upon it through the permission of the city that exercises exclusive control over it. If in doing this it has damaged appellant in a manner not common to all the property holders along the street, it must respond in damages for so doing, but it cannot be restrained from a use of the street sanctioned by the legislature of the state and permitted by the city council of the city of San Antonio.

The motion for rehearing is overruled.

WATELSKY et al. v. COX et al. (McLAURY, Intervener).

(Court of Civil Appeals of Texas. Jan. 25, 1902.)

ACTION ON LIQUOR BOND—INTERVENTION—ILLEGAL CONTRACT—WILLFULLY INSTIGATING SUIT.

A father sued for violation of a liquor license bond by furnishing beer to his minor son. The father then settled with the saloon keeper, and refused to prosecute further. Before suit he had assigned one-half the claim to another, who intervened and prosecuted the suit to judgment. Defendants pleaded the settlement with plaintiff, and barratry by intervener. There was evidence that before the

suit was commenced intervenor visited plaintiff several times, urging him to sue, and agreeing to see to the costs. Defendants offered evidence, which was rejected, that intervenor had instituted several similar suits against them without justification, and which were dismissed, and that he proposed to a witness that he take his young brother into the saloon, and then sue on the bond, and they would divide the recovery, saying that defendants "were robbing the people, and there wasn't any harm to rob them." *Held*, that as, under Pen. Code, art. 290, it is a misdemeanor for a person to "willfully" instigate the bringing of any suit in which he has no interest, "with intent to distress or harass" the defendant, such evidence should have been admitted to show that the contract for a fee was a part of the same illegal transaction, and unenforceable.

Appeal from Tarrant county court; M. B. Harris, Judge.

Action by James Cox, plaintiff, and W. R. McLaury, intervenor, against I. K. Watelsky and others. From a judgment in favor of the intervenor, defendants appeal. Reversed.

Orrick & Terrell, for appellants. Robt. G. Johnson, for appellee.

CONNER, C. J. On a former day of the term the judgment in this case was affirmed in an oral opinion, but on motion for rehearing we have finally concluded that we were in error in so doing. As originally instituted, the suit was in the county court by James Cox upon a liquor dealer's bond, in statutory form, given by I. K. Watelsky, and the other appellants as sureties. The breaches alleged, as we originally construed the petition, were substantially but two, to wit: That Watelsky's agent had given and permitted the giving of beer and intoxicating liquors to one Arthur Cox, a minor son of James Cox, and had permitted said minor to remain in the saloon owned and kept by Watelsky, where said beer had been so given, contrary to the obligations of said bond; the damages being laid in the sum of \$1,000. Appellants, in defense, pleaded, in substance, settlement and payment to Cox, the original plaintiff, and that W. R. McLaury, who had intervened, and set up an assignment of one-half of the cause of action to him, had been guilty of barratrous conduct, in willfully encouraging and inciting James Cox to bring the suit, with intent to harass Watelsky and his sureties, and that the assignment to McLaury was therefore void and insufficient to authorize the recovery sought by him by virtue thereof. On the trial the breaches of the bond alleged were established beyond controversy, as was also the fact that, after the institution of the suit, appellants had compromised with and paid James Cox \$110 in full settlement of the cause of action, and Cox, in accord therewith, had refused to further prosecute the suit. James Cox, however, had executed and delivered to McLaury an assignment of one-half of the cause of action, as alleged; and the other facts were such as that McLaury was entitled to re-

cover herein as therein provided, unless defeated by reason of barratrous conduct in procuring the contract, as alleged by appellants. The court instructed the jury that no barratry was shown, and refused to submit the issue; and intervenor therefore obtained judgment for \$500 (one-half of the damages shown), from which this appeal has been prosecuted.

We will notice but one question, and that arises upon the action of the court, here duly presented, in excluding evidence offered by appellants to the effect that prior to the present suit intervenor had instituted several other like suits against them without legal justification, as was to be inferred from the fact that they were afterwards dismissed without further prosecution, and in all of which appellants had been harassed and burdened with costs, payment of attorney's fees, etc.; and evidence also, in substance, as shown in the bill of exceptions taken to its exclusion, that in April, 1899 (about the time the breach of the bond in this case occurred), intervenor had approached one Bud Clements, and proposed to him that he (Clements) should "carry his younger brother" into Watelsky's saloon, and that then suit should be brought; that he (intervenor) would pay the expenses, and divide the recovery,—at the same time remarking that "they were diamond-breasted Jews, and that they had no business in this country; that they were robbing the people; and that there wasn't any harm to rob them," or words to that effect. This evidence was offered for the purpose of showing intent and malice towards the particular defendants involved, but was excluded as irrelevant and immaterial. While the evidence may have been insufficient to establish barratry, as defined by the article of the Criminal Code applicable herein (Pen. Code, art. 290), as was evidently concluded by the trial court, and with which view we originally concurred, it is nevertheless undeniably true that there was evidence tending to show that, prior to the institution of the suit, intervenor "instigated," "incited," or "encouraged" its institution. He made several visits to the home of James Cox with this apparent purpose. He met Cox's objection that the institution of the suit would involve the payment of costs with the proposal that he (intervenor) would see to that, and finally procured the contract or assignment mentioned. If such instigation, incitement, or encouragement, if any, was "willfully" done by the intervenor, as that term is used in the Penal Code, and with "intent to distress or harass" I. K. Watelsky, then by the article cited he was guilty of a misdemeanor,—a penal offense, punishable as such. If so, and the contract for fee was but part of the transaction or negotiations, it thereby became tainted with the illegality of the proceedings, and unenforceable, in accord with the principle that no court will lend its aid in the enforcement of

a contract tainted with fraud or illegality. See, also, 5 Am. & Eng. Enc. Law (2d Ed.) p. 815, etc., for the effect generally given somewhat similar contracts denominated as "champertous." We think the evidence mentioned was relevant and material upon the issue of intent. The jury would have been entitled to consider the same in determining the intent, purpose, and spirit of intervener in "encouraging" the suit, if the jury should find that he did so. We therefore conclude that the court erred in excluding the evidence offered that is designated in bills of exceptions Nos. 1, 3 and 4.

In remanding the case for a new trial, we think it proper to say that, while we have construed the original petition as only declaring upon two separate breaches of the bond, it is nevertheless not entirely clear that the petition should be so limited. The question of the jurisdiction of the county court so involved, however, is so easily remedied by amendment that we forbear discussion.

Judgment reversed, and cause remanded.

PULLMAN PALACE CAR CO. v. ARENTS.

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

CARRIER—SLEEPING CAR—LOSS OF BAGGAGE—NEGLIGENCE OF CARRIER—CONTRIBUTORY NEGLIGENCE—VENUE—DAMAGES—EVIDENCE.

1. Where a passenger holding a railway ticket from a station in Texas to one in Mexico entered a sleeping car at the Texas station, though his ticket was not taken up or car fare collected until the train had entered Mexico, he was a passenger from the Texas station, and the contract was practically entered into there; and an action for violation thereof may be brought in that state, in a county in which such car company has an agent, though neither plaintiff nor defendant is a resident of Texas.

2. Where, in an action against a sleeping car company for lost baggage, there is no testimony as to value, other than that of plaintiff, and the court finds about one-third of his estimate, the finding should not be set aside on objection, first taken on appeal, that part of plaintiff's testimony was inadmissible.

3. While plaintiff was a passenger on a sleeping car, his valise was stolen from the car at a station in Mexico. The rules of the company required the rear door and windows of the car to be closed while at such stations. The conductor and porter testified that they were so closed just before entering the station, and that while there they stood on the platform near the car. Plaintiff stepped out of the car, leaving the valise near an open window at which two passengers sat. They moved away while he was gone, without closing the window, and soon after the train started the loss was discovered. *Held*, that findings that the company's employees were negligent in not keeping the window closed, or in failing to see and prevent the theft, and that plaintiff was not negligent, were justified.

Appeal from El Paso county court; Jas. R. Harper, Judge.

Action by C. A. Arents against the Pullman Palace Car Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Richard F. Burges, for appellant. Maurice McKelligon, for appellee.

JAMES, C. J. Arents sued to recover the value of a valise and traveling bag alleged to have been stolen from appellant's car at Chihuahua, Mexico. The case was tried by the judge without jury, and judgment was rendered for plaintiff for \$136.

The first assignment presented by appellant's brief is that the court erred in overruling a motion to dismiss for want of jurisdiction, after the testimony was in, for the reason that neither plaintiff nor defendant was a resident or citizen of Texas, and that the contract out of which plaintiff's cause of action arose was entered into without the state, and was to be performed and was performed wholly without the jurisdiction thereof, and because the alleged acts of negligence out of which this cause of action arose occurred wholly without the limits of the state. The facts were that plaintiff, holding a first-class railway ticket from El Paso to Jimenez, in the republic of Mexico, entered and was received into the sleeper in question at the station of El Paso, although his ticket, for convenience of the carriers, was not taken up, nor his sleeping car fare collected, until after the train left Juarez station, in Mexico, opposite El Paso. The fare was undoubtedly collected from El Paso. Plaintiff was a passenger from that point, and the contract relative to his carriage was practically entered into there. It was proved that defendant had an agent at El Paso, which, under our statute, authorized suits against defendant to be brought in that county. We entertain no doubt of the correctness of the order overruling the motion.

The next assignment is that the court erred in finding that the value of the articles lost by plaintiff amounted to \$136, for the reason that all the testimony failed to show the true value of the articles, or to establish any basis or measure by which the value thereof could be accurately determined. The propositions of law relied on and advanced under the above assignment are that: "In a suit for the value of secondhand clothing, as of anything else, the measure of damages is the market value, unless it be shown the articles have no market value. Where articles lost have no market value, the actual loss in money to the owner (not any fanciful price he might, for special reasons, set on them) would afford the measure of damages." The only testimony as to value was plaintiff's, and though some of his testimony may have been improper, according to strict rules of evidence, yet no objection was made to it, and it was at least relevant to the subject of damages. We do not believe that a judgment ought to be disturbed because objectionable testimony as to value was introduced, on complaint made for the first time in the appellate court, unless, perhaps, it should be manifest that a gross in-

justice has been done. This cannot be claimed, because the trial court in this instance did not give judgment to the extent the evidence of value went, but for about one-third of what it indicated.

The remaining assignment contends that the evidence did not warrant finding that the loss was due to negligence of defendant's servants, and that plaintiff's own testimony showed that the loss was due to his contributory negligence in leaving the baggage under an open window, and lying upon a seat within easy reach of any one outside the car. In these cases it is well settled that the fact of loss of baggage from a sleeper does not of itself make defendant liable, or raise any presumption of negligence, and that it must appear that it was due to some negligent conduct of defendant's servants. Of course, if plaintiff's own negligence contributed, he could not recover. These principles require no citation of authorities. The court must necessarily have resolved these issues in favor of plaintiff, and the assignment requires us to decide whether or not the evidence is such as to warrant these conclusions. It appeared that one of defendant's rules requires its employes to close the car windows and the rear door of the car when entering a large station like Chihuahua. This is required, doubtless, in the proper exercise of care in reference to thefts of the property of defendant and its guests. This car had a conductor and two porters, one of whom was buffet cook. The train stopped first at a pumping station. The conductor testified that he knew that before the train stopped at the pumping station the windows of the car were all down, and the rear door closed, and that they were closed after leaving it, and when they ran into the main station; that the rear door remained locked until after the train left Chihuahua, and that at the station the porter remained by the front steps, and he himself remained near there; and that the buffet waiter went into the depot to get supplies. The porter testified that he went through the car and closed the windows before the train stopped at Chihuahua on the night in question, and they were all down when he left the car to stand at the steps to help passengers on and off, as the rules required of him. It was about 9 o'clock when they left Chihuahua. None of the berths were made up. It does not appear whether the window in question was on the side toward or from the station. Plaintiff testified: That he left the car at this station to go outside. That his grip was under an open window, and the handbag was on the seat, next the open window. Two passengers were sitting at the window where his baggage was, and, not liking to disturb them, and thinking his baggage safe, as they made no attempt to leave the car, he went out without closing the window, as he otherwise would have done. While he was gone these passengers went out, leaving the win-

dow open, and soon after plaintiff returned into the car they also came back. The loss of the baggage was discovered a few minutes after leaving the station. Plaintiff says one porter (presumably, the one on the steps) left the car unguarded while he priced a Chihuahua dog, and that the conductor had not been in the car for some time before reaching Chihuahua, and was not in it when plaintiff left it. There is nothing in the evidence to contradict the testimony that the rear door was closed, nor that the car windows were closed, when the car was entering the station. But when plaintiff left the car after it stopped the window in question was open, and all the employes were out of the car; the porter being at or near the steps, the conductor on the outside on the same side, and the cook inside the station. The window was probably opened as the car stopped by the passengers who occupied the seat. The conduct of plaintiff in going out without closing the window, and leaving his effects as they were, may have been negligence on his part, but not so as a matter of law, under the circumstances. He may have had, as it seems he did have, some fear for the safety of his baggage, on account of the open window, but two fellow passengers were sitting at the window, without any apparent intention of leaving; and whether or not he acted under the circumstances as an ordinarily prudent man would have done, in going off for a while, leaving his baggage there, was a question of fact.

As to negligence of defendant's servants: The record does not show definitely how long the train stopped at this station, but as the conductor testified that "the loss, presumably, occurred between 9 and 9:10 o'clock," we may infer that it stopped that long. The time was near the end of June. Although the employes may have seen that the windows were down when the train stopped, it may be that due care for the safety of property in the car, which was a question of fact, required something more in the way of vigilance on their part. A jury may have believed that they had no just reason to presume that the passengers within would allow the windows to stay closed for such length of time, and that the car should have been more closely watched by them than it was. The rule requiring the windows to be closed on entering large stations, as this one, indicates the existence of unusual risks at such places, and that the closing of windows, or guarding them, or other precautions, should be taken to protect property inside the car from thefts. The rule having for its object such precaution would seem to involve more diligence than that the servants should merely close the windows as the train enters a station, and go off about other matters, paying no further attention to them, where the stop is for a considerable time, and conditions are such as make it probable that they would be opened. The conductor

admitted to plaintiff that this was his first trip, and he was not familiar with all his duties. It seems incomprehensible that a theft of this kind through a window could be perpetrated on the side of the car toward the station, when the light was bright, and both the porter and conductor on that side, if any diligence at all had been observed. On the other hand, if the act was done through a window on the dark side, the evidence shows that none of the employes paid any attention to that side. We conclude that there was sufficient testimony to warrant finding that the loss was due to negligence of defendant's servants.

Affirmed.

DREW et al. v. WOOTEN et al.¹

(Court of Civil Appeals of Texas. Dec. 21, 1901.)

HOMESTEAD—SEPARATION AND ABANDONMENT OF PART—DEED OF HUSBAND ALONE.

A married man purchased a block containing 12 lots for a homestead, and built a house on a corner lot, in which he resided with his family, inclosing the whole block with a wire fence. He sold the lot on the corner opposite his house, and executed a deed therefor without his wife joining. Nine days before the deed was executed the purchaser placed the lumber for a house on the lot, and immediately built a house, which he and his grantees occupied. The grantor or his family never occupied or used any part of the lot after the lumber was placed thereon. Soon after the house was built, the lot was fenced off from the rest of the block. The grantor lived six years thereafter, and never rendered the lot for taxes, nor did his wife during that time, or within the year after his death. She made no claim that the lot was part of the homestead, and the deed invalid, until more than a year after her husband's death. *Held*, that the grantor had separated the lot from the homestead, and abandoned all homestead claim thereto, before the deed was executed, and hence his deed conveyed a good title, and his widow had no interest in the property.

Appeal from district court, Childress county; G. A. Brown, Judge.

Action by Mary Hughes Drew and others against Augusta Wooten and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Edward E. Diggs, for appellants. Stovall Johnson and A. A. Henderson, for appellees.

STEPHENS, J. April 6, 1893, William Whitehead conveyed to Frank Wilson lot 6 in block 90 in the town of Childress. Suit was brought by appellants, the remote vendees of Wilson, to recover this lot from appellee Augusta Wooten, the surviving widow of William Whitehead, who died in the summer of 1899, and W. G. Wooten, her second husband, and C. Harmonson. In the trial before the court without a jury the recovery sought was denied, and from that judgment this appeal is taken.

But one error is assigned, in which assignment it is stated that the only issue involved is whether or not "at the time of the execution of the deed by said William Whitehead conveying to Frank Wilson said premises" the same constituted a part of the homestead of Whitehead and wife. The evidence warranted a finding that when Whitehead purchased block 90, March 7, 1893, which was then vacant, it was with the intention on the part of himself and wife of making the entire block their homestead; that when they moved into the house which they had just constructed on lot 1, the northeast corner of this block, about March 22, 1893, and when they inclosed with a wire fence the entire block two days thereafter, such was still the intention of his wife. But was the evidence such as to warrant a finding that the lot in controversy, the northwest corner of the block, had become, and was still, a part of the homestead, when Whitehead, without the joinder of his wife, conveyed it to Wilson, April 6, 1893? The conduct of William Whitehead about the time and after the deed was made to Wilson, who had already prepared to build and at once built a house upon and occupied the lot as a home for several years thereafter, tended strongly to show that when he made the deed to Wilson, and even prior thereto, he must have intended to sever this lot from the homestead. It was within a year thereafter fenced off from the rest of the block by the father of Mrs. Whitehead, though, as claimed by him, merely for the purpose of keeping Wilson's chickens out of his garden. It was never rendered for taxes by William Whitehead during the remaining six years of his life, although he rendered the other 11 lots in the block regularly; nor did Mrs. Whitehead render it the year after his death. No notice was ever given to Wilson, or to any of his several vendees, who occupied lot 6 in succession, during all these years, as a home, that it was claimed as a part of the Whitehead homestead. Against these stubborn facts of contemporaneous and after conduct is the bare statement, though under oath, of Mrs. Wooten, that she refused to sign the deed, and never intended to give up, but always claimed, lot 6 as a part of the homestead, which, in view of seven years of silence on her part, pending the continuous occupancy of the lot in question by others as a home, to say nothing of her omission of the lot from her tax rendition of 1900, looks very much like an afterthought. It has been several times held in this state to be within the power of the husband, acting in good faith, without the concurrence of the wife, to contract the homestead area by abandonment, he being the head of the family. There must, however, be an actual abandonment; mere intention to abandon, as evidenced by his deed and the like, not being sufficient where the homestead use continues. But where prior to or contemporaneous with the delivery of the deed and surrende

¹ Rehearing denied January 25, 1902.

of actual possession of a part of the homestead premises there is both the good-faith intention on the part of the husband, who makes the deed, to abandon, and an actual cessation of the occupancy and use of the part so conveyed as a part of the homestead, such conveyance by him alone is not within the constitutional inhibition. *Tackaberry v. Bank* (Tex. Sup.) 22 S. W. 152-154. That it was the intention of Mr. Whitehead, in selling lot 6 to Willson, whatever may have been the intention of his wife, to exclude it from the homestead, must be accepted, we think, as an established fact, and we so find. To overturn the judgment, however, we must further find that when the deed was made to Willson lot 6, then, if it had not theretofore, ceased to be occupied or used as a part of the homestead; or, rather, that the evidence did not warrant a finding to the contrary. On this issue there was seeming conflict in the testimony, but on careful analysis, making due allowance for the inaccuracy of witnesses after the lapse of many years as to time and dates, this conflict will be found more apparent than real. We find nothing in the testimony of other witnesses in direct or necessary conflict with the following testimony of witness Bates, the truth and accuracy of which cannot reasonably be doubted: "I was in charge of the Carey Lombard lumber yard in Childress in March, 1893. I had just come to Childress. I knew Frank Wilson and Wm. Whitehead. I sold Frank Wilson the lumber to build the house in controversy in this suit situated on lot 6, block 90, on the 20th day of March, 1893, and delivered same to him that day. I went to the place where the house now stands on that day, after I delivered the lumber, and the lumber was on the ground, and the carpenters were at work sawing same for building. I do not remember whether the fence was there around the block or not. I know I sold and delivered the lumber to Wilson on March 20, 1893, because my books show it." It thus appears that, even before the deed was made to Willson, the lumber for his home must have been purchased and thrown upon the ground, doubtless in anticipation of such conveyance; and while the testimony of Augusta Wooten and her father, and perhaps other witnesses, was to the effect that his house was not built till after the deed was made to him, and after Whitehead had been occupying for a short time the entire block as a home, they did not state when Wilson commenced to build his house; and the fact yet remains that in thus allowing Wilson to enter upon lot 6 and make preparation to build a house of his own upon it, Whitehead must have surrendered its use and occupancy as a part of his homestead, if, indeed, it had ever become a part thereof. Wilson was positive that after he purchased the lot neither Whitehead nor his wife ever used or occupied the same in any way, or attempted to do so. If block 90 was the separate property of Mrs. White-

head, the several purchasers from her husband were innocent purchasers, for value, from one holding the legal title. We think the court should have allowed each of the contending parties a home, instead of giving two to Mrs. Wooten.

The judgment is therefore reversed, and here rendered for appellants.

LINDSEY et al. v. STATE et al.

(Court of Civil Appeals of Texas. Dec. 11, 1901.)

COUNTIES—JUDGMENTS—TRANSFER—FRAUD—ACTION—VENUE—APPEAL—EVIDENCE—PARTIES—BILL OF EXCEPTIONS.

1. Under Sayles' Civ. St. art. 1194, providing that no resident of the state shall be sued out of the county of his domicile, except as therein authorized,—one such exception being that an action for a fraudulent act may be brought in the county where the act was committed,—an action to set aside the fraudulent transfer of a judgment may be brought in the county where such transfer was obtained, though the defendants reside in another county.

2. An action to set aside the fraudulent and unconstitutional transfer by a county commissioners' court of a judgment on a bail bond to the sureties thereon is not a collateral attack on the judgment of a court of competent jurisdiction.

3. Under Const. art. 3, § 55, providing that the legislature shall have no power to authorize the release in whole or in part of the indebtedness of any individual to the state or to any county, the action of a county commissioners' court in transferring a judgment recovered on a forfeited bail bond to an agent of the judgment debtors and for their benefit, for less than the amount due on the judgment, is void.

4. Under Rev. St. art. 845, authorizing a commissioners' court to sell a judgment belonging to the county, where the judgment debtors are insolvent, such court cannot sell a judgment at a discount to such debtors, or to their agent for their benefit.

5. The improper joinder of a person as defendant in an action is not prejudicial to the other defendants, where all the costs incurred by reason of his joinder are taxed against him.

6. A certificate of the clerk of the county court that at a certain time he had indexed a certain judgment record is not competent evidence of such indexing.

7. Where the bill of exceptions does not indicate the ground on which evidence was excluded, an assignment of error based on such exclusion cannot be entertained.

On Motion for Rehearing.

In an action to set aside the alleged fraudulent transfer by a county commissioners' court to the sureties of a judgment entered on a bail bond, evidence considered, and held, that the issue of fraud should have been submitted to the jury.

Appeal from district court, Edwards county; J. M. Goggin, Judge.

Action by the state of Texas and Edwards county against A. J. Lindsey and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Walter Anderson and John C. Townes, for appellants. J. R. Sanford and Ball & Fuller for appellees.

FLY, J. This suit was instituted by the state of Texas, through her district attorney,

J. R. Sanford, and Edwards county, against A. J. Lindsey, T. D. Lindsey, J. J. Jones, T. M. Payne, Martin Moran, and W. D. Walker to set aside the transfer made by the commissioners' court of said county of a certain judgment in favor of the state of Texas against Dick Lindsey, as principal, and all of the above-named defendants, as sureties, except Walker. It was alleged that all of the defendants, now appellants, resided in Mason county. W. A. Johnson, the district clerk of Edwards county, was a party defendant, and a mandamus was prayed for against him to compel him to issue an execution under the judgment aforesaid. It was alleged in the petition that on October 24, 1894, in the district court of Edwards county, in a proceeding styled "State of Texas v. Dick Lindsey et al.," the state recovered of Dick Lindsey, as principal, and A. J. Lindsey, T. D. Lindsey, J. J. Jones, T. M. Payne, and Martin Moran, as sureties, on a certain forfeited bail bond, the sum of \$6,000, with interest at the rate of 6 per cent. per annum from date of the judgment and all costs of suit. It was further alleged that at the February term, 1897, of the commissioners' court of Edwards county, appellants, through fraudulent representations made by them to said court, obtained a transfer of the aforesaid judgment to W. D. Walker for the sum of \$500; that said transfer was simulated; and that the sureties on said bail bond were the real purchasers of said judgment. It was averred that the sureties were not insolvent, as represented to the commissioners' court by Walker, acting for said sureties, but that they were worth largely in excess of said judgment above all other incumbrances and debts. Appellants excepted to the petition for want of jurisdiction of their person, and pleaded their privilege to be sued in Mason county, and denied the allegations of fraud made in the petition. The exceptions and plea were overruled, and after hearing the evidence the court instructed a verdict for appellees, and upon the verdict so returned judgment was rendered, decreeing that the state for the use of Edwards county, had a valid judgment lien on certain real estate described therein for the full amount of the original judgment, less the \$500 paid by Walker; that the lien be foreclosed; that the transfer of the judgment be set aside; and that the district clerk be commanded to issue an order of sale in the terms of the law.

It was established by the evidence that on October 24, 1894, the state of Texas recovered a judgment in the district court of Edwards county against Dick Lindsey, as principal, and A. J. Lindsey, Martin Moran, J. J. Jones, T. M. Payne, and T. D. Lindsey, as sureties, on a forfeited bail bond, in the sum of \$6,000, with 6 per cent. interest per annum from date and all costs of suit. An appeal was taken by the sureties to the court of criminal appeals, where the judgment was

affirmed on June 22, 1898, 46 S. W. 1045. An execution was issued to Edwards county, which was returned "No property found," and on March 5, 1895, an alias execution was issued to Mason county, and levied on certain property in that county, which had been transferred to numerous parties, subsequent to the date of the judgment. The parties to whom the lands had been transferred brought suits to enjoin the execution, which were continued on the docket until March 1, 1897, when they were dismissed at plaintiffs' costs. The sheriff did not sell the lands, but made a return showing the pendency of the suits. On February 8, 1897, the commissioners' court of Edwards county passed and entered an order selling the judgment to W. D. Walker for \$500. Walker is a relative of A. J. Lindsey, and did not go in person to negotiate a purchase of the judgment, but sent A. J. Lindsey, one of the judgment debtors, to buy the judgment. When the judgment was transferred to him, he transferred it to the sureties, but said he did not remember what he got for it. In a letter written by the attorney of the sureties to the commissioners' court, he represented that all the sureties were insolvent, and that Walker was induced to buy the judgment in order to aid the sureties in getting a release from the judgment. The reasons given by the commissioners' court for the transfer of the judgment were that the principal was dead when the bail bond was forfeited; that the sureties were insolvent, and that the property held by them had been disposed of; that the execution had been enjoined, and that Edwards county needed ready cash money. The facts showed that appellants were not insolvent and that the transfers made by them were fraudulent and void. The uncontradicted evidence established that Walker was acting as the agent of the judgment debtors, and that they were the real beneficiaries of the transfer of the judgment.

The seventh exception in article 1194, Sayles' Civ. St., to the general rule that no person, an inhabitant of this state, shall be sued out of the county in which he has his domicile, is that in all cases of fraud suits may be instituted in the county in which the fraud was committed. That article is construed to mean "that, where the principal cause of action is a fraudulent act, suit may be brought in that county where that act was committed, or that, where the main object of the suit is to set aside a fraudulent transaction, it may be brought in the county where the fraud was committed." *Freeman v. Kuechler*, 45 Tex. 592; *Boothe v. Fleet*, 80 Tex. 141, 15 S. W. 799. The object of this suit was the cancellation of a transfer of a judgment alleged and proven to have been obtained by fraud in Edwards county, and the district court of that county for that reason had jurisdiction of the persons of appellants, if for no other reason.

There is no merit in the contention that the suit was a collateral attack upon the judgment of a court of competent jurisdiction. On the other hand, it was a direct proceeding to cancel a transfer obtained by fraud, and made in contravention of the constitution, and which was therefore null and void; and the district court had jurisdiction of the matter. *McCampbell v. Durst*, 73 Tex. 410, 11 S. W. 380.

It is provided in section 55, art. 3, of the constitution of Texas, that the legislature "shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any incorporation or individual to this state, or to any county, or other municipal corporation therein." The language of this provision is explicit and comprehensive, and it is too clear to admit of question that by reason of such provisions no compromise made with the sureties by the commissioners' court of Edwards county, whereby a less sum than the amount of the judgment was to be received by the county, would be valid. The proof demonstrates that the sureties in this case, in procuring the transfer of the judgment to Walker, were endeavoring to circumvent and evade the section of the constitution above cited. It was a palpable scheme to obtain by indirect methods that which they could not get by direct means. So thinly was the scheme disguised that the attorney of the sureties wrote a long application setting up matters which he deemed sufficient to make a case in favor of his clients that should induce the commissioners' court to sell the judgment to a third party. After stating all the reasons why the judgment was of little value, he wrote that "W. D. Walker, the undersigned, is related to A. J. Lindsey and J. J. Jones, and a friend to T. D. Lindsey and Martin Moran, and is induced to make the proposition here below on the grounds of being desirous to aid them in being at some time released from said unjust judgment at a reasonable amount." In a letter written about the same date that the application to purchase the judgment was written, the attorney wrote to the commissioners, advising them that they could sell the judgment under article 845, Rev. St., which was copied into the letter, and added: "I can say that the bondsmen feel that it would not be at all just and right to now make them pay this bond, even if collection could be forced. At the same time they prefer to get it in shape where they can pay out, and not be ruined forever; and as attorney for the bondsmen I can say, I think, with reasonable certainty, that a forced collection of this judgment can never be made. Besides, I think we have a reasonable certainty that the judgment will be remitted or set aside. I send you a proper order to be entered on the minutes of the court. After it is so recorded, it should be deliv-

ered to Mr. Walker as his; same being to him a transfer of the judgment." The language quoted could not more clearly have declared that the whole object of the transfer to Walker was to extinguish the judgment, if it had been said so in terms; and the after conduct of Walker in immediately selling the judgment in question is but confirmation, strong and irresistible, of the design of the whole transaction. It was also established that A. J. Lindsey, one of the sureties, gave a bond for the costs of the suit in which the judgment was rendered against him and his co-sureties, as required by the terms of the sale.

Article 845, Sayles' Civ. St., is invoked as justifying the commissioners' court in transferring the judgment. That article of the statutes gives, or attempts to give, authority to the commissioners' court to sell judgments, the proceeds of which revert to and belong to the county, when the principal and sureties are insolvent, so that the judgments or any part thereof cannot be collected. If the statute had in contemplation to authorize a compromise or sale of a judgment, either directly or indirectly, to the judgment debtors, it is violative of the constitution, and consequently invalid; and it can offer no defense to the sureties in this case. If sureties on bail bonds can make fraudulent transfers of their property, and then buy through an agent the judgments against them for nominal sums, the constitutional provision can be overridden in every such case, and the evil intended to be prohibited will flourish with vigor in the very face of the constitution.

It is insisted that, as some of the witnesses for appellants swore that the sureties gave Walker \$800,—an increase of \$300 over the amount paid by him to the commissioners' court,—this was testimony to show that the sale to Walker was valid, and that, therefore, the court erred in taking the case from the jury. The evidence, without contradiction, showed that Walker was acting for the sureties in buying the judgment, and any sum given by them to him as a reward for the use of his name cannot render the transaction valid and legal. The transaction still remained a release or relinquishment of a part of a debt due by the sureties on the judgment, which is inhibited by the constitution.

The allegations of fraud were sufficient, and the general demurrer and special exceptions urged against the petition were properly overruled. If the district clerk, W. A. Johnson, was improperly joined in the suit, which we do not hold, it could not in any manner have prejudiced the rights of appellants. The costs were not increased, because the costs incurred by reason of his joinder were adjudged against him; and, as he did not introduce a witness or file a pleading, we cannot see how appellants were injured by his presence in the case. Rail-

way Co. v. Helm, 64 Tex. 147; Lee v. Turner, 71 Tex. 264, 9 S. W. 149; Railway Co. v. Watkins, 88 Tex. 20, 29 S. W. 232.

In order to obtain a judgment lien in Texas, it is not only necessary to have an abstract of it, as required by article 3285, Sayles' Civ. St., recorded by the county clerk in a book kept for that purpose, but it is essential that the record of the judgment should be alphabetically indexed, and such index must show the name of each plaintiff and of each defendant in the judgment, and the number of the page of the book upon which the abstract is recorded. Article 3288, Id., and authorities cited. No presumption arises, from the fact that the abstract of judgment is properly recorded, that an index has been made. Nye v. Moody, 70 Tex. 434, 8 S. W. 606; Nye v. Gribble, 70 Tex. 458, 8 S. W. 608.

In order to prove an indexing of the abstract of the judgment against the sureties on the bail bond, over the objection of appellants, appellees introduced the certificate of the clerk of the county court of Mason county to the effect that at a certain time he had indexed the judgment record, "showing the names of each plaintiff and the names of each defendant in said judgment, and the number of the pages of the book upon which said abstract is of record." That part of the index applying to the judgment in evidence was not copied in connection with the abstract of judgment; the only evidence of the indexing being the certificate of the clerk. Copies of the records of the county clerk's office, properly certified, would be admissible in evidence; but the statement of the clerk as to matters of record has not been made admissible, and the certificate as to the indexing, without a certified copy of that part of the index which was applicable to the judgment in question, was not evidence that the abstract of the judgment was indexed. Reynolds v. Dechaumes, 22 Tex. 116; Allbright v. Governor, 25 Tex. 687. In the case of Wood v. Knapp, 100 N. Y. 114, 2 N. E. 632, it was held that it was not within the province of the person making the certificate to determine what is or is not material to a question pending in a legal tribunal. He may certify to the correctness of copies of official papers in his office, so as to make them evidence; but beyond that his certificate has no more effect than the opinion of any other person. The admission of this testimony was erroneous, and, while not affecting any part of the judgment, except that declaring and foreclosing a judgment lien, will necessitate reversal as to that part of the judgment. If such certificate could be held competent evidence of a proper indexing, it was defective in this case, because it does not state there was an index in the alphabetical order.

The bill of exceptions upon which the twenty-fourth assignment of error is based cannot be entertained, because it fails to in-

dicate the grounds upon which the evidence was excluded. Kolp v. Specht, 11 Tex. Civ. App. 685, 33 S. W. 714; Johnson v. Crawl, 55 Tex. 571.

The twenty-fifth assignment of error complains of the admission of the testimony of W. D. Walker, A. J. Lindsey, Theo Smidt, and T. E. Matheny, and the fraudulent deeds executed by the sureties. This evidence was properly admitted to prove that the transfer of the judgment was in fact a release to the judgment debtors, and therefore void. The acts testified to by the witnesses and the fraudulent transfer formed links in the chain of evidence which established the fraud alleged in the petition. If the order of transfer can be given the dignity of a judgment, this was a direct proceeding to cancel, and proof aliunde the record was admissible.

We conclude that there is no merit in the remaining assignments of error, and that it will not be necessary to discuss them.

The judgment of the district court is affirmed, except in so far as it declared and foreclosed a judgment lien on the land described therein, and provided for an order of sale. As to that portion of it, it is reversed, and the cause remanded, to be tried on that issue alone.

On Motion for Rehearing.

(Jan. 29, 1902.)

A reconsideration of the statement of facts changes the opinion of the court as to the propriety of the peremptory instruction to the jury to find for appellees. There is some testimony, unsatisfactory though it may appear, to the effect that Walker was acting for himself in buying the judgment, and the issue should have been submitted to the jury. We conclude, therefore, that the whole judgment should be reversed, and the cause remanded; and it is so ordered.

GALVESTON, H. & S. A. RY. CO. v. BUTCHEK.

(Court of Civil Appeals of Texas. Oct. 23, 1901.)

RAILROADS—EMPLOYÉ—NEGLIGENCE—DEFECTIVE IMPLEMENTS—EVIDENCE—VERDICT.

1. In an action by an employé against a railroad company to recover for injuries sustained by falling into a pit in the roundhouse, evidence considered, and held not sufficient to justify a finding that the plank furnished by defendant to serve as a bridge across such pit was insufficient or defective.

2. Where a plank was furnished by a railroad company to serve as a bridge over a pit in a roundhouse, and plaintiff was injured by the careless way in which the plank was placed, the employer was not liable; the negligence being that of plaintiff or of a fellow servant.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Charles F. Butchek against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed on rehearing.

Newton & Ward, for appellant. R. B. Minor, for appellee.

NEILL, J. This suit was brought by appellee against appellant to recover damages for personal injuries alleged to have been caused by the negligence of the railway company while Butchek was, as its servant, at work in its machine shop in San Antonio. After alleging the existence of the pits, and the necessity and means provided by appellant for its servants to cross them in the performance of their labors, as found in our conclusions of fact, and charging that, through appellant's negligence, one of the pit boards furnished its servants for crossing the pits was too short to span the space intended to be bridged thereby, and rest and lap sufficiently upon its intended supports to be securely supported and held in position, the appellee, in his petition, makes the following allegations as to the occurrence of the accident resulting in his injuries: That in the course of his work he was engaged in carrying a heavy instrument, weighing about 100 pounds, known as a "jackscrew," from one part of said shop to another, and in so doing he had occasion and was required to cross one of said pits spanned by said insecure pit board or bridge; that while carrying the jackscrew, and exercising ordinary care, and having no knowledge of the danger and insecurity of the pit board and its supports, which danger and insecurity were not patent nor observable to any one exercising ordinary care, he stepped upon said pit board in the attempt to cross thereon, whereupon, by reason of said negligence, and of the shortness and insecurity of the pit board, and the insufficiency and insecurity of its support, the pit board slipped from its supports, and appellee was thereby precipitated into the pit spanned by said pit board, into the bottom; and that by said fall he was severely bruised and injured in body and limbs, etc. The appellant answered by a general denial, and by specially pleading assumed risk, negligence of fellow servants, and contributory negligence. The case was tried before a jury, and the trial resulted in a judgment in favor of appellee for \$2,000.

Conclusions of Fact.

On June 16, 1900, the appellee, Charles F. Butchek, was, and had been for three weeks immediately prior thereto, employed by appellant as a "general helper" in its machine shop in the city of San Antonio. During the time of his employment there were, as necessary to the work required to be done there, three engine pits, which are about 20 feet apart, and are parallel with each other.

They are from 85 to 88 feet in length, 39 inches in depth from top of rail to bottom, and walled with brick; the width between the walls being 45 inches. On the top of the walls are placed stringers constructed of 12x15-inch timber, to which a rail is fastened. The distance between the inside flanges of the rails on either wall is 55 inches; i. e., 4 feet 7 inches. The stringers under the rails are laid on top of the walls, and the rails are 10 inches further apart than the walls, making a space of 5 inches on each side of the pit between the inside walls and the flange on the rails. In doing their work in the shop, appellant's servants were required frequently to cross the engine pits; and, as a means of crossing, the company provided what are called "pit boards," which, as occasion demanded their use, were placed across the pit by the servant when necessary for him to cross. On the day above stated it became necessary, in the performance of his service, for the appellee to cross one of the pits with a jackscrew which weighed nearly 100 pounds. One of the pit boards furnished by the appellant was laying across the pit which appellee had to cross, it evidently having been placed there during the day by a fellow servant. Before going upon the board, the appellee, to use his language, "put his foot on it and tested it"; and, "there being nothing to show that the board was insecure," he stepped on it with the other foot, when the board slipped or fell from its support, and he was thereby thrown into the engine pit and seriously injured. His testimony is direct to the fact that the pit board from which he fell "was too short." The testimony of appellant's witnesses was that pine boards, 2 inches thick, 12 inches wide, and 4 feet 6 inches long, were the kind furnished and used for the purpose of crossing the pits, and that they were cut to a standard length; and one of the boards provided for such use was exhibited in the court room, and measured before the jury. But there was no evidence tending to show that it was the same board from which appellee fell. Nor was any explanation offered by appellant on the trial for its failure to exhibit that board, or prove its exact length, though it is apparent that the board that appellee fell from could have been identified by appellant, and its length exactly proven. If the pit board had been of the length that appellant's witnesses testified the boards furnished by it were, it would have been impossible for it to have slipped from its support, if placed across the pit in the way the appellee testified it was at the time he stepped upon it. We therefore conclude that the board furnished by appellant for appellee to cross said pit was, by reason of its being too short, unsafe; that it was negligence in the appellant to furnish for the use of its servants such an unsafe appliance; that the defect in its length was not known, nor obvious or patent, to the appellee, when

he endeavored to walk upon the board across the pit; that in stepping upon the board the appellee was in the exercise of ordinary care; that such negligence of the appellant was the proximate cause of appellee's injury, unaided by any negligence on his part, or of his fellow servants.

Conclusions of Law.

It is too well settled to require citation of authorities, that the master personally owes to his servants the duty of using ordinary care and diligence to provide for their use reasonably safe instrumentalities of service. Among these are such reasonably safe appliances as may reasonably be required to insure their safety while at work, or passing over his premises to and from work. He cannot, by a rule requiring them to inspect, throw this duty from himself upon the servants it is designed to protect in their employment. If this could be done, it would be mighty easy for the master to abrogate a principle of law designed for the protection of his servants. When, however, he delegates to a servant the performance of a duty he personally owes other servants, and the servant to whom it is delegated is injured through his negligence in its performance, the master is not responsible for the consequences of such servant's negligence. To illustrate: If the servant upon whom appellant imposed the duty of preparing and furnishing reasonably safe pit boards to be used by its servants in crossing the pits while at work in the machine shop had been injured while crossing the pit on one of the boards prepared by him, which by reason of his negligence was too short to be reasonably safe in the use designed, he could not recover. For his injury would be the result of his own negligent performance of a duty the master had rightfully delegated to him. In the case before us the appellant had delegated no such duty to the appellee, but simply sought, by a rule requiring the servant to see that appliances were safe, to absolve itself from a duty imposed by law for the servant's protection. The defect in the pit board not being patent and open to ordinary observation, the appellee had the right to assume that the appellant had discharged its duty, and that the board was reasonably safe for use in crossing the pit. As to whether the appellant discharged this duty was a question of fact for the determination of the jury, and there being evidence tending to show it had failed to do so, and that appellee was injured in consequence of such failure, the court did not err in refusing appellant's request to peremptorily instruct a verdict in its favor, nor in failing to give special charge No. 3 requested by appellant.

The portion of the charge complained of in the third assignment of errors was as favorable to appellant as the law applicable to the facts warranted. The appellant could not have been prejudiced by the court's re-

fusal to admit the testimony referred to in the fourth assignment of error.

There is no error assigned requiring a reversal of the judgment, and it is affirmed.

On Rehearing.

(Jan. 29, 1902.)

FLY, J. The judgment in this case can be sustained only on the ground that the evidence established that the board upon which appellee had stepped when he fell and was injured was too short for the use for which it was intended. This is the only ground of negligence set up in the petition, and, if that allegation is not sustained by the evidence, a reversal must necessarily follow. Appellee swore that there were various planks in the machine shops where he was working which were used in crossing the pits, which were a necessary adjunct to the shops. He said: "A good many of them were there. I don't know how many. About fifteen. These boards are used by the employes to walk over the pits, or, if they have to stand right over the pit to work, they stand on these boards. * * * The boards were 2x12 rough pine boards." Appellee was evidently describing all of the boards, and not the one alone from which he fell. Again, when shown a board, appellee said: "I don't recognize that board. I have seen planks like that before. They are some of the boards out of the machine shop,—boards like that. That is what you call a 'pit board.' That is the kind of board that had stretched across the pit." In all this testimony it is clear that appellee is describing the whole of the pit boards, and, when he testified that the pit board he fell from was too short, it is evident from the whole of the testimony that he meant not only that the identical pit board was too short, but that the whole of the pit boards were too short for the use to which they were put. Save and except the one sentence, "The pit board I fell from was too short," there was no evidence to show that this pit board was too short.

Having arrived at the conclusion that the pit board from which appellee fell was similar in all respects to the other boards in use by appellant, the next question would be as to whether the testimony established that the kind of pit boards in use by appellant were defective and not suitable for the purposes for which they were intended. The uncontroverted evidence showed that the pit board that was exhibited in the trial court was a standard pit board, and was the kind in use at the time that appellee was injured, and that it was 4 feet 6 inches in length. The evidence also established that the pits were walled with brick, and on top of these walls were placed timbers 12x15 inches in dimensions, and on top of these timbers in the center between the rails were laid. From one wall to another across the pits is

a distance of 3 feet 9 inches, and the distance between the flanges of the rails was shown to be from 4 feet 6 inches to 4 feet 7 inches. The walls are 10 inches nearer each other than the flanges of the rails are; that is, 5 inches on each wall outside the flanges. The walls being 3 feet 9 inches apart, it is clear that a board 4 feet 6 inches long would have a support of $4\frac{1}{2}$ inches at each end, if the ends were equidistant from the flanges; and, if one of the ends was directly against a flange, the other would have at least 4 inches support on the opposite wall. It is clear, therefore, that no negligence was shown, if the injury occurred where the walls were erected. The evidence established that there were points in the pits where the walls did not extend into the pit as above, which are denominated "dugouts." Over these dugouts there were rails on each side of the rails on which the wheels of the engines move, which are guard rails to keep the ones in use in place. They take the place of the wooden stringers, the rails in use being laid on the flanges of the guard rails. The distance between the inside guard rails is about 4 feet and 1 inch. Pit boards over the dugouts would have $2\frac{1}{2}$ inches on the guard rails on which to rest. From the uncontradicted proof we conclude that, no matter where the accident occurred, it must have resulted from the manner in which the board was placed, and not from any defect in the board.

It is urged by appellee that the evidence established that the board was laid across a dugout, and that it was too short for that particular location. Our conclusion being that the board was long enough for any part of the pit, it would be immaterial as to where it was placed; but, in view of the contention of appellee, we will say that, to our minds, there is no proof that would sustain a finding that the board was across a dugout. The witness Melgrin saw the accident, and swore that it occurred at a point where there was no dugout, and appellee did not contradict him on that point, but was uncertain as to whether it was over a dugout or not. He said: "I am not positive whether it was situated where the stringer was under it, or where the stringer was cut away. It was right close to the place where the dugout began." Again he said: "I am not positive whether it was on the support rail or the timber. * * * I mean by 'support rail' the guard rail attached unto the main rail. * * * I do not mean to say whether it was over the drop pit or not. It was either over the drop pit, or right near it." If, as we think, the testimony established that the accident grew out of the careless way in which the plank was placed, appellee could not recover, because it was either his negligence, or that of a fellow servant, that caused it. In a case the facts of which are very similar to those in this case, it was said by the supreme court of Pennsylvania:

"The plaintiff was an employé of the defendant company, and at the time he received the injury of which he complains he was, with other laborers, engaged in the performance of work to which he and they were assigned. He was familiar with the duties which devolved upon him, and with the appliances used in the performance of the work in which he was engaged. * * * With full knowledge of the nature of his employment and of the appliances used therein, he must be held to have assumed the risk involved in it." *Wilkinson v. Manufacturing Co. (Pa.)* 48 Atl. 810. The language may be applied with propriety in this case.

The motion for rehearing is granted, and the judgment is reversed and the cause remanded.

NEWCOOMB et al. v. COX et al.¹

(Court of Civil Appeals of Texas. Jan. 13, 1902.)

CONTRACTS—PAROL AGREEMENT FOR SALE OF LAND—STATUTE OF FRAUDS—SUFFICIENCY OF EVIDENCE—STATUTE OF LIMITATIONS—CO-TENANTS—ADVERSE POSSESSION.

1. Where one claiming title to land under an alleged executed parol agreement for sale thereof moved upon the land pursuant to a request from the owner, and occupied it jointly with the owner, and rendered her valuable services, in consideration for which, and other services to be thereafter rendered, the owner promised that upon her death the title to the land should vest in claimant, the agreement was within the statute of frauds, and could not be enforced.

2. The evidence showed that one claiming title to land under an alleged executed parol contract of sale moved upon the land of her own accord for the purpose of voluntarily assisting the owner thereof, who was old and feeble; that claimant occupied the land jointly with the owner, rendered her valuable services, and made \$8 worth of improvements on the land; and that the owner promised that at her death claimant should have the property. *Held*, that claimant's title was not established, since the evidence showed neither a present gift nor a sale.

3. Valuable improvements made on land after the death of the owner thereof in reliance on a promise, made by such owner during life to the party making such improvements, that such party should have the land at the death of the owner, could not perfect the title to the land in claimant, since to allow such an effect would abrogate the statute of wills.

4. Possession of land by a co-tenant thereof will be presumed to be a possession under the common title until notice has been given to the other tenants by the tenant in possession that the holding is adverse, or the tenant in possession does some act in regard to his holding of such unequivocally adverse character and notoriety that the other co-tenants will be presumed to have notice of the repudiation of their title; and hence mere possession of and payment of taxes on property of a decedent by her sister, who claimed the property by gift from or parol contract of sale with decedent, was not adverse possession against the other heirs of decedent, who had no notice of such adverse claim.

Appeal from district court, Houston county; John Young Gooch, Judge.

¹ Rehearing denied.

Action by H. L. Newcomb and others against Thomas B. Cox and others, J. E. Downes intervening as a defendant. From a judgment in favor of defendant Downes, plaintiffs appeal. Reversed.

H. W. Moore, for appellants. Aldrich & Lipscomb, for appellees.

PLEASANTS, J. This is an action of trespass to try title, brought by appellants against the appellees, Thomas B. Cox, German Smith, and Jo Jim. The property involved in the suit is an undivided one-third of lot No. 21 in the town of Crockett, in Houston county. The appellees above named pleaded not guilty, and also the three, five, and ten years' statutes of limitation, and further answered that they were the tenants of J. E. Downes, and asked that he be made a party. Downes answered, adopting the pleas of his tenants and codefendants, and, pleading further, averred that he had purchased the premises in question from Mrs. Mary Mortimer, and had received from her a warranty deed to same; that the said Mary Mortimer was a sister of Mrs. P. Offrey, deceased, through whom plaintiffs claim as heirs at law; and that on or about the 10th day of July, 1888, the said Mrs. Offrey, for a valuable consideration, transferred and sold said premises to Mrs. Mortimer. This answer then contains allegations of fact, which are set out for the purpose of showing a parol sale of the premises by Mrs. Offrey to Mrs. Mortimer, the substance of said allegations being that on the date above mentioned Mrs. Offrey, who was a widow, about 80 years of age, and in feeble health, and had no one to nurse and care for her, proposed to Mrs. Mortimer, who was then teaching a school in the town of Crockett, and earning thereby about \$25 per month, if she would give up said school, and live with her, that she (Mrs. Mortimer) should have a homestead interest in said premises during their joint lives, each having the same full and free use and enjoyment of same, and that upon her (Mrs. Offrey's) death the title in fee to said premises should vest solely and exclusively in Mrs. Mortimer; that it was contemplated in said proposition that Mrs. Mortimer would nurse Mrs. Offrey in sickness and assist her in all of the duties of housekeeping, both parties being poor, and unable to employ servants or assistance of any kind; that Mrs. Mortimer accepted said proposition, gave up her school, and went to live with Mrs. Offrey, and until the death of the latter, which occurred in July, 1889, continued to forego her school, which was worth, as aforesaid, the sum of \$300 per year, and lived with and rendered services to Mrs. Offrey of the reasonable value of \$300; that during the time Mrs. Mortimer so lived with Mrs. Offrey she held possession of said premises in common with Mrs. Offrey, and since the death of the latter Mrs.

Mortimer and those holding and claiming under her have held and claimed said premises in fee absolutely, and exclusive of the claims of all other persons, and have paid all taxes thereon, and kept the same insured; that, after taking joint possession of said premises with Mrs. Offrey as aforesaid, the said Mrs. Mortimer, with the knowledge and consent of Mrs. Offrey, made permanent and valuable improvements thereon prior to Mrs. Offrey's death, and has also made valuable improvements on same since her death, which latter improvements were contemplated and approved by Mrs. Offrey in her lifetime. Mrs. Mortimer intervened in the suit, and adopted as her answer the answer of the defendant Downes. The cause was tried by a jury in the court below, and resulted in a verdict and judgment in favor of the defendant Downes for the title and possession of the premises before described, and against appellants for all costs of suit, from which judgment this appeal is prosecuted.

The material facts proven upon the trial of the case are as follows: Mrs. P. Offrey is the common source of title. She died intestate on July 5, 1889, leaving as her sole heirs two sisters and a brother, F. A. Newcomb, who is now dead. The appellants are the heirs of said F. A. Newcomb. After the death of Mrs. Offrey's husband, which occurred in August, 1888, her sister, Mrs. Mary Mortimer, who was then teaching school and living in the town of Crockett, abandoned her school, and went to live with Mrs. Offrey, and during the remainder of the latter's life continued to live with her, and assisted her in keeping house, nursed her during her sickness, and performed services for her of the reasonable value of \$300. The school abandoned by Mrs. Mortimer when she went to live with her sister was worth \$300 a year. After her husband's death Mrs. Offrey expressed the desire to have her sister come and live with her, stating that she was tired of seeing her (Mrs. Mortimer) go around from pillar to post without a home, and wanted her to have a home, and if she would quit her school, and come and live with her, she should have a home with her (Mrs. Offrey) during the latter's life, and at her (Mrs. Offrey's) death all of her property, including the premises in controversy, should belong to Mrs. Mortimer. During Mrs. Offrey's life she and Mrs. Mortimer occupied the premises jointly, and Mrs. Mortimer's right to exercise equal dominion and control of the premises with that exercised by Mrs. Offrey was expressly recognized by the latter. Mrs. Mortimer testified that she had no contract with Mrs. Offrey when she quit her school and went to live with her, but that she gave up her school voluntarily, and went to live with her sister, and wait on her, if she needed it; and that after she went to live with her Mrs. Offrey told her that she should have all of her property, including the premises in question, after her

death. Prior to Mrs. Offrey's death, Mrs. Mortimer had a well on the place cleaned out, at a cost of \$5, and the fencing repaired, at a cost of \$3. These were the only improvements made on the place by Mrs. Mortimer before her sister's death. After Mrs. Offrey's death a new room was added to the house, and a stable and crib built on the lot, by Mrs. Mortimer. The room is shown to have been worth \$100, but the value of the other improvements is not shown. The appellant Frank Allbright is a minor, and all the other appellants reside in Louisiana. None of them ever had any notice of the fact that Mrs. Mortimer was claiming all of the property. The record discloses no act of Mrs. Mortimer's showing a denial of the interest of her co-tenants in the premises of which they should be required to take notice prior to the conveyance by her to the appellee Downes in 1898.

It is well settled that an executed parol contract for the sale of land, the purchase money having been paid, and the possession taken, and valuable improvements placed thereon by the vendee, will constitute a good title to the land in the vendee; but we are of opinion that neither the pleading nor the evidence in this case shows that the parol contract of sale relied on by the appellees is one that can be enforced in a court of equity. The contract alleged is not a present sale or transfer of the land, but an agreement that the title to the property should vest in the vendee upon the death of the vendor in consideration of personal services to be performed by the vendee. Such contract is within the statute of frauds, and cannot be enforced. *Sprague v. Haines*, 68 Tex. 216, 4 S. W. 371. If we concede, however, that the contract alleged was sufficient, if fully executed, to vest title in Mrs. Mortimer, the evidence wholly fails to establish such contract. Mrs. Mortimer, the alleged vendee, expressly denies the execution of the contract as alleged, and testifies that she voluntarily quit her school, and went to live with her sister, without having any contract with her, and that Mrs. Offrey gave her the property, or promised her that it should be hers when she (Mrs. Offrey) died. It is unnecessary to cite authority upon the proposition that proof of a parol gift of land will not sustain an allegation of a parol sale; but admitting, for the sake of argument, that the pleadings in this case are sufficient to entitle the appellees to have proven a parol gift of the land, followed by such possession and the making of such improvements by the donee as would perfect the title in her, the evidence is insufficient to establish such title. The testimony of

Mrs. Mortimer shows that Mrs. Offrey did not make a present gift of the premises to her, but only promised that she should have the place after her death. No valuable improvements were placed on the property by Mrs. Mortimer prior to the death of Mrs. Offrey (the cleaning out of the well and the repair of the fencing at a total cost of \$8 cannot be said to constitute valuable improvements), and it is perfectly clear that, had Mrs. Offrey, in her lifetime, repudiated her alleged gift, Mrs. Mortimer could not have enforced same as against her. Such being the case, no title to the premises had vested in Mrs. Mortimer prior to the death of Mrs. Offrey, and to hold that the erection of improvements after the death of Mrs. Offrey in reliance upon the promise of Mrs. Offrey that she (Mrs. Mortimer) should have the place at her death will perfect the title to said premises in Mrs. Mortimer would be to abrogate our statute of wills. While it is clear that Mrs. Offrey intended that her sister should have the property after her death, she failed to do what was necessary to make her intention effective, and under the facts of this case this court is powerless to effectuate such intention.

The evidence also fails to show title in appellees by limitation. The possession of a co-tenant will be presumed to be a possession under the common title, and the tenant in possession cannot claim to have held adversely to his co-tenant unless it clearly appears that he had repudiated their title. In such case mere possession and payment of taxes do not constitute adverse possession as against the co-tenant, but, to render the possession adverse, notice of such adverse holding must be given the co-tenants by the tenant in possession, or must be shown by such acts of unequivocal character and notoriety that the co-tenant will be presumed to have notice of the repudiation and denial of his title. *Phillipson v. Flynn*, 83 Tex. 580, 19 S. W. 136. As before stated, no notice was given appellants that Mrs. Mortimer was claiming the entire premises, and the only act of hers from which a repudiation of the title of her co-tenants should be presumed, shown in the evidence, was the sale to Downes, which occurred less than five years before this suit was brought. The undisputed evidence shows that appellants, as heirs at law of Mrs. Offrey, are the owners of an undivided one-third interest in the premises sued for. The judgment of the court below will be reversed, and judgment here rendered in appellants' favor of said undivided interest, and it is so ordered.

Reversed and rendered.

GULF, W. T. & P. RY. CO. et al. v.
BROWNE.¹

(Court of Civil Appeals of Texas. Jan. 6,
1902.)

SALES—PLACE OF DELIVERY—TRANSFER OF
TITLE—DAMAGE IN TRANSIT—ACTION FOR
PURCHASE PRICE—LIABILITY OF PURCHASER—
RECOVERY OVER AGAINST CARRIER—
JOINDER OF ACTIONS—VENUE—PLEADING—
EVIDENCE.

1. Under Rev. St. art. 1194, providing that no citizen shall be sued out of the county of his domicile, except in the following cases, and exception 23, declaring that suits against private corporations may be commenced in the county where the cause of action arose, an action against a private corporation domiciled in one county, on a contract arising in another county, may be brought in the latter county.

2. Defendant's agent purchased goods from plaintiff, to be delivered free on board the cars in G. county, for cash. Plaintiff delivered the goods as agreed, drawing on defendant at its domicile in H. county for the price, with bills of lading attached. The evidence showed that the parties intended the seed to become defendant's property when delivered on board the cars in G. county, and that the draft, with bills of lading attached, was drawn at the agent's request to enable him to pay cash as agreed; he not being present when they were delivered. *Held*, that the title passed to defendant when the goods were delivered in G. county, with a lien and right of possession in plaintiff until they were paid for, and that, therefore, plaintiff was not responsible for damage sustained by the goods in transit.

3. In an action for the price of goods damaged in transit, and before actual receipt by the purchaser, where the pleadings disclosed a controversy as to the ownership of the goods while in the possession of the railroad company, allegations in the answer that the goods were delivered to the railroad company in good condition, as defendant "now charges for the purposes of the alternative prayer hereafter made," and were damaged by its negligence, and defendant therefore prays that the railroad be made a party, and, if plaintiff recovers judgment against defendant, that defendant have judgment over against the company, sufficiently shows, as against a general demurrer, that defendant seeks relief against the railroad in the alternative that it is held to be owner of the goods when damaged, and liable for the price.

4. The joinder of causes of action is left, in large measure, to the discretion of the trial court.

5. In an action for the price of goods damaged in transit through the alleged negligence of a railroad company, it was proper to bring the railroad company into the suit on defendant's complaint for judgment over against it in the event that defendant was found to be owner when the damage occurred, and liable for the price to plaintiff.

6. On an issue as to the liability of a railroad company for goods damaged in an unprecedented storm, where there was no evidence as to the effect of the storm on its cars, or to show that they were broken or leaks caused as a result thereof, mere evidence that the cars containing the goods appeared to be good, close, dry cars, and the testimony of the conductor that the cars were in good condition at a certain point, was insufficient to clear the company of negligence, not excluding the possibility of their leaky condition.

7. Where goods purchased by defendant were damaged in transit through the negligence of a railroad company, and refused by him on

their delivery by a connecting line, which at defendant's instructions sold the same to third persons, the connecting line was entitled to retain its freight charges out of the proceeds of such sale.

Appeal from Gollad county court; M. W. Fowler, Special Judge.

Action by N. H. Browne against the Houston Cotton Oil Company, in which the Galveston, Harrisburg & San Antonio Railway Company and the Gulf, Western Texas & Pacific Railway Company were brought in as parties defendant on the petition of the original defendant. Judgment for plaintiff against the original defendant, and in favor of the latter over against the other defendants, and certain defendants appeal. Affirmed.

Proctors, for appellant railway company. G. E. Pope, for appellant oil company. Bell & Browne, for appellee.

GARRETT, C. J. N. H. Browne brought suit in the county court of Gollad county against the Houston Cotton Oil Company, a corporation under the laws of the state of Texas, with its domicile in Harris county, for the recovery of the agreed price of two car loads of cotton seed sold to it by the plaintiff, and delivered free on board the cars of the Gulf, Western Texas & Pacific Railway Company at Gollad for shipment to the oil company at Houston. The oil company had no agent in Gollad county. The contract of sale was made with the plaintiff by one Swift, an agent of the oil company, by telephone from Cuero. Browne required payment for the seed in cash, and Swift requested him to draw upon the oil company for the price of each car load, less one ton for the correction of weights at the defendant's mill, with bills of lading attached, which he did through a bank at Gollad. The drafts and bills of lading were sent by the bank to Galveston, and the seed were shipped on the morning of September 8, 1900. The great storm of that date having occurred, Browne directed the railway company to deliver the seed to the oil company without presentation of the bills of lading. The seed were tendered to the oil company by the Galveston, Harrisburg & San Antonio Railway Company, to which it had been delivered in course of transportation; but the oil company refused to accept them because they were rotten and unsound, and refused to pay for them. The defendant oil company first pleaded to the venue of the suit, and, further answering the plaintiff's cause of action, it denied that the contract was for the sale and delivery of the seed at Gollad, but alleged that, on the contrary, it was for the delivery of the seed on board cars in the city of Houston, Harris county, and alleged that the seed were to be sound, dry seed, for use in the manufacture of cotton seed oil, but that plaintiff, disregarding his agreement, shipped and offered to deliver to the

¹ Rehearing denied, and writ of error denied by supreme court.

defendant seed which upon their arrival in Houston were found to be rotten and entirely worthless, and the defendant refused to receive the same, and so notified the plaintiff. It pleaded further that the cars containing said seed were tendered to it by the Galveston, Harrisburg & San Antonio Railway Company, and that, immediately upon finding out the condition of the seed, it notified said railway of its refusal to accept the same, and ordered that they be sold for the best price obtainable, the proceeds to be held for whom it might concern; that the seed were sold by the defendant by the direction of the railway company, and the proceeds, \$112.88, were delivered to the railway company; and the defendant prayed that the Galveston, Harrisburg & San Antonio Railway Company might be made a party to the suit, for the purpose of determining the ownership of the money held by it. The answer also contained the following allegations making the appellant Gulf, Western Texas & Pacific Railway Company a party to the suit: "Defendant would further show to the court that heretofore, to wit, on the 8th day of September, 1900, the cotton seed referred to in plaintiff's petition were by plaintiff, N. H. Browne, delivered at Goliad, Texas, to the Gulf, Western Texas & Pacific Railway Company, a railway corporation duly incorporated under the laws of the state of Texas, and a common carrier for hire, having a local agent at Goliad, to wit, A. H. Williams, as defendant is informed, and so believes, and now charges, for the purposes of the alternative prayer hereinafter made, in good, sound condition, to be transported by said railway company, for a valuable consideration stipulated to be paid to said railway company, with dispatch and caution, from said town of Goliad, in Goliad county, to the city of Houston, in Harris county, Texas, and there to be delivered to this defendant in good, sound condition, but that said Gulf, Western Texas & Pacific Railway Company, disregarding its contract so to do, negligently failed to transport and deliver said seed with diligence, dispatch, and caution, and said seed were delayed en route to said Houston, Texas, far beyond the time ordinarily and necessarily consumed in the transportation of freight from Goliad to Houston, and that by reason of said long delay in transportation, and the negligent handling of said seed while being transported, and the defective condition of the cars in which said seed were being carried, the exact nature and character of any or of all of which this defendant is unable to state, the said seed became and were wet, heated, and spoiled, and were entirely rotten and worthless to this defendant when they reached the said city of Houston and were tendered to defendant, and on account thereof defendant refused to receive said seed from said railway company. Defendant therefore prays that said Gulf, Western Texas & Pacific

Railway Company be made a party to this suit. Premises considered, defendant prays that citation issue to said Galveston, Harrisburg & San Antonio Railway Company and the Gulf, Western Texas & Pacific Railway Company, in the terms of law requiring them, and each of them, to appear at the next term of this court, and, in the event plaintiff recovers a judgment against this defendant, that defendant have judgment over against the Galveston, Harrisburg & San Antonio Railway Company for the sum of one hundred and twelve dollars and eighty-eight cents, proceeds of sale of cotton seed ordered sold by said company, and that it have judgment over against Gulf, Western Texas & Pacific Railway Company for the balance of any judgment plaintiff may recover after deducting the amount so recovered from said Galveston, Harrisburg & San Antonio Railway Company. And defendant prays for any other or further relief which it may be entitled to in law or equity." The Gulf, Western Texas & Pacific Railway Company demurred to the plea of the cotton oil company generally,—that it did not state any cause of action against it, and that the cause of action attempted to be set up could not be joined with the original cause of action for the price of the cotton seed. It also pleaded specially that the cars into which the seed were loaded were proper and suitable cars, in no manner defective, and were thoroughly dry and clean; that, if the seed became spoiled, the condition was not due to any defect in the cars in which they were loaded. Appellant further alleged that it only became liable for the transportation of the seed from Goliad to Victoria, the end of its line, but that if it were held liable for the entire transportation to Houston, and there were any delays whereby the seed were damaged, the same were due solely to the act of God in the storm of September 8, 1900, the facts of which and the transportation were fully alleged, and in no manner to any act or omission on the part of the appellant, and neither plaintiff nor the cotton oil company should recover anything from it in this cause. The answer of the Galveston, Harrisburg & San Antonio Railway Company to the pleading of appellant against it admitted the sale of the seed as alleged by the oil company, and alleged that after deducting the freight charges, which amounted to \$97.92, there was left in its hands \$14.96, to be disposed of in accordance with the provisions of the statute. When the case was called for trial the court overruled the plea of the cotton oil company to the venue, and the demurrers of the appellant railway company, and, having heard the case without a jury, rendered judgment in favor of the plaintiff against the cotton oil company for the sum of \$463.65, the amount sued for, with legal interest, and in favor of the cotton oil company against the Gulf, Western Texas & Pacific Railway Company for the

sum of \$448.60, the amount of plaintiff's judgment, less \$14.96 for which it recovered judgment against the Galveston, Harrisburg & San Antonio Railway Company.

The conclusion of the trial court in overruling the plea to the venue of the suit is supported by the evidence, and should be sustained. According to the finding of the court, the contract was that of a private corporation, and arose in the county of Goliad. Such being the case, the defendant could be sued in that county. Rev. St. art. 1194, exception 23. Swift, the agent of the defendant, purchased the two car loads of cotton seed from the plaintiff, to be delivered on board the cars at Goliad for an agreed price, to be paid in cash, with the exception of one ton in each car to allow for loss in weight at the defendant's mill. Thus stated, the contract is clearly one to be performed in Goliad county. But it is claimed that by drawing on the defendant at Houston for the price of the seed, with bills of lading attached, the plaintiff retained in himself the title to the seed until they should be paid for, and that thus the contract was one to be performed in Harris county. No doubt, these facts would make, *prima facie*, such a contract. *Seley v. Williams* (Tex. Civ. App.) 50 S. W. 399. The evidence was sufficient, however, to overcome this *prima facie* case, and to show that, according to the intention of the parties, the seed became the property of the defendant when they were delivered on board the cars at Goliad, and that the drafts, with bills of lading attached, were drawn at the request and for the convenience of Swift, the agent of defendant, to enable him to pay cash for the seed, as he had agreed to do; he not being present when they were delivered. And the effect of the transaction was to pass the title of the seed to the defendant, with a lien and right of possession in favor of the plaintiff until they were paid for. *Craig v. Marx*, 65 Tex. 649; *Waples v. Overtaker*, 77 Tex. 7, 13 S. W. 527, 19 Am. St. Rep. 727. The finding that the seed were sound and dry when they were loaded in the cars is also supported by the evidence, and, the title having then passed to the defendant, the plaintiff was not responsible for their condition when they reached Houston, and was entitled to recover the full price for dry and sound seed.

We are of the opinion that the answer and plea of the defendant to the plaintiff's cause of action, and impleading the appellant, was sufficient, upon general demurrer, to show a cause of action against the railway company in favor of the cotton oil company for damage to the seed in transit. The petition and answer disclosed a controversy between the plaintiff and defendant as to the ownership of the seed while they were in the possession of the railway company, and construing the entire answer and plea in the

light of the issue thus made, and indulging every reasonable intendment in favor of the pleading, we think it at least argumentatively appears that the defendant sought relief against the defendant upon the alternative that it should be held to be the owner of the seed, and that the pleading was good upon general demurrer. *Wynne v. Bank*, 82 Tex. 378, 17 S. W. 918. The joinder of causes of action is left, in a large measure, to the discretion of the trial court. If, under the facts in this case, the plaintiff, asserting title to the cotton seed, had sued the railway company for damages to them in course of transportation to Houston, the railway company would hardly be denied the right to implead the cotton oil company, and have the right of ownership settled, so as to prevent a double recovery against it. The cotton oil company, on the other hand, might reasonably desire to have the liability of the railway company to it determined in the same suit in which the ownership of the seed, as between it and plaintiff, was settled. The appellant does not appear to have sustained any injury by the action of the court in requiring it to answer the complaint of the defendant. It was not drawn into a jurisdiction in which it could not otherwise have been sued, nor does it appear to have been delayed or in any manner prejudiced in being required to go to trial. Its liability to the defendant depended upon the issue of ownership between the plaintiff and defendant, and we cannot hold that it ought not to have been brought into the case. There was no error in overruling the demurrer to the joinder of causes of action.

We have considered the facts as to the storm, and the exemption of the appellant from liability for it as an act of God, and are of the opinion that the conclusion of the trial court that the appellant has failed to clear itself of negligence must be sustained. The testimony is not satisfactory as to the condition of the cars when the seed were loaded. According to the evidence of the seed men, they appeared to be good, close, dry cars; and of the conductor, Woodhouse, that the cars were in good condition when they left Victoria. This is very general evidence as to the condition of the cars, and does not at all exclude the idea that they may have been in a leaky condition. There is no evidence as to the effect of the storm upon them, or to show that they were broken or leaks caused as a result thereof.

The court properly allowed the Galveston, Harrisburg & San Antonio Railway Company to retain the money for the freight out of the proceeds of the sale of the seed, and the pleadings were sufficient to authorize a recovery by the defendant for the difference after deducting the net proceeds.

The judgment of the court below will be affirmed. Affirmed.

GRAHAM v. ST. LOUIS, I. M. & S. RY. CO.
(Supreme Court of Arkansas. Jan. 11, 1902.)

Dissenting opinion. For majority opinion, see 65 S. W. 1048.

BUNN, C. J. I think an erroneous construction has been put upon the deed from the ancestor of appellant to the appellee company, and that that construction grows out of an idea that the company has only an ordinary easement in the land, with all the restrictions incident to such a holding. A railroad being a quasi public institution, it is not clear but that it would be contrary to public policy for a railroad to purchase property, and take a deed therefor which might at any time be virtually nullified by conditions subsequent, to say nothing of conditions precedent. The theory of the court seems to be that in purchasing this land, and accepting the deed in question therefor, the railroad company bought land; its purchase to take effect on the happening of an event in the future,—its assertion of a desire to use it as for railroad purposes. The very purchase and sale between the parties was an assertion of the purposes of the deed, and the right to the possession in the railroad accrued eo instanti, and ipso facto, without further claim; and the holding the possession by the grantor for the time was, of course, under and by the permission of the grantee, and not that of tenant in common with the grantee, and on equal footing with it. From all we can determine from the evidence, the railroad company paid the full price of the land; and, if there were other consideration than the sum named in the deed, it could only be in the nature of a benefit accruing to the grantor, or to accrue to him, by the construction of the Y track or other railroad appliances. It is to my mind evident that the delivery of the deed was a constructive delivery of the possession of the land, and the grantor, his heirs and assigns, could not controvert the title or right of possession of the grantee on this state of case alone. Now, if a reasonable time had elapsed, and the grantee had yet failed to make use of the land for railroad purposes, then, if any injury had accrued to the grantor, or his heirs or assigns, he or they could bring suit for a forfeiture, and the land would revert on a successful termination of the suit. But the grantor in such case, or those holding under him, would probably have to show that the failure to use the land for railroad purposes had caused an injury to him or them, or to the public. At all events, the grantor, like any other tenant at will, must first deliver up possession before he can contest his landlord's

title; and in such a case as the one at bar he must assume the affirmative, and show that the railroad has forfeited its grant. If this be not the true theory, then the judgment of the circuit court should have been reversed outright; for, complaint being based on the deed, if the latter was operative only on a contingency like that of an assertion of the plaintiff of its present use for the land for railroad purposes, then the suit was prematurely brought, or else the plaintiff failed to make out its whole case in its complaint. In either case the circuit court's judgment as to the title was wrong, if the opinion of this court be correct. No mere claim of adverse possession on the part of the grantor, or those holding under him, could justify a suit by the grantee before it had placed itself in a position to enjoy the possession of the land; for, under the ruling of the court, it had no right to the possession by reason of holding the deed merely. Our statutes, inferentially, at least, give a construction to these right of way deeds which may throw light on the subject; for it is stated that, when a railroad company and the owner of land over which the road is to run cannot agree, a suit for condemnation may be instituted. The inference is that the agreement is that the owner shall convey just such right and interest in the land as will pass on the judgment in condemnation proceedings. Now, what is that interest? In the concluding words of section 2777, Sand. & H. Dig.: "Whereupon it shall and may be lawful for such railroad company to enter upon, and have the right of way over such lands forever." In the one case the use of the land is ascertained and determined by the courts; and in the other it is conceded to be a legitimate and proper use by the grantor, and, more than that, that the railroad company has the right to acquire the lands by condemnation proceedings, and he chooses to make his own terms of sale, rather than to intrust that matter to the courts and juries. Now, I am of the opinion that the theory of the court that this deed grants an ordinary easement, or a right with all the restrictions of a common-law easement, is erroneous. From the very definition of "easement" it appears that it is quite a different thing from the right acquired by a railroad for a right of way. And this is so patent to the courts that the most or many of them believe, hold, and define the right of a railroad thus acquiring land to be not an easement in fact, but in the nature of an easement; that is, possessing some of the elements and incidents of a technical easement, but not all.

Holding these views, I think this case should be affirmed, or at least determined as originally decided by this court.

FERGUSON v. JOSEY et al.

(Supreme Court of Arkansas. Jan. 11, 1902.)

INTOXICATING LIQUORS—STATUTES—CONSTITUTIONALITY—SEARCHES—DESTRUCTION—DAY IN COURT—CONVERSION—SEIZURE—RELEASE.

1. Acts 1899, p. 11, § 1, provides that certain judicial officers, having reasonable grounds to believe that intoxicating liquors are kept in any prohibited district, to be sold contrary to law, or have been shipped there to be so sold, shall issue a warrant directing a search for such liquors, specifying the place to be searched, and directing such liquors to be publicly destroyed, provided that any person on whose premises or in whose custody such liquor may be found shall be entitled to his day in court before said property is destroyed. *Held*, that so much of the section as provided for the seizure and destruction of the liquor, irrespective of the part authorizing a search, was constitutional.

2. The act providing for its seizure and destruction being constitutional, and such liquor having been seized and held by officers, the owners of it were not entitled to the release or value of it because it was found by a search made for it by authority of a warrant issued for that purpose, whether such search was unlawful or not.

Appeal from circuit court, Hempstead county; Joel D. Conway, Judge.

Action by William Josey and John F. Ward, partners under the name of Josey & Ward, against J. R. Ferguson and others. From a judgment against defendant Ferguson, he appeals. Reversed.

Plaintiffs' complaint alleged that on the 9th day of June, 1899, they were the owners of and in possession of a lot of intoxicating spirits, which is described in the complaint, and that defendants Ferguson, Spraggins, McCollum, and Bridewell had unlawfully taken possession of the same and converted it to their own use, to their damage in the sum of \$190.50.

J. H. McCollum and W. V. Tompkins, for appellant. J. P. Hervey and T. E. Webber, for appellees.

BATTLE, J. The defense of appellant is based upon an act entitled "An act to suppress the illegal sale of liquors and to destroy the same when found in prohibited districts," approved February 13, 1899. Acts 1899, p. 11. Section 1 of that act is as follows: "It is hereby made and declared to be the duty of the chancellors, circuit judges, justices of the peace, mayors and police judges, on information given or on their own knowledge, or when they have reasonable grounds to believe that alcohol, spirituous, ardent, vinous, malt or fermented liquors, or any compound or preparation thereof commonly called tonics, bitters or medicated liquors of any kind, are kept in any prohibited district to be sold contrary to law, or have been shipped into any prohibited district to be sold contrary to law, that they issue a warrant, directed to some peace officer, directing in such warrant a search for

such intoxicating liquors, specifying in such warrant the place to be searched, and directing such officer on finding any such liquors in any prohibited district to publicly destroy the same, together with the vessels, bottles, barrels, jugs or kegs containing such liquors: provided, that this act shall not apply to the giving away or selling of native wines where the sale is authorized by law: * * * provided, that any persons on whose premises or in whose custody any such liquor may be found under warrant of this act, shall be entitled to his day in court before said property shall be destroyed."

And section 3 is as follows: "That if any suit shall be brought against any officer or his bondsmen, or any other person, to recover for any liquors, vessels, barrels, bottles, jugs or kegs destroyed under the provisions of this act, it shall be a complete defense to such suit for such officer, bondsmen or other person to show to the satisfaction of the court or jury that such liquors so destroyed were being sold contrary to law, or were kept to be sold contrary to law, or had been shipped into any prohibited district to be sold contrary to law, or that any portion of the liquors so destroyed had been a part of any liquor so sold contrary to law, or kept to be sold contrary to law, and upon such showing being made, such officer, bondsmen or other person shall not be liable for the value of the liquor, vessels, barrels, bottles, jugs or kegs so destroyed." Acts 1899, p. 12.

Appellees insist that so much of this act as authorizes a search is in violation of the constitution and is void. Assuming that to be true, it does not follow that the whole of the act is void. For it is evident that the act, when construed as a whole, does not intend that the search provided for shall be a condition precedent to the right to seize and destroy the liquors described.

The act makes it the duty of certain officers, on conditions named, to "issue a warrant, directed to some peace officer, directing in such warrant a search for such intoxicating liquors, specifying in such warrant the place to be searched, and directing such officer on finding any such liquors in any prohibited district to publicly destroy the same." Is this part of the act constitutional? Statutes which authorize the seizure of intoxicating liquors when illegally kept for sale, under warrant issued for that purpose, and their forfeiture or destruction when it shall be established that the liquor seized was illegally kept for sale, after notice to and hearing of claimants, have generally been upheld and sustained as constitutional. *State v. Miller*, 48 Me. 576; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *State v. Wheeler*, 25 Conn. 290; *Black, Intox. Liq.* §§ 52, 53, and cases cited; 2 Tied. Cont. Pers. & Prop. pp. 825-827, § 168, and cases cited.

After making it the duty of certain officers to issue warrants directing the search for and seizure of intoxicating liquors kept in

any prohibited district to be sold contrary to law, the act provides "that any persons on whose premises or in whose custody any such liquor may be found under warrant of this act, shall be entitled to his day in court before said property shall be destroyed." This clearly means that the owner of such liquor shall be entitled to a fair and legal trial, with all the usual incidents thereto, for the purpose of ascertaining and determining whether his property has been forfeited, before it shall be destroyed; that he, or his agent in legal custody, shall have notice of the charge of the guilty purpose upon which his property is declared to be unlawfully held, a time and opportunity to prepare his defense, an opportunity to meet the witnesses against him face to face, and the benefit of the legal presumption of innocence. Without these privileges a day in court might be of little value, and it is not to be presumed that the act intended that a day in court should be a useless and worthless privilege or right, or an idle ceremony or farce.

So much, therefore, of the first section of the act as provides for the seizure and destruction of liquor kept in a prohibited district, to be sold contrary to law, without that part which authorizes a search, is constitutional. This being true, and the liquor in question being subject to seizure and destruction because it was kept to be sold contrary to law, and it still being held by the sheriff to be disposed of according to law, the owners of it are not entitled to the release or value of it because it was found by a search made for it by authority of a warrant issued for that purpose. The law imposes the forfeiture and destruction of it as a punishment for keeping it for an unlawful purpose, and it stands in an attitude like that of a criminal complaining that he has been unlawfully arrested, and insisting that he should be released and lawfully arrested before he can be tried. In the case supposed the courts held that the legality or illegality of the arrest of the prisoner does not affect the jurisdiction of the court, or his guilt or innocence. *Elmore v. State*, 45 Ark. 243. So in the case at bar the liquor in question is, by reason of the seizure of the same, within the jurisdiction of the mayor's court; and the owners of it are entitled to a trial to determine whether it has been forfeited, and is subject to destruction. Their remedy as to the liquor is at present in the mayor's court. As to remedies for unreasonable or unlawful searches, we make no decision. That is not a question in the case.

The judgment of the circuit court is therefore reversed, and the cause is remanded, with instructions to the court to overrule the demurrer to the appellant's answer, and for other proceedings.

HUGHES and RIDDICK, JJ., absent.

JACKSON et al. v. GORMAN.

(Supreme Court of Arkansas. Jan. 11, 1902.)

PROBATE COURT—CHANCERY JURISDICTION—
APPEAL—CHANGE OF ACTION—JUDG-
MENTS—COLLATERAL ATTACK.

1. The chancery courts have no appellate jurisdiction; hence a cause appealed to a circuit court from a probate court cannot be transferred to a chancery court.

2. On an appeal from probate court, the cause of action cannot by amendment in the circuit court be changed to a new and different action.

3. The judgment of a probate court on the allowance of a claim against an estate is final, after the time for appeal therefrom has passed, and cannot be attacked on an application to sell lands of the estate to pay debts.

4. Where the probate court has made an order of sale of the land of an estate to pay debts, and the time for appeal has passed, the order will be presumed to have been made on a proper showing, and cannot be attacked on the ground that such showing was not made.

Appeal from circuit court, St. Francis county; Hance N. Hutton, Judge.

Proceeding commenced in probate court by H. P. Gorman, administrator of the estate of H. Evans, deceased, to fix another day for the sale of the lands of the estate to pay debts. The demurrer of Mary E. Jackson and other heirs to the petition being overruled, and the administrator's demurrer to their answer being sustained, they appealed to the circuit court. From the judgment of the circuit sustaining a demurrer to their answer and cross bill filed in that court, and order denying their motion to transfer the cause to the chancery court, such heirs appeal. Affirmed.

Cockrill & Cockrill, for appellants. R. W. Nicholls, R. J. Williams, and Norton & Prewett, for appellee.

BUNN, C. J. This is a proceeding commenced by H. P. Gorman, administrator in succession to James Evans, first administrator of H. Evans, in the probate court of St. Francis county, on the 15th day of January, 1900, by filing a petition to fix another day for the sale of the lands of the estate of said H. Evans, deceased, to pay the debts thereof. The appellants, Mary E. Jackson and the other heirs at law of H. Evans, on leave asked and obtained, were made parties defendant to this petition; and therefore they demurred to the petition, and, their demurrer being overruled, filed their answer, to which answer the petitioner interposed his demurrer, which was sustained. The defendants appealed to the circuit court of St. Francis county, and therein filed their amended answer and cross bill, and asked that the cause be transferred to the chancery court of the district. The petitioner interposed his demurrer to this amended answer and cross bill, and resisted the motion to transfer. The demurrer of the petitioner was sustained by the court, and the motion to transfer over-

ruled, and the defendants appealed to this court.

The chancery courts are in no sense appellate courts, in this state, for there are no courts inferior to them which have chancery jurisdiction. In this case it was sought to invoke a jurisdiction on appeal which can only act by original bill, or in cases where the Code provides for a transfer of cases commenced on the law side of the circuit court by mistake to the proper docket or forum. To transfer a case on appeal, where the appellate court tries de novo, is to change the cause of action by amendment from what it was in the court of original jurisdiction to a new and different action, which we think cannot be done. Therefore there was no error in the refusal by the circuit court to transfer.

The amended answer and cross bill is mainly an attack upon the validity of the orders of the probate court allowing claims against the estate under the administration of James Evans, now also deceased, and made years ago. These allowances are in the nature of judgments, and after the expiration of the term are not within the control of the probate court. It follows that to attack them in the probate court would be in violation of all rules on the subject. The circuit court on appeal can have no other issues before it than had the probate court from which the appeal is taken. These judgments of the probate court, moreover, were final, after the expiration of the term at which they had been rendered, and could not be reopened by the probate court, and could only be called in question by appeal, or by original bill in chancery, on the allegation of fraud, accident, or mistake. *Clark v. Shelton*, 16 Ark. 474; *Dooley v. Dooley*, 14 Ark. 122; *West v. Waddill*, 33 Ark. 575; *Rogers v. Wilson*, 13 Ark. 507; *Carter v. Engles*, 35 Ark. 205.

The other paragraphs of the amended answer and cross bill constitute an attack upon the manner of obtaining the order of sale July 21, 1897, in this: that the petitioner did not make the showing required by statute to obtain the order. The probate court had acted, and, presumptively, upon the proper showing made, and the term had passed without objection raised; and the conclusion is that everything was properly done. Besides, if it be at all necessary to so state, the record does not show that there was a substantial failure on the part of the petitioner to comply with the statute.

Upon the whole case, the decree is affirmed.

RIDDICK, J., did not participate.

NELSON et al. v. HIRSCHBERG.

(Supreme Court of Arkansas. Dec. 21, 1901.)
SALE—BREACH OF CONTRACT—MEASURE OF DAMAGES.

The measure of damages for breach of contract for sale of lumber having a market

value at time and place of delivery (the purchasers refusing to take and pay for it) is the difference between the contract price and the market price (the latter being less than the former) at the time and place of delivery.

Appeal from circuit court, Lee county; Hance N. Hutton, Judge.

Action by H. Hirschberg against Nelson & Dunham. Judgment for plaintiff, and defendants appeal. Affirmed.

H. F. Roleson and Norton & Prewett, for appellants. McCulloch & McCulloch, for appellee.

BATTLE, J. H. Hirschberg commenced this action against Nelson & Dunham in the Lee circuit court on the 5th day of February, 1900, alleging in his complaint that the defendants were indebted to him in the sum of \$1,195 for money paid and advanced by him to defendants in different amounts from June 5, 1899, to September, 1899, upon a contract for the sale and delivery of lumber by defendants to plaintiff; that the contract was never performed by defendants; and that defendants refused to repay said sum of money to plaintiff.

The defendants answered, denying that they were indebted. They admitted the advancement of the money, but alleged that it was advanced on an agreement to buy of defendants, and take at an agreed price, about 1,000,000 feet of lumber; that plaintiff, after having advanced that amount of money, refused to comply with his contract, and failed and refused to take the lumber, and failed and refused to inspect and receive such of it as had been cut and tendered to him.

And for counterclaim they alleged that plaintiff had on the 5th day of June, 1899, entered into a written agreement with defendants, the particulars of which they set out in full, and made an exhibit of the contract, as part of their cross complaint. They alleged that the plaintiff, Hirschberg, failed and refused in any manner to comply with his contract, and that by reason of such failure and refusal they had been damaged in the sum of \$6,628.

The contract exhibited was as follows:

"Memorandum of agreement made and entered into this 25th day of May, 1899, by and between D. L. Nelson and J. P. Dunham, of Round Pond, St. Francis county, and state of Arkansas, party of the first part, and H. Hirschberg, of New York City, in the borough of Manhattan, and state of New York, party of the second part:

"Witnesseth, said party of the first part has this day sold to the said party of the second part, the following hardwood lumber, viz.:

"150 to 200 M feet of white oak, quarter sawed, to be composed of grades of firsts and good seconds, and to be sawed as per diagram hereto attached, and to be delivered as hereinafter mentioned; * * * 300 to

100 M feet of red oak, of the same grades and conditions as the white oak; * * * 100 to 200 M feet 1st and good 2nd white calico, or gray ash, plain sawed, as per conditions hereinafter named; 400 to 500 M feet red gum, log run.

"All the herein or foregoing various kinds of lumber must be well manufactured, sawed full thickness, and well edged; the ends carefully trimmed, or sawed off to full, even lengths. * * * And all lumber to be sawed into such thickness as the said party of the second part, or his agent, John Mulhfield, may from time to time direct. * * * The party of the second part and his agent, John Mulhfield, is to receive all lumber sawed as aforesaid every week or month, and cause payment to be made monthly for all lumber inspected and received. * * * In the event of a failure on the part of the party of the first part to fulfill this, or said agreement, then said first party is to refund all money so advanced, with interest at the rate of 8 per cent."

We have omitted the provisions in the contract about prices, piling lumber, etc.

Plaintiff filed a reply to the counterclaim, and in it admitted the execution of the contract of June 5th exhibited by defendants, but alleged that prior to that date defendants had entered into a valid contract with one Deutsch for the sale of the same lumber, which contract with Deutsch was still pending, unperformed and unrescinded; that Deutsch had instituted a replevin suit for said lumber, which suit is still pending; that defendants, by reason of the validity of the contract with Deutsch, are, and have at all times been, unable to perform their contract with plaintiff; that plaintiff refused to accept the lumber claimed by Deutsch, but has at all times been ready to accept all lumber to which defendants had clear title. For further answer, he said that defendants on the — day of October, 1890, executed a mortgage to one Rolfe on all the lumber then cut.

The issues were tried by a jury. On the trial, D. L. Nelson, one of the defendants, testified in their behalf substantially as follows: He made the contract, exhibited, with one Mulhfield, the agent of plaintiff. After defendants had about 95,000 feet of oak lumber and about 100,000 feet of gum lumber sawed and on their yard, he endeavored to induce the plaintiff to inspect, receive, and pay for it, and he failed and refused to do so, but he did advance to the defendants as much as \$1,195 upon the contract. Defendants then offered to prove by this witness the damages they suffered by this failure and refusal of the plaintiff, by showing the amount of profits they would have received if they had completed their contract and received the stipulated price; and the court refused to allow them to do so, holding that it was not the proper measure of damages, but that the measure was the differ-

ence between the contract and market prices at the place of delivery. Witness then testified that the defendants sold the lumber, and that it had a market value at their mill, which was the same it was at St. Louis or Memphis, less the cost of getting it there. After this evidence was adduced, "counsel for defendants stated that they did not think it worth while to make further efforts to introduce testimony, for the reason that the rulings of the court upon the measure of damages upon the whole contract, and upon the question of damages by reason of depreciation of the logs and lumber, were adverse to defendants.

"Thereupon the court, without objection by defendants, instructed the jury to return a verdict for plaintiff for \$1,195, with interest, and they returned a verdict for \$1,220.87."

And the defendants appealed.

Was the circuit court correct as to the measure of damages?

The contract in question was for the sale of lumber which had a market value at the stipulated time and place of delivery. After the refusal of appellee to receive and pay for it, the appellants held and disposed of it as their own property. The measure of damages in such cases (the vendors having complied with their part of the contract), as a general rule, is the difference between the contract price and the market price (the latter being less than the former) at the time and place of delivery stipulated in the contract. If the market was equal to or exceeded the contract price, there would be no actual damages, and none could be recovered. *Glasscock v. Rosengrant*, 55 Ark. 376, 18 S. W. 379; *Morris v. Cohn*, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384; 2 *Mechem, Sales*, § 1690, and cases cited; 2 *Suth. Dam.* (2d Ed.) § 647; 2 *Sedg. Dam.* (8th Ed.) § 753.

The case before us comes within the general rule.

Judgment affirmed.

WHITE SEWING MACH. CO. v. LOGAN.
(Supreme Court of Arkansas. Jan. 11, 1902.)

CONTRACTS—INTERPRETATION.

Where a sewing machine company agreed to give an agent 1 machine as a premium in case he sold 12, he was not entitled, on selling and paying for 11 machines, to retain a twelfth one as a premium.

Appeal from circuit court, Craighead county; Felix G. Taylor, Judge.

Action by the White Sewing Machine Company against J. T. Logan. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Ed L. Westbrooke, for appellant.

BATTLE, J. Appellant sued appellee for a balance due on a written contract by which it undertook to furnish and sell to appellee

sewing machines at specified prices, which he agreed to pay. Appellee admitted the contract, and alleged that he had paid all that he was owing upon it, but that an oral agreement had been substituted for it, by which appellant agreed to give him a machine as a premium if he sold 12 for it (the company) in the year 1898; that he sold 11, and was entitled to 1 as a premium; and that he had accounted and paid for the 11.

On the trial he testified that the allegation made by him as to the substituted contract was true; that appellant furnished him with 12 machines, and he sold 11, and accounted and paid for the same, and retained 1 as a premium. The value of this machine was \$20. Another witness testified that appellant agreed to give him a sewing machine if he sold 25 in the year 1898, and nothing as a premium if he did not.

The jury returned a verdict in favor of the appellee, and judgment was rendered accordingly.

We think, accepting the statement of either witness as to the terms of the contract, to be true, that appellee sold only 11 machines in the year 1898, and is not entitled to the premium offered, and is indebted to the appellant for the value of the machine retained, which is \$20.

The judgment of the circuit court is therefore reversed, and the cause is remanded for a new trial.

HUGHES and RIDDICK, JJ., absent.

NEELEY v. PHILLIPS et al. (HODGES, Intervener).

(Supreme Court of Arkansas. Jan. 11, 1902.)

LANDLORD AND TENANT—LANDLORD'S LIEN—WAIVER—MORTGAGE.

A landlord executed an instrument waiving the priority of his lien over a mortgage by his tenant given to secure a crop advance, the instrument reciting that it was made with the mortgagee; but not expressly authorizing an assignment thereof, or even mentioning assignees, successors, etc. Thereafter the mortgage was assigned, but the assignee was told by the landlord before the assignment that the waiver of the lien was personal with the original mortgagee. The latter surrendered the waiver to the landlord after the assignment. *Held*, that the waiver was personal to the original mortgagee, and would not inure to the benefit of the assignee of the mortgage.

Appeal from Crittenden chancery court; Edward D. Robertson, Chancellor.

Landlord's attachment by J. O. Neeley against J. A. Phillips and others, and A. Hodges intervenes. From a decree in favor of the intervener, the plaintiff appeals. Reversed.

S. M. Neely and H. D. Minor, for appellant. L. P. Berry, for appellees.

BUNN, C. J. J. A. Phillips rented the plantation of J. O. Neeley, in Crittenden

county, for the year 1898, for the rental sum of \$800. He was financially unable to run the plantation without assistance from others in the way of supplies, and Neeley was not so situated as to give him the desired aid. Phillips negotiated with Godfrey, Frank & Co., furnishing merchants of Memphis, Tenn., who agreed to furnish him; Neeley at the same time, as a matter of inducement to them, agreeing to waive his landlord's lien in their favor to the extent of \$1,200 in money and supplies to be furnished to Phillips for the year. Phillips then gave Godfrey, Frank & Co., through a trustee, a deed of trust conveying his crops of cotton and corn for the year, and other things, as security for such advances, and the customary promissory note for the amount; and Neeley gave to them at the same time a written waiver of his prior lien, according to their previous agreement, which is in words and figures as follows: "In consideration of one dollar to me in hand paid by Godfrey, Frank & Co., of Memphis, Tenn., the receipt of which is hereby acknowledged, and for the further consideration that Godfrey, Frank & Co. have agreed to furnish J. A. Phillips, a tenant on my plantation, with money and supplies during the year 1898 as specified in a deed of trust executed by the said Phillips in their favor, I hereby waive, in favor of said Godfrey, Frank & Co., all my lien as landlord, for rent, advances, or otherwise, on the crops to be grown during the year aforesaid, to the amount of \$1,200, and further agree that the tenant may ship to the said Godfrey, Frank & Co. all agricultural products grown upon the said premises during said year, to be sold, and the proceeds applied first to the discharge of the indebtedness secured by the deed of trust in their favor, and costs thereof, to the amount of \$1,200, and the balance, if any, to be applied to the payment of the rent due me. [Signed] J. O. Neeley." Subsequently (the date not stated) Godfrey, Frank & Co. assigned and transferred the deed of trust to one C. L. Lewis, as the agent of A. Hodges, for the expressed consideration of \$465.23, and indorsed his transfer on the back of the deed of trust. At the same time he gave back the written waiver to J. O. Neeley. Afterwards, finding that the crops on the plantation were being carried away by or for others than Godfrey, Frank & Co., Neeley brought suit by attachment on the rent claim against Phillips; and Hodges intervened, claiming a lien on the crops as assignee of the deed of trust from Godfrey, Frank & Co., and the benefits of the waiver given by Neeley to Godfrey, Frank & Co., which he contends goes with the assignment of the deed of trust, as a matter of law. This contention of Hodges constitutes the main issue in the case, and was sustained in favor of Hodges by the chancellor,—the cause having been transferred to the equity court of the district,—from which decree the plaintiff, Neeley, appealed to this court.

In *Smelting Co. v. Belden*, 127 U. S. 387, 8 Sup. Ct. 1309, 32 L. Ed. 246, the supreme court said: "Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar language of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.'" The waiver under consideration, exhibiting in its very language and terms something of the elements of trust and confidence, and having not the mere payment of money for its consideration, shows that the written waiver is not necessarily, as a matter of law, general, and as forming a part of and going with the deed of trust in the assignment thereof. This being true, the question is one of fact, going to show the real intention of the parties in making and accepting the written waiver,—whether it was understood to be personal or general in its operation. The uncontradicted testimony in the case shows that while Lewis, the agent of Hodges, was negotiating with Godfrey, Frank & Co. for the purchase of the deed of trust, he was informed in plain and emphatic terms by Neeley, in person, that the latter had made the waiver as personal to Godfrey, Frank & Co., and still insisted that such was the true intent and meaning of the same between himself and the latter. He also testifies that he so held in conversation with them; and by their conduct they corroborate Neeley in this, in surrendering the written waiver back to him after the assignment of the deed of trust to Lewis for Hodges. The knowledge of Lewis was the knowledge of his principal, Hodges, on the subject. We are therefore of opinion that it is fairly shown that the waiver was personal, and all the parties to this suit knew that fact; and, that being so, the decree of the chancellor on that issue should be reversed.

There is a question of damages, growing out of the care or alleged want of proper care of the property after the levy of the attachment. It is claimed that the sheriff intrusted the property, which appears to have been the ungathered crops in the field, to a person designated by the plaintiff as custodian, and that he suffered the stock in the neighborhood to get in and depredate upon the crops, to the great damage of the tenant and intervener. To this the custodian, as a witness, testifies, in effect, that the fencing was old and inefficient, and that he did everything in his power to preserve the crops. It appears really that there was no evidence to support the charge, and, as the attachment is shown not to have been wrongfully sued out, we see no grounds for the assessment of damages.

Reversed and remanded, with directions to enter decree in accordance with this opinion.

RIDDICK, J., not participating.

CRAWFORD v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Missouri. Jan. 27, 1902.)

PARTIES—SUBSTITUTION—APPEAL—COURTS
—JURISDICTION—REVIVAL OF ACTION—SURVIVAL.

1. Where plaintiff, having recovered judgment, appeals, as authorized by Laws 1891, p. 70, amending Rev. St. 1880, § 2246, from a motion granting a new trial, and files a short transcript, but dies before his bill of exceptions is prepared and filed, the trial court, required by Rev. St. 1890, § 727, to sign the bill of exceptions, which becomes a part of the record, may revive such action during the trial term in favor of the personal representative of the plaintiff, notwithstanding the appeal, and without being authorized so to do by a writ of *scire facias* from the supreme court.

2. Where the defendant and the administrator appear in the trial court after plaintiff's death, and stipulate that the administrator may file the bill of exceptions at the succeeding term, it constitutes a revival of the action in the administrator's favor, without further process.

3. The trial court having allowed an order reviving the cause in favor of the administrator, it is unnecessary, to sustain the appeal, to obtain a further revival in the supreme court.

4. The trial court having jurisdiction to revive the cause to enable the administrator to file the bill of exceptions, the supreme court has no jurisdiction to complete such record, or to allow a bill of exceptions for the trial court.

5. Where a cause of action for personal injury is reduced to judgment, and a new trial is granted, and plaintiff dies pending an appeal therefrom, the cause survives to his administrators, as the original cause of action was merged in the judgment, and the order granting the new trial is not final, but only suspends the judgment, which will be restored in full vigor if the order is reversed.

Marshall, J., dissenting.

In banc. Action by Thomas Crawford against the Chicago, Rock Island & Pacific Railway Company. Judgment was rendered in favor of plaintiff, but a motion for a new trial was granted, from which plaintiff appealed, but died before the determination thereof. Motion to substitute plaintiff's administrator as party plaintiff. Motion sustained.

James W. Boyd, for appellant. Brown & Dolman, for respondent.

GANTT, J. 1. On the 8th day of October, 1901,—the first day of the present term,—Lewis C. Gabbert, the administrator of Thomas Crawford, whose name appears in the transcript filed as plaintiff and appellant, filed his motion to substitute his name as appellant in lieu of his intestate, who died after taking the appeal in this case; and that motion was denied October 26, 1901, and at the present term. On November 5, 1901, he moved the court to set aside its order denying him the right of substitution, and leave was given to file briefs for and against this motion; and the motion is now submitted on these briefs, and the copies of record of the circuit court filed.

The facts of record are that on December

18, 1900, Thomas Crawford filed his petition in the circuit court of Buchanan county, alleging that by the negligence of defendant he received personal injuries and was damaged in the sum of \$2,000. At the January term, 1901, defendant filed its answer, and the said Crawford his reply. The cause came on for trial at the January term, 1901, and resulted in a verdict for said plaintiff, Crawford, for \$2,000; and judgment was rendered accordingly on the 12th day of February, 1901. Afterwards, on the 15th of February, 1901, the defendant moved the court for a new trial, alleging among other grounds that the court erred in giving instruction No. 3, asked by plaintiff, for the reason that the same is contrary to, and in violation of, article 2 of the constitution of Missouri; "that the court erred in holding that the amendment of section 28 of article 2 of the constitution of Missouri proposed by the Fortieth general assembly, providing that, in the trial by jury of all civil cases in courts of record, three-fourths of the jury concurring may render a verdict, had been lawfully submitted to the people of the state of Missouri and adopted by them at the general election in the year 1900, and had become a valid provision of the constitution of Missouri, and because said amendment was not submitted to a vote separately, but was included in and voted upon in said election with another amendment with reference to verdicts of juries in courts not of record, and because said amendment was not submitted to a vote of the people of this state in the manner provided by sections 1 and 2 of article 15 of the constitution of Missouri, in that said proposed amendment was not published in a newspaper in each county in the state for four consecutive weeks next preceding the said general election of 1900." Thereafter, on the 6th of March, 1901, and at the same term, this motion was sustained, and a new trial awarded defendant, because the circuit court was of opinion that the constitutional amendment providing that three-fourths of a jury concurring could render a verdict in the case was unconstitutional, and upon the further ground that two separate amendments were submitted together in the ballot as voted for by the people. The grounds of the motion that the verdict was against the weight of the evidence and that the verdict was excessive were withdrawn by mutual consent. To the action of the court in granting a new trial the said plaintiff, Crawford, then and there duly excepted, and then and there, on March 6, 1901, filed his affidavit for appeal from the order granting a new trial, and his appeal was allowed, and a transcript of the judgment and the order allowing the appeal was duly certified to this court by the clerk of the circuit court on the 15th of March, 1901; and the docket fee having been paid March 23, 1901, the said transcript was filed in the office of the clerk of this court. And

afterwards, on March 26, 1901, on motion of the said plaintiff, Crawford, the said appeal was advanced to be heard by this court in banc, and the same was set down for argument on April 25, 1901. In the meantime, on March 30, 1901, said plaintiff, Crawford, died; and on April 25, 1901, his death was suggested on the record of this court, and no further step was taken at the April term of this court in the cause. After the death of Thomas Crawford, Lewis C. Gabbert was appointed administrator of his estate in the probate court of Buchanan county, and qualified as such; and thereafter on May 4, 1901, and during the same term at which the judgment had been rendered in favor of said Crawford, and the motion for new trial sustained, the said Lewis C. Gabbert entered his appearance to said action in the circuit court of Buchanan county, and the defendant herein entered its appearance, and said Gabbert was made party plaintiff; and thereupon, by the agreement of both parties, said administrator was granted leave to file his bill of exceptions during the May term, 1901, of said Buchanan circuit court. And afterwards, and during said May term, said administrator filed his bill of exceptions, which was signed by the judge of said court, and made a part of the record of this cause; and thereupon, on October 8, 1901, said administrator moved this court as aforesaid to entitle this cause as "Lewis C. Gabbert, Admin'r of Thos. Crawford, Dec'd, Appellant, vs. The Chicago, Rock Island & Pacific Railroad Company, Respondent," and his right to have the same done presents the question for decision at this time.

The objection by the defendant is that the order of the circuit court purporting to revive the suit in the name of Gabbert, the administrator, was void, and said court was without jurisdiction to do so, because by the allowance of the appeal that court lost jurisdiction of said case, and had no power to permit such revivor. In the determination of this controversy, we must call to our aid certain fundamental principles. Thus, it is settled law in this state that during the whole of the term in which any judicial act is done the proceedings are considered to continue in fieri, and even after a judgment has been rendered the record remains in the breast of the judges of the court, and is therefore subject to amendment or alteration as they may direct, but they cannot, after the lapse of the term, further than by nunc pro tunc entries, make the record speak the exact truth of what did occur. *Aull v. Trust Co.*, 149 Mo. 1, 50 S. W. 289; *Rottmann v. Schmucker*, 94 Mo. 144, 7 S. W. 117; *Caldwell v. Lockridge*, 9 Mo. 362; *State v. Treasurer*, 43 Mo. 228; *McCabe v. Lewis*, 76 Mo. 296. And it is equally well determined that this power of the court over its own records, and its right to amend, correct, and complete the same, is not affected by the fact that an appeal has been taken from its judgment.

Bank v. Allen, 68 Mo. 474; Dekalb Co. v. Hixon, 44 Mo. 341; Jones v. Insurance Co., 55 Mo. 342; Gamble v. Daugherty, 71 Mo. 590. While a different doctrine was announced in Ladd v. Couzins, 35 Mo. 513, that case was subsequently discredited in Gamble v. Daugherty, supra, so that the doctrine is that, though an appeal transfers jurisdiction of the case, still the trial court has full jurisdiction and control of its own record, and may, notwithstanding the appeal, amend, correct, and perfect the same so that it shall show exactly what transpired in said court. State v. Logan, 125 Mo. 22, 28 S. W. 176. Counsel cite Burgess v. O'Donoghue, 90 Mo. 299, 2 S. W. 303; but in that case this court was called upon, not to invade the right of the circuit court to correct during the term any error in its judgment, or to prevent it from correcting by nunc pro tunc order some misprision of its clerk, but to prevent the circuit court from setting aside a sale made at a subsequent term in pursuance of its judgment rendered at a former term, and from which an appeal had been taken without a supersedeas, and the judgment affirmed in this court; and no doubt can be entertained that the judgment of this court on that state of facts was correct, but it does not in the least affect the proposition now being discussed. Proceeding a step further: By statute law, since the admission of this state into the Union, whenever, in the progress of any trial in any civil suit pending in any court of record, either party shall except to the opinion of the court, and shall write his exceptions, and pray the court to allow and sign the same, the person composing the court, if such bill be true, shall sign the same, and every bill of exceptions so signed by the judge, and filed in court or with the clerk by order of the court, shall form a part of the record of the cause in which it is filed. Rev. St. 1899, §§ 727, 732; Rev. St. 1899, §§ 2167, 730; Rev. St. 1845, c. 136, art. 4, §§ 25, 28; Rev. St. 1885, p. 464, §§ 20, 23.

Coming now to the record before us, it appears that the record was not complete when the original plaintiff, Thomas Crawford, took his appeal. A trial had occurred, in which he had recovered judgment, and a new trial had been granted, to which action he had excepted. He had the right to appeal from that order granting a new trial by virtue of the amendment of 1891 to section 2246, Rev. St. 1889. See Laws 1891, p. 70. And in order to present his appeal in an intelligible form to this court, he was entitled to have his exceptions taken in the circuit court made a part of the record of that court; and it was a part of the inherent jurisdiction of that court to complete the full record of the trial in that court, and cause its rulings therein to be embodied in a bill of exceptions approved and signed by the judge thereof, and filed in said court. This right it had irrespective of any appeal that might be taken from its said order, or

any writ of error that might issue to it from this court, without in any manner infringing upon the jurisdiction of this court to determine said case on appeal. In so doing it would merely be completing its own record. And it had the power to do this at any time during the term, or could by its order of record extend the time beyond the term. Indeed, this court has gone so far as to hold that an appellant is entitled to the whole record upon appeal, and where the court had granted time to file a bill of exceptions, and this time extended beyond the day when by law he was required to file his transcript in this court, this was considered a valid excuse for not filing the transcript, and good cause why the judgment should not be affirmed for failure to file the transcript. Investment Co. v. Martin, 125 Mo. 117, 28 S. W. 434; Cunningham v. Roush, 141 Mo. 640, 43 S. W. 161. To correct what we deem an incorrect construction of the statute in those cases, we have at this term promulgated a rule of this court that such extension of time shall not relieve the party appealing from filing his short transcript of the judgment and order granting the appeal within the time fixed by section 812, Rev. St. 1899. Rule 25, 162 Mo. vi., 65 S. W. v. And before the rulings just adverted to, it was the practice of this court to refuse to affirm a judgment for failure to file the transcript where the term of the circuit court extended beyond the time allowed to file the transcript in this court, on the theory that the circuit court might modify or set aside its judgment at any time before the final adjournment of the term at which it was rendered. What, then, results? If the original plaintiff, Crawford, had lived until the end of the January term, 1901, no doubt whatever could exist that he could have filed his bill of exceptions at any time before its adjournment. He had perfected his appeal, as we now hold he should have done, by the short method, without prejudicing his right to have his exceptions incorporated into the record, and the circuit court still retained jurisdiction for that purpose. This being true, did his death forever cut off this right? Could not his administrator have those exceptions made part of the record? We think he could, by having the cause revived in his name during that term of the court. This we say, assuming that it was a cause of action which survived to the personal representative, which we will discuss later on. The court made the order substituting the plaintiff without a scire facias to defendant to show cause against it, and the defendant, as the record shows, voluntarily entered its appearance, and agreed with said administrator that he should have until the May term to file the bill of exceptions. When the defendant thus entered its appearance and made this stipulation, the cause stood revived without further process. This has

been the rule for many years in this state. In *Farrell's Adm'r v. Brennan's Adm'r*, 25 Mo. 88, loc. cit. 94, it was held that where, upon the death of a party plaintiff, his administrator is made plaintiff, as his representative, without the appearance of the defendant, or notice to him, the irregularity will be cured by the appearance of the defendant, and the granting of a continuance on motion of defendant; Judge Scott saying, "This surely healed the error." And a similar ruling was made in *Ferris' Adm'r v. Hunt*, 20 Mo. 404, wherein it was said the defendant's appearance in court, and making a motion to set aside the order allowing the cause to be continued against him in the name of the administrator, was a sufficient appearance, without a *scire facias* to bring him into court. Here there was no objection, but a general appearance and a friendly stipulation; and, so far as consent can give jurisdiction over the person, it was ample. *Shockley v. Fischer*, 21 Mo. App. 551; *Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 728. We have, then, a court of record, with the unquestioned right to correct, amend, and perfect its record, with full power to set aside its judgment during the term, with a coincident right in the plaintiff to have his bill of exceptions filed and the record completed; and, this being so, when both parties consent, we cannot see why this revivor, had in this way, is not an incident of that court's jurisdiction to perfect its own record; and, the cause having been revived once, it is not necessary to do a useless thing, and revive it again in this court. Holding, then, as we do, that, in reviving the cause to enable the administrator to file the bill of exceptions taken in the lifetime of his intestate, the circuit court, during the term at which the judgment was taken, was proceeding within its own jurisdiction, and in no manner infringing upon any prerogative of this court, it is plain that this court was without jurisdiction to complete said record, or allow for that court a bill of exceptions to its rulings. But it is suggested, and at first blush we were inclined to the view, that the administrator should have applied to this court for *scire facias* to revive the suit; but, upon further consideration. It is plain that the bill of exceptions must have been filed at the January term, or by permission obtained at that term, and it is at once apparent that the bill could not be filed without a party plaintiff in court to file it, or take the leave to do so; and we have then this result, if we rule that the case could only be revived in this court: The administrator would have applied to this court for a *scire facias* at the April term, and under our laws it would have been returnable in October, some six months after his right to file a bill of exceptions had expired, or, in a word, he would have forever lost that right; and this conclusion would be reached by denying a legal

truism, viz., that the circuit court of Buchanan county had full jurisdiction during the January term of that cause, and could have set aside its order of appeal and its order granting a new trial, and restored plaintiff's judgment, and saying that, with all this power, it could not permit a revivor by consent, and allow a bill of exceptions to be filed.

But we are here confronted with a long list of cases to the effect that after the appeal was taken the cause was pending in this court, and the circuit court could take no step. We have seen that this in no sense interferes with the power of the circuit court over its own records to amend and perfect the same; but, as to the statement that after appeal taken the cause is pending in the appellate court, it will be found, in every one of the cases cited, this was said of the effect of the appeal after the close of the term of the circuit court; and it will be found that none of these cases denies the power of the circuit court during the term to set aside the order granting the appeal itself, or denies that during the term the circuit court had plenary jurisdiction of the case, and until the term ended it did not lose the right to correct or set aside its own judgments. The principle involved is highly important. The law and its underlying reason are stated with singular force and clearness by the supreme court of Texas, in an opinion by Mr. Justice West, in *Garza v. Baker*, 58 Tex. 483. In that case the plaintiff had obtained judgment for possession and damages, but was not satisfied with his verdict for damages, and moved to have that part of the verdict set aside. The motion was overruled, the circuit court holding it indivisible. Thereupon plaintiff gave notice of appeal from that portion of the judgment relating to damages, and the defendant gave notice of an appeal from the whole judgment, and perfected his appeal by filing his supersedeas bond, whereby he claimed the jurisdiction of the supreme court attached; and after this, during the same term, the plaintiff filed a new motion to set aside the whole judgment, which the court sustained, and thereupon the defendant applied to the supreme court for mandamus to compel the circuit court to certify his appeal, which it had refused to do, and it was denied. Said the court: "The appellate jurisdiction of this court cannot, in the nature of things, attach until the final judgment sought to be passed under review has become final and conclusive in fact, as well as in form and name. The district courts of this state have, from the nature of the broad grant to them in the constitution of large original judicial power in the fullest sense, very extensive and exclusive jurisdiction; and it must follow that the supreme court, having only appellate authority, is as powerless as the lowest court in the state to control or revise its action, either on appeal or writ of error, until the district court has ex-

hausted the power granted to it by the constitution as the trustee and sole depository of that valuable and extensive portion of the judicial authority with which it is clothed by the organic law, and in the just and lawful exercise of which it is as independent of, and free from the control of, this court as it is and ought to be free from the control of the executive and legislative branches of the government. * * * In its own peculiar sphere the district court is itself independent and supreme in its power, and this court has no authority to inquire into or revive its judgments during the period of time when by its very organization and constitution it still has the power to alter or change them. When it has performed this high duty, when its grasp upon the subject-matter of the suit has relaxed, and when its power over its orders and action ceases, by the operation of the laws and the constitution, to exist, then, and not before, can the revisory jurisdiction of this court be called into exercise by virtue of the grant of appellate judicial power given it by the constitution and laws." The court in that case expressly approved *Blum v. Wettermark*, 58 Tex. 125, in which it was said: "Yet, so far as we are advised, it was never held or claimed that such notice perfected the appeal, so as to divest the jurisdiction of the district court from its judgments during the term, or that a term of this court to which such appeal should be returned was to be fixed otherwise than by counting from the last day of the term of the district court."

Accordingly we hold that the mere taking of the appeal from the order granting a new trial, and filing the short transcript in this court, did not deprive the circuit court of its original jurisdiction to make any and all proper orders to perfect its own record during that term; and, as an incident of that jurisdiction, it had the power to permit the cause to be revived in order to let the administrator file the bill of exceptions already taken, when the administrator had appeared and asked to be substituted, and defendant appeared and consented to the order of May 4, 1901,—all during the same term. The appeal taken was returnable to the October term of this court, by express statutory provision. This conclusion is entirely in harmony with the decisions of this court in *Ess v. Griffith*, 128 Mo., loc. cit. 59, 30 S. W. 343, and *State v. Gates*, 143 Mo. 63, 44 S. W. 739. Nothing said in either of those cases contravened the right of the circuit court to have set aside its order granting a new trial, and thereby avoided both of said appeals. Those cases only hold that after the circuit court grants a new trial, and the losing party appeals therefrom, until the propriety of its action is settled on appeal the case itself cannot be tried again in the circuit court, for the reason that, if the appellate court sustains the order granting the new trial, both parties can then proceed in

the second trial without waiving any rights, and, if the trial court is reversed, judgment may be entered on the original verdict, and the expense and delay of a new trial averted; but to no other extent is the jurisdiction of the circuit court affected, or its power during the term to perfect and amend its own record denied. *State v. Lewis*, 71 Mo. 170.

2. But as the law never requires an unnecessary thing, the question arises, if the cause of action did not survive to the administrator, why should this court proceed further with this appeal, and retain defendant in court? The contention of defendant is that the cause of action died with the original plaintiff, Crawford, and thereby the action has abated, whereas the position of plaintiff is that the original cause of action for the personal injuries suffered by Crawford became merged in a judgment which survives to his personal representatives, and that the action of the circuit court in setting that judgment aside was not final, but was suspended by the appeal, and, if plaintiff is successful, that judgment will be restored to all of its vigor. We think that plaintiff is right, and that the cause did not abate with the death of Crawford, the original plaintiff, as he had obtained his verdict and judgment, and appealed from the order setting it aside. *Lewis v. Railroad Co.*, 59 Mo. 495, 21 Am. Rep. 385, is directly in point. In that case Lewis sued to recover damages for loss of a leg. He obtained a verdict and judgment in the circuit court, and, under the law then existing, defendant appealed to the general term of the circuit court of St. Louis, and the judgment was reversed, and plaintiff appealed to this court, and pending his appeal in this court the plaintiff died; and thereupon his administrator came to this court and asked to be made a party, and the defendant resisted on the ground that the suit abated on the death of Lewis. On that preliminary question this court said: "It is insisted that the action died with the person, and, as the judgment in his favor was reversed, it was thereby entirely destroyed or annihilated, and nothing was left but a simple right to recover, which would abate at his decease. Had the reversal been in a court of last resort, where it would have been necessary to have had a new trial on the merits, this effect might have been ascribed to it. The judgment in that event would not only have been annulled, but all the subsequent proceedings would have been on the original cause of action. But now, if the judgment of the intermediate court—the general term—is reversed, the effect is to restore the judgment of the trial court. *Rankin v. Perry*, 5 Mo. 601; *Strouse v. Drennan*, 41 Mo. 289. The operation of the judgment is suspended, but new life and validity may be imparted to it. Where, in a transfer of a suit from the circuit court to the supreme court, the plaintiff died after it was removed to the latter court, a motion

to abate the suit was denied, and it was revived in the name of the personal representatives. The court said that, by the recovery in the lifetime of the injured party, the claim for damages was merged in the judgment, and became a debt, with which the personal representative was chargeable; that there was a difference between a simple appeal and an appeal in the nature of a writ of error; the latter merely suspended the judgment of the inferior court, but did not annul it. *Kimbrough v. Mitchell*, 1 Head, 539. The correct doctrine seems to be that where an appeal is in the nature of a writ of error, and only carries up the case to the court of appeals as an appellate court for the correction of errors that may have intervened on the trial of the case below, and for its adjudication upon the question whether the judgment appealed from should be affirmed, reversed, or modified, and the court has no other than appellate powers, to affirm, reverse, or modify, then such appeal does not vacate, but merely suspends the operation of, the judgment." The parallel seems to be perfect, and the conclusion inevitable, if that case is to stand; and as few cases have been so often approved in all its scope and expressly on this point, we see no cause for departing from it, and for the further reason that in our opinion, as an original proposition, it correctly decides the point now under consideration. *State v. Woodson*, 128 Mo., loc. cit. 517, 31 S. W. 105; *Lewis v. McDaniel*, 82 Mo. 577. If, upon a hearing, this court should determine that the circuit court erred in granting a new trial, the order of the circuit court to that effect will be reversed, and the judgment of plaintiff in that court will be restored in full force and vigor, whereas it is now suspended by the order granting the new trial. *Coatney v. Railway Co.*, 151 Mo. 35, 51 S. W. 1036.

Our conclusion is that the motion of the administrator should be sustained.

BURGESS, C. J., and SHERWOOD, ROBINSON, BRACE, and VALLIANT, JJ., concur. MARSHALL, J., dissents.

STATE ex inf. CROW, Atty. Gen., v. EVANS.
(Supreme Court of Missouri, Division No. 2.
Jan. 13, 1902.)

PUBLIC OFFICES—CIRCUIT CLERK—RECORDER
—POPULATION—OUSTER—VESTED RIGHT
—EVIDENCE—JUDICIAL NOTICE.

1. The court will take judicial notice of the published official census of the United States, for the purpose of determining the population of the several counties of the state at a given period.

2. Rev. St. 1899, § 9079, provides that in every county having a population of 10,000 the county court may make an order separating the offices of circuit clerk and recorder of deeds. Section 9080 provides that, if such order is made within 12 months next before the time provided for the election of a recorder, the governor of the state, on being notified by the

county court, will appoint a recorder to hold office until his successor is qualified, and that the circuit clerk shall deliver to him all books and papers pertaining to the office of recorder. Held, on a petition showing that a county court had made such an order, and it appearing that the population justified the order, the court would award a writ of ouster against the circuit clerk, to compel him to deliver possession of the office of recorder to the governor's appointee; the clerk not having a vested right by virtue of his election to such office, entitling him to serve the full term for which he was elected.

Proceedings by the state, on the information of the attorney general, E. C. Crow, against William C. Evans, to oust the defendant from a public office. Writ of ouster awarded.

On the 27th day of November, 1901, the attorney general filed in this court the following information:

"In the Supreme Court of Missouri, Division No. 2, October Term, 1901. State of Missouri ex informatione Edward C. Crow, Attorney General, vs. William C. Evans. Comes now Edward C. Crow, attorney general of the state of Missouri, and informs the court that one William C. Evans has, without any legal right or authority whatsoever, since the 9th day of November, 1901, unlawfully usurped, used, held, and exercised the office of recorder of deeds within and for the county of Crawford, in said state of Missouri, which said office is an important public office, and that said William C. Evans does still unlawfully usurp, use, hold, and exercise the powers of said office within the state and county aforesaid, and since the 9th day of November, 1901, said William C. Evans has unlawfully claimed, received, and enjoyed the rights, fees, and emoluments belonging and appertaining to said office. Informant, the attorney general of the state of Missouri, by reason of the premises aforesaid, prays for judgment that said William C. Evans has unlawfully usurped and unlawfully held and exercised the said office of recorder of deeds within and for the county of Crawford and state aforesaid, and that proceedings at law be issued against said William C. Evans, and that he be ousted from said office. Edward C. Crow, Attorney General."

The writ having been duly served, the respondent, Evans, on the 21st day of December, 1901, filed the following answer and return:

"State of Missouri ex informatione Edward C. Crow, Attorney General, Informant, vs. William C. Evans, Respondent. Now at this day comes respondent, William C. Evans, and, for his amended answer to the information herein filed, denies that said respondent has, without any legal rights or authority whatsoever, since the 9th day of November, 1901, unlawfully usurped, used, held, and exercised the office of recorder of deeds within and for the county of Crawford, in the state of Missouri; denies that said respondent does still unlawfully usurp,

use, hold, and exercise the powers of said office within the state and county aforesaid since the 9th day of November, 1901; denies that said respondent has unlawfully claimed, received, and enjoyed the rights, fees, and emoluments belonging and appertaining to said office; and denies generally and specifically each and every other allegation contained in said information. And for further answer respondent avers that heretofore, to wit, on the 8th day of November, 1898, he was the legal candidate of the Republican party of Crawford county, Missouri, for the office of circuit clerk and recorder of deeds, having been duly nominated for such office by nomination legally and regularly made, as shown by the certified copy of the nominations of the Republican party of Crawford county, Missouri, herewith filed, marked 'Exhibit A,' and made a part of this answer; that on the 8th day of November, 1898, at the regular and general election held in said Crawford county, Missouri, on the said 8th day of November, 1898, said respondent, as the candidate aforesaid, and one W. J. Self, were voted upon for the candidates to the office of circuit clerk and recorder of deeds within and for said county and state; that on the 10th day of November, 1898, the result of said election, and the votes cast thereat for the various candidates for the office of circuit clerk and recorder of deeds within and for said Crawford county, Missouri, was ascertained and determined by U. S. Wright, clerk of the county court within and for said county and state, together with the assistance of Marcus Earney and U. B. Wright, two of the judges of said county court, when and where it was ascertained and determined that the respondent herein, William C. Evans, had been duly and legally elected to the office of said circuit clerk and recorder of deeds,—he, the said respondent, having received 1,421 votes, as against 1,257 votes cast for W. J. Self, his opponent,—whereupon said U. S. Wright, clerk of the county court aforesaid, issued a certificate of election declaring that said respondent, William C. Evans, had been duly elected circuit clerk and recorder of deeds within and for said county and state, and certified the same to the secretary of state within and for Missouri, as required by law. And respondent further avers that afterwards, to wit, on the 5th day of December, 1898, a commission was duly issued by the governor of the state of Missouri, and attested by the secretary of state, commissioning said William C. Evans, clerk of the circuit court within and for said Crawford county, Missouri, for a term of four years, authorizing and empowering him, the said respondent, to discharge all the duties according to law pertaining to said office, which said commission is hereto attached, marked 'Exhibit B,' and made a part of this answer; that on the 12th day of December, 1898, the respondent, William C. Evans, appeared before U. S. Wright,

clerk of the county court within and for said county and state, and qualified by taking the oath and giving bond to the state of Missouri in the sum of \$2,500, conditioned that he, the said William C. Evans, the respondent herein, should faithfully perform and discharge all the duties enjoined on him by law as recorder of deeds within and for said county and state as required by law, a certified copy of which said bond is herewith filed, marked 'Exhibit C,' and made a part of this answer. Wherefore, by reason of all the premises, and by virtue of the certificate of election, qualification, and bonding as aforesaid, respondent avers that he has, during all the times aforesaid mentioned in the information herein filed, with legal right and authority, used, held, and exercised the duties and emoluments of the office of recorder of deeds within and for said Crawford county, Missouri, and still does lawfully use, hold, and exercise the rights, privileges, and liberties of said office of recorder of deeds, as well he might and still may do so under the law, as well as receive the emoluments of the office, all of which he is ready to prove and verify as the court shall award. Wherefore he prays judgment that the said office of recorder of deeds, its rights, duties, franchises, privileges, and emoluments belonging and appertaining thereto, by him claimed, may be adjudged to him as required by law. Wm. C. Evans, Respondent.

"State of Missouri, County of Crawford—ss.: On this 20th day of December, 1901, before me, a notary public, personally came one William C. Evans, who first being duly sworn, upon his oath says that the matters and facts stated and contained in the above and foregoing answer are true and correct. A. H. Harrison, Notary Public. [Seal.] My term expires August 30, 1903."

The attorney general's reply to respondent's return is as follows:

"In the Supreme Court of Missouri, Division No. 2, October Term, 1901. State of Missouri, ex Informatione Edward C. Crow, Attorney General, Informant, vs. Williams C. Evans, Respondent. Comes now the informant herein, and, for reply to respondent's alleged answer, states that heretofore, to wit, on the 6th day of November, 1901, the county court of Crawford county, Missouri, being lawfully in session, made and spread upon its records an order dividing the office of recorder of deeds and the office of circuit clerk, which is recorded in Book —, at page —, in the county court records of Crawford county, Missouri, and a copy of which is hereto attached; that afterwards, on the 7th day of November, 1901, Governor A. M. Dockery, in pursuance of the power vested in him by law, appointed Thomas M. Wright recorder of deeds within and for the county of Crawford and state of Missouri, to hold until his successor is elected and qualified, and a copy of which said commission is hereto attached, and marked

'Exhibit B'; that afterwards, to wit, on the 8th day of November, 1901, Thomas M. Wright took and subscribed the following oath of office, to wit:

"'State of Missouri, County of Crawford. I, Thomas M. Wright, do solemnly swear that I will support the constitutions of the United States and the state of Missouri, and faithfully demean myself in office as recorder of deeds of Crawford county, Missouri. T. M. Wright.

"'Subscribed and sworn to before me this 8th day of November, 1901. U. S. Wright, Clerk County Court. [Seal.]'

—And that on said 8th day of November, 1901, in pursuance of the statutes, he made and executed, with good and lawful securities, the following official bond:

"'Know all men by these presents, that we, Thomas M. Wright, principal, and Uriah B. Wright, William Wright, Joseph N. Taylor, and L. C. Mattox, as securities, are held and firmly bound unto the state of Missouri in the sum of five thousand dollars, for the payment of which we hereby bind ourselves and our heirs, executors, and administrators. Witness our hands this 8th day of November, 1901. The condition of the above bond is such, however, that whereas, the said Thomas M. Wright was on the seventh day of November, 1901, duly appointed to the office of recorder of deeds of the county of Crawford, in the state of Missouri, and has been duly commissioned: Now, therefore, if the said Thomas M. Wright shall faithfully perform the duties enjoined on him by law as recorder, and shall deliver up all the records, books, papers, writings, seals, furniture, and apparatus belonging to the office, whole, safe, and undamaged, to his successor, then this obligation to be void; otherwise to remain in full force and effect.

"'Thomas M. Wright.

"'Uriah B. Wright.

his

"'William X Wright

mark

"'Joseph N. Taylor.

"'L. C. Mattox.

"'Witness: H. W. Ramsey.

"'Filed November 8, 1901. U. S. Wright, County Clerk.

"'Approved by the court. M. A. Clayton, P. J.'

—That said Wright was at the time of said appointment a qualified and legal voter of the state of Missouri, and a resident thereof for one year at least, a male citizen over twenty-one years of age, and in all respects duly qualified to hold the office of recorder of deeds within and for said county, and to perform the duties thereof. Informant states that upon said Thomas M. Wright being appointed, commissioned, and qualified as aforesaid, he became entitled to the office, and that respondent herein now unlawfully and unjustly deprives him thereof. Wherefore informant prays a judgment of ouster may be rendered against respondent, and

for such other orders in the premises as the court may deem proper. Edward C. Crow, Attorney General."

The motion for judgment on the pleadings is as follows:

"In the Supreme Court of Missouri, Division No. 2, October Term, 1901. State of Missouri ex information Edward C. Crow, Attorney General, Informant, vs. William C. Evans, Respondent. Comes now the informant, and prays the court to render judgment on the pleadings herein, for the reason that respondent has shown no title to the office, and on the face of the pleadings the state is entitled to a judgment of ouster against him. Edward C. Crow, Attorney General."

The duly-certified copy of the order of the county court of Crawford county made on the 6th day of November, 1901, and filed as an exhibit, and made part of the attorney general's reply, recites that it appeared to the court from the official census that Crawford county had a population of more than 10,000 inhabitants, and that the circuit clerk of said county had been, and was then, exercising and performing the duties of recorder of deeds of said county. It was thereupon ordered by the court that the office of the circuit clerk and recorder of deeds be, and the same are, divided and separated, under authority and in pursuance of sections 9079, 9080, Rev. St. Mo. 1899; and a copy of said order was directed to be certified to the governor of Missouri. The governor on the 7th day of November, 1901, appointed Thomas M. Wright recorder of deeds within and for said county of Crawford, and a commission in due form of law was delivered to him, and, as alleged, said Wright took the oath of office and filed his bond.

The Attorney General and Sam B. Jeffries, for informant. A. L. Reeves, Henry Clymer, and H. H. Harrison, for respondent.

GANTT, J. (after stating the facts). This court will take judicial notice of the published official census of the United States, for the purpose of determining the population of the several counties of this state at a given period. State v. Jackson Co. Ct., 89 Mo. 237, 1 S. W. 307; State v. Wofford, 121 Mo. 61, 25 S. W. 851. According to the census of 1900, Crawford county had 12,959 inhabitants. Section 9079, Rev. St. Mo. 1899, provides for the division of the office of circuit clerk and recorder as follows: "In every county having a population of ten thousand inhabitants, it shall be lawful for the county court to make an order separating the offices of circuit clerk and recorder of deeds." Section 9080 of the same Revised Statutes provides that, if the order mentioned in the next preceding section shall be made 12 months next before the time provided for the election of a recorder, an election shall be ordered for the purpose of filling said office, to be held not exceeding 40 days thereafter; but, if the order is made within 12 months next before the time provided for the elec

tion of a recorder, the governor of the state, on being notified by the county court of the fact, shall appoint some suitable person as recorder, who shall hold his office until his successor is duly qualified, and shall receive all the books and papers pertaining to said office, and the circuit clerk shall deliver to him all books and papers pertaining to the office of recorder. It will be observed that the order dividing the offices made by the county court, and the appointment of the governor, were within 12 months next before the time provided for the election of a recorder of said county under the statutes of this state, as that election will be held on the first Tuesday after the first Monday in November, 1902, or November 4, 1902. The county of Crawford having a population of over 10,000 inhabitants on the 6th of November, 1901, and the county court having on that day made its order separating the offices of circuit clerk and recorder of deeds, and that order having been duly certified to the governor, and the governor having appointed Thomas M. Wright recorder of deeds within and for said county until his successor shall be elected and qualified, it is obvious that the only question presented by the pleadings in this case is whether the respondent, the circuit clerk of said county, has such a vested right in and to the emoluments of the office of recorder of deeds for said county by virtue of his election as circuit clerk and ex officio recorder of deeds of said county on November 8, 1898, that the order of the county court separating said offices, and the appointment of the governor, cannot affect his title thereto. It may be well to note that the statutory provisions found in sections 9079, 9080, Rev. St. 1899, were in force long prior to the election of respondent to the office of circuit clerk and ex officio recorder in November, 1898. A person in the possession of a public office created by the legislature has no such vested interest or private property therein that it cannot be modified or repealed by the legislature which created it. Such offices are not held by grant or contract, but are subject to such modifications and changes as the legislative branch of the government may deem it necessary or advisable to enact, unless inhibited by the constitution. This is the law of this state, and generally in the United States. *State v. Davis*, 44 Mo. 181. As said by the supreme court of the United States in *Butler v. Pennsylvania*, 10 How., loc. cit. 416, 13 L. Ed. 478: "The selection of officers who are nothing more than agents for the effectuating of such public purposes is a matter of public convenience or necessity, and so, too, are the periods for the appointments of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents or to reappoint them after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being

of the public. * * * It follows, then, upon principle, that in every perfect or competent government there must exist a general power to enact and to repeal laws, and to create and change or discontinue the agents designated for the execution of those laws." Accordingly it was ruled in that case that a statute changing the term and the compensation of officers, by which the then incumbents were deprived of a part of the term they would otherwise have enjoyed, was not a violation or impairment of a contract within the protection of the constitution of the United States. That doctrine has been universally accepted by the courts of this and the other states. *Mechem*, Pub. Off. §§ 463-464; *Koontz v. Franklin Co.*, 76 Pa. 154; *People v. Van Gaskin*, 5 Mont. 352, 6 Pac. 80; *Bryan v. Cattell*, 15 Iowa, 538; *Denver v. Hobart*, 10 Nev. 28; *Prince v. Skillin*, 36 Am. Rep. 325; *People v. Squires*, 14 Cal. 13.

It necessarily follows that as Evans, the respondent, held an office created by the legislature, by virtue of being circuit clerk, the legislature had the power, in its wisdom, either to abolish the office, or to separate it from the office of circuit clerk, and provide for its occupancy either by election or appointment, without infringing any vested right which he had therein. As the county court lawfully separated the offices, and the office of recorder is no longer appendant to his office as circuit clerk, he has usurped and intruded into it since the appointment and qualification of Wright, the governor's appointee, and the writ of ouster is awarded, with the costs of this proceeding.

KRECHTER v. GROFE.¹

(Supreme Court of Missouri, Division No. 1.
Dec. 17, 1901.)

WILLS—DEVISE—BOUNDARIES—DESCRIPTION—PRIOR OCCUPANCY—"MORE OR LESS."

1. Where a will, in devising two contiguous lots of land, gives the dimensions of the westerly lot in clear and unambiguous terms, and describes the other lot as lying next east thereof, the dividing line so defined is not controlled or varied by the fact that testator had constructed insignificant improvements for the use of tenants occupying such respective lots, the dividing line of which improvements did not correspond with the line of such devise.

2. Where testatrix in her will defined the boundaries of city lots devised, to the inch, the use of the words "more or less" could not have been meant to cover a distance of eight or ten feet.

Appeal from St. Louis circuit court; Jas. E. Withrow, Judge.

Action by Philomena Krechter against Mary Grofe. From a judgment for defendant, plaintiff appeals. Affirmed.

O. J. & R. Lee Mudd, for appellant. Frank A. Hobeln, Edw. F. Garesche, and Fredk. A. Wislizenus, for respondent.

BRACE, P. J. This is an action in ejectment, tried before the court without a jury.

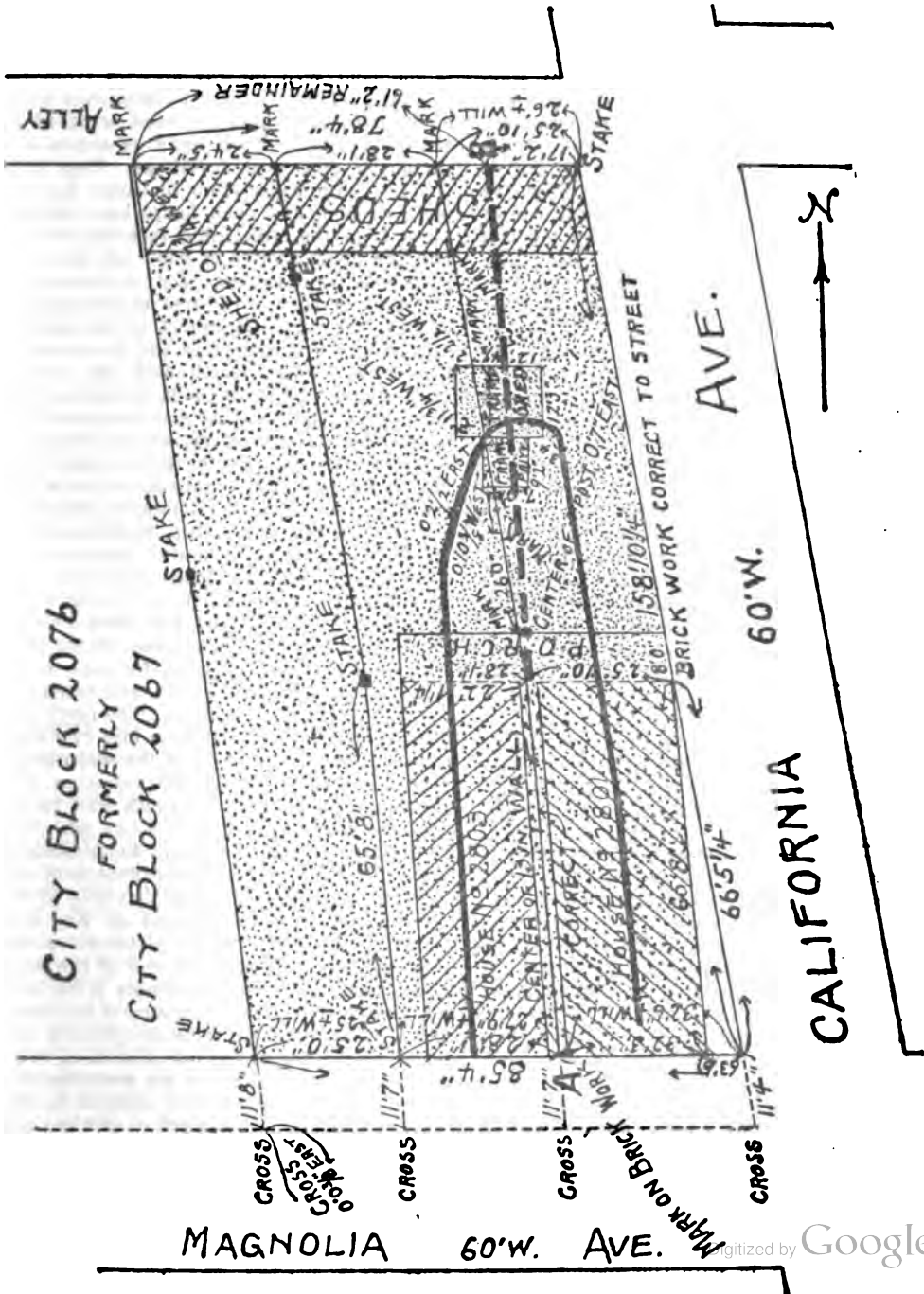
¹ Rehearing denied January 13, 1902.

in which, at the close of plaintiff's evidence, the court declared the law to be "that the facts proved by the evidence offered by the plaintiff are not sufficient to support the plaintiff's contention." Thereupon the plaintiff took a nonsuit, with leave; and, her motion to set the same aside having been overruled, she appealed.

On the 5th of May, 1896, Mrs. Theckla Krechter died seised and possessed of the real estate shown in shadings on the following plat:

"Said tract containing a front of 85 ft. 4 inches on north line of Magnolia Ave., and extending northwardly to an alley, on the south line of which it has a width of 78 feet 4 inches; said tract being bounded east by California Ave., and on the west by the lot conveyed by Phil. Krechter to Cath. Zelhen-der," etc.

By her last will and testament, duly admitted to probate, she devised this property as follows: "Second. It is my will, and I hereby direct, that all the real estate owned by



me in city block No. 2076 (alias number 2067), of the city of St. Louis, Missouri, shall be disposed of in manner following: That is to say, I devise and give to my daughter Mary Grofe that certain brick building known as number 2801 Magnolia avenue, in said city of St. Louis, Mo., together with the lot of land on which it stands, fronting 32 feet and 6 inches, more or less, on the north line of Magnolia avenue, by depth northwardly of 156 feet, more or less, to an alley 15 feet wide, on which said lot has a front of 26 feet, more or less, to have and to hold the same unto her, her heirs, and assigns, forever. The said lot is bounded as follows: On the east by California avenue, south by Magnolia avenue, and north by said alley. The foregoing devise is made, however, on the following condition: That she, the said Mary Grofe, shall pay or cause to be paid out of the land so devised the sum of thirty-five hundred (\$3,500) dollars, whereof the sum of two thousand (\$2,000) dollars shall be paid unto my said daughters Helena Krechter, now Sister Thekla, and Katharine Krechter, now Sister Johanna, share and share alike, and the balance of fifteen hundred (\$1,500) dollars thereof shall be paid to my executor herein, and shall be used for the payment of all my just debts, my funeral expenses, and the three legacies hereinafter mentioned, for \$100.00 each; and the surplus, if any, shall be paid over to the residuary legatee named in this, my will. I devise and give unto my daughter Philomena Krechter that certain brick building known as number 2803, north side of Magnolia avenue, in said city of St. Louis, Missouri, together with the lot of land thereto belonging, having a front of 27 feet and 9 inches, more or less, on the north side of Magnolia avenue, by a depth northwardly of 156 feet, more or less, to an alley 15 feet wide, and being bounded on the east by property hereinbefore devised to my said daughter Mary Grofe, and on the south by Magnolia avenue, and north by said alley: provided, however, that she, the said Philomena Krechter, shall pay or cause to be paid unto my said daughter Emma Kesselheim, out of the realty so devised, the sum of two thousand (\$2,000) dollars. I do further direct that the several amounts charged against my said daughters Mary Grofe and Philomena Krechter, respectively, as specified herein, shall be paid by each of them within 12 months from the probate of this, my will, and without interest. I devise and give unto my daughter Emma Kesselheim a certain lot of ground situated in city block No. 2076 of the city of St. Louis, Mo., fronting 25 feet, more or less, on the north side of Magnolia avenue, by a depth northwardly of 156 feet, more or less, to an alley 15 feet wide, and being bounded south by Magnolia avenue, north by said alley, east by property herein last above devised to Philomena Krechter, and west by property now or formerly belonging to Catherine Zellahaber, to

have and hold the same unto her, her heirs and assigns, forever."

This tract was all inclosed, but there were no division fences. The building No. 2801 and 2803, mentioned in the will and shown upon the plat, is a double, three-story brick house, divided into two by a partition wall. It fronts on Magnolia avenue, running back northwardly 65 feet 8 inches, at right angles with that avenue. The line of the partition wall extended back straight from the rear of the building, in that direction, to the alley, is indicated on the plat by the red¹ dotted line. The triangular piece of land between that line and the black line next west of it, is the land sued for. It appears from the evidence: That the brick building was erected in 1890, and since has been occupied by tenants using the lower story as stores, and the upper stories as dwellings. That it is supplied with water from the main in Magnolia avenue, and each house had separate pipes from the street, and separate meters; and the upper stories of each are also supplied with water-closets. That a frame porch about 8 feet wide in the rear of the building extends the whole length of it, the eastern end of which conforms to the west line of California avenue, which does not run at right angles with Magnolia avenue. That shortly after the building was erected a 7 by 9, one-story, frame privy, distant about 26 feet from the rear of the porch, was built, and in the rear of it two hydrants were placed, over which was afterwards erected a one-story, 12x12, frame shed, used as a wash house by some of the tenants. The hydrants were fed by separate pipes extended from the separate water pipes of each house, about on the line indicated by the black dotted² line on the plat; and in the rear of the tract was erected a line of sheds, for coal, wood, hay, etc., fronting on the alley, and extending the whole width of the tract. The privy was divided by a wooden partition into two compartments, and a division of the wash house was indicated by the slight projection of a wooden partition from its south wall in the direction of the hydrants, on a line with that in the privy. That, as a rule, the tenants in No. 2801 used the east compartment of the privy, the east hydrant, and that side of the wash house, and the tenants of No. 2803 used the west compartment of the privy, the west hydrant, and the west side of the wash house, and that these outhouses were built and so used under the directions of the testatrix. And upon these facts the plaintiff contends, as the dotted red line aforesaid, being an extension of the line of the partition wall of the main building to the alley, is in line with the partition of the privy, and the partition indicating a division of the wash house, and runs between the two hydrants, that this

¹ The red dotted line here referred to is the black dotted line in the plat.

² The black dotted line here referred to is the heavy line in the plat.

extended line is the east line of the lot devised to her by the will, and hence she has title to the triangular piece of land aforesaid, and the judgment of the court ought to have been in her favor. The fault of this contention is that there is nothing in the will to support it. Whatever may have been the view and intentions of Mrs. Krechter at the time she had these little, insignificant structures erected for the convenience of her tenants, is a matter of no moment, so far as the present inquiry is concerned. *Bradley v. Bradley*, 24 Mo. 811. The will itself is clear and unambiguous, and needs no explanation from extrinsic facts or circumstances. The defendant was to have house No. 2801, and the lot on which it stands, which lot she says fronts 32 feet 6 inches on Magnolia avenue, with a depth of 156 feet back to the alley, on which it has a front of 26 feet, and is bounded on the east by California avenue, south by Magnolia avenue, and north by the alley. The use of the conventional words "more or less" in this will, in which the testatrix is dealing with measurements to the inch, is of little or no significance, and could not have been meant to cover a distance of 8 or 10 feet. So that by this contention the lot thus specifically, minutely, and to the inch described in the will, is reduced from one having a front of 26 feet to one having a front of only 17 feet 2 inches, on the alley, while the lot given to the plaintiff, and which was to be bounded on the east by the lot given to the defendant as thus described, is correspondingly enlarged. There is nothing in the will to warrant such a construction, and the court was right in refusing to adopt it.

The judgment of the circuit court is affirmed. All concur.

STATE ex inf. FOLK v. TALTY et al.
(Supreme Court of Missouri, Division No. 2.
Jan. 14, 1902.)

QUO WARRANTO—INSTITUTION OF ACTION—
DISCRETION.

Under Act March 20, 1872 (Sess. Acts 1871-72, pp. 66, 67; Rev. St. 1890, § 4457), providing that in case any person shall usurp an office the attorney general or the circuit attorney shall exhibit an information in the nature of a quo warranto at the relation of a person desiring to prosecute it, and when it has been filed it shall not be dismissed without consent of the relator, the exhibiting of the writ is within the discretion of the attorney general or circuit attorney, and the exercise of such discretion can be interfered with only for clear abuse thereof.

Application by the state, on the information of Joseph W. Folk, for writ of prohibition to John A. Talty and William G. Buechner. Granted.

Edward C. Crow, Atty. Gen., for relator.
C. W. Rutledge, for respondents.

BURGESS, J. On the 18th day of June, 1901, Joseph W. Folk was circuit attorney

within and for the city of St. Louis, and Thomas J. Buckley was a member of the house of delegates from the Twenty-Fourth ward in said city. And on that day the state of Missouri, at the relation of William G. Buechner, presented a petition to one of the judges of the circuit court of said city (the Honorable John A. Talty), in which he alleged that he was legally elected to the position then and now unlawfully held by said Thomas J. Buckley, and requested that a writ of mandamus be issued, commanding Joseph Folk, as circuit attorney for said city, to exhibit an information against said Thomas J. Buckley to oust him from his seat as a member of the house of delegates as aforesaid; and in pursuance of said request the Honorable John A. Talty, as judge of the circuit court of said city as aforesaid, did on the day named, in vacation, issue an alternative writ of mandamus, commanding Folk, as circuit attorney, to sign and exhibit an information in said Talty's court, in the nature of a quo warranto, at the relation of William G. Buechner, against Buckley, requiring him to show by what authority he used and enjoyed the rights, liberties, and privileges as a member of the house of delegates of the city of St. Louis from the Twenty-Fourth ward. On the 20th of June, 1901, Folk made application to the presiding judge of division No. 2 of the supreme court for a writ of prohibition to prohibit Judge Talty from further proceeding with the case, which said application was as follows:

"In the Supreme Court of the State of Missouri, April Term, 1901, Division No. 2 Thereof. State ex rel. Joseph Folk, Relator, vs. John A. Talty and William G. Buechner, Respondents. Relator states that he was on the 6th day of November, 1900, duly elected circuit attorney within and for the Eighth judicial circuit of Missouri, and thereafter, in due time and in the proper manner, legally qualified, and became and is now the circuit attorney for the Eighth judicial circuit, and exercises the powers and duties of said office; that John A. Talty is one of the judges of the Eighth judicial circuit of the state of Missouri, commissioned and legally qualified and acting as such, presiding over division No. 7 of the circuit court of the city of St. Louis; that William G. Buechner is a citizen of the city of St. Louis and the state of Missouri. Relator states that on the 17th day of June, 1901, there was filed in the office of the clerk of the circuit court in the city of St. Louis, and presented to the Honorable John A. Talty, judge of division No. 7 of the circuit court, in vacation, at the June term, 1901, on the 18th day of June, 1901, a petition praying for writ of mandamus, which petition is in words and figures following, to wit:

"State of Missouri, City of St. Louis—ss.: In the Circuit Court, June Term, 1901. Petition for Mandamus. State of Missouri, at the Relation of William G. Buechner, Peti-

tioner, vs. Joseph W. Folk, Circuit Attorney within and for the Eighth Judicial Circuit, Defendant. (1) The petition of William G. Buechner respectfully represents to the court that on Tuesday, the 2d day of April, 1901, at the city of St. Louis, Missouri, an election was duly held for certain officers in and for said city, including a member of the house of delegates of the municipal assembly from each ward of said city for a term of two years from and after that date. (2) That at said election William G. Buechner, the petitioner, one Thomas J. Buckley, one Felix Lawrence, and one M. Ballard Dunn were candidates, and the only candidates in the Twenty-Fourth ward of said city, for member of the house of delegates aforesaid from said ward; that your petitioner received the highest number of legal votes cast in said ward for said office at said election; that the judges of election in the various precincts of said ward duly canvassed the votes cast for said office at said election, and certified the same results to the board of election commissioners for the city of St. Louis, Missouri; that the said board of election commissioners, in accordance with the law, canvassed and added up the correct returns of the judges of election of the Twenty-Fourth ward for member of the house of delegates from said ward, and found and declared, according to law, that your petitioner had received 1,827 votes, Thomas J. Buckley 1,822 votes, Felix Lawrence 922 votes, and M. Ballard Dunn 18 votes, for said office, and that your petitioner, having received the highest number of votes cast for said office, was the duly-elected candidate; that the said board of election commissioners on the 6th day of April, 1901, issued to your petitioner a certificate of election for said office as provided and required by law; that on the 6th day of April, 1901, your petitioner took and subscribed the oath of office before the city register of said city, as prescribed by the charter of said city; and that he then was and became qualified in every respect to sit and act as a member of the house of delegates aforesaid from the said Twenty-Fourth ward. (3) Petitioner states that at the time of his said election he possessed and he now possesses all of the qualifications required by the charter of the city of St. Louis to be possessed by members of said house of delegates; that at the time of his election he had attained the age of at least 25 years; had been a citizen of the United States and of the city of St. Louis at least three years, and of the Twenty-Fourth ward of said city for at least two years, next before said election; he is not, and had not at that time been, directly or indirectly interested in any contract with the said city, or with any department or institution thereof; was not indebted to the city or state on account of any tax; and has never been convicted of malfeasance in office, bribery, or other corrupt practices or crimes; and that he had paid city

and state taxes for two years next before said election. (4) Petitioner further states to the court that on the organization of the house of delegates aforesaid, to wit, on the 6th day of April, 1901, the duly-appointed committee on credentials of the members of said house of delegates submitted a report to said house in which it was stated that certain members (among them, William G. Buechner, your petitioner, from the Twenty-Fourth ward) had received their certificates of election from the election commissioners of said city, and had duly qualified before the city register of said city, which report was unanimously adopted by said house of delegates, and spread on the journal of the proceedings of said house; that thereby petitioner was admitted to, and thereafter, and until the time hereinafter stated, did occupy his seat in, said house of delegates as member thereof from the Twenty-Fourth ward of said city, and was fully recognized by said house of delegates as a lawfully elected member thereof; that he was called upon and permitted to vote on various measures and proceedings had in said house, and in every way, manner, and form declared and proclaimed to be a member of said house, and fully confirmed in his right and title to his seat in said house as such member. (5) And petitioner further states to the court that thereafter, to wit, on the 9th day of April, 1901, said Thomas J. Buckley, conspiring with a majority of the members of said house of delegates to unlawfully deprive petitioner of his seat in said house of delegates, caused and procured to be brought before said house a contest of the election of your petitioner, said Buckley claiming therein to have received a higher number of votes than petitioner for said office at said election, and thereupon said house of delegates, in pursuance of the conspiracy aforesaid, against the protest of petitioner, and without authority of law, took and assumed jurisdiction to judicially determine said contest of election of said Buckley against the petitioner; that said house of delegates, without previous notice to petitioner, and without giving petitioner an opportunity to be heard, or to defend his rights to his said seat, by a mere majority vote declared petitioner's seat vacant, and that said Buckley had been duly elected thereto, and that he had received a majority of votes at the election aforesaid for said office, and ejected petitioner from his seat, and installed said Buckley therein. (6) Petitioner states that, from that time until the filing of this petition, the said Thomas J. Buckley, without legal warrant, certificate of election, grant, or right whatsoever, has held, used, and enjoyed the office of member of the house of delegates from the Twenty-Fourth ward; that he has usurped, intruded into, and unlawfully held said office, and still does usurp, intrude into, and unlawfully hold and exercise said office at the city of St. Louis, Missouri, aforesaid, in contempt of and to the

great damage and prejudice of the authority of the state of Missouri, and to the great and irreparable damage and prejudice of this petitioner. (7) Petitioner further states that the defendant Joseph W. Folk is the circuit attorney within and for the Eighth judicial circuit of the state of Missouri; that petitioner applied to said circuit attorney, and requested him, in his official capacity, to exhibit to this honorable court an information in the nature of a quo warranto, at the relation of this petitioner, against the said Thomas J. Buckley, according to the statute in such cases made and provided, to oust said Buckley from petitioner's seat in said house of delegates; that petitioner presented and submitted to said circuit attorney a petition in due form, in the nature of a quo warranto, containing a statement of the facts of the usurpation of said Buckley as aforesaid, and stated that he desired to prosecute such a proceeding against said Buckley at his own expense, and that he had employed counsel to prosecute such proceeding in his own behalf, but that said circuit attorney, in violation of his official duty to the state of Missouri, and of his duty to your petitioner as a citizen and taxpayer and the rightful claimant of said office, and with a wrongful determination to deprive petitioner of said remedy, and to leave him without remedy in the premises, refused, and still refuses, so to do. Petitioner states that he has applied to Edward C. Crow, the attorney general of the state of Missouri, and requested him to exhibit said information in his official capacity at the relation of petitioner, and stated to him that he desired to prosecute the same at his own expense, and had employed counsel to act in his own behalf, but that said attorney general has refused, and still refuses, so to do. (8) Petitioner states that he is without further remedy in the premises, save and except by the compulsory process of this honorable court. Wherefore petitioner prays that by writ of mandamus the said defendant Joseph W. Folk, circuit attorney within and for the Eighth judicial circuit aforesaid, be commanded and required to sign and exhibit in this court an information in the nature of a quo warranto at the relation of this petitioner against the said Thomas J. Buckley, to require him to show by what authority he claims to have, use, and enjoy the office, rights, liberties, and privileges of member of the house of delegates of the municipal assembly of the city of St. Louis, Missouri, from the Twenty-Fourth ward thereof, and for such other process, orders, and remedies in the premises as may to the court seem meet and proper. C. W. Rutledge, Attorney for William G. Buechner, the Petitioner.

"State of Missouri, City of St. Louis—ss.: William G. Buechner, being duly sworn, upon his oath states that the matters and things stated in the foregoing petition are

true, to the best of his knowledge and belief. Wm. G. Buechner, Petitioner.

"Subscribed and sworn to before me this 17th day of June, A. D. 1901. My term expires January 29th, 1908. Albert C. Blanke, Notary Public. [Seal]"

—And that afterwards, on the 18th day of June, 1901, said John A. Talty, acting as judge of division No. 7 of the circuit court of St. Louis city, in vacation, at the June term, 1901, issued an alternative writ of mandamus commanding the said Joseph W. Folk, circuit attorney of the Eighth judicial circuit of the state of Missouri, to sign and exhibit an information in said court in the nature of a quo warranto, at the relation of William G. Buechner, against the said Thomas J. Buckley, to require him to show by what authority he claims to have, use, and enjoy the office, rights, liberties, and privileges of a member of the house of delegates of the municipal assembly of the city of St. Louis, Missouri, from the Twenty-Fourth ward thereof, or to appear before said circuit court in court room No. 7 on Friday, June 21, 1901, at ten o'clock a. m., then and there to show cause, if any, why said Joseph W. Folk should not so file said information in the nature of a quo warranto aforesaid. Relator states that the object and nature of said proceedings of mandamus is to compel relator, in his official capacity as circuit attorney, to file an information in quo warranto to determine a contested election for membership in the house of delegates in the Twenty-Fourth ward between William G. Buechner and Thomas J. Buckley; that said election, contested under article 3, § 8, of the charter of the city of St. Louis, has been determined by said house of delegates; and that under said article 3, § 8, of the charter of the city of St. Louis, each house of the municipal assembly 'shall be the sole judge of the qualification, election and return of its own members' (2 Rev. St. 1899, p. 2481), and each house is, under the authority vested in it by the charter, legally authorized to declare all that constitutes a legally elected member of each of said respective bodies of the municipal assembly. Relator states that, under the constitution and the laws of the state of Missouri, the relator is vested with an official discretion in determining whether or not he will file a quo warranto proceeding against any person for usurping a public office, and that relator did exercise his discretion in this matter, and investigated the question, and decided that it was his duty to refuse to institute said quo warranto proceedings to oust Thomas J. Buckley as a member of the house of delegates, for the reason that, under the constitution and laws of the state of Missouri, after the house of delegates had taken up the matter of the contest between Buechner and Buckley for the seat in the Twenty-Fourth ward of the city of St. Louis

in said house, and determined the same, the said finding of said house of delegates, and their determination as to the right and authority of Buechner and Buckley in the matter of said contest, could not be reviewed in a quo warranto proceeding. And relator states that, under the constitution and laws of the state of Missouri, it is made the duty of the supreme court to see that the circuit court of the city of St. Louis, and each division thereof, and the judges thereof, as well as other inferior courts, keep within the bounds and limits of their respective jurisdictions prescribed for them by the constitution and statutes of the state. Relator states that the proceedings in the circuit court of the city of St. Louis before John A. Talty, as judge of division No. 7 thereof, in vacation, are in violation of the constitution and laws of the state of Missouri, and to the manifest damage, prejudice, and grievance of the relator and the public, and are wholly illegal and void. Relator states that the proceedings aforesaid now being had in the circuit court of the city of St. Louis, division No. 7 thereof, is a direct attempt on the part of said circuit court to try in a quo warranto proceeding a contested election case, and determine the right to a seat in the house of delegates from the Twenty-Fourth ward in the city of St. Louis, and that under the constitution and laws of this state a quo warranto proceeding is not a contested election case, within the meaning of the constitution. Relator further states that said proceedings in the circuit court of the city of St. Louis, division No. 7 thereof, is a direct, illegal, and unauthorized attempt to determine the right of William G. Buechner to a seat in the house of delegates from the Twenty-Fourth ward of the city of St. Louis. Relator further states that said proceedings in said circuit court in the city of St. Louis, division No. 7 thereof, is a direct and unauthorized attempt on the part of the circuit court of the city of St. Louis, division No. 7 thereof, and John A. Talty, as judge thereof, in vacation, to direct and compel relator, as circuit attorney of the Eighth judicial circuit of Missouri, to file a proceeding in quo warranto to determine the right to a public office, and that the authority and power to determine when and under what circumstances relator will file a quo warranto to determine the right to a public office is by the constitution and laws of Missouri vested in the circuit attorney of the city of St. Louis, and that relator necessarily has an official discretion to exercise to determine the question as to when a quo warranto should be filed, and therefore said effort of said circuit court, and said John A. Talty, as judge thereof, in vacation, is an unwarranted and unlawful usurpation of power and jurisdiction not possessed by said circuit court in the city of St. Louis, division No. 7 thereof, nor by said John A. Talty, as judge thereof, in vacation. Relator states that said circuit

court of the city of St. Louis, division No. 7 thereof, nor John A. Talty, as judge thereof, in vacation, has no power or authority by mandamus to compel relator to file quo warranto proceedings to determine the question as to whether or not William G. Buechner is entitled to a seat in the house of delegates from the Twenty-Fourth ward of the city of St. Louis. Relator states that it belongs peculiarly to the supreme court to put official construction upon the statutes of the state of Missouri, and the constitution thereof, and the common law of this state, and that it is the duty of the supreme court to prohibit the circuit court, or any division thereof, or any judge thereof, in the city of St. Louis, or any other inferior court, from placing any construction on the statute or laws or constitution of the state of Missouri different from that which is put upon them by the supreme court; that the said circuit court of the city of St. Louis, and all other courts of the state of Missouri, are to expound and construe the statutes and laws of this state as the supreme court shall say the same ought to be expounded, in order that there may be prevented the disorderly and disgraceful spectacle of the officers of the different courts, with different processes, coming in direct collision, and in order that the judiciary shall not unlawfully and illegally interfere with the executive and legislative branches of the state government acting within their proper sphere and according to law. And to this end it is the duty of this court to prevent a misconstruction of the statutes by prohibition, and this court has power and jurisdiction so to do. Wherefore relator prays the remedy of a writ of prohibition against John A. Talty and William G. Buechner, and that the same be issued and directed to them, prohibiting them from further continuing the mandamus proceedings styled, 'The State of Missouri, at the Relation of William G. Buechner, Petitioner, vs. Joseph Folk, Circuit Attorney within and for the Eighth Judicial Circuit, Defendant,' in the circuit court of St. Louis, division No. 7 thereof. Relator further prays that the order heretofore issued by John A. Talty, judge of division No. 7 of the circuit court of the city of St. Louis, in vacation, ordering and commanding said Joseph W. Folk, circuit attorney of the Eighth judicial circuit of the state of Missouri, to sign and exhibit in said circuit court an information in the nature of a quo warranto at the relation of William G. Buechner, petitioner, against the said Thomas J. Buckley, to require said Buckley to show by what authority he claims to have, use, and enjoy the office, rights, liberties, and privileges of a member of the house of delegates of the municipal assembly of the city of St. Louis, Missouri, from the Twenty-Fourth ward thereof, or to appear before said circuit court, in court room No. 7, on Friday, June 21, 1901, at ten o'clock a. m., then and there to show cause, if any,

why relator should not file said quo warranto proceedings, be set aside and held for naught, and that the said respondents, and each of them, be prohibited from taking any further action in the premises aforesaid.

"Edward O. Crow,

"Attorney General, for Relator."

The writ was granted, and the respondents have filed the following returns:

"In the Supreme Court of Missouri, Division No. 2. State ex rel. Joseph W. Folk, Relator, vs. John A. Talty and William G. Buechner, Respondents. Now at this day comes respondent John A. Talty, and, for his return to the order to show cause why a writ of prohibition should not issue as prayed at the suggestion of relator herein, admits that he did, acting as judge of division No. 7 of the circuit court of St. Louis city, in vacation, at the June term, 1901, issue an alternative writ of mandamus commanding relator, Joseph W. Folk, to exhibit an information in said court, in the nature of a quo warranto, at the relation of William G. Buechner and against Thomas J. Buckley, or to appear before said circuit court in court room No. 7 on Friday, June 21, 1901, at 10 o'clock a. m., and show cause why he should not do so; and respondent further states that he made said order so that he might hear the parties in court, and there determine whether, under the law and the facts, he should make the order prayed for against relator; that, since the order made by this honorable court, respondent has refrained from all action in the premises, and holds himself in readiness to comply with any orders made by it. Wherefore respondent prays that the writ of prohibition be not issued against him as prayed by relator, and that he go hence with his costs. John A. Talty, pro se."

"In the Supreme Court of Missouri, April Term, 1901, Division No. 2. State ex rel. Joseph W. Folk, Relator, vs. John A. Talty and William G. Buechner, Respondents. Comes now respondent William G. Buechner, and, for answer and return to the petition and the writ of prohibition heretofore issued: (1) Admits that the relator herein is the circuit attorney within and for the Eighth judicial circuit of Missouri. Admits that John A. Talty is one of the judges of the Eighth judicial circuit, presiding over division No. 7 of the circuit court of the city of St. Louis, and this respondent is a citizen of the city of St. Louis and state of Missouri. Admits that he filed the petition for a writ of mandamus against relator, as set out in the relator's return, in the circuit court of the city of St. Louis, Missouri, and that said petition was presented to the Honorable John A. Talty, judge of division No. 7 of said circuit court. Admits that said John A. Talty, as judge of said division of said circuit court, upon presentation of said petition to him, issued an alternative writ of mandamus against the relator herein, as

circuit attorney within and for the Eighth judicial circuit, commanding him to sign and exhibit an information in the nature of a quo warranto at the relation of this respondent against Thomas J. Buckley, or to show cause why he should not so do, as alleged in relator's petition. (2) Denies that the object and nature of said proceedings in mandamus were to compel the relator herein to file an information in quo warranto to determine a contested election for member of the house of delegates in the Twenty-Fourth ward between William G. Buechner and Thomas J. Buckley, as alleged in relator's petition herein, but states that said proceedings were to compel relator to exhibit an information in the nature of a quo warranto at the relation of this respondent against said Buckley, to require him to show by what authority he holds and executes said office, and to oust him from said office if he failed to show any legal authority for holding same. Denies that the relator herein is, under the constitution and laws of Missouri, vested with an official discretion in determining whether or not he will file an information in the nature of a quo warranto at the relation of any person desiring to prosecute against any person usurping a public office; and this respondent states that the statute in such cases makes it mandatory on the relator, as the incumbent of the office of circuit attorney, to exhibit such an information; and the circuit court of the city of St. Louis, Missouri, is fully empowered under the constitution and laws of Missouri, to compel him, by mandamus, to perform such a duty imposed on him by law. Denies that the mandamus proceedings aforesaid are in violation of the constitution and laws of Missouri, to the manifest damage, prejudice, and grievance of the relator and the public, and that same are wholly illegal and void. Denies that said proceedings are a direct attempt on the part of the circuit court to try in a quo warranto proceeding a contested election case, and to determine the right to a seat in the house of delegates from the Twenty-Fourth ward of the city of St. Louis. Denies that said proceedings are a direct, illegal, and unauthorized attempt to determine the right of this respondent to his seat in the house of delegates aforesaid. Admits each and every allegation set out in relator's petition not controverted in this return. (3) This respondent, for further answer and return, states that he is the duly-elected member of the house of delegates of the municipal assembly of the city of St. Louis, Missouri, from the Twenty-Fourth ward; that he was so elected at the election held April 2, 1901, in the city of St. Louis; that he received the highest number of votes for said office; that the board of election commissioners for the city of St. Louis duly issued to him his certificate of election; that he took the oath of office before the city reg-

later of said city; that he was duly installed in his office at the organization of said house of delegates; that he had all of the qualifications for said office required by law; that the house of delegates, after his installation in said office, and at the instance of said Thomas J. Buckley, and without any notice, or requiring any notice to be given to the respondent, undertook to try and determine a contest of election of this respondent instituted in said house by said Buckley; that said house of delegates, against the protests of this respondent, and without giving him an opportunity to be heard, arbitrarily decided said contest against this respondent, ousted him from his office, and installed said Buckley therein; and that said Buckley from that time to the present time has held and executed said office. (4) This respondent states that the action of the house of delegates aforesaid, in trying and determining an election contest against one of its members, ousting him and installing another therein, was without warrant or authority of law; that its action in the premises was an unlawful infringement and usurpation by a legislative body upon the functions and powers of the judiciary of the state; that the trial and determination of an election contest of a municipal officer is a proceeding under the constitution and laws of Missouri for the determination of the judicial branch of the state government. (5) This respondent states that the constitution of the state of Missouri provides that the powers of the government shall be divided into three branches,—the legislative, the executive, and the judicial,—and that each shall be confided to a separate magistracy, and that no branch shall exercise the powers properly belonging to any other branch; that the action of the house of delegates aforesaid, being the trial and determination of a matter properly belonging to the judiciary by a legislative body, was a violation of this provision of the constitution, and therefore void. (6) This respondent further states that the constitution of the state of Missouri further provides that the trial and determination of contested elections of municipal officers shall be by the courts of law; that the action of the house of delegates aforesaid being the trial and determination of an election contest of a municipal officer by a legislative body, was in violation of this provision of the constitution, and therefore void. (7) This respondent further states that if the house of delegates, as alleged in relator's petition herein, undertook to try and determine the election contest of said Buckley against this respondent under and by authority of the provisions of article 3, § 8, of the charter of the city of St. Louis, which provides that each house 'shall be the sole judge of the qualifications, election, and return of its own members,' and if said section does undertake to give the house of delegates the power to try and determine election contests of its own mem-

bers, said section is in conflict with the provisions of the constitution above mentioned, and is therefore void, and any act of the house of delegates thereunder is wholly void; that the article in the constitution of Missouri which authorizes the promulgation of the charter of the city of St. Louis by the people of St. Louis, expressly provides that 'such charter shall always be in harmony with and subject to the constitution and laws of Missouri.' Article 9, § 16. (8) This respondent further states that under the constitution and laws of Missouri the circuit court of the city of St. Louis is vested with supervisory control over the action of inferior tribunals, and, if the house of delegates aforesaid had power to determine an election contest, its action was judicial in its nature, and that of an inferior tribunal. Its action was subject to the supervisory control of the circuit court aforesaid, and the circuit court of the city of St. Louis has the power in quo warranto proceedings to oust said Buckley from said office if it finds him to be an intruder. (9) This respondent states that the action of the house of delegates aforesaid, being without legal authority, was wholly void; that the said Thomas J. Buckley, holding said office solely by reason thereof, and not being the duly-elected candidate to said office, became, was, and is a usurper and intruder into said office, and he unlawfully holds and executes the same. (10) This respondent further states that the laws of the state of Missouri provide that in case any person shall usurp, intrude into, and unlawfully hold and execute any office, the circuit attorney in the jurisdiction in which the action arises shall exhibit to the circuit court an information in the nature of a quo warranto at the relation of any person desiring to prosecute the same; that this respondent applied to the relator herein, and stated all of the facts of the usurpation of said office by said Buckley, and requested the relator to exhibit an information in the nature of a quo warranto at this respondent's relation against said Buckley, and stated that he desired to prosecute the same at his own expense, but that the relator refused so to do; that this respondent applied to Edward O. Crow, as attorney general of the state of Missouri, and requested him to exhibit said information in the nature of a quo warranto at this respondent's relation, and that he refused so to do; that he again applied to the relator herein, and the relator again refused to exhibit said information; and, being without further remedy in the premises, this respondent applied for the writ of mandamus aforesaid against the relator. (11) This respondent further states that if a discretion is vested in the circuit attorney as to whether or not he will exhibit an information in the nature of a quo warranto at the relation of any person desiring to prosecute, that such discretion can only be exercised in a case of disputed facts; that

in this case there is no dispute as to the facts, and mandamus will lie to control an erroneous conclusion of law on the part of any discretionary officer, where the matter before him is preliminary to the action or the trial of the action proper, and is a question of law on a stated set of facts. (12) And this respondent further states that the relator herein, the said Thomas J. Buckley, and a majority of the members of the house of delegates aforesaid, belong to the same political party or organization, and that said party or organization is politically opposed to the party to which this respondent belongs; that this respondent applied to the relator, and stated the facts of his case, as hereinbefore and in relator's petition set out, all of which the relator admitted he knew to be true; this respondent further informed relator that he had employed counsel in good standing to examine the law bearing on said facts, and give an opinion on the same; that said counsel did so, and gave an opinion that said Thomas J. Buckley was in law a usurper, and could be ousted from said office, and said counsel so stated the same to the relator, and fully argued the case with him; that this respondent stated to relator that he was ready and willing to pay all costs and expenses of said proceedings in quo warranto, and had employed counsel to prosecute the same in his behalf to final determination; that all he required of relator was that he sign a proper petition in the nature of a quo warranto at this respondent's relation, so that same could be exhibited in the circuit court with relator's official sanction, according to the requirements of the law, and relator was not required to do any other act in the case unless on his own volition, but relator arbitrarily refused to sign any such petition. And this respondent further states that from the foregoing facts he infers, and therefore asserts the fact to be, that the relator's refusal aforesaid was because of partiality to said Buckley and prejudice, passion, and adverse interest to this respondent; and this respondent stated that under the law, where an official discretion is influenced by bad faith, partiality, prejudice, passion, or adverse interest, it can and will be controlled by mandamus, and such an official will not be heard to set up his official discretion in his defense. Wherefore, having fully answered herein, the respondent prays that the temporary order of prohibition be dissolved; that the circuit court of the city of St. Louis, Missouri, and John A. Talty, presiding judge of division No. 7 thereof, be ordered to further proceed with the mandamus proceedings herein prohibited, and that this respondent be discharged hence with his costs. O. W. Rutledge, Attorney for William G. Buechner."

And upon that return the relator filed the following motions:

"In the Supreme Court of Missouri, Octo-

ber Term, 1901, Division No. 2. State ex rel. Jos. W. Folk, Relator, vs. John A. Talty and William G. Buechner, Respondents. Comes now the relator herein, and moves to strike out the return of John A. Talty herein for the reason that said return sets out no facts that show a legal reason for the issue of the alternative writ of mandamus commanding the relator, Joseph W. Folk, to exhibit an information in said court in the nature of a quo warranto at the relation of William G. Buechner and against Thomas J. Buckley. Second. For the reason that said return does not show any legal grounds why the writ of prohibition should not issue in this case. Third. For the reason that respondent John A. Talty had no legal right to issue the alternative writ commanding relator to appear in said circuit court No. 7, in order that said John A. Talty, judge of said circuit court for the city of St. Louis, division No. 7 thereof, might bear the parties in court, and there determine whether, under the law and the facts, he should make the order prayed for. Edward C. Crow, Attorney General."

"In the Supreme Court of Missouri, October Term, 1901, Division No. 2. State ex rel. Joseph Folk, Relator, vs. John A. Talty and William G. Buechner, Respondents. Comes now the relator, and moves to strike out all of paragraph 4 of the return herein; also paragraph 8, paragraph 9, and paragraph 10, and particularly that portion of paragraph 10 beginning with the words 'that this respondent applied to Edward C. Crow, Attorney General of the State of Missouri,' etc., and concluding with the words 'against the relator,' at the close of said paragraph 10; also paragraph 11 of said return and paragraph 12 thereof,—for the reason that the matters and facts set forth in the parts of said return which relator moves to strike out are wholly immaterial to the issue involved in the controversy, and constitute no reason why respondents herein should not be restrained by a writ of prohibition in this case. Edward C. Crow, Attorney General."

"In the Supreme Court of Missouri, Division No. 2, October Term, 1901. State ex rel. Joseph Folk, Relator, vs. John A. Talty and William G. Buechner, Respondents. Comes now the relator herein, and moves the court to strike out the answer of the respondent William G. Buechner: First. Because the return of the respondent does not state any facts constituting a legal reason why the writ of prohibition should not issue in this case. Second. Because the return shows it is an attempt to try an election contest for a seat in the house of delegates for the Twenty-Fourth ward in the city of St. Louis by means of a quo warranto proceeding. Third. Because the return of the respondent William G. Buechner shows that the circuit court of the city of St. Louis had no jurisdiction to issue the writ of mandamus against the relator herein. Edward C. Crow, Attorney General."

The paramount question in this case, and the one which overshadows all others, is as to whether or not the circuit court had jurisdiction to compel an executive officer of the state to sign and file a writ in the nature of a quo warranto to determine the title to an office. The question, then, presented is, who is entitled, under the statute as it now stands, to ask that an information in the nature of a quo warranto be filed? It was ruled in the case of *State v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393, that prohibition is the proper remedy to prevent a court from assuming a jurisdiction it has not, or exceeding a jurisdiction it has; and, unless the circuit attorney had no discretion to exercise with respect to the quo warranto proceeding against Buckley, and was obliged to institute such proceeding against him upon the application of Buechner, or that in failing to do so he was either not exercising his discretion at all, or in so doing was acting in a capricious or arbitrary manner, the circuit court was without jurisdiction or authority to compel him to institute such proceeding, and prohibition was the proper remedy. The first legislation in this state in regard to informations in the nature of quo warranto proceedings in the circuit court was in 1825, when the legislature passed "An act to regulate proceedings upon information in the nature of quo warranto" (Rev. Laws 1825, p. 654), the first section of which is as follows: "That in case any person or persons shall usurp, intrude into or unlawfully hold and execute any office or franchise it shall and may be lawful to and for the attorney-general or the circuit attorney of the proper circuit with the leave of any circuit court to exhibit to such court one or more information or informations in the nature of a quo warranto at the relation of any person or persons desiring to sue and prosecute the same, who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into or unlawfully holding and executing any such office or franchise, and to proceed thereon in such manner as it is usual in cases of information in the nature of a quo warranto; and if it shall appear to such court that the several rights of divers persons to the same office or franchise may properly be determined on one information it shall and may be lawful for such courts to give leave to exhibit one such information against several persons in order to try their respective rights to such office or franchise." The section of the act quoted is a substantial copy of the fourth section of an act of the legislature of the state of New York with respect to informations in the nature of a quo warranto, passed February 6, 1788, by which it was provided that: "In case any person or persons shall usurp, intrude into or unlawfully hold or execute any office or franchise within this state it shall and may be lawful to and for the at-

torney-general, with the leave of the supreme court, to exhibit one or more informations in the nature of a quo warranto at the relation of any person or persons desiring to sue and prosecute the same, who shall be mentioned in such information or informations as the relator or relators." Laws 1788, c. 11. And under that statute the attorney general in the case of *People v. Sweeting*, 2 Johns. 184, moved for leave to file an information in the nature of a quo warranto against Sweeting, acting supervisor of the town of Manlius, in said state. It was held that it was discretionary with the court to grant motions of the kind or to refuse them. By the Revised Statutes of New York of 1829 (volume 2, p. 581) this discretionary power was taken from the courts, and vested in the attorney general, in the following language: "Information in the nature of a quo warranto may be filed in the supreme court of this state by the attorney-general against individuals upon his own relation or upon the relation of any private party and without applying to such court for leave when any person shall usurp, intrude into or unlawfully hold and exercise any public office," etc. It was thereafter held by the supreme court of that state in the case of *People v. Attorney General*, 22 Barb. 114, that under the provisions of said statutes and the Code it was for the attorney general, and not the supreme court, to determine whether, in any particular case, it is proper that an action to try the right to an office shall be brought or not, and that mandamus would not lie to compel him to prosecute an action of that nature. In 1835 (Rev. St. Mo. 1835, p. 523) the Missouri statute was changed so as to read as follows: "Section 1. In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise the attorney-general or circuit attorney for the proper circuit, with the leave of any circuit court, shall exhibit to such court an information in the nature of a quo warranto at the relation of any person desiring to prosecute the same." It will be observed that the change in the statute in no way interfered with the discretionary power of the circuit court to grant or refuse permission to the attorney general or circuit attorney of the proper circuit to exhibit an information in the nature of a quo warranto at the relation of any person desiring to prosecute the same. This statute remained unchanged until March 20, 1872 (Sess. Acts 1871-72, pp. 66, 67), when it was amended so as to read as follows: "Section 1. In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney general of the state, or any circuit, county or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person

desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney. If such information be filed or exhibited against any person who has usurped, intruded into or is unlawfully holding or executing the office of judge of any judicial circuit, then it shall be the duty of the attorney general of the state, or circuit or prosecuting attorney of the proper county, to exhibit such information to the circuit court of some county adjoining and outside of such judicial circuit, and nearest to the county in which the person so offending shall reside." "At common law the attorney general ex officio has the right either to sue out a writ of quo warranto or to bring an information in the nature of a quo warranto to try the title to a public office, and is not compelled to ask leave of the court; but no private individual at common law has a right to use the name of the attorney general for the purpose of suing out such a writ, or of bringing such an information." *Attorney General v. Sullivan*, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455. After the act of 1830 of New York had been passed, and the provision of a former statute requiring leave of the court to file informations was dropped from the statute, and the act provided that an information in the nature of a quo warranto may be filed in the supreme court of the state by the attorney general against individuals upon his own relation or upon the relation of any private party when any person shall usurp, intrude into, or unlawfully hold or exercise any public office, etc., the supreme court of that state, in construing the statute as amended, in *People v. Attorney General*, supra, upon an application for mandamus to compel the attorney general to file a quo warranto under the statute, ruled that since the change of the statute it was for the attorney general, and not the court, to determine whether in any particular case it was proper that an action to try the right to an office should be brought or not. In course of the opinion it was said: "There is nothing in the language of the statute which indicates an intention on the part of the legislature, when dispensing with the necessity of applying to the court for leave to commence the action, to surrender all control over the proceeding. On the contrary, it is plain, I think, that it was intended that the attorney general should, upon the circumstances of each case as it should be presented to him, determine whether the public interest requires that a suit should be prosecuted. Although private rights are always more or less involved in the action, yet it is in substance as well as in form an action on behalf of the people. It must be prosecuted in

their name and by the officer whose duty it is to protect their rights."

Now, in the light of these authorities, is there anything in the language of the statute (Rev. St. 1899, § 4457) indicative of an intention on the part of the legislature to make it the imperative duty of the attorney general of the state or any circuit or prosecuting attorney of the county in which the action is commenced to exhibit to the court having jurisdiction an information in the nature of a quo warranto at the relation of any person desiring to prosecute the same, and, when such information has been filed and proceedings have been commenced, to prohibit him from dismissing or discontinuing the same without the consent of the person therein named as relator, and thus surrender all control over the proceeding? It is argued by defendants that the statute is mandatory, in that the words "shall exhibit," as therein used, "mean that the act itself must be done," and that the circuit attorney had no discretion with respect to the matter, but was bound to exhibit the writ when requested to do so by Buechner. That the word "shall," as generally used, is mandatory may be conceded, but it is a cardinal rule that "the intention of an act will prevail over the literal sense of its terms" (Suth. St. Const. § 219), otherwise it might lead to absurd consequences, which could but be the result in this case if the statute be construed according to its strict letter. If the statute is to be interpreted in accordance with defendants' contention, the proceeding would be at the mere will or caprice of any person in position to prosecute it, and the attorney general, circuit or prosecuting attorney, as the case might be, a figurehead, a mere non-entity; and we are unable to believe that any such state of affairs was ever contemplated by the legislature. The power of determining whether or not the action shall be commenced must exist somewhere, and from the very nature of the writ, its character and purpose, it should rest with the officer who represents the people of the state with respect to such matters. As was said in *People v. Attorney General*, supra: "The office of attorney general (and the same may be said of a prosecuting attorney) is a public trust. It is a legal presumption that he will do his duty; that he will act with strict impartiality. In this confidence he has been endowed with a large discretion, not only in cases like this, but in other matters of public concern. The exercise of such discretion is, in its nature, a judicial act, from which there is no appeal, and over which courts have no control." It is too clear for discussion that under the act of 1825, and up to 1872, the control of the action in the nature of quo warranto was retained by the state, and that leave of court to institute such proceeding was a prerequisite to the presentation of such a writ. Nor since the amendment of the quo warranto law in 1872, and as it exists at this

time, has there been an express provision in the statute taking away from the state and its officers the right to institute such proceedings at their discretion, and to control the same, in the absence of which it must be presumed that there was no intention to change the policy of the state with respect to quo warranto proceedings. While mandamus cannot be resorted to to control the exercise of discretion, it is not unfrequently used to correct the abuse of discretion, but it is only where it clearly appears that the officer refusing is not in the discharge of his duty in refusing to exercise his discretion at all, or is acting in utter disregard of the legal rights of others. *State v. Lafayette County Court*, 41 Mo. 221; 2 Spell. Extr. Rem. (2d Ed.) § 1384; *City of Detroit v. Circuit Judge of Wayne County*, 79 Mich. 384, 44 N. W. 622. There is nothing, however, disclosed by the record in this case, which justified the issuance of the writ of mandamus against the circuit attorney by the defendant Talty upon that or any other ground.

Our conclusion is that it was not within the power or jurisdiction of Judge Talty, as judge of the circuit court of the city of St. Louis, to compel Circuit Attorney Folk to exhibit a writ in the nature of a quo warranto at the relation of defendant Buechner against Buckley to require him to show by what authority he claimed to hold the office of a member of the house of delegates of the city of St. Louis. For these considerations the provisional rule is made absolute. All concur.

WOMBLE v. PRICE'S GUARDIAN.¹

(Court of Appeals of Kentucky. Jan. 24, 1902.)

INFANTS—SALE OF REAL ESTATE—PLEADING—FAILURE TO FILE TITLE PAPERS—GUARDIAN AD LITEM—REPORT—DEPOSITIONS REQUIRED TO BE TAKEN ON INTERROGATORIES.

1. In an action by a guardian against his ward for the sale of the ward's real estate and a reinvestment of the proceeds as provided by Civ. Code Prac. § 480, plaintiff must, as required by Id. § 492, subsec. 4, state facts showing that the sale will benefit defendant, and not merely his conclusion to that effect.

2. Plaintiff should have filed with his petition the title papers under which the property was held, as required by Civ. Code Prac. § 492, subsec. 2.

3. Civ. Code Prac. § 52, providing that the clerk may, when there is no one on whom process can be served for an infant defendant, appoint a guardian ad litem, to the end that summons may be served on him, applies only to infants under 14 years of age; and therefore the appointment of a guardian ad litem for an infant defendant 16 years of age, before she had been served with process, was premature; it being provided by Id. § 38, that no appointment of a guardian ad litem shall be made until defendant is summoned.

4. Under Civ. Code Prac. § 30, subsec. 3, providing that no judgment shall be rendered

against an infant until his guardian or guardian ad litem shall have made defense, or filed a report stating that, after a careful examination of the case, he is unable to make defense, it was error to render judgment against an infant defendant upon the report of the guardian ad litem that he had no defense to make, without any statement that he had examined the record.

5. Where the only defendant against whom a deposition is to be read is under the disability of infancy alone, the deposition must be taken upon interrogatories, as required by Civ. Code Prac. § 574, except, as there provided, "in actions and proceedings for divorce and alimony and the custody of children when involved in such a suit."

Appeal from circuit court, Ballard county.
"To be officially reported."

Action by T. M. Baker, guardian of Bettie Price, against Bettie Price, for a sale of real estate and reinvestment of the proceeds. Judgment for plaintiff, and defendant Bettie Price (now Womble) appeals. Reversed.

Oliver & Oliver, for appellant.

HOBSON, J. On March 11, 1890, appellee, T. M. Baker, as guardian of Bettie Price (now Womble), filed this suit against her in the Ballard circuit court, under section 489 of the Civil Code of Practice, for a sale of certain real estate owned by her, and the reinvestment of the proceeds in other property. On April 22d the court, on the pleadings and proof, ordered a sale of the property, which was duly made, and the sale was subsequently confirmed. On March 19, 1901, this appeal was prosecuted by the ward; she having in the meantime married. The only party appellee is the guardian, T. M. Baker, and the only question before us is the regularity of the proceeding.

The allegation of the petition upon which the sale is ordered is in these words: "Now plaintiff states that it will be greatly to the interest of his ward that the above property be sold, and the proceeds thereof be reinvested in other property, or the money loaned out on interest." Section 492, subsec. 4, provides: "Facts must be stated in the petition and must be proved showing that the sale will benefit the defendant." The purpose of this provision is to require the pleader to allege in his petition more than his mere conclusions, and to state the facts on which these conclusions are based. The petition in this case does not comply with the statute. Subsection 2 of section 492 requires that the title papers, or copies of them, under which the property is held, must be filed with the petition. No title papers were filed with the petition. At the time the petition was filed, and when the summons was issued, the clerk made an order appointing a guardian ad litem for the infant. The ward was 16 years of age. By section 52, the clerk may appoint a guardian ad litem in cases of this character when there is no one on whom the process can be served, to the end that the summons may be executed on

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

him; but this section only applies when the infant is under age of 14 years. By section 38, no appointment of a guardian ad litem shall be made until the defendant is summoned. The appointment by the clerk was therefore premature and without authority. By section 38, subsec. 3, no judgment shall be rendered against an infant until his guardian or guardian ad litem shall have made defense or filed a report stating that, after a careful examination of the case, he is unable to make defense. The report of the guardian ad litem is not sufficient, under this statute. It is in these words: "Having been appointed guardian ad litem for the infant, Bettie Price, in this action, will say I have no defense to make in this action, but only ask the court to protect the rights of said infant according to law in the disposition of the proceeds from the sale of realty embraced in plaintiff's petition." The requirement that the guardian ad litem must file a report stating that, after a careful examination of the case, he is unable to make defense, is intended to secure from him a careful examination of the record; and the report filed in this case fails to show that the guardian ad litem had discharged this duty.

The depositions filed in the record upon which the judgment was rendered were taken upon cross-examination by the guardian ad litem. Section 574 of the Code provides: "If all of the parties against whom a deposition is to be read have been constructively summoned and have not appeared, or be defendants and under disability, other than coverture or infancy and coverture combined, the deposition must be taken upon interrogatories, except in actions and proceedings for divorce and alimony and the custody of children when involved in such a suit." The section peremptorily requires all depositions to be taken upon interrogatories in two classes of cases: (1) Where all of the parties against whom they are to be read have been constructively summoned and have not appeared; (2) where all of the parties against whom they are to be read are defendants, and under disability other than coverture, or infancy and coverture combined. It applies to all actions except those for divorce and alimony and the custody of children, when involved in such suits. The only defendant to this action was the infant, Bettie Price. She was the only party against whom the depositions were to be read, and was under disability other than coverture, or infancy and coverture combined. The proof should therefore have been taken upon interrogatories. When so taken, neither party is permitted to be present at the examination in person or by attorney, and the clerk, if no cross interrogatories are filed, is required to file certain questions to be answered by the witness. The purpose of the statute seems to be to protect infants and persons constructively summoned in the examination of the witnesses.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

LAY v. LAY.¹

(Court of Appeals of Kentucky. Jan. 22, 1902.)

DEEDS—VESTING OF TITLE SUBJECT TO LEASE—GIFT TO INFANT SON—DELIVERY AND ACCEPTANCE.

1. Where a deed of gift from parents to an infant son, subject to a lease for 22 years, provided that at the end of the lease the possession was to be delivered to and vested in the grantee, the title vested immediately, subject to the lease.

2. A husband being financially embarrassed, he and his wife made a deed of certain land to their infant son, subject to a lease made by them to the wife's father for a period of 22 years. Held that, as the reservation was for the benefit of the grantors,—the lessee being only a nominal party,—as between them and the grantee, they were the real owners of the beneficial title during the continuance of the lease, and liable for the taxes while they enjoyed the property, wherefor the gift could not be said not to be beneficial to the infant.

3. As the grantors caused the deed to be recorded, there was prima facie a delivery, though the deed was returned by the clerk to the grantors and remained in their possession, there being a reasonable presumption that they intended to part with the title; and, the gift being beneficial to the grantee, acceptance will be presumed.

Appeal from circuit court, Pulaaski county. "Not to be officially reported."

Action by Thankful Lay against Milton Perkins Lay to cancel a deed and quiet title to land. Judgment for defendant, and plaintiff appeals. Affirmed.

W. A. Morrow and T. Z. Morrow, for appellant. Jas. Denton, for appellee.

HOBSON, J. On October 2, 1883, Thankful Lay and her husband, Isaac P. Lay, signed and acknowledged a deed to their infant son, Milton Perkins Lay, then 10 years old. The deed was recorded soon after its execution. On October 12, 1898, she filed this suit against Milton Perkins Lay, in which she alleged that her husband was dead; that the deed was returned by the clerk to her after it was recorded, and had since been in her possession; that it was never delivered to or accepted by the grantee, Milton Perkins Lay; and that it was not intended to be delivered to him, or that he should accept it. In the deed a lease to Elijah Owens, her father, for the period of 22 years, was reserved. She alleged that this lease had been transferred to her, and that she was the sole owner and in possession of the land. She prayed that the deed be canceled as a cloud on her title, and that her title be quieted. The defendant, Milton Perkins Lay, denied the allegations of the petition, and alleged that his father and mother had delivered him the deed, and had placed him in possession of the land, and

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that he had made valuable and lasting improvements upon the land, for which he prayed a lien if the deed was canceled. He also pleaded the 15-year statute of limitation. On final hearing the circuit court dismissed the petition.

The proof shows that Thankful Lay and her husband went to Somerset, the county seat, and had the deed drawn by a lawyer, and then signed it, acknowledged it before the clerk, and had it recorded. Milton Perkins Lay, then 10 years old, went with them, and the transaction was explained to him by them. The reasons for the making of the deed were that the husband, Isaac Lay, was financially involved, and it was feared that his creditors would attempt to subject the land. The son Milton Perkins Lay was blind, or nearly so, and also crippled or disabled in one of his shoulders. Other land had been conveyed to the other son, and this land was intended to make Milton even with him. Elijah Owens had no interest in the lease. It was simply put in his name for the benefit of the grantors in the deed. When Milton Perkins Lay became of age, he settled on a part of the land, and has since lived on it.

It is insisted that the deed was subject to the lease, and passed no title, though delivered; also that there was no delivery of the deed, and that delivery cannot be presumed, because it was not beneficial to the infant. The deed is in these words: "This deed of sale and grant and conveyance made on this, the second day of October, 1883, by Thankful Lay and her husband, Isaac T. Lay, party of the first part, and Milton Perkins Lay, their son, party of the second part, all of the county of Pulaski and state of Kentucky, witnesseth, that the said first party, for and in consideration of the sum of one dollar to them by the second party in hand paid, and in consideration of the love and affection they bear to their said son, the party of the second part, have sold, given, and granted, and by these presents do hereby convey, to Milton Perkins Lay, a certain tract or parcel of land situated in Pulaski county, Ky., on the water of Sinking creek; being the same land conveyed by Will C. Curd, master commissioner of the Pulaski circuit court, to the said Thankful Lay on the 17th day of October, 1882. Said land is bounded and described as follows, to wit [here follows the boundary]. This sale and conveyance is made subject to a lease this day made by the party of the first part to Elijah Owens for the period of twenty-two years from this date. At the end or termination of said time the possession of said land is to be delivered to and vested in the party of the second part herein, to have and to hold forever; and the party of the first covenant to and with the party of the second part, his heirs and assigns, that they will defend the title to said tract of land (subject to the lease afore-

said) specially forever." The deed is a conveyance of the land, taking effect at its date, subject to the lease to Owens for 22 years, and at the end of the lease "the possession of said land is to be delivered to and vested in the party of the second part." The right to possession is postponed until the end of the lease, but the title subject to the lease vested immediately. It cannot be maintained that this gift was not beneficial to the infant. As between him and the grantors, they would have to pay the taxes during the continuance of the lease; for Owens, the father of Mrs. Lay, was only a nominal party. The reservation was really to her and her husband, the grantors in the deed; and, as between them and the grantee, they would have to pay the taxes while they enjoyed the property. For, as between them and the grantee, they were the real owners of the beneficial title to the property during the continuance of the lease. 25 Am. & Eng. Enc. Law, 110; Ky. St. § 4023. As to the delivery of the deed, in *Bunnell v. Bunnell*, 64 S. W. 424, this court said: "No particular form of procedure is required to effect a delivery. It is not essential that the paper be actually transferred. If the grantor, when executing it, intends it as a delivery, and this is known to and understood by the grantee, and they treat the estate as having actually passed thereby, it will have that effect, though the instrument be left in the possession of the bargainor." In *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392, where a father executed a deed to his minor son, which he recorded, but retained in his possession, it was held, under facts similar to those before us, that the title passed. The court said: "While the delivery of a deed is necessary to make it effectual in passing title, it is established by the following authorities that when a deed to a minor child is absolute in form and beneficial in effect, and the father and grantor voluntarily causes the same to be recorded, acceptance by the grantee will be presumed, and such facts constitute prima facie a delivery, and afford reasonable presumption that the grantor intended to part with the title, and that clear proof should be made where a person who, under such circumstances, has executed, acknowledged, and caused a deed to be recorded, before the court would be warranted in declaring that he did not intend to part with his title. *Cecil v. Beaver*, 28 Iowa, 242, 4 Am. Rep. 174; *Robinson v. Gould*, 26 Iowa, 89; 3 Washb. Real Prop. (3d Ed.) 261; *Masterson v. Cheek*, 23 Ill. 72; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377. We are of the opinion that the plaintiff has failed to make such proof as would authorize us to declare that it was not the intention of the grantors to part with their title to the land conveyed to the defendant." See, also, 6 Am. & Eng. Enc. Law (2d Ed.) 153, 154, 162.

Judgment affirmed.

EXCELSIOR COAL MIN. CO. v. VIRGINIA IRON & COAL CO.¹

(Court of Appeals of Kentucky. Jan. 24, 1902.)

SALES—CONSTRUCTION OF CORRESPONDENCE BETWEEN BUYER AND SELLER—QUESTION FOR COURT—ESTOPPEL—FAILURE TO PLEAD.

1. Where the last of several letters which passed between plaintiff and defendant as to the sale of coal was from defendant to plaintiff, containing a statement of defendant's understanding of plaintiff's proposition as to quality and price, and an acceptance thereof, that letter, in the absence of any reply thereto by plaintiff, bound plaintiff, if it furnished the coal, to do so on the terms stated in that letter.

2. The contract being in writing and free from ambiguity, it was the duty of the court to construe the contract, and to instruct the jury accordingly.

3. Though the bills which accompanied every shipment of coal gave notice that the coal being furnished was "run of the mine" and that the price per ton charged was for each ton of 2,000 pounds, defendant corporation is not estopped to claim that the plaintiff undertook to furnish "screened coal," and that the price agreed was for each ton of 2,240 pounds, as the attention of defendant's officers, who knew the terms of the contract, was not called to its violation, and defendant made payments under a mistake as to its rights.

4. An estoppel is not available unless specially pleaded, and, as plaintiff failed by its reply to plead an estoppel, the court did not err in refusing an instruction on that subject.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by the Excelsior Coal Mining Company against the Virginia Iron & Coal Company to recover a balance due for coal sold and delivered to defendant. Judgment for plaintiff for only a part of its claim, and it appeals. Affirmed.

Wm. Low and Geo. W. Saulsberry, for appellant. J. F. Bullitt and J. R. Sampson, for appellee.

BURNAM, J. Appellant instituted this suit to recover an alleged balance of \$1,304.69 for coal sold and delivered to the defendant, which it had refused to pay for. The defendant in its answer denied the alleged indebtedness, and said that it contracted by correspondence with plaintiff in March, 1900, to furnish at its furnaces in Middlesboro, Ky., and mines in Tennessee, screened run of mine coal, delivered on board cars at its mines, at the price of 95 cents per gross ton of 2,240 pounds; that the plaintiff, under the contract, shipped to it large quantities of unscreened run of mine coal, and billed it to them at the rate of 95 cents per net ton of 2,000 pounds; and that, by mistake and oversight of its agents, plaintiff had been paid for this coal as billed \$875 in excess of the amount due, by reason of the difference between the net and gross ton. It further alleged that during the months of March, April, May, and June, plaintiff furnished to it 5,722 gross tons of unscreened coal, which

was accepted by its agents through mistake, and that the difference in the price of screened and unscreened coal was 30 cents per ton, and that by reason thereof it was damaged \$1,707.68, for which it prayed judgment by way of counterclaim. Plaintiff replied, denying that it had agreed to furnish coal at the rate of 95 cents per gross ton of 2,240 pounds, or that it agreed to furnish screened coal, or that it was liable to defendant in any amount on the grounds set up in its answer and counterclaim. A jury trial resulted in a verdict and judgment for plaintiff for \$461. Its motion for a new trial having been overruled, it prosecutes this appeal, and asks a reversal chiefly upon the ground that the circuit judge, in his instructions to the jury, construed the contract between the parties to call for screened coal, and a gross ton of 2,240 pounds, and for the additional reason that the court refused to instruct the jury that if plaintiff shipped and billed coal to the defendant upon the basis of 95 cents per ton of 2,000 pounds run of the mine, and it received and paid therefor, it was thereby estopped from relying upon the contract.

It is admitted that the entire contract between the parties is contained in certain letters copied in the record, and that plaintiff billed each of the cars in the following form:

Virginia Iron, Coal & Coke Co.:

Bought of Excelsior Coal Mining Company,
Incorporated.

Miners and Shippers of Excelsior Coal, Middlesboro, Ky. Miners of the Best Steam, Gas, Domestic Coal.

Date	Car Initial	Car Number	Grade	Weight	Tons	Price	Am't
Mar. 1	L. & N.	32,573	R. M.	62,600	31.3	\$1.00	\$31 30
		32,632	"	61,300	30.65	1.00	30 65
2	"	30,036	"	61,500	30.75	1.00	30 75
3	"	30,000	"	61,900	30.95	"	30 95
	"	33,178	"	49,400	24.7	"	24 70
	"	30,035	"	64,700	32.35	"	32 35
	"	26,612	"	49,500	24.75	"	24 75
5	"	30,030	"	62,300	31.1	"	31 10
6	"	34,190	"	59,000	29.55	"	29 06
7	"	32,927	"	67,600	33.8	"	33 80
	"	34,000	"	58,800	29.4	"	29 40
	"	30,154	"	62,300	31.15	"	31 15
	"	35,417	"	58,900	29.45	"	29 45
8	"	32,693	"	61,900	30.95	"	30 95
10	"	33,419	"	59,400	29.7	"	29 70

The first of the letters from appellee's purchasing agent to the coal mining company, dated March 9, 1900, requests information as to the grades of coal mined by it, and the best price of each grade. In response to this letter appellant's superintendent answered that the price for "screened run of the mine coal" was \$1 per ton at the mines, with 5 per cent. rebate when the bill was paid. On the next day, March 13th, appellee responded, "We accept your offer for Excelsior 'screened coal,' to be furnished as required by us at Middlesboro Steel Plant and Blast Furnaces, at one dollar and ten cents

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

per ton, delivered." The two letters contained the only reference to the quality of the coal to be furnished found in the correspondence, and there seems no escape from the conclusion that both parties contemplated that screened coal was to be furnished under the order. Several letters passed between them as to where the coal was to be delivered, and the time when the contract was to run, and the words "gross ton" are not used until appellee's letter of March 31st, which was the last letter on the subject. In this letter the contract finally agreed on by the parties, as understood by appellee's purchasing agent, is clearly set out. It says: "Yours of the 29th at hand. Accept your proposition for coal at steel plant and blast furnace at Middlesboro for twelve months from April 1st at ninety-five cents per gross ton on cars at your mine. We hope the business will prove profitable to you, and satisfactory to both parties." If appellant did not intend to furnish the coal at 95 cents per gross ton, it was clearly its duty, after the receipt of this letter, either to have refused to furnish it at all, or to have informed appellee that it only contemplated furnishing unscreened coal at 95 cents for a ton of 2,000 pounds. Certainly it cannot be permitted to claim, after the receipt of this letter, which is not denied, that it did not understand what was expected of it by appellee. As the contract between the parties was in writing and without ambiguity, it was the duty of the court to construe the contract, and instruct the jury in accordance with his views thereof. In our opinion, he did not err in instructions Nos. 1 and 2. But counsel for appellant very earnestly contend that, even if it be conceded that the contract was for the sale of screened coal at 95 cents per ton, appellant was to recover the amount sued for, for the reason that the bills which accompanied every shipment of coal notified appellee that the coal being furnished was run of the mine, and that the price charged was at the rate of 95 cents for each ton of 2,000 pounds, and that, having accepted the goods after opportunity to know the facts, it was estopped from asserting any claim on account of a defect in either the quality or quantity of the coal so furnished. We do not think that this well-recognized principle of law applies to the facts of this case, as it is shown that appellant's violation of the particulars of the contract relied on escaped the attention of the officers of the corporation who knew the terms of the contract, and that the payments for the goods delivered were made under a mistake of its rights. Besides: "The great weight of authority is to the effect that the facts constituting an estoppel in pais, to be available, must, with rare exceptions, be specially pleaded, for the reason that, had it been pleaded as an estoppel, the party sought to be estopped might have avoided its effect by

sufficient proofs and explanations, but, not being pleaded, that question was not litigated at all." See *Faris v. Dunn*, 70 Ky. 276. As the plaintiff has failed to rely upon the estoppel in its reply, we are of opinion that the trial court did not err in refusing an instruction based upon this idea.

Judgment affirmed.

BASKETT v. TIPPIN et al.¹

(Court of Appeals of Kentucky. Jan. 31, 1902.)

DRAINS—PRESCRIPTIVE RIGHT TO USE—PARTIAL TRANSCRIPT—PRESUMPTION IN FAVOR OF JUDGMENT.

1. Where a ditch was a necessity to the lands of plaintiffs, and had been in use for over 30 years, plaintiffs were entitled to a mandatory injunction requiring defendant to remove an obstruction, especially as a new ditch had been opened on defendant's application on condition that the old ditch should remain open.

2. It being averred by plaintiff and denied by defendants that the old ditch had been in use for over 30 years, it must be presumed, in the absence of a part of the evidence, that the evidence supported the claim.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by S. L. Tippin and others against John Baskett, Sr., for an injunction and for damages. Judgment for plaintiffs, and defendant appeals. Affirmed.

Yeaman & Yeaman, for appellant. John F. Lockett, for appellees.

DURBILLE, J. It appears that the appellees owned adjoining tracts of land in Henderson county, between which there had been for upwards of 30 years run a ditch for drainage purposes, which passed from their lands upon and over the lands of appellant by way of a culvert under a railroad. This ditch appears to have followed the natural flow of the surface water over said lands, but the appellant desired that a new ditch should be opened, under the drainage act of 1893 (see section 2390 et seq., Ky. St.), along the upper side of Tippin's land, which should not pass under the railroad, but when it reached the right of way should follow alongside of it. He also desired that that part of the old ditch which ran through his land should be closed. Accordingly, application was made in the county court to open such a public ditch, and viewers were appointed, to whose report a remonstrance was filed by appellees, and re-viewers were appointed, to whom appellant made application for the same purpose. Appellees objected to the opening of the new ditch unless the old ditch was permitted to remain open, claiming that the proposed ditch would not sufficiently drain their lands if the old one should be closed. They claimed, also, that appellant had been paid by them to open and clean out the old ditch, but that it had become over-

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grown with vegetation, and they desired the privilege of themselves cleaning it out where it passed through appellant's land. The reviewers declining to recommend the opening of the public ditch unless appellant would agree to the contention of appellees, this contention was agreed to, and on their recommendation the railroad company increased the capacity of its culvert through which the old ditch discharged. Upon this agreement and understanding with the reviewers and appellees, the latter withdrew their objection to the new ditch, and it was accordingly recommended and opened. Appellees, at their own expense, cleared out the old ditch; but appellant, at a point on his own land, constructed an earth dam across the old ditch, which obstructed the flow of water therein. Appellees thereupon brought this suit, complaining of appellant's action, and praying for damages and injunction. The sufficiency of the averments of the petition was not questioned. Issues of fact were raised by the answer, and testimony taken thereon, a part only of which is presented to us in the record. The trial court gave judgment denying the claim for damages, but awarding an injunction for the removal of the dam.

It is objected here that the averments of the petition were insufficient; and it is possible that, under the authorities, they might be so held on demurrer. We think, however, that after the issues of fact have been made, and trial had thereon, the defective averments must be considered as cured.

It is also objected that the agreement of appellant to keep open the old ditch was not in writing, and was within the statute of frauds. We are of opinion, however, that the relief here granted was grantable upon equitable principles, without reliance upon contract rights. It was averred and denied that the old ditch had been in use for over 30 years. The evidence in the record tends to support the claim. We must presume that the evidence not brought before us supported it, and that, taken together, the evidence in and out of the record supports the judgment granting the injunction against appellant from obstructing the ditch, and requiring him to remove the obstruction placed therein by him. This is manifestly equitable, in view of the fact that the construction of the new ditch along and upon the lands of one of the appellees, and presumably beneficial to the adjacent lands of appellant and his son, was obtained upon the understanding that the old ditch was to continue in use for the benefit of appellees. Whether the facts showed an adoption of the old ditch as a ditch under the drainage act, we are not called on to decide. We must presume the evidence presented to the trial court established its necessity to the lands of appellees, and their prescriptive right to its continued use.

The judgment is affirmed.

CHESAPEAKE & N. KY. v. HANMER.¹

(Court of Appeals of Kentucky. Jan. 29, 1902.)

NEGLIGENCE—PLEADING—ALLEGATION THAT PLAINTIFF WAS "OTHERWISE HURT"—MOTION TO MAKE MORE SPECIFIC—CARRIERS—INJURY TO PASSENGER—ACTION, WHETHER CONTRACT OR TORT—SALE OF RAILROAD PROPERTY NOT DISSOLUTION OF CORPORATION—COMMON-LAW ACTION FOR INJURY IN ANOTHER STATE—PRESUMPTION AS TO LAW OF OTHER STATE.

1. The allegation of specific personal injuries, followed by the allegation that plaintiff was "otherwise greatly hurt and wounded," does not authorize proof of injuries other than those specifically alleged, and therefore the court properly refused to require plaintiff to make his petition more specific.

2. As plaintiff sought to recover for the negligence of the servants of defendant railroad company in failing to keep its road in repair, his cause of action was in tort, though he also alleged a contract with defendant to carry him safely as a passenger; that being merely matter of inducement to show that he was where he had a legal right to be when he was injured.

3. The fact that the railroad property of defendant corporation had been sold under decree of court furnished no reason for dismissing the action, as the corporation continued to exist, at least until its liabilities were settled.

4. In a common-law action to recover damages for personal injuries inflicted in another state it will be presumed that the common law prevails in that state, in the absence of allegation and proof to the contrary.

Appeal from circuit court, Allen county.

"Not to be officially reported."

Action by W. G. Hanmer against the Chesapeake & Nashville Railway to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

W. O. Goad, W. L. Porter and W. O. Dismukes, for appellant. Lewis McQuown and B. W. Bradburn, for appellee.

O'REAR, J. This action was for personal injuries sustained by appellee while a passenger on appellant's railway between Gallatin and Scottsville. The jury awarded \$1,100 in damages.

The train on which appellee was a passenger when injured fell through a high trestle. It is alleged that appellee was "thereby severely injured, cut and bruised upon his body, arms, and legs, two of his ribs were broken, and he was otherwise greatly hurt and wounded." The first ground of reversal urged is that the trial court erred in overruling appellant's motion to make the petition more specific as to how he was "otherwise hurt." The allegations of the petition of specific injuries preclude proof of others not made. The reason is, the pleader thereby notifies the defendant of the particular injury upon which he will seek to recover, challenging an issue upon that fact alone, and inviting evidence solely to support or refute it. It would be manifestly unfair to allow the plaintiff to then enlarge his case, and make proof of injuries different

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

and distinct from those pleaded. The words "and otherwise greatly hurt and wounded," when coupled with such specific allegations, may be treated as surplusage, and consequently ignored. Such was the ruling of the court in this case, and it is approved.

The second objection is that the court erred in not requiring appellee to elect whether he would prosecute for the tort or upon the breach of contract. We are of opinion that but one cause of action was stated in the petition, and that was in tort for the negligence of appellant's servants and employes in failing to keep its road in proper repair, by reason of which the bridge fell. Its timbers were alleged and shown to have been rotten and insecure. What was said about the contract to carry appellee safely as a passenger was merely matter as inducement to show that appellee was where he had a legal right to be when injured. *McMurtry v. Railroad Co.*, 84 Ky. 462, 1 S. W. 815.

After issue joined, one Robert Nuck filed his affidavit stating that the railway property of appellant had been sold under a decree of the United States circuit court at Nashville, and purchased by Walter A. Weber. He asked that the action be dismissed, which was, of course, overruled. The railway company had not ceased to exist, even if its property had been sold. The corporation continued to be such, in any event, till its liabilities were settled.

The court properly overruled appellant's motion for a peremptory instruction. This motion could not have been based upon the absence of any evidence sustaining appellee's claim, for there was abundance. But it seems to have been made upon the theory that the injury was done in Tennessee, and, as there was no proof of what the law of that state was as giving and regulating a right of recovery in such case, the court was not authorized to submit the issue of injury and damage to the jury. The suit is a common-law action, and, in the absence of allegation and proof to the contrary, the court assumes that the common law prevails in Tennessee. *Miles v. Collins*, 1 Metc. 312; *Stern v. Freeman*, 4 Metc. 311; *Honore v. Hutchings*, 8 Bush, 692.

Judgment affirmed, with damages.

CITY OF LOUISVILLE v. SELVAGE et al.¹
(Court of Appeals of Kentucky. Jan. 29, 1902.)

STREET ASSESSMENTS—AMENDED PETITION SEEKING RECOVERY AGAINST CITY—STATUTE OF LIMITATIONS—RES ADJUDICATA—REAPPORTIONMENT—INTEREST AND COSTS.

1. An action by contractors against an abutting property owner to enforce a lien for the entire cost of a street improvement having been brought within one year after the execution of the work, an amended petition seeking to recover of the city 10 per cent. of the

amount was not barred by the statute of limitations, though not filed until after the lapse of five years.

2. A judgment against the original defendants for 90 per cent. of the apportionment warrant sued on was not a bar to a subsequent recovery against the city of the other 10 per cent., as there was then no adjudication between plaintiffs and the city.

3. A judgment against the original defendants for the full amount of the warrant having been reversed on the ground that they were liable for only 90 per cent. thereof, the city was liable for interest on the remaining 10 per cent. only from the time of the reapportionment on the return of the case to the lower court, or from the filing of amended petition against the city seeking to recover that amount, and is liable only for such costs as have accrued since the reapportionment.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by C. P. Selva and others against Joshua F. Bullitt and others to enforce a lien for the cost of a street improvement. Judgment for plaintiffs against the city of Louisville, and the city appeals. Reversed.

H. L. Stone, for appellant. Lane & Harrison, for appellees.

WHITE, J. This is the second appeal of this case. The former appeal was styled, "*Joshua F. Bullitt v. Selva*," etc., and the opinion is found in 47 S. W. 255. The action was originally brought against Bullitt, the city of Louisville, and various property owners along the street improved. The first judgment was against Bullitt for the full amount of the apportionment warrant against his property. On appeal this court held that he was liable for only 90 per cent. of the warrant, and remanded the case for judgment for that sum, or proportion of the warrant. Upon return of the case, Bullitt's part was paid; and appellees filed an amended petition claiming against the appellant city 10 per cent. of the warrant, under the former opinion of this court, and also claimed interest on the whole sum of the apportionment warrant, and further claimed judgment for costs incurred in the case against Bullitt, and the costs paid on the appeal. Appellant pleaded to the amended petition (1) statute of five years' limitation; (2) *res adjudicata*; (3) a denial of liability for either interest or costs. The action was submitted for judgment on petition and answer. Judgment was rendered for appellees for the 10 per cent. on the apportionment warrant of Bullitt, for interest on the whole amount of the warrant till Bullitt's part was paid, and for costs (\$101.05) heretofore incurred. From that judgment this appeal is prosecuted.

As it appears from the record this action was first begun against the city in 1893, there can be no question of limitation, as that was less than one year from the execution of the work.

The plea of *res adjudicata* is likewise bad; for it is not alleged, nor does the record

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show, that the judgment rendered against Bullitt disposed of the case as to the city, or denied appellees a right of recovery against the city. There was no adjudication between the appellant city and the appellees. We are of opinion, therefore, that there was no error in rendering judgment against appellant city for 10 per cent. of the apportionment warrant, which the former opinion held could not be recovered from the property holder Bullitt.

The court erred in adjudging to appellees interest on the full amount of the apportionment warrant, or on any amount of the warrant till the reapportionment by the court on the return of the case under the mandate of this court. Likewise it was error to adjudge against appellant the costs on the former appeal, as that was costs of reapportionment, and in a case wherein appellant was not a party to the appeal. This was expressly decided by this court in *Gosnell v. City of Louisville*, 46 S. W. 722, and *City of Louisville v. Selvage*, 51 S. W. 447. In each of these cases the court expressly held that the city was not liable for interest or costs until a reapportionment had been made. These cases were decided under the same law as the present case, and it is therefore binding on us here.

For the errors indicated, the judgment is reversed, and the cause remanded, with directions to render judgment for appellees for 10 per cent. of the apportionment warrant, with interest from the date of filing the amended petition, and for costs subsequently accruing since the reapportionment.

UNITED STATES BUILDING & LOAN
ASS'N'S ASSIGNEE v. FORE-
MAN et al.¹

(Court of Appeals of Kentucky. Jan. 29, 1902.)

BUILDING AND LOAN ASSOCIATIONS—ASSIGNMENT FOR CREDITORS—RIGHTS OF BORROWING MEMBER.

1. In an action by the assignee of a building and loan association to recover a loan, it was error to strike out certain parts of the petition which averred the subscription of stock by defendant, the precipitation of the maturity by reason of the insolvency and assignment of the association, the payment of dues on stock, and the book value of the stock, and dividends thereon.

2. It was error to dismiss the petition of the assignee, and to give the association judgment for the balance of the debt after crediting all amounts paid, whether as interest, premiums, or dues, as the record showed facts sufficient to justify the assignment. *Loan Co.'s Assignee v. Wood* (Ky.) 60 S. W. 858, followed.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action by the Columbia Finance & Trust Company, assignee of the United States Building & Loan Association, against J. T. Foreman and others, to recover a loan and

enforce a mortgage lien. Judgment for defendants, and plaintiff appeals. Reversed.

W. A. De Haven, for appellant. Henry Watson, for appellees.

DU RELLE, J. The appellant, the Columbia Finance & Trust Company, as assignee of the appellant building and loan association, brought suit against Foreman, as a borrowing member of the association, to enforce its mortgage lien upon a lot of land in Montgomery county; alleging the insolvency of the association, its assignment to the trust company, the precipitation of the maturity of the note and mortgage, and making a subsequent vendee of the lot a party defendant. None of the original defendants seems to have made any defense, but a later vendee (one Gould) became a party and made defense, attacking the validity of the assignment, the right of the assignee to the assets of the association, and claiming credit for all payments made,—whether as interest or dues on stock. The trial court struck out certain parts of the petition which averred the subscription of stock by Foreman, the precipitation of the maturity by reason of the insolvency and assignment of the association, the payment of dues on stock, and the book value of the stock, and dividends thereon. This order, under numerous rulings of this court, was erroneous.

Upon final hearing the petition of the assignee was dismissed, but the association was given judgment for the balance, after crediting all amounts paid, whether as interest, premiums, or dues. This was error. The record shows quite conclusively that the facts with regard to the assignment were practically the same as those which were held to justify the assignment in *Loan Co.'s Assignee v. Wood* (Ky.) 60 S. W. 858.

It follows, therefore, that the judgment was erroneous, and it is reversed, and the cause remanded, with directions to enter judgment for appellant, the building and loan association's assignee, in accordance with the principles laid down in the case of *Loan Co.'s Assignee v. Wood*, supra.

JONES et al. v. PATTERSON et al. PAT-
TERSON v. DAVIS et al. DAVIS
et al. v. PATTERSON.¹

(Court of Appeals of Kentucky. Jan. 28, 1902.)

DEEDS—LAND EMBRACED TO WHICH GRAN-
TOR HAD NO TITLE—ADVERSE POSSESSION
— CONSTRUCTIVE POSSESSION — RIGHT OF
WRONGDOER TO RELY ON OUTSTANDING TI-
TLE—VALIDITY OF JUDGMENT—IRREGULAR-
ITIES IN PROCEEDINGS.

1. The mere fact that a deed included land which the grantor had a right to convey did not vest the grantee with either the title or possession of land embraced in the deed to which the grantor had no valid legal title.

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2. Plaintiffs cannot, in support of their claim of title by possession, rely upon the fact that they built a cabin on the land in controversy, and installed a tenant therein, after the institution of their action.

3. One who has entered upon land in the constructive possession of others by reason of their paper title cannot resist a recovery by them by showing an outstanding title in another.

4. A judgment decreeing a conveyance of land rendered more than 30 years ago, having been acquiesced in by the parties, will not be declared void because no affidavit for a warning order is found in the record, or because the answer of a guardian ad litem was not signed, or because of other like irregularities in the preliminary steps.

Appeals from circuit court, Breathitt county.

"Not to be officially reported."

Action by J. S. Jones and others against J. W. Cardwell to recover damages for trespass to land. Intervention by I. N. Patterson, claiming the land in controversy. Judgment in favor of I. N. Patterson against plaintiffs for possession of the land, refusing relief sought by Patterson against Polly Davis and others, and also the relief sought by them against Patterson, and plaintiffs appeal, and I. N. Patterson and Polly Davis and others prosecute separate appeals. Affirmed upon appeal of plaintiffs and upon the appeal of Polly Davis and others, and reversed upon the appeal of I. N. Patterson.

W. B. Dixon and Marcum & Pollard, for appellants Jones and others. J. J. C. Bach, for appellants Davis heirs. R. A. Hurst, W. W. McGulre, W. S. Pryor, Hazelrigg & Chenault, and J. J. C. Bach, for appellees Patterson.

BURNAM, J. The controversy in this case involves the title and ownership of about 3,000 acres of land located upon the waters of the South Fork, and the tributaries thereof, of Quicksand creek, in Breathitt county, Ky. The appellees Patterson and the Davis heirs claim under 15 Kentucky patents issued to Robert P. Davis in 1807. There is also a controversy between Patterson and the Davis heirs as to the ownership of the land, but both agree that appellants have no interest therein. The appellants J. S. Jones, D. D. Jones, D. R. Clark, C. J. Little, Taylor, and Crate, claim a possessory title dating from an alleged entry upon the land by one Preston Howard, their remote grantor. They also claim to trace their title to a patent issued to James Reynolds by the commonwealth of Virginia on the 18th day of July, 1784, containing 126,140 acres of land. They also allege that the Davis patents are void for the reason that the land embraced therein is covered by the Reynolds patent and numerous other senior patents granted by the commonwealth of Kentucky. The action was originally brought at law by appellants against J. W. Cardwell for trespass. They alleged that they were the owners and in possession of about 3,000 acres of land. The

appellee Patterson intervened in this suit and asserted title to 2,200 acres of land embraced within the boundaries claimed by appellants by virtue of a conveyance from Davis and the Davis heirs. He also alleged that certain deeds under which appellants claim were forgeries, and asked that he be adjudged the owner of the land claimed by him. Appellants, in their response to Patterson's petition, averred that his claim was a cloud upon their title, and asked that it be quieted. Patterson, in a subsequent pleading, responded that no one had ever had the actual possession of the land in controversy; that they were uninclosed wild lands. He also made his pleading a cross petition against the Davis heirs, who replied, denying title in the appellee Patterson, and asserting title in themselves. And in an amended answer, which they make a counterclaim against appellants, the Davis heirs assert ownership in themselves, and allege that appellants had forcibly entered upon the land, and sought to recover of them both possession and damages. The trial court sustained the title of appellees, and gave judgment against appellant for the possession of the land; refusing the relief sought by Patterson against the Davis heirs, and also that sought by them against Patterson, both of whom base their claim upon the 14 patents to R. P. Davis in 1807, which made out a prima facie case for the appellee for the whole of the land in controversy.

We will first direct our attention to an examination of the facts upon which appellants rely to establish their possessory title to the land in controversy, and also their claim that it had been previously patented, and that by reason thereof the patents to Davis were void. It is conceded that Preston Howard lived for many years at the mouth of a stream known as Howard's Fork, which empties into the South Fork of Quicksand creek, and that Howard's Fork has three tributaries, known as Wilson's, Calhoun's, and Hagin's Forks, which empty into it about one mile and a half above its mouth, and that the lands in controversy are situated on these three forks, above what is known as the flat rock on Wilson's Fork, the rock house on Calhoun's Fork, and a beech and lyn on Hagin's Fork; and it is earnestly insisted by appellees that none of appellants' grantors ever had any possession above these well-known marks. A great deal of difficulty and uncertainty arise from the fact that the records of the Breathitt county court were burned in 1873; it being insisted that the titles which were subsequently recorded were, to a large extent, fictitious and forgeries. Preston Howard's first paper title to any of the land in dispute is a deed executed to him on the 3d day of March, 1841, by Coleman Williams in consideration of \$150 paid cash in hand. Williams conveys a certain tract of land, described as "beginning on the south bank of

the South Fork of Quicksand creek, at two sycamores and a sugar tree, 20 poles above the upper corner of a one hundred acres survey in Perry county; thence running up the creek on both sides, including its tributaries, to a conditional line made by Williams and Howard." And in 1853 Howard obtained a patent for 50 acres on Howard's Fork, extending up to a poplar, beech, and flat rock on the Wilson Fork. He settled his son Russell on that part of his boundary which was located farthest from the mouth of the creek. In 1864 Howard moved away from this tract of land, and went to Jackson county, where he resided until his death. In 1886, in consideration of \$1,000, he conveyed to Stephen Carpenter all of his land in Breathitt county on the waters of the South Fork of Quicksand creek, which is described as beginning at a "white walnut on a small island near an old school house at the lower end of the farm, and running to a conditional line between Preston Howard and Henry Williams at a double maple at the mouth of a small drain in the south side of the Fork of Quicksand creek; thence a straight line across said creek; thence with Howard's outside line so as to include all the land owned by Howard lying between him and Henry Williams, Robert Davis, and Russell Howard, going still around with his outside line to the beginning,—containing four hundred acres to same, more or less." When this deed was again recorded, after the burning of the county clerk's office, it was altered so as to call for 1,400 acres, instead of 400. The original deed, being in existence and filed in this record, makes this fact apparent. After his purchase, Stephen Carpenter occupied the Howard residence, near the mouth of the creek, until February, 1873, when he conveyed to William Kash, and on the same day Kash conveyed to Elizabeth Williams the boundary conveyed to him. Both of these deeds call for 600 acres. The land conveyed is described as lying on the South Fork of Quicksand creek, and does not embrace the 150 acres above it, which had been previously sold by Stephen Carpenter to Samuel Carpenter. After his purchase, Williams occupied the old Howard house about 15 years. During this interval it does not appear that he ever acquired any additional land, but in June, 1889, he executed a deed to a boundary to the appellant, which he represents as containing 2,640 acres. At this point, for the first time, the deed purports to convey a tract of 2,000 acres of land, which it is claimed Preston Howard held under a marked boundary whilst he lived in Breathitt county, and under a deed from Thomas Sewell, and to have been in Howard's deed to Stephen Carpenter, and to have passed from Carpenter to Kash, and Kash to Williams. This 2,000-acre boundary extended to the waters of Calhoun's and Hagin's Forks of Howard's creek, and not only covered the boundary of land embraced

in the deed from Stephen to Sam Carpenter, but also included the greater part of the lands covered by the patents issued to Davis, and which are included in the lands claimed by appellee Patterson. The deed referred to, from Thomas Sewell to Preston Howard, purports to convey a certain tract of land lying on the South Fork of Main Quicksand creek, and is described as follows: "Beginning at a small island, two sycamores, one sugar tree; thence up the creek on both sides, including its tributaries, to a conditional line between Preston Howard and Henry Williams,—about 2,000 acres, more or less." The deed further recites that the boundary is a portion of the Reynolds survey, which the grantor purchased of John Hargis, and the consideration recited in the deed is a compromise, and \$10 paid cash in hand. It will be observed that the description contained in this deed is the identical description contained in the deed from Coleman Williams to Preston Howard in 1841. And it seems to be the boundary embraced in the deed made by Preston Howard to Stephen Carpenter in 1869, except that the sale represents the land to be 2,000 acres more than the Howard deed speaks of it as containing. But in the meantime Preston Howard had conveyed 150 acres of land held by him when he resided at the mouth of Howard's creek to his son Russell. The facts surrounding the deed from Sewell to Howard are, to say the least, somewhat suspicious. It purports to have been acknowledged by Sewell in 1849 before William Barnett, deputy clerk for John Hargis, of the Breathitt county court, but does not seem to have been recorded until the 3d day of June, 1886, and then by a party who testifies that he was not a deputy clerk at all. It further appears that as soon as it was recorded the original deed was withdrawn from the clerk's office, and the most diligent efforts have entirely failed to show any trace of it thereafter. In March, 1889, shortly before the execution of the Williams deed to appellant, Preston Howard and wife, who, it is claimed, were then residing in Jackson county, Ky., executed a deed to their grandson Asberry Howard, of Breathitt county, in consideration of \$500, to a tract of land on Quicksand creek, containing 2,000 acres, and which the deed recites to be a part of the boundary land which the grantors had purchased of Colby Williams; and the boundary of this deed seems to cover substantially the same land which is subsequently embraced in the deed from Williams and wife to appellant. This deed was executed by Preston Howard more than 15 years after his removal from Breathitt county, and one of his sons testified that he had been dead for several years before the date of its execution. It further appears that this same Berry Howard, a grandson of Preston Howard, obtained possession of the title bond which had been executed by Stephen Car-

penter to Samuel Carpenter, and claimed to be the owner of the 150-acre tract of land covered by the bond some time previous to the date of the Williams deed to appellant. Stephen testifies that this bond only called for 150 acres of land, but that Berry Howard represented that he had contracted to sell a boundary of 394 acres to the Quicksand Lumber Company, and proposed to Carpenter that if he would increase the number of acres so as to make it call for 394 acres, instead of 150, he would give him \$25 in cash, and accept a quitclaim deed therefor, and that he did so, although he well knew that he had only sold Samuel Carpenter 150 acres of land. It further appears that Berry Howard sold and conveyed this tract of land to the Quicksand Lumber Company in 1888, and that it was in possession thereof under its deed at the date of the Williams deed to appellant. The appellants relied, as a link connecting their chain of title with the Reynolds grant, on a deed which purports to have been executed in February, 1848, by John Hargis to Thomas Sewell, which contains this recital: "Also the said John Hargis and wife hereby allens, sells, and quits claim of said Sewell and the balance of his outland, or sheriff's deed, which Hargis has not sold to others. And this last land or sheriff's deed contains, say, from 15,000 to 25,000 acres, more or less. The boundary is of record, Deed Book number 1, pages 216 and 217. This only includes Hargis' part yet unsold. All the above lands being on the north side of the North Fork of the Kentucky river, in Breathitt county, Ky., above and below the town of Jackson, and described as aforesaid in the conveyance of the old thousand acre tract." The deed further stipulates that neither Hargis nor his heirs are to be in any way accountable as to the warranty of this old 1,000-acre tract.

It is admitted by counsel that the recitals of this deed, and those contained in the deed from Sewell to Howard, are the only evidence which connects the title of Preston Howard in any way to the Reynolds patent. It is also admitted that, when Williams had his deed recorded after the fire, there was inserted in the boundary for the first time the words "including its tributaries." It also appears that the same Williams' grantor was the party who produced and had recorded, apparently for the first time, the alleged deed from Sewell to Howard, long after the death of Sewell. But even if it be conceded that the Sewell deed was not a forgery, the proof in the case clearly shows that neither Howard nor his vendee, Stephen Carpenter, ever claimed under it. This is shown by the fact that in 1853 Howard obtained a patent for 50 acres of land on Howard's creek, which extended to the poplar, beech, and flat rock on the Wilson Fork, and subsequently took out two additional patents, of 25 acres each, for land which were clearly covered by the

Sewell conveyances. And Stephen Carpenter, his vendee, obtained two patents for 200 acres each. And he testified: That one of them "began at the lower end of his farm, and ran up the left-hand fork of South Fork up the ridge between Davis' land and Howard's Fork until they struck the big rock house on Calhoun Fork; thence a straight line to the beginning." That the other 200-acre patent began "at the mouth of a drain on Calhoun's Fork, just above the rock house, and ran across the spur to the beech and lyn on Hagin's Fork; thence down Hagin's Fork to the McDonnell Fork; thence up the spur of the ridge to the top of the ridge; and thence down the ridge between Howard's Fork and the water of South Fork to two Maples,"—whilst John McDaniel, Sam Carpenter, and C. B. McQuinn, all of whom live in the immediate neighborhood, testify that the upper line of Preston Howard's farm, at the time he lived there, was at the poplar, beech, and flat rock on Wilson Fork, the beech and lyn on Hagin's Fork, and the rock house on Calhoun's Fork. The location of these lines of Howard's farm seems to have been so well known that when Davis, who lived upon the adjacent tract of land, and who was a practical surveyor, made the surveys which are the basis of the patents relied on by appellee, he began them at these well-known objects; two of them beginning at the flat rock on Wilson Fork, two at the rock house, and a fifth at the lyn and beech. And undoubtedly the 150-acre tract of land conveyed by Stephen to Sam Carpenter lay directly between the land of Stephen Carpenter and the alleged marked boundary around the ridges, which, in the main, is the same land that is in controversy. Besides, it is evident from Howard's deed that he only sold the land on the main creek to the conditional line between him and Williams, and up to the McDaniel and Russell Howard tracts, both of which lay above the tract claimed by him at that time, and the tributaries of Howard's creek. Besides, it is by no means certain that the land embraced in the deed of Hargis to Sewell covers the land in controversy. The alleged conveyance by the sheriff to Hargis is not produced, nor are any of the proceedings under which the judgment was obtained upon the execution issued attempted to be shown. We are of the opinion that the proof offered by appellants is insufficient to connect them with the Reynolds patent.

But appellants argue that, even if the Reynolds patent does not cover the land, it is shown that Preston Howard lived on and claimed the land in controversy for more than 20 years after his purchase from Coleman Williams, and for more than 15 years after obtaining the deed from Sewell, and that his actual possession extended to the marked boundary which he claimed, and that these facts are sufficient to authorize the presumption of a grant from the common-

wealth. It is true that Russell and Miles Howard, sons of Preston Howard, in their depositions given about 40 years after they moved off the land, and long after the death of their father, give some color to the contention. But this proof is insufficient to rebut contemporaneous acts, and the declarations of the conveyances as to the amount of the land conveyed by Howard and acquired by Carpenter. Carpenter testifies that Howard told him that the rock house on Calhoun's Fork was his upper corner on that fork. And John McDaniel testifies that Howard told and showed him that his upper line crossed Wilson's Fork at that rock, and Calhoun's Fork at the rock house, and Hagin's Fork at the beech and lyn. And similar testimony is given by McQuinn. It is perfectly clear that the boundary which Carpenter conveyed to Kash crossed Howard's Fork below the mouth of Wilson's and Calhoun's Forks, leaving the land which he had sold to Sam Carpenter between the residue of his farm and the land in contest. It should also be remembered that Carpenter purchased a considerable boundary from McDaniel while he was in possession. Williams never claimed to own the Sam Carpenter boundary under his purchase from Stephen Carpenter; nor is it contended that he had ever actual possession of this tract of land, although it was undoubtedly covered by his conveyance to appellants in 1880. After their purchase from Williams in June, 1880, appellants put John Russell as their tenant in the house which had been occupied by Williams at the mouth of Howard's Fork, and leased to him not only the land to which Williams had an undoubted title, but also all the land in controversy; and shortly after their lease to Russell they built a cabin on the land in controversy, and put a woman in possession of it. This seems to have been the first effort on the part of appellants to acquire claim by adverse possession to this boundary, but, as this was only four years before the institution of this suit, it was insufficient to vest them with title. By their purchase from Williams appellants acquired title to a very considerable boundary of land, but the mere fact that the deed from Williams included land which he had a right to convey did not vest his vendees with either title or possession of land to which he had not a valid legal title, although both tracts are covered by the deed. See *Trimble v. Smith*, 4 Bibb, 257; *Busw. Lim.* § 268. Appellants have failed to show their title or possession to the land in controversy, as the cabin built on the land, and the installation of a tenant therein, after the institution of this suit, cannot affect the rights of the parties.

But it is contended that, if appellants have shown no right to relief, appellees are in no better condition, because the patents issued to Davis in 1807 are void for the reason that senior grants both from the state of Ken-

tucky and the commonwealth of Virginia cover the same land. Appellants, however, cannot avail themselves in this litigation of this well-settled rule. As said by Judge Mills in *Fowke v. Darnall*, 15 Ky. 320: "Courts in modern times have leaned considerably against permitting a defendant who comes in by wrong from protecting that wrong by the title of others with which he is unconnected." And in *Sowder v. McMillan's Heirs*, 34 Ky. 456, it was held that when the possession of plaintiff is shown (and in this case appellees undoubtedly hold the constructive possession of the land in controversy by reason of their paper title) "and the entry upon it by the defendant, the right to recover cannot be resisted by showing that there is an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter." And the rule announced in this case was quoted and approved in *Ratcliff v. Iron Works Co.*, 87 Ky. 559, 10 S. W. 365, and in *Stembridge v. Britschu* (Ky.) 20 S. W. 278. In the last case it was decided that, the plaintiffs having had possession of the land for more than the statutory period, the defendant could not defend his own wrong by the titles of others with whom he had no connection. We therefore deem it unnecessary to determine whether the third line of the Reynolds patent extended beyond Quicksand creek, or to consider the alleged senior patents spoken of by the witness Thurston, as there is no claim that appellants connect with any of these alleged patents.

Cross appeals have also been prosecuted from the judgment of the circuit court by appellee Patterson against the Davis heirs, and by the Davis heirs against Patterson. Their contention grows out of a judgment of the circuit court, which adjudges to the Davis heirs a part of the 2,200 acres of land described in the 14 patents from the commonwealth of Kentucky to R. P. Davis. The facts out of which this controversy grew are that in June, 1865, R. P. Davis sold and conveyed to Patterson 5,000 acres of land on Calhoun's Fork of Howard's creek in consideration of \$5,000. In April, 1866, Patterson sued Davis, alleging that there was only about 1,400 acres of land embraced in the boundary, and prayed a cancellation of the deed, and a judgment against Davis for \$2,145, the amount he had paid. This suit was compromised, and a written agreement entered into between Davis and Patterson in which Davis agreed to procure from the commonwealth patents for the 2,400 acres of land, including the land covered by his deed, and was to keep \$1,800 which had been paid to him by Patterson, and to refund \$345; the parties being allowed eight months in which to execute their covenants. Davis kept all of the \$2,145, but procured warrants for 2,400 acres of land, including the 1,400 acres covered by his original deed, on which patents were issued; but before

he could execute a deed to Patterson he died, and thereafter his widow and administratrix instituted suit against Patterson in the Breathitt circuit court, asking for a specific performance of the contract between her husband and Patterson. The court so decreed, and directed a conveyance of the lands to be made to appellee by a special commissioner, which was done. This deed was examined and approved in open court in October, 1867. This judgment is attacked in this proceeding by the heirs of Davis on the ground of certain alleged irregularities in the preliminary steps: First, it is contended that there was no affidavit for a warning order, and therefore Patterson was not before the court; second, that the answer of the guardian ad litem was not signed; third, that the patents referred to in the petition, and made exhibits, were not formally filed, and that the judgment did not specifically describe the land, etc.—it being contended that on account of these irregularities Patterson acquired no title under the judgment and deed made to him by the commissioner, and that they, as heirs at law of Davis, are vested with the legal title, and should be adjudged possession of the land in controversy. It appears that the greater part of the land in controversy was included in, and passed under, the deed made by Davis in his lifetime; and nearly all of the alleged irregularities complained of in this case were relied on in the case of *Newcomb's Ex'rs v. Newcomb*, 76 Ky. 544, 26 Am. Rep. 222, where it was said, after a full investigation of the authorities, "that the presumption is always indulged in favor of the jurisdiction of courts of general jurisdiction, and they cannot be assailed in collateral proceedings and adjudged void for the reason that some preliminary steps to be taken in the inception of the action are not found among the files of the clerk in whose office they are required to be kept." And in *Berry v. Foster* (Ky.) 58 S. W. 709, it was said that after the lapse of 20 years it would be conclusively presumed, in a collateral proceeding, that the ordinary preliminary steps had been taken. And these reasons apply with peculiar force to the case at bar. The judgment was rendered more than 30 years ago, and has been acquiesced in by the heirs of Davis, although they lived upon an adjacent tract of land, and the record shows a substantial compliance with all the requirements of the statute.

For the reasons indicated, the judgment is affirmed upon the original appeal, and upon the cross appeal of Davis' heirs against Patterson, and reversed upon the cross appeal of Patterson against the Davis heirs, and cause remanded, with instruction to adjudge Patterson the owner of all the land covered by the deed made to him under the judgment of the Breathitt circuit court by A. R. Patrick, commissioner.

HACKER et al. v. HOOVER et al.¹
(Court of Appeals of Kentucky. Jan. 28, 1902.)

DEEDS—DELIVERY TO MOTHER FOR INFANT CHILDREN—ACCEPTANCE—AGREED ORDER AND DEED CONSTRUED TOGETHER.

1. Where a deed conveying land to a mother and her infant children was delivered to the mother for herself and children, the title vested in her and the children, as an acceptance by them must be presumed, the deed being beneficial to them, and therefore it was proper to cancel a second deed by the grantor conveying the land to the mother alone.

2. An agreed order dismissing an action for divorce in which the wife sought alimony and maintenance must be read in connection with a deed executed by the husband on the same day, and as a part of the same transaction, for the purpose of determining what the agreement was as to how the deed should be made.

Appeal from circuit court, Clay county.
"Not to be officially reported."

Action by Ella Hoover and others against Jennie Hacker and Joseph Hacker to cancel a deed. Judgment for plaintiffs, and defendants appeal. Affirmed.

James Eversole, for appellants. James Andrew Scott, for appellees.

HOBSON, J. On April 25, 1895, there was an action pending in the Owsley circuit court, in which D. M. Vaughn was plaintiff and Jennie Vaughn defendant, and in which she sought alimony and maintenance for herself and her six children born of the marriage between herself and D. M. Vaughn, as well as a divorce from him. Previous to that time certain personal property had been set apart to her, and on that date the following agreed order was entered in the case: "We, D. M. Vaughn, plaintiff, and Jennie Vaughn, etc., defendants, for value received of D. M. Vaughn, and five hundred dollars in hand paid to Jennie Vaughn, or to E. W. Robertson for the heirs of D. M. Vaughn and Jennie Vaughn's heirs, have this day settled the above-styled case, and said attachment in said case is to be discharged and held for naught. This is to be in addition to the property that has already been adjudged to the defendant Jennie Vaughn, and this is a full and complete settlement of the above-styled case, except the big mare; and said D. M. Vaughn gives the colt to Ella Vaughn, his daughter, and said colt is to be Ella Vaughn's property in this settlement, and not to be taken away from her by any one." On the same day that this judgment was entered E. W. Robertson and wife executed and acknowledged a deed whereby they conveyed to Jennie Vaughn and the six children of herself and her husband jointly a tract of land. The consideration of the deed was the \$500 named in the agreed judgment. D. M. Vaughn was present when the deed was drawn, and it was written according to his directions. It was

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

prepared by her father, who was a lawyer, and she was induced by his persuasions to have it so prepared. The deed was delivered by Robertson and wife, and was lodged for record. Some time after this the deed was withdrawn from the clerk's office under a promise to the clerk that it would be returned in a few days. It was not returned, and Jennie Vaughn then got Robertson and wife to execute a new deed conveying the land to her. She had been divorced from her husband. After her divorce she intermarried with her co-appellee, Joseph Hacker. D. M. Vaughn, her former husband, then brought this suit in the name and on behalf of the six infant children, as their next friend, to cancel the second deed made by Robertson, and have the first deed returned to the clerk's office and recorded. After preparation the court decreed the relief sought.

The delivery of the deed to Jennie Vaughn and herself for the children divested Robertson of all title to the land, and vested the title in Jennie Vaughn and the infant children. An acceptance of the deed by the infants will be presumed, as it was beneficial to them. The rule is that where the contract between persons, though made at the same time or in the same transaction, is set out in different papers, all of them will be read together in ascertaining their real meaning. Under this rule we do not think that there is any doubt from the agreed order and the deed read together that the title to the land was to be vested jointly in the mother and the six children who were named in the deed. The children are cotenants with her. The judgment complained of awards them no more than the joint interest in the land which the deed vested in them, and on the whole case this seems to us the only conclusion that the proof in the record warrants.

Judgment affirmed.

YONTZ v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Jan. 30, 1902.)

CRIMINAL LAW—CHANGE OF VENUE—WAIVER OF OBJECTION TO COUNTY—INSTRUCTION AS TO CONSPIRACY—INSTRUCTION AS TO TESTIMONY OF ACCOMPLICE—MISCONDUCT OF COUNSEL IN ARGUMENT—HARMLESS ERROR.

1. Where a change of venue is granted on motion of accused, and he goes into trial without objection to the county to which the venue is changed, it is too late after verdict to object for the first time that the county to which the venue was changed is not adjacent to that in which the indictment was found.

2. Where appellant and others were jointly indicted for murder, the indictment alleging that appellant was aided, encouraged, and advised by his codefendants, and other persons whose names were unknown to the grand jury, to commit the murder, and that either one of his codefendants, or some person unknown to the grand jury, killed deceased, and that ap-

pellant was present, aiding, encouraging, and abetting the commission of the crime, and the testimony was to the effect that appellant and certain other persons met and agreed to go to the house of deceased and whip her and certain members of her family, and in the event of resistance to kill them, if necessary, the indictment and the proof were sufficient to authorize an instruction as to conspiracy.

3. As only one accomplice testified, it was sufficient to instruct the jury that accused could not be convicted on the testimony of an accomplice, without adding the words "or accomplices."

4. The fact that the commonwealth's attorney in his argument to the jury made reference to the guilt of one who was not on trial was not prejudicial to accused.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Mack Yontz was convicted of murder, and he appeals. Affirmed.

N. B. Hays, for appellant. O. V. Riley, R. J. Breckinridge, and H. L. Howard, for the Commonwealth.

BURNAM, J. The appellant, Mack Yontz, was jointly indicted with Elijah and Solomon Fleming by the grand jury of Letcher county for the murder of Jemimah Hall. When the case was called for trial at the August term, 1901, of the Letcher circuit court, appellant filed his petition, and moved for a change of venue from Letcher county to some county where he could have a fair and impartial trial. The commonwealth's attorney made no objection, and the change of venue was ordered to the Bell circuit court. Upon separate trial in the Bell circuit court, appellant was found guilty of murder, and judgment rendered sentencing him to the penitentiary for life. Upon appeal, plaintiff complains that the Bell circuit court had no jurisdiction to try the case, because the offense was committed in the county of Letcher, and Bell county did not adjoin Letcher. Section 1109 of the Kentucky Statutes provides: "When a criminal or penal prosecution is pending in any circuit court, the judge thereof shall, upon the application of the defendant or the commonwealth, order the trial to be had in some other adjacent county to which there is no valid objection, if it appears that the defendant or commonwealth cannot have a fair trial in the county where the prosecution is pending, and if the judge is satisfied that a fair trial cannot be had in an adjacent county, he may order the trial to be had in the most convenient county in which a fair trial can be had." The change of venue from Letcher county was made on the motion of the accused, and consented to by the commonwealth. The circuit judge was of the opinion, from the affidavit filed, that a fair and impartial trial could not be had in Letcher county, and, for reason satisfactory to himself, sent the case to Bell county. No objection was made by appellant to the selection of Bell county at the time the order was made, and no motion was made by him after the transfer to Bell

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

to remand the case either to Letcher or to an adjacent county, and no objection of any kind was made by him until after the verdict of guilty was rendered. Where a change of venue is granted, and the accused goes into trial without objection in the county to which the venue is changed, it is too late after verdict to raise this question for the first time. See *Lightfoot v. Com.*, 80 Ky. 516; *Hourigan v. Com.*, 94 Ky. 520, 23 S. W. 355.

The next ground of complaint is of the third instruction given to the jury, on the ground that there was no proof or averment in the indictment which justified an instruction based upon a conspiracy to commit the crime for which appellant was being tried. We are unable to see the force of this contention. The indictment charges the appellant, first, with the murder of the deceased, and that he was aided, encouraged, and advised to commit the murder by the parties jointly indicted with him, and other parties whose names and number were to the grand jury unknown. It also charges that either one of the parties jointly indicted with him, or one unknown to the grand jury, killed the deceased, and that appellant was present, aiding, encouraging, and abetting the commission of the crime. And the testimony of Elijah Fleming is to the effect that appellant and certain other parties met at a school house in the immediate neighborhood of the deceased's residence, and agreed with each other to go to her house, and take her and certain members of her family out and give them a whipping; and it was further agreed that if they were resisted they would do so by force, and, if necessary, kill the deceased and all the members of her family. The averments of the indictment and the proof in the case were both sufficient to authorize the instruction complained of.

It is also complained that the court refused to tell the jury that defendant could not be convicted upon the testimony either of an accomplice or accomplices. The jury were instructed on this point in the language of section 241 of the Criminal Code of Practice, and, as only one accomplice was introduced, the use of the word "accomplices" was wholly unnecessary. See *Howard v. Com.* (Ky.) 61 S. W. 756.

Appellant reserved exceptions to a number of alleged errors in the conduct of the trial, and especially in the admission and rejection of testimony. It will be unnecessary for us to notice in detail the grounds of each of these exceptions. We have carefully examined them, and, with one or two exceptions, are of the opinion that the court did not err at all. And in those instances where the court was perhaps technically in error, they were not prejudicial to the defendant, and could not have affected in any way the result of the trial. The most important of these alleged errors was that the commonwealth's attorney, in his closing address to the jury, used this language: "Gentlemen of

the jury, why did not Morgan Reynolds submit to arrest and stand trial, if he was not guilty? If he was not guilty, he would have said so to his mother and sisters." As Reynolds was not on trial, there was no occasion for the commonwealth's attorney to have made this remark. But we are unable to see how it could have affected prejudicially the rights of the defendant.

After a careful examination of all the grounds relied on for a reversal, we feel constrained to deny the relief sought. Judgment affirmed.

BEATTY v. THOMPSON'S ADM'R.¹

(Court of Appeals of Kentucky. Jan. 23, 1902.)

HUSBAND AND WIFE—RIGHTS OF HUSBAND'S CREDITORS—FRAUDULENT GIFT TO WIFE.

1. Money given by a debtor to his wife after plaintiff's debt against him was created still belonged to him as against plaintiff, though deposited in bank in the wife's name, and therefore real estate purchased with the money in the wife's name may be subjected to plaintiff's debt.

2. Objection to depositions upon the ground that they were taken without notice was waived where no exceptions were filed before the cause was submitted.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by the administrator of Sarah D. Thompson against Sarah B. Beatty and Samuel W. Beatty to subject land to the payment of a debt. Judgment for plaintiff, and defendant Sarah B. Beatty appeals. Affirmed.

Tabor & Warren, for appellee.

PAYNTER, J. The object of this action was to subject to the payment of appellee's debt against Samuel W. Beatty a lot which had been conveyed to Sarah B. Beatty, his wife. The question here involved is whether, after Samuel W. Beatty became indebted to appellee's intestate, he furnished the money to his wife to pay the purchase money of the property. From the facts and circumstances presented in this case it appears that neither Beatty nor his wife had anything with which to buy the property until the husband recovered a judgment for damages for personal injury against the street railway company. One thousand dollars of this money was deposited in bank in the name of the appellant. On the day the property was paid for, the purchase money being \$300, \$650 was drawn from the bank. In view of the facts and circumstances surrounding Beatty and his wife, it is but fair to infer that \$600 of the money drawn from the bank was used in paying the purchase money of the lot. If he attempted to give the \$1,000 to his wife, it was fraudulent as to the intestate's rights, as her debt existed

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

at the time of the transaction. At the time the property was purchased the money in the bank belonged to the husband notwithstanding it was deposited in her name; so when it was used to pay for the property it was in law the property of the husband. The court properly held that the lot was subject to the payment of the appellee's debt.

The appellant moved to set aside the judgment on several grounds. Part of the charges embraced in the motion for a new trial were refuted by the record. Those that were not thus refuted were not supported by the proof. Notice was given by the appellee that he would take depositions. If they were taken without notice, exceptions should have been filed before the cause was submitted for judgment. Had the deed and account filed as evidence not been considered by the court on the hearing of the case, the other testimony offered abundantly supports the judgment.

The judgment is affirmed.

LOUISVILLE & N. R. CO. v. CAROTHERS.¹
(Court of Appeals of Kentucky. Jan. 30, 1902.)²

CARRIERS—INJURY TO PASSENGER BY COLLISION—RES GESTÆ—OUTCRIES OF OTHER INJURED PASSENGERS AS EVIDENCE.

In an action to recover damages for injury to a passenger in a collision of trains, the fact that there were outcries by other passengers may be shown as a part of the *res gestæ*, but the particulars of what they said are not admissible.

"Not to be officially reported."

Petition for modification of opinion. Granted in part.

For former report, see 65 S. W. 833.

GUFFY, C. J. The fact that there were exclamations, outcries, or screams by the other passengers may be shown as part of the *res gestæ*, but the particulars of what they said do not seem to have been material to any issue in the case. The opinion in the Simpson Case (Ky.) 64 S. W. 733, was intended to go no further than this, and the opinion in this case is modified to this extent.

WALSTON et al. v. CITY OF LOUISVILLE
(two cases).¹

(Court of Appeals of Kentucky. Jan. 28, 1902.)

LIMITATION OF ACTIONS—COMMENCEMENT OF ACTION—ISSUING OF SUMMONS AGAINST NONRESIDENT—MUNICIPAL CORPORATIONS—INTEREST ON TAXES—SPECIAL LEGISLATION—DISMISSAL OF APPEAL—FAILURE TO FILE TRANSCRIPT IN TIME.

1. Under Ky. St. § 2624, providing that "an action shall be deemed to have been commenced at the date of the first summons or process issued in good faith from the court or tribunal having jurisdiction of the cause of action" the

filing of petition and issuing of summons against defendant stopped the running of the statute, though defendant was a nonresident, plaintiff city and its attorney being ignorant of that fact.

2. The provision of the charter of cities of the first class requiring the payment of interest on taxes past due is not void as special legislation, though the statutes do not provide for the payment of interest on taxes due to cities of other classes, or to the state or county.

3. Appellants were entitled to have an appeal granted by the clerk without first dismissing an appeal granted to them by the lower court; but a motion by appellee, made before submission of the appeal granted by the clerk, to dismiss the appeal granted below, must prevail, the transcript not having been filed as much as 20 days before the second term after the appeal was granted.

4. A supersedeas not issued until after time for filing transcript had expired must be discharged.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Actions by the city of Louisville against Thomas Walston, trustee, and others, to recover taxes. Judgment for plaintiff in each action, and defendants appeal. Affirmed.

Lane & Harrison, for appellants. H. L. Stone, for appellee.

PAYNTER, J. In 1896 the appellee filed in each of these cases a petition by which it sought to recover taxes due for the years of 1891, 1892, 1893, and 1894. Summonses were issued upon the petitions, and returned not executed. It being ascertained that the defendants were nonresidents, the mayor of the city filed his affidavit in each of the cases for a warning order, which was duly made. In each of the cases an answer was filed pleading the five-year statute of limitations. This plea was made upon the theory that the filing of the petition and the issuing summonses thereon did not prevent the statute of limitations from running against the taxes, as the defendants were then nonresidents; that, as the warning orders were not made until March, 1898, the statute of limitations barred a recovery of the taxes in each case claimed for the years of 1891 and 1892. It is urged that the doctrine announced in *Bank v. Hoffman* (Ky.) 35 S. W. 631, applies to this case. In that case the court held that the plaintiff knew that the defendant Hoffman was a nonresident when the summons was issued, and that he could not be brought before the court, except by a warning order. For that reason the court held that filing the petition and issuing the summons did not prevent the statute of limitations from running. In effect, the court held that the summons was not obtained in good faith. In this case it is not shown that the mayor of the city or its attorney knew that the defendants were nonresidents at the time the summonses were issued, nor that they knew that fact until about the time the affidavit was filed for a warning order. Sec-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

² Rehearing denied.

tion 2524, Ky. St., reads as follows: "An action shall be deemed to have been commenced at the date of the first summons or process issued in good faith from the court or tribunal having jurisdiction of the cause of action." The facts in this case failing to show that the first summons was not issued in good faith, the statute of limitations cannot be applied to the claim asserted by the city for taxes.

Section 2908, Ky. St., is part of the act for the government of cities of the first class, the city of Louisville being the only city in that class. The section provides that taxes shall draw interest from a certain time. It is urged that the section is violative of the constitution, because some of the acts for the government of cities of certain classes fix different rates of interest on past-due tax bills and some do not provide that they shall draw interest at all. It is also claimed that the statutes do not allow interest on past-due state, county, or district tax bills. It is urged that an act is invalid allowing interest on past-due tax bills unless it applies to state, counties, municipalities, and all political subdivisions, and that when it is made to apply alone to cities of one class it is local or special legislation, prohibited by section 59 of the constitution. On this question we must take issue with counsel. Section 156 of the constitution reads as follows: "The cities and towns of this commonwealth, for the purpose of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." The constitution requires the general assembly to classify the cities. The organization and powers of each class shall be defined by general laws, so that the same class shall possess the same powers and be subject to the same restrictions. The language of the section shows that a law for the government of cities is general when it applies to cities of a class. Without taxation a municipal government could not be carried on. Taxes

are the food upon which municipal and other governments live; as it were, they are their very life blood. Under the constitution the same rate of taxation must prevail in all cities of the same class, the same time for payment must be provided, and the same penalties imposed for the nonpayment of taxes. To require the payment of interest on past-due tax bills is somewhat in the nature of a penalty. If not that, then it is compensation for indulgence in the payment of taxes. It is as much of a general law to impose a penalty for the nonpayment of taxes or to require the payment of interest on past-due tax bills in cities of a class as it is to provide that taxes shall be levied and collected therein. It is a governmental function to impose taxes, and it is equally so to prescribe the method of their collection and the penalties for nonpayment.

Before these cases were submitted, there was a motion entered by the appellee to dismiss the appeals, because the transcripts were not filed more than 20 days before the beginning of the second term of this court after the appeals were granted in the court below. The appeals were granted by that court February 27, 1900. The transcripts were filed March 19, 1901, and an appeal at that time was granted by the clerk of this court. The motion to dismiss the appeals granted by the clerk of this court must be overruled, because the appellants had the right to have such appeals granted at any time within two years after the rendition of the judgment, whether or not the appeals granted in the court below had been dismissed. The motion to dismiss applies to all the appeals. As the transcripts were not filed 20 days before the second term of this court after the appeals were granted in the court below, the motion to dismiss them must be sustained. As the supersedeas was not issued until December 4, 1900, it must be discharged. In our opinion, the doctrine of *Gorley v. City of Louisville* (Ky.) 47 S. W. 263, and *City of Louisville v. Kuntz* (Ky.) 47 S. W. 592, as to the statute of limitations, does not apply to this case.

The judgments are affirmed.

GRAY v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Jan. 29, 1902.)

CRIMINAL LAW—APPEAL—TIME FOR FILING TRANSCRIPT.

Under Or. Code Prac. § 336, the 60 days allowed for filing transcript of the record in the clerk's office of the court of appeals in a felony case runs from the date of the judgment, and not from the date of the filing of the bill of exceptions, unless the time for filing bill of exceptions is extended to a subsequent term; the extension of time for filing bill to a subsequent day in the same term at which the judgment was rendered not being sufficient to extend time for filing transcript.

Appeal from circuit court, Bell county.

"To be officially reported."

Motion to dismiss. Granted.

W. G. Colson, for appellant. Robt. J. Breckinridge, for appellee.

GUFFY, C. J. The appellee has entered a motion to dismiss this appeal because the transcript was not filed in the clerk's office of this court within 60 days from the rendition of the judgment, and cites sections 334 and 336 of the Criminal Code of Practice, and *Stratton v. Com.*, 84 Ky. 190, 1 S. W. 83, in support of his motion to dismiss. It appears that the judgment sentencing the appellant was entered on the 7th day of November, 1901, and the transcript filed in the clerk's office of this court on the 7th of January, 1902, which was not within 60 days from the 7th of November, 1901; but it appears that at the time of the rendition of the judgment the appellant was given until the 30th day of the then term of the Bell circuit court to prepare, tender, and file a bill of exceptions, which bill was filed on the 9th day of November, 1901, and the court entered an order suspending the judgment, and giving appellant 60 days to file the transcript in the clerk's office of this court. Section 334 of the Criminal Code of Practice provides: "The court of appeals shall have appellate jurisdiction in prosecutions for felonies, subject to the restrictions contained in this article." It is provided by section 336 that an appeal may be taken by defendant in the following manner only: "The appeal must be prayed during the term at which the judgment is rendered and the prayer noted on the record in the circuit court. The appeal shall be granted as a matter of right. (2) When an appeal is prayed the court shall, if defendant desire it, make an order that the execution of the judgment be suspended until the expiration of the period within which the defendant is required to lodge

a transcript of the record in the clerk's office of the court of appeals. After the expiration of such period the judgment shall be executed unless the defendant shall have filed in the clerk's office of the court rendering the judgment, the certificate, as provided in subsection 3 of this section, that the appeal has been taken, or a copy of an order of the court of appeals granting further time to lodge the transcript. (3) The appeal is taken by lodging in the clerk's office of the court of appeals, within sixty days after the judgment, a certified transcript of the record. The clerk of the court of appeals shall thereupon issue a certificate that an appeal has been taken, which shall suspend the execution of the judgment until the decision upon the appeal. (4) If time be given, beyond the term at which the judgment is rendered, to present a bill of exceptions, the transcript of the record may be filed in the clerk's office of the court of appeals within sixty days after the bill of exceptions is made a part of the record." In *Stratton v. Com.*, 84 Ky. 190, 1 S. W. 83, this court had under consideration the precise question involved in the case at bar, in which the court, after referring to the facts in that case, and discussing parts of section 336 of the Criminal Code, said: "By subsection 4 it is provided that time may be given beyond the term at which the judgment is rendered to present a bill of exceptions, in which case the transcript of the record may be filed in the clerk's office of the court of appeals within sixty days after the bill of exceptions is made part of the record. But the provision of subsection 4 does not apply to this case, for the bill of exceptions was filed and made part of the record during the same term (July, 1885) the judgment was rendered. It seems to us clear that, in order to give to the court of appeals jurisdiction in a felony case, a certified transcript of the record must be filed in the clerk's office within sixty days after the judgment, or, in a state of case provided for in subsection 4, within sixty days after the bill of exceptions is made a part of the record, unless an order be made by the court of appeals granting further time to lodge the transcript." Thus it seems that this court has expressly decided that, unless the transcript is filed in the clerk's office of this court within 60 days from the rendition of the judgment, no appeal can be entertained, except in cases where the time for filing the bill of exceptions has been extended to a day in the next term of the court rendering the judgment.

It therefore follows that the transcript was not filed as required by law, and the motion to dismiss must be, and is, sustained, and appeal dismissed.

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

SMITH'S ADM'X v. MIDDLETON.¹

(Court of Appeals of Kentucky. Jan. 31, 1902.)

MASTER AND SERVANT—LIABILITY FOR SERVANT'S NEGLIGENCE—EVIDENCE THAT SERVANT WAS ORDINARILY CAREFUL—GROSS NEGLIGENCE OF DRUG CLERK—MASTER'S LIABILITY FOR PUNITIVE DAMAGES—MEASURE OF DAMAGES FOR CAUSING DEATH.

1. Where it was sought to charge the master with the servant's negligence, evidence that the servant was a careful, sober, painstaking man was not admissible for defendant; no attempt having been made by plaintiff to prove that the servant was generally careless, inattentive, or dissipated.

2. The act of a drug clerk in selling morphine for calomel, and placing it in a box labeled, "Calomel $\frac{1}{4}$ grain," was evidence of gross negligence, entitling plaintiff to an instruction defining that degree of negligence, and telling the jury that, if they believed such negligence existed, they might award punitive damages against the employer for a death caused thereby.

3. Punitive damages may be awarded against the master, whether a natural person or a corporation, for the gross negligence of the servant in the line of his employment.

4. In an action to recover damages for the death of a child five years of age, it was error to instruct the jury, if they should find for plaintiff, to fix the damage at a fair equivalent in money for the power of deceased to earn money, lost by reason of the destruction of his life, and that in fixing the damages they should "take into consideration the age of the deceased at the time of his death, his earning capacity, and the probable duration of his life," as the words "his earning capacity" were probably misleading, and should have been omitted, in view of the tender years of decedent.

Appeal from circuit court, Shelby county.
"To be officially reported."

Action by the administratrix of Charles Earl Smith against George N. Middleton to recover damages for the death of plaintiff's intestate. Judgment for plaintiff for only a part of the amount claimed, and she appeals. Reversed.

Beard & Marshall and Willis & Willis, for appellant. J. C. Beckham & Son and G. G. Gilbert, for appellee.

O'REAR, J. Appellee was a druggist at Shelbyville. He had besides himself, in charge of his store, a licensed pharmacist, and two other salesmen who were not licensed pharmacists. Charles Earl Smith was an infant aged about four years. His mother and her sister called at appellee's drug store with an ordinary pill box bearing a label, besides the druggist's name, as follows: " $\frac{1}{4}$ grain calomel." They handed this box to one of appellee's clerks,—one who was not a pharmacist,—and asked him to furnish in the box 25 cents worth of calomel in one-fourth grain tablets, which he undertook to do. They also made other purchases, including having a prescription refilled. They returned to the drug store shortly afterwards, and

were delivered their packages by a clerk, which they carried to their homes. The statement of the women is that they kept on hand a supply of calomel in this form for use as occasion might seem to require. Mrs. Smith had three little children, Charles Earl being the second. He was complaining of a cold, and as a remedy she sought to administer what she believed was calomel, being some of the pellets contained in the box referred to. She did give him three of these pellets,—one at the end of each hour for three hours. It subsequently developed that, instead of calomel, the box contained morphine. The result was the death of the child. His administratrix has brought this suit against the druggist for the negligent destruction of the child's life, alleging that the mistake by which the clerk furnished morphine instead of calomel, and putting it in a box labeled, "Calomel $\frac{1}{4}$ grain," was gross negligence of such a degree as entitled the plaintiff to recover punitive damages. The jury found for the plaintiff a nominal sum, and she appeals, presenting three grounds for the consideration of this court, upon which she asks a reversal.

1. The defendant (appellee) was permitted to prove on the trial that the clerk who furnished the medicine, and who, by the way, claimed he did not furnish morphine, but did calomel, was a careful, sober, painstaking man. This evidence was objected to. It had not been attempted, for the plaintiff, to prove that the clerk was either generally careless, inattentive, or dissipated. Therefore the question was not whether generally and ordinarily the clerk was as suggested by the evidence, but whether upon the occasion under inquiry he was careful or negligent. In our opinion, it ought not to affect this case in the least however careful and attentive the clerk was ordinarily, if on this particular occasion he was negligent or grossly negligent. The sole question to be submitted to the jury on that point was whether the clerk did furnish morphine on this prescription instead of calomel, and whether such an act was, or not, grossly negligent. We are of opinion that the testimony discussed above should have been excluded, and the inquiry confined to the particular transaction,—as to whether it was or not negligent.

2. On the trial of the case the court refused to submit to the jury the question of punitive damages. Whether this was upon the theory that the master, when a natural person, is not liable to punitive damages, because of the gross neglect of his servant when upon the master's business and in the line of his employment, where care has been used by the master in the selection of the servant, or whether it was upon the idea that there was no evidence of gross neglect shown in this case, we are not informed. The court is of the opinion that to put in charge of a business of this kind one with

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

authority to dispense such poisonous and dangerous drugs as morphine (it was shown in this case that these unlicensed clerks were authorized to sell this drug), where such one gave such a deadly drug to one calling for calomel, placing it in a box labeled, "Calomel $\frac{1}{4}$ grain," without notice of the true nature of the drug furnished, was of itself such evidence of that degree of gross negligence that would warrant a jury in finding punitive damages against such wrongdoer. It is not suggested, nor can we apprehend that it is in any wise probable, that the act of furnishing the wrong drug in this case was willful. If it was furnished by the clerk, it was undoubtedly a mistake and unintentional. However, it was a mistake of the gravest kind, and of the most disastrous effect. We cannot say that one holding himself out as competent to handle such drugs, and who does so, having rightful access to them, and relied upon by those dealing with him to exercise that high degree of caution and care called for by the peculiarly dangerous nature of this business, can be heard to say that his mistakes by which he furnishes a customer the most deadly of drugs for those comparatively harmless is not, in and of itself, gross negligence, and that of an aggravated form. In a business so hazardous, having to do so directly and frequently with the health and lives of so great a number of people, the highest degree of care and prudence for the safety of those dealing with such dealer is required. And that degree of care exacted of such dealer will be required, also, of each servant intrusted by him with the conduct of his calling. In argument, however, much stress is laid upon the suggestion, if the master, who is not a corporation, exercises due care in the selection of competent and careful servants, that for their gross or willful neglect, even in the discharge of their duties in his business, he is not liable. It is argued that as punitive damages are awarded, in one sense, as a punishment of the wrongdoer for his negligence, only the one actually guilty should be so punished. It is admitted that a contrary rule exists in this state where the master is a corporation. It is said that in such a case the master can act only by its servants; that from the necessities of the case the servant, when acting for his employer in the discharge of his line of duty, is the master, so far as the act in question is concerned. We are asked to differentiate the liabilities of these two different classes of employers. Why a different rule of liability should be applied to one who is compelled to operate his business by servants, to that applied to one who elects to do so, is not shown, nor are we able to perceive. There seems to have been at one time much contrariety of opinion among the courts on this point, which has later become less marked. In this state we never recognized the distinction now sought to be drawn.

The doctrine seems to us to be unsound, if not pernicious. It would imply that, with respect to all of the grossly neglectful acts or intentional acts of the servant in the supposed furtherance of his master's business, the law clothed the master with immunity, if the act was right, because it was right, and, if it was wrong, it clothed him with like immunity because it was wrong. He would thus get the benefit of all his servant's acts done for him, whether right or wrong, and escape the burden of all intentional or grossly neglectful acts done for him which were wrong. Under the operation of such a rule, it would always be safer for the master to conduct his business vicariously than in his own person. The public are invited to deal with the servant concerning his master's business. Through him only can the business be transacted, if the master so wills. Then for his intentional or grossly neglectful act done within the scope of his employment the one dealing with him would be left without remedy. This would be an inducement to one engaged in a specially hazardous business to conduct it by the means of financially irresponsible agents, because if they should succeed in the business the master would get all the profits, while, if by their gross negligence or willful act injury resulted to another, the master and his business would not be hurt, so far as direct punishment was involved. It is said by Thompson, in his Commentaries of the Law of Negligence: "A doctrine so fruitful of mischief could not long stand unshaken in an enlightened system of jurisprudence." In *Hawkins v. Riley*, 17 B. Mon. 110, which was an action by one injured by the alleged gross negligence of a stage driver,—the stage being operated by a natural person,—the court said: "If the collision was brought about by the wantonness, recklessness, or gross negligence of the driver, then it was permissible in the jury, in view of all the facts, to award what the law terms 'exemplary damages' as well against the proprietors as the driver." We are of opinion, therefore, that the court erred in not giving to the jury an instruction defining "gross negligence",—the one asked for,—and predicated upon it another permitting the plaintiff to recover punitive damages if the jury find such negligence to exist.

3. As to the measure of "compensatory damages," the court gave the jury the following instruction: "If the jury find for the plaintiff, they will fix the damage at a fair equivalent in money for the power of deceased to earn money, lost by reason of the destruction of his life, not exceeding \$10,000; and in fixing the damages the jury will take into consideration the age of the deceased at the time of his death, his earning capacity, and the probable duration of his life." Ordinarily this instruction fairly presents the law as administered in this state on this subject. In this case, considering the tender

years of the decedent, we are of the opinion that the use of the expression "his earning capacity" was probably misleading to the jury. We rather think that an instruction after this form would have been more appropriate: "If the jury find for the plaintiff, they will fix the damages at such a sum, not exceeding \$10,000, as would be a fair compensation to the estate for the destruction of the power of the deceased to earn money; and in fixing such damages the jury should take into consideration the age of deceased at the time of his death, and the probable duration of his life."

The judgment is reversed, and the cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

WORTHAM v. STITH.¹

(Court of Appeals of Kentucky. Jan. 30, 1902.)

STATUTE OF FRAUDS—CONTRACT FOR SALE OF LAND—FAILURE OF WRITING TO DESCRIBE LAND.

A written contract for the sale of "115 acres of land," without further description, has no more force than a parol contract, and therefore no action for its breach can be maintained.

Appeal from circuit court, Hardin county. "Not to be officially reported."

Action by C. M. Wortham against A. M. Stith to recover damages for breach of contract. Judgment for defendant, and plaintiff appeals. Affirmed.

Sprigg & Chelf, for appellant. R. L. Stith and O'Meara & Montgomery, for appellee.

PAYNTER, J. This action is based upon a writing which reads as follows: "Elizabethtown, Ky., Dec. 12th, 1900. Received of C. M. Wortham three hundred dollars in part payment of 115 acres of land, which I have this day sold him for \$3,100.00,—\$1,000 cash, and \$2,100 in one and two years' time. Possession to be given and deed made Feb. 1st, 1901, when the balance of the cash payment is to be made, and the notes dated. [Signed] A. M. Stith." It is averred in the petition that \$300 of the \$1,000 cash payment was paid at the time the writing was executed; that the defendant refuses to convey the property; that he (plaintiff) had been greatly damaged, delayed, and inconvenienced by the defendant's breach of the contract, in refus-

ing to convey the property. The plaintiff prayed judgment for the \$300, and, in addition thereto, \$1,000 damages. It will be observed that there is no description of the land in the writing, and therefore it is against the statute of frauds and perjuries, which provides that no action shall be brought to charge any person upon a contract for the sale of real estate unless the contract, agreement, or some memorandum, be in writing signed by the party to be charged therewith. In *Jones v. Tye*, 93 Ky. 390, 20 S. W. 388, the receipt described the land as adjoining "the McKebly land." The court held that the contract was unenforceable, because there was no description of the land; and in that case the court said: "According to these cases, and others that might be cited, it is clear that the receipt in this case is not a sufficient memorandum of the sale to comply with the statute of frauds, because it fails to identify with reasonable certainty the land sold; and to allow the controversy as to the identity of the land to be settled by the mere weight of verbal testimony would, as it seems to us, defeat the very object of the statute of frauds." The defendant tendered in open court the \$300, which was accepted by the plaintiff on his claim. The question for review is the right of appellant to recover damages for the appellee's refusal to convey the land. The contract is not enforceable, and no action can be maintained thereon. The transaction amounted to nothing more than a verbal promise to convey the land. It necessarily follows that, if the contract cannot be enforced, no action for a breach of it can be maintained. The case of *Bryant v. Everly* (Ky.) 57 S. W. 231, is not in conflict with the view herein expressed. In that case the plaintiff paid \$700 for a timber contract and for land. The party who paid the \$700 got the timber contract, but the party who agreed to convey the land refused to do so. The court necessarily had to ascertain the value of the land, in order to know the amount the purchaser was entitled to have returned. It certainly would not have been right to have compelled him to have accepted the timber contract at the price of \$700, when he was to have it and the land for that amount. When the value of the land was ascertained, it showed what part of the consideration was for the timber contract, and he was entitled to have returned the amount he had paid for the land. We think that the court in this case properly sustained the demurrer to the petition.

The judgment is affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

LOUISVILLE & N. R. CO. v. McCLAIN.¹

(Court of Appeals of Kentucky. Jan. 30, 1902.)

DAMAGES—PHYSICAL EXAMINATION OF PLAINTIFF—PUNITIVE DAMAGES—BURDEN OF PROOF.

1. As plaintiff had been fully examined by two surgeons of defendant at the time of the injury complained of or shortly thereafter, and was examined by three other physicians at different times, and there was little conflict in the testimony of the five physicians, there was no substantial error in overruling defendant's motion for a personal examination at the time of the trial, or in refusing to allow proof that plaintiff had declined to submit to a further examination.

2. The court properly instructed the jury that they might award punitive damages if there was gross neglect, there being sufficient evidence to authorize the submission of that question.

3. As defendant, by its answer, denied that plaintiff was injured at all, the burden of proof was upon plaintiff.

Appeal from circuit court, Bullitt county.
"Not to be officially reported."

Action by W. D. McClain against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh, Straus & Eagles and R. W. Hines, for appellant. Halstead & Yewell, for appellee.

HOBSON, J. Appellee, McClain, was a passenger on one of the defendant's trains on December 23, 1899, which, while standing at Gap in the Knob, a station in Bullitt county, was run into by a heavy freight train following it. Appellee was in the rear of the train, and was thrown by the collision from the car in which he was sitting out upon the track, falling upon his back, and sustained injuries causing an inflammation of the nerves near the lower end of the spine. He was confined to his bed for some days by the bruise, which was quite painful, and brought this suit to recover for alleged permanent injuries. He recovered a judgment for \$1,500. The collision is the same referred to in the case of Railroad Company v. Simpson, 64 S. W. 733, and Same v. Carothers, 65 S. W. 833, recently decided, and the facts of the occurrence are set out fully in those opinions.

Appellant filed the affidavit of its counsel, and moved the court to require the plaintiff to submit to a personal examination before the trial of the case. The court overruled the motion. Appellant then on the trial proposed to prove to the jury that the plaintiff

had objected to the examination, and the court refused to admit the evidence. It is provided by the Code of Practice that a judgment cannot be reversed unless for an error to the substantial rights of the party complaining. It is discretionary with the court whether he will order a personal examination, and this court will not reverse unless there is an abuse of discretion, and it may fairly be concluded that the rights of the party complaining were substantially prejudiced. The appellee had been examined fully by two surgeons of the appellant at the time of the accident, or shortly thereafter. In February following he was examined by a distinguished physician in the city of Louisville, whose deposition was taken in the case. He had also been examined at different times by two other physicians. The testimony of all five of these physicians was introduced on the trial, and there was little conflict in their statements. The testimony of the physicians leaves no room for doubt that the appellee was badly bruised, that his nervous system was shocked, and that the trouble with him after the effect of the bruise passed off was due to the inflammation of the nerves, or neuritis. This condition is not seen on the surface, and the trouble is a subtle one. We are unable to see from the evidence that a further examination made at the trial could have revealed anything that was not shown by the evidence before the jury. It was clearly shown the spine was uninjured, and that the trouble was exclusively in the nerves. We therefore conclude that there was no substantial error in overruling the motion for a personal examination, or in refusing to allow proof before the jury that the plaintiff had declined to submit to a further examination, because he had a right to stand on what he conceived to be a sufficient showing as to his injuries, and to submit the question to the judgment of the court. *Electric Line Co. v. Allen* (Ky.) 44 S. W. 89; *Distilling Co. v. Riggs* (Ky.) 45 S. W. 99.

The proof in the case was amply sufficient to justify submitting the question of gross neglect to the jury, and, if there was gross neglect, punitive damages might be awarded.

The appellant, by its answer, denied that plaintiff was injured at all. The injury to him was the gist of the action. The burden of proof was therefore upon him, and the court properly so held on the trial.

The instructions of the court properly submitted the issues in the case to the jury, and on the whole record we see no substantial error to the prejudice of appellant. The verdict is not excessive under the evidence.

Judgment affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ALLISON et al. v. COCKE'S EX'RS.**SAME v. PRESTON'S EX'RS.**

(Court of Appeals of Kentucky. Jan. 23, 1902.)

"To be officially reported."

Petition for rehearing. Denied.

For former report, see 65 S. W. 342.

HOBSON, J. Appellants' counsel, by petition for rehearing, has presented with great force the proposition that appellees, having an election of remedies for the breach of their contract, cannot take more than one; or, as he puts it, "declare the contract void, and at the same time seek a recovery which could only be based on the contract." His argument is based upon the theory that the vendors have declared the contract void, and have sought to hold the forfeited money; that this must be done subject to the vendees' right to sue in equity for relief against the penalty, and that the vendors have the right to ask the court to require the vendees, who come into court seeking equity, to do equity. Of course, when counsel speaks of declaring the contract void, and at an end, he refers only to that part of the contract which requires the vendors to convey their land and the vendees to pay for it, for the contract does not provide that it shall be entirely void by reason of the breach, but expressly excepts the payment of the two sums aggregating \$20,500. So the declaration of forfeiture and the attempt to retain the forfeited money is an attempt to enforce the literal terms of the contract. The vendors' claim is upon the contract, and the vendees have sued for equitable relief against enforcement of this provision of the contract. The relief is granted them upon equitable terms, which are that the vendors shall not be put to actual loss because a court of equity relieves against the enforcement of their contract right. By the terms of their contract they were entitled to \$20,500, already paid to them as an indemnity against loss by reason of the breach of the contract. Having elected to rely upon this indemnity, they are limited to the amount of it. They cannot get more than the amount thus fixed, but they must not be compelled in equity to take less than the loss they have suffered by the vendees' failure to carry out the contract. They are allowed to retain out of their forfeiture so much, and only so much, as will make them whole; substantially the same amount that they would obtain by a suit for specific performance, for in such a suit the costs of decretal sale would go against the vendees in the contract.

Appellants' case is an application by them to be relieved from a forfeiture. It rests upon the ground that appellees should not, in justice and right, be permitted to retain appellants' money for nothing. The relief

which equity will afford them must be governed by equitable principles. In so far as appellees have paid out the money received from appellants in reasonable expenses fairly incurred in making or attempting to carry out the contract, they should not be liable; for this money is not in their hands, and the principles on which appellants' action is grounded apply only to money in the hands of appellees which, in equity, they should not be permitted to retain. And in determining how much, if any, of the sum paid by appellants to appellees may be retained, equity will not consider alone the disbursements made by appellees, but will take into consideration also the rights of appellees, and the situation in which they are left. If, at the termination of the contract, the property, valued at its reasonable market price, was not of value equal to the amount coming to appellees from appellants under the contract, then to this extent they would be losers by reason of appellants' breach of the contract, if the fund in their hands is taken from them. Equity will not aid appellants in making a profit out of their own breach of contract, at the expense of appellees. Appellants cannot be placed in a more favorable situation than they would have occupied if they had complied with their contract, and they can recover only so far as, in justice and right, appellees should not be allowed to retain the money paid to them over and above their cost and reasonable expenses. If the property was of value equal to the balance due under the contract, they may recover the whole balance. If it was not, they may recover only so much of it, if any, as remains after deducting the loss which appellees sustained by appellants' failure to carry out their contract.

The petition is overruled.

DINEEN v. HALL et al.

(Court of Appeals of Kentucky. Jan. 29, 1902.)

"To be officially reported."

Petition for rehearing. Denied.

For former report, see 65 S. W. 445.

GUFFY, O. J. On account of the zeal manifested by the appellees' attorney in his petition for a rehearing, as well as the practical importance of the question involved, we have determined to file a response to the petition for a rehearing.

The case of *Malone v. Conn*, 95 Ky. 83, 23 S. W. 377, and *Aims v. Same, Id.*, is conclusive upon the question involved in the case at bar, and was decided October 31, 1893. The syllabus reads as follows: "Real estate in which infants own a remainder interest can be sold only for the purpose of reinvestment as provided by section 491 of

the Civil Code of Practice. There cannot be a sale of such property under section 490, Id. And the fact that the life tenant, as guardian for the infant remainder-men, asks for a sale of the property, alleging that the owners are joint tenants, and that the property cannot be divided, does not vest the possession in the remainder-men, so as to authorize the sale. Therefore the purchaser at such a sale does not acquire such a title as a court of equity will require one who has purchased from him to accept. While dower is not an estate until assigned, an estate by the curtesy takes effect as a freehold estate immediately on the death of the wife." The case of *Swearingen v. Abbott* (decided May 19, 1896) 35 S. W. 925, also conclusively sustains the opinion heretofore rendered in the case at bar. The court, speaking through Chief Justice Pryor, said: "While it is manifest the property in this case is indivisible, and perhaps it is to the interest of the infants that it should be sold, still the proceedings do not follow the provisions of the Code authorizing the sale of infants' real estate. It is true, the owner of three-fourths of the realty consents to the sale, and the life tenant, by cross petition, is seeking to subject the realty to the satisfaction of a lien; yet the infants, by their next friend, could not bring the action, because they were not in possession, and, although with a vested estate, the possession is with the life tenant and the other joint owner. *Malone v. Conn*, 95 Ky. 93, 23 S. W. 677. This is not a sale for debt, within section 489 of the Code, or a proceeding under 491, but an attempt to sell under section 490, because the estate was vested in the infants. Whether or not the title passed by reason of the cross petition of the father is a question of doubt; but the purchaser is complaining, and it is not only proper, but essential, that these statutes regulating the sale of infants' realty should be complied with. If the father has a lien, let him enforce it, or, if the joint tenant wants it sold, let her bring the action, and not by her next friend of the infants, without an averment bringing the case within either of the sections of the Code under which the realty of infants can be sold. Section 490 not only requires that the estate should be vested, but the possession must be with the infants. Here they have no right to enter because of the life estate in the father." This court, in *Malone v. Conn*, supra, speaking through Judge Pryor, said: "The case of *Power v. Power* (Ky.) 15 S. W. 523, was not a construction of this section; the court holding only that the widow acquired the title by virtue of the assignment, and not before. The title vests in such a case in the heirs, subject to the widow's right of dower, and there the title remains until dower is assigned. Says Mr.

Minor in his Institutes: 'There is a radical difference between a right of dower and an estate by the curtesy. The latter takes effect as a freehold estate immediately on the death of the wife. On the other hand, dower is not in any sense an estate until assigned.' 2 Minor, Inst. 157. This is the common rule, the widow not being vested with the title or the power. She has no legal seisin or right of entry until dower is assigned. 2 Scrib. Dower, 27. Whether or not this right of entry is affected by our statute is not necessary to determine, as it is plain the vested interest in remainder, without the possession, did not authorize the sale under section 490. In the case of *Kean v. Tilford*, 81 Ky. 800, where the parties held as tenants in common, their several interests being different, this court held that, as the parties before the court all owned the realty, the mere fact of one interest being greater than another did not prevent the sale under the statute. There may not be a unity or equality of interest, but where the parties, plaintiffs and defendants, all own the estate and are in the possession, the fact that one of the essentials required to create a joint tenancy at the common law is absent will not preclude a sale under the statute." It follows that the title exhibited is not such as the chancellor should require the appellees to accept. The opinion of the court in *Kean v. Tilford* was delivered by Chief Justice Pryor; and it will be seen from the foregoing that the court discusses the case of *Kean v. Tilford*, and shows that the opinion in that case is not at all in conflict with the opinion in *Malone v. Conn*, supra. It seems to us that there is a good and valid reason that might be urged in support of the doctrine announced herein. In the case at bar, if the sale of the land was sustained, it would necessarily follow that there would be a valuation of the interest of the life tenant (the father), and he would be paid the amount so found as the value of his life estate, leaving only the residue of the purchase money to go into the hands of the guardian of the infants, when, if the property remained unsold, the infants would ultimately own and possess the entire estate, and in many instances such a result would be much more beneficial to the infant than to have the property sold, and an apportionment of the proceeds made between the life tenant and the infant; hence it is that the law requires, in case of a sale of the infant's property, the possession of which is in the infant, that only a vested remainder can be sold, as provided in section 491 of the Code.

From the foregoing, it is clear that the sale in the case at bar was unauthorized, and the petition for a rehearing is therefore overruled.

ABSHIRE et al. v. ROWE et al.¹

(Court of Appeals of Kentucky. Jan. 29, 1902.)

GUARDIAN AND WARD—EXECUTION OF NEW BOND—JOINT LIABILITY OF SURETIES ON BOTH BONDS.

Where an additional guardian's bond is executed, on motion of a surety in the original bond, for the purpose of releasing him from liability for the guardian's future acts, the sureties in the two bonds are jointly liable for past and future acts of the principal, as if all had signed the original bond, except that the motioner is liable only for the guardian's past acts.

Appeal from circuit court, Pike county.

"To be officially reported."

Action by Samuel J. Salyer, guardian of Ulysses S. Rowe and others, against A. J. Abshire and others, on a guardian's bond. Judgment for plaintiff, and defendants A. J. Abshire and K. F. Robertson appeal. Affirmed.

J. M. Robertson, for appellants. J. F. Butler, for appellees.

O'REAR, J. One James Matney was appointed guardian for the infant appellees Rowe in August, 1895, by the Pike county court, and executed a bond, with L. D. Marrs and seven others as sureties. Thereafter there came to the hands of the guardian a fund belonging to the infants jointly to the amount of \$1,666.66. On the 17th day of March, 1897, pursuant to a notice executed by said L. D. Marrs and D. B. Marrs, two of the sureties, the guardian was required to execute a new bond. The notice was for the purpose only of procuring the release of the two sureties named. This new bond was executed with appellants Abshire and K. F. Robertson and others as sureties. At the August term, 1898, of the Pike county court, Matney was removed as guardian, and Samuel J. Salyer was appointed his successor, who brought this suit against all the sureties in both the bonds executed by his predecessor, Matney, alleging the insolvency of Matney and the devastavit of his ward's estate, and alleging that he had refused and failed to pay over the amount, or any amount, of the money so received by him for them, and had failed to make any investment of same for them. Appellants Abshire and Robertson, sureties on the new bond, plead that the money received by the guardian was received before the new bond was executed or required, and that, likewise, it was squandered and converted by the guardian before the execution of the new bond. They claim that in consequence of these facts they are not bound, and they cite and rely upon *Boyd v. Withers* (Ky.) 46 S. W. 13; *Jones v. Gallatin Co.*, 78 Ky. 491; *Cassilly v. Cochran's Guardian* (Ky.) 13 S. W. 844.

The question is, what was the purpose and

what is the effect of the new bond? It is argued for appellants that it was to answer for the faithful accounting by the guardian of the wards' estate coming to his hands from and after its date. In *Boyd v. Withers*, supra, the court held that in any event the burden was upon the guardian or his surety claiming exemption to show when the devastavit was committed, and in the absence of such showing a judgment against any of the sureties would be upheld. In *Cassilly v. Cochran's Guardian* (Ky.) 13 S. W. 844, it was adjudged that, under the peculiar facts of that case, the conversion of the wards' estate by the guardian occurred after the execution of the new bond, and therefore the sureties upon the new bond were undeniably liable. The question here presented did not necessarily arise, and was not decided, in either of the cases cited. By section 1068 of the Kentucky Statutes it is made the duty of the county judge to at least once in each year carefully inquire into the solvency of all the sureties upon the bond of each fiduciary; and, if there is reason to believe that any bond is not amply sufficient to protect from loss those interested, he is required to give notice to such fiduciary "that a new bond, or additional surety on the old one, is required, and upon the failure of such fiduciary to give such bond or surety within a reasonable time, to be fixed by the court, he shall be removed." It is obviously the purpose of this statute to give to the county court a discretion, and invest it with a duty, long exercised by that tribunal, to exact ample and rigid security for the protection of infants whose estates are committed to guardians. A guardian is appointed subject to being removed for cause during the minority of the infant, and the bond first executed covers that period. *Elbert v. Jacoby*, 8 Bush, 542. It not infrequently happens that one or more, or possibly all, of the sureties on the bond may become insolvent. They would not be interested, therefore, in directing the attention of the county court to derelictions of the principal. But the court may require the security to be strengthened by requiring additional surety, or the execution of a new bond. In either event it is the purpose of the court to protect the infant's interest. If the new bond should take effect only from its date, and the conversion of the ward's property or other wrongful act that may thereafter be complained of had occurred before the execution of this new bond,—the sureties in the old one having become insolvent,—then the execution of such new bond would probably be useless, so far as any practical benefit is concerned. Unless such new bond is executed, or additional surety furnished, it is the duty of the court to then remove the guardian and appoint another. This termination of his office, depriving him of its emoluments and privileges, and requiring of him an immediate settlement and transfer of the wards' assets to the successor,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

would all have occurred at the time of the original complaint, except for the execution of a new bond. The result of such execution is to continue the guardian in office, and to continue his rightful custody and use of his ward's estate, and to prevent for the time being an action to require him to account for and pay over what had previously come to his hands. It is what the language of the statute says it is,—“an additional surety.” This statute is not new in our law. It has existed in one form or another from the earliest history of the commonwealth. And under it this court has uniformly held that the execution of one or more additional bonds is merely cumulative, affording additional protection to the infant, and additional security to him that the guardian shall execute and shall have executed faithfully all the duties of his office. *Hutchcraft v. Shrou's Heirs*, 1 T. B. Mon. 208, 15 Am. Dec. 100; *Frederick v. Moore*, 18 B. Mon. 472; *Elbert v. Jacoby*, 8 Bush, 545; *Withers v. Hickman*, 6 B. Mon. 292; *Taylor v. Taylor's Ex'rs*, Id. 559; *Middleton's Adm'r v. Hensley* (Ky.) 52 S. W. 974; *Slevers v. Havens*, 5 Ky. Law Rep. 858. And such is the rule, it seems, elsewhere. *Jones v. Hays*, 44 Am. Dec. 78; *Poole v. Cox*, 49 Am. Dec. 410. These cases all hold that the obligation of all of the sureties in all the bonds is coequal and coextensive. It was held in *Wilborne v. Com.*, 5 J. J. Marsh. 617, under the act of 1797, then in force, that county courts had the right, in exercising their jurisdiction requiring additional sureties, to extend the order so as to release former sureties, if, in their judgment, it was thought expedient to do so, but unless, by the terms, the former surety was released, he continued bound for all the acts of the guardian. It was also held in that case that the surety on the new bond was likewise liable for all the acts of the guardian. By section 4659 of the Kentucky Statutes it is provided that a surety on any official bond, or bond of a guardian, who wishes to be relieved from future liability, and to obtain indemnity for such loss as may have been incurred, or either, may, by written notice to the principal obligor, require him to appear before the court in which the original bond was given, to execute a new bond with other surety, or to effect a discharge of the motioner from future liability, or as indemnity for the past acts of the principal, or for both. Section 4663 of the Kentucky Statutes makes the execution of such bond a discharge of all the sureties making the motion for release from all liability for the acts of the principal thereafter done; and, if the object be so specified, the bond shall contain a stipulation or covenant to indemnify the surety against any loss already incurred by reason of the suretyship. In this case it does not appear that there was a motion for indemnity, and therefore the sole question is the effect of the execution of the new bond, not as to the motioners

Marrs, but as between the new sureties, the appellant here, and the old sureties, who did not make the motion. The statute expressly restricts the release effected by the execution of this new bond to such of the old sureties as moved for it. It must follow that the sureties on the old bond who did not move for the release were intended by the lawmaking body to be continued upon their liability. As between the motioners and those executing the new bond, the motioners would be liable only for such defalcation as had occurred before its execution; but, as between the other sureties on the old bond and the sureties of the new, they all stand alike, and upon the same footing. We could not conclude otherwise, and be in harmony with the earlier and persistent rulings of this court upon the effect of such obligations. Had the new bond contained a covenant of indemnity to the motioners in the old one, then, as between the obligors in the old bond, making the motion, and the obligors in the new, those in the new bond would have been liable for the whole of the defalcation, whenever committed. In the absence of such covenant, applying the general doctrine above discussed, and assuming that the defalcation occurred before the execution of the new bond, then the liability of all the obligors, sureties on all the bonds, is coequal, as if they had all executed one bond originally. In *Watts v. Pettit's Heirs*, 1 Bush, 155, the court had under consideration the relative liabilities of sureties on an old and a new guardian's bond, where the new one had been executed under notice such as above provided for. The statute, however, in that case, was materially different in language from our present statute. The language of the statute in that case was, “If a guardian shall give new bond when ruled to do so by the court, his former security shall not be bound for any acts of his thereafter.” 1 Acts 1855-56, p. 111, § 1. The court construed that language to exonerate the surety making the motion and requiring the execution of a new bond from all liability from any act of the guardian, whenever committed. *Jones v. Gallatin Co.*, 78 Ky. 491, was a controversy between sureties upon different bonds as to their respective liabilities for a defalcation of a sheriff as collector of revenue. It may well be argued that the sureties upon the sheriff's bond undertook to covenant only against the wrongful acts of their principal within the period covered by their obligation; that is, from the time the bond was executed. Not so, however, as to a guardian's bond. There the guardian obligates himself to the ward by executing a bond to the commonwealth that he will account for and pay over to the ward all money that has come or may come to his hands by virtue of his office. Such is the effect, in one sense, of his undertaking. It is not merely that he will not misappropriate the ward's funds, but that, whenever legally demanded, they will be forthcoming

The covenant is broken when default is made upon demand of the ward upon arriving at age, or upon demand of the guardian's successor if the guardian is removed or otherwise vacates his office, to pay over the balance remaining due the ward. In another sense the breach may be said to have occurred, though not necessarily completed, at such time as the guardian may have converted his ward's estate. Properly, the guardian should not mingle the ward's estate with his own. It should be employed separately, and securities and evidences of debt taken in his name as guardian for the benefit of the ward, though it is not infrequent that guardians do use, and without any improper motive, their wards' money, being solvent, and feeling that they are bound by ample security to make good the same, with legal interest, as required by the statute. They deem it is their privilege to personally use the fund. We are not prepared to say that such use would of itself constitute a breach of the bond. It was doubtless in part for this reason that the earlier decisions of this court, as well as those later, have adopted and applied the rule concerning the general liability of all the sureties upon all the bonds for all of the acts of the guardian during the duration of his office, and until such sureties may be released by appropriate orders of court.

It follows from what has been said that there was but one cause of action in this case, and that it was not necessary to sue the sureties upon the respective bonds in separate actions, but that one suit might be maintained against all of them, and in the same action.

Judgment affirmed.

JACKSON v. BREWER et al.¹

(Court of Appeals of Kentucky. Jan. 29, 1902.)

SCHOOLS AND SCHOOL DISTRICTS—GRADED-SCHOOL DISTRICT—TAXATION OF LAND LYING OUTSIDE DISTRICT.

Under Ky. St. § 4464, providing for the establishment of graded schools, and providing that no point of the boundary in a proposed graded common-school district shall be more than $2\frac{1}{2}$ miles from the site of the proposed school house, that part of a farm lying outside the $2\frac{1}{2}$ -mile limit is not subject to taxation for graded-school purposes, though the dwelling house of the owner is within the limit, as the provision of Id. § 4458, that where the lines dividing school districts pass through the lands of any person, dividing the same, the tax shall be levied and paid to the district wherein the homestead may be situated, does not apply to graded-school districts.

Appeal from circuit court, Henry county.
"To be officially reported."

Action by B. F. Jackson against H. A. Brewer and others for an injunction. Judgment for defendants, and plaintiff appeals. Reversed.

John D. Carroll, for appellant. D. A. Sachs, for appellees.

GUFFY, J. It is substantially alleged in the petition in this action that the plaintiff (now appellant) is a resident and taxpayer in Henry county, and the owner of a large personal estate and more than 500 acres of land in said county; that his residence, which he occupies, and a small portion of his land, not exceeding 100 acres, are situated within $2\frac{1}{2}$ miles of the graded-school building erected and established in Eminence Graded-School District; that 400 acres of his land are situated more than $2\frac{1}{2}$ miles from said building; and that all of his land is in one body, except that a part of it is separated by a turnpike road, and was bought by him at different times, and from different parties. The petition then proceeded to show that appellees, except Woodruff, are trustees of said school district, and that they had appointed Woodruff to collect the school tax due to said district, and that they had taken from the assessor's book all the value of the land assessed for the year 1899 and for the year 1900, and had demanded of him \$51 for the year 1900, being a poll tax of \$1 on his head, and an ad valorem tax of 25 cents per \$100 on all of his personal property and land situated in Henry county, listed as aforesaid for the year 1899, and have levied on the personal property of this plaintiff to the value of \$250, and threaten to and will sell said property unless enjoined by the court, and plaintiff will suffer great and irreparable injury if said property is sold; that the boundary of the district, a copy of which is filed, fixed and described the boundary of said district (the boundary then being given); and that the public-school building in Eminence was fixed as a graded-school house, and certified to be not exceeding $2\frac{1}{2}$ miles from the boundary of said district. It is further alleged that the plaintiff had tendered to said collector \$25, amount of the poll and ad valorem tax that is due by him on all of his personal property, and all of his land situated within said district, and within $2\frac{1}{2}$ miles of said building, but defendants claimed the right to levy and collect taxes from him on all of his land, although 400 acres of said land are not within the boundary, or within $2\frac{1}{2}$ miles of said school building; that he is not liable to pay tax on any part of his land situated $2\frac{1}{2}$ miles from said school building, and that it is the duty of the defendants to have a survey made, so that it may be ascertained how much of his said land is within $2\frac{1}{2}$ miles of said building, and within said boundary; that the boundary describing the district, which says, among other things, "including B. F. Jackson," means simply to include his residence, and no part of his land situated farther from said graded-school building than his residence, and does not include or mean to include any of his land situated farther from said building

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

than his residence, although said land may be within $2\frac{1}{2}$ miles of said building (and he files herewith, and as a part hereof, a map showing the lines of said district); that defendants had no right to levy or collect from him any tax on land situated farther from the building than his residence; that in no event had they the right to collect tax on any of his land situated more than $2\frac{1}{2}$ miles from said graded-school building; and that it is the duty of the defendants to have an accurate survey made, to determine how much of his land is within $2\frac{1}{2}$ miles of said graded-school house. He further prayed for an injunction against Woodruff, as collector and treasurer, enjoining him from selling any of plaintiff's property to pay said graded-school tax until they ascertained by survey how much of his land is within $2\frac{1}{2}$ miles of said school. He asked that it be adjudged that, according to the intent and meaning of said boundary, the words "including B. F. Jackson" mean only to include his residence and such part of his land as is between his residence and nearer to said graded-school building. If this cannot be done, then he asked the court to adjudge that no part of his land situated more than $2\frac{1}{2}$ miles from said graded-school building be liable to said tax, and asked that defendants be required to make an accurate survey, so that they may know how much, if any, of his land is within $2\frac{1}{2}$ miles from said building, so that he may know how much tax he must pay annually, if it be adjudged that he must pay tax on all of his land within $2\frac{1}{2}$ miles of said building; that he tenders \$25, which amount he has heretofore tendered to defendants, to pay the full amount of school tax, believing in good faith that said amount is all that he owes, and asks the court to enjoin defendants and said Woodruff from selling his property, and that he be granted all necessary and proper relief. The defendants demurred to the petition, which demurrer was sustained by the court, and, plaintiff declining to amend, his petition was dismissed; hence this appeal.

The chief question presented for consideration is whether or not the land of plaintiff which is situated more than $2\frac{1}{2}$ miles from the site of the school building is subject to tax authorized by law to be collected for graded-school purposes. Section 4464, Ky. St., authorizes the establishment of graded schools, when same are voted for by the requisite number of voters, and by such vote a tax not exceeding 50 cents on each \$100 assessed in said proposed graded-school district, town, or city, belonging to said white voters or corporations, or a poll tax in any sum named in said order, not exceeding \$1.50 per capita on each white male over 21 years of age residing in said proposed common-school district, or both a poll and ad valorem tax, if so stated in the order. It is further provided that no point of

the boundary in the proposed graded common-school district shall be more than $2\frac{1}{2}$ miles from the site of the proposed school house, and the location and site of said school house in said district must be set out with exactness in the petition filed with the county judge in fixing the boundary of the graded school, and providing for submission of the question to a vote of the district. The contention of the appellees is that all the land owned by B. F. Jackson is subject to taxation, as within or for the benefit of said graded-school district; and it is argued that inasmuch as section 4458, relative to common schools, provides that where a tax has been levied as may be under sections 4457 and 4458, where the lines dividing school districts pass through the lands of any persons dividing the same, the tax shall be levied and paid to the district wherein the homestead may be situated; and it is sought to apply the section supra to a graded school, in so far as the question of taxation is concerned. We do not think such contention is tenable. It will be seen that the sections last referred to are parts of article 9, and are applicable to common-school districts, and make no reference whatever to graded schools. Neither is there any statute specifying the distance that the lines of any common-school district shall be from the school building. Moreover, it will be seen that said tax is limited to 25 cents in any one year on ad valorem. The law as to graded schools may be found in Ky. St. art. 10, § 4464 et seq., and provides for a different rate of taxation, and has various requirements and provisions not found in the section in reference to common schools; and the language is, "not exceeding 50 cents on each \$100.00 property assessed in said proposed graded common school district," etc. It would seem that a reasonable and fair construction of such language is that real estate not within the boundary could not and would not be made liable under the provisions of the sections supra.

It is further urged for appellees that the land of appellant outside the graded-school boundary would be exempt from common-school district taxation in an adjoining common-school district. We do not think such would necessarily be the result, but, whether so or not, it could in no wise affect the question under consideration. It would hardly be contended that, if a common-school district or if a graded-school district was voted within a certain boundary, land wholly unoccupied by any person, and not taxable in an adjoining district, would be exempt from tax so voted. In fact, this question seems to have been settled in the case of *School Dist. v. Davis* (Ky.) 64 S. W. 438. It will be seen from the opinion in the case supra that Davis instituted suit against the trustees aforesaid, seeking to enjoin them from collecting a graded-school tax on 80 acres of land of

his home farm; the 80 acres being included within the boundaries of the graded-school district. He alleged that his home farm constituted about 700 acres; that 80 acres of this lies within the boundary of the graded-school district, and the residue, including his residence, was in an adjoining school district; and that he paid tax on his whole tract of land in the school district where his residence was located. The defendants answered, and the demurrer was sustained to the answer, and the trustees appealed. The appellee first based his contention that the land in question was not liable for any of the tax for the graded school upon that part of section 4458 of the statutes heretofore discussed, which provides that, when the dividing line between two districts shall run through or divide the lands of a person, the tax shall be levied and paid to the district where the homestead may be situated. This court, after a discussion of the question, and referring to various sections of the statute, said: "Section 4481 of this act provides for the issuance of bonds of the graded-school district for the purpose of providing suitable grounds, school building, and apparatus for the graded school; and section 4482 provides that the board of trustees in any graded-school district where a tax has been voted shall cause to be levied and collected an annual ad valorem tax, in any sum not exceeding the amount voted for in said district, under the provisions of this law, upon each \$100 worth of property of every kind and character having value and owned by any white person, company, or corporation subject to taxation within the limits of said graded common-school district. There is no provision in this section of the statute similar to that in section 4458 which authorized the payment of taxes upon the property included within the corporate lines of the district in any other school district." It was further stated in the opinion that at the time the bonds were issued the land in question was included within the boundary of the graded-school district, and is still so included. The fact that the appellee subsequently purchased a large boundary, in which his residence is located, and which is outside of the exterior boundary line of the graded-school district, did not relieve the 80 acres from the just proportion of the bonded debt which was incurred by the board upon the faith that his 80 acres of land were liable for their due proportion thereof,—citing *Board of Education of Hawesville v. Louisville, H. & St. L. Ry. Co.* (Ky.) 62 S. W. 1125; *Bennett v. City of Louisville* (Ky.) 62 S. W. 1041; section 155 of the constitution. The court reversed the judgment, and held that the 80 acres were subject to the graded-school tax. It does not appear in this case that any bonds were issued, but it seems to us that the principle is the same. It is a familiar rule of law (with but few, if any,

exceptions) that where a tax is levied in a district by a vote of the people, or made lawful by such vote, it is levied upon all the property within the boundary of the district, and no more. The situs of personal property is, as a general rule, governed by the residence of the owner, but not so with real estate. The situs of real estate is where it is in fact situated; and, although this rule of taxation seems to have been departed from in regard to taxation voted or levied by common-school districts, we are not disposed to apply it to the district under consideration, or a tax where there is no statute authorizing the same. We are not disposed to hold that the trustees of a graded-school district are bound to lay off the boundaries by a regular survey, containing metes, bounds, courses, and distances, though it might be well for this to be done; but that is a question addressed to the legislature, rather than to the courts. If the exact boundary of the district in question becomes material, it will be within the power of either party to litigation to procure a survey of the same as is provided by law. See *Hundley v. Singleton* (Ky.; filed Jan. 16, 1902) 66 S. W. 279. We are clearly of the opinion that no part of the real estate of the appellant which is more than 2½ miles from the location of the school building is liable to taxation under the graded-school law in question.

It results from the foregoing that the court erred in sustaining the demurrer to the petition, and the judgment appealed from is therefore reversed, and the cause remanded, with directions to overrule the demurrer, and for proceedings not inconsistent herewith.

THOMAS' ADM'R v. MAYSVILLE GAS CO.¹

(Court of Appeals of Kentucky. Jan. 30, 1902.)

DEATH—ACTION FOR CAUSING—DEATH OF ADMINISTRATOR AND BENEFICIARY PENDING ACTION—REVIVAL.

An action by a father, as administrator, under Ky. St. § 6, to recover damages for the death of his child, did not abate upon the death of the father, but the action should have been revived in the name of his successor as administrator; the recovery, after the payment of funeral expenses, costs of administration, and costs of recovery, being for the benefit of the father's estate, plaintiff's intestate having left no widow, child, or mother.

Appeal from circuit court, Mason county. "To be officially reported."

Action by the administrator of Isaac Thomas against the Maysville Gas Company to recover damages for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Reversed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

A. E. Cole & Son and Thos. R. Phister, for appellant. E. L. Worthington and W. H. Wadsworth, for appellee.

HOBSON, J. On the former appeal of this case (see *Thomas' Adm'r v. Gas Co.*, 56 S. W. 153) the judgment of the circuit court, dismissing the action on a peremptory instruction of the court to the jury to find for the defendant, was reversed, and the cause remanded for further proceedings. When the case was returned to the circuit court, James Thomas, the administrator of Isaac Thomas, was dead; and S. P. Perrine, who had been appointed administrator de bonis non of the estate, moved the court to revive the action in his name. This motion was overruled, the court holding that the action, after the death of James Thomas, could not be revived. The ground of this ruling was that James Thomas was the father of the decedent, Isaac Thomas, who left no children, and that as, under the statute, the whole recovery was for the benefit of the father, the action abated upon his death. The propriety of this ruling involves the construction of section 241 of the constitution, and section 6 of the Kentucky Statutes, enacted pursuant to it: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the estate of the deceased person." Const. § 241. "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased. The amount recovered, less funeral expenses and the cost of administration, and such costs about the recovery, including attorney fees, as are not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order, viz.: (1) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to such widow or husband. (2) If the deceased leaves either a widow and children or a husband and children, then one-half to such widow or husband and the other one-half to the children of the deceased. (3) If the deceased leaves a child or children, but

no widow or husband, then the whole to such child or children. If the deceased leaves no widow, husband or child, then such recovery shall pass to the mother and father of deceased, one moiety each, if both be living; if the mother be dead and the father be living, the whole thereof shall pass to the father; and if the father be dead and the mother living, the whole thereof shall go to the mother; and if both father and mother be dead, then the whole of the recovery shall become a part of the personal estate of the deceased; and after the payment of his debts, the remainder, if any, shall pass to his kindred more remote than those above named, as is directed by the general law on descent and distribution." Ky. St. § 6. Section 3844, Ky. St., is as follows: "When any personal representative shall commence an action, or shall be sued, and shall die, be removed or superseded by another before the termination of the action, his successor may, by order of court, be substituted in the place or stead of the original plaintiff or defendant."

Previous to the adoption of the present constitution, where death resulted from willful neglect no recovery could be had, under the statute, unless the decedent left wife or child; and there could be no recovery for ordinary negligence, under the other section of the statute, for the death of persons in the employ of the company. To change this, and make a harmonious rule governing the whole subject, the above section of the constitution, and the statute pursuant to it, were enacted. The plain purpose of these provisions was to allow a recovery in all cases by the personal representative. The amount recovered goes first to pay funeral expenses, cost of administration, and expenses incidental to the recovery; then to certain kindred; and, if none, it then passes, after the payment of debts, under the general law on descent and distribution. The purpose of this was to provide for a recovery in all contingencies where death had resulted from negligence or wrongful act, without regard to the kin of the intestate who survived him. The beneficiaries are not proper parties to the action. It, under the statute, is to be brought by the personal representative. If James Thomas had not qualified as the administrator of Isaac Thomas, and appellant, Perrine, had qualified in the first place as such administrator, then the death of James Thomas would have had no effect upon the action. The administrator, notwithstanding his death, might have prosecuted the action to a recovery, and, after paying the preferred claims, would have held the balance of the fund for the estate of James Thomas. James Thomas being in esse when his son died, his right attached, and, having attached, descended at his death, with his other personal property. His right is against the administrator, who, under the statute, is authorized to prosecute

the suit just as upon other choses in action or claims. The fact that the defendant to the action succeeded in defeating a recovery until one or more of the beneficiaries died had no effect upon its liability to the administrator. The law regards that as done which ought to have been done; and, if it is finally held liable, those persons who would have gotten the fund if the claim had been paid off when the right attached are not affected by the fact that they did not survive the final result of the litigation. We are referred by the learned counsel to a number of decisions in other states, under statutory provisions not similar to ours, which uphold the judgment of the circuit court; but we are of opinion that the legislative intent under our statute is too clear to be disregarded.

Judgment reversed, and cause remanded, with directions to sustain the motion for a revival, and for further proceedings consistent with the opinion.

JOHNSON et al. v. BOSKE, Sheriff.

SAVAGE et al. v. SAME.¹

(Court of Appeals of Kentucky. Jan. 23, 1902.)

COUNTY TAXATION—REPEAL OF SPECIAL STATUTE—INJUNCTION.

1. The sheriff of Kenton county should have been enjoined from collecting a road and bridge tax levied by the fiscal court exclusively upon the owners of property in the county outside the city of Covington, as the special acts authorizing such a tax were repealed by Ky. St. §§ 1833-1851, defining the powers and duties of the fiscal court with relation to public roads, and repealing all acts inconsistent therewith.

2. As plaintiffs allege in their petition that the tax is an unjust discrimination against them in favor of citizens owning property in the city, and pray for all proper relief, there is enough in the petition to show their right to an injunction on the ground that the special acts have been repealed.

Appeals from circuit court, Kenton county. "Not to be officially reported."

Actions by M. A. C. Johnson and others and George S. Savage and others against John Boske, sheriff, to enjoin the collection of taxes. Judgment for defendant, and plaintiffs appeal. Reversed.

S. D. Rouse, for appellants. R. O. Simmons, for appellee.

BURNAM, J. Both of these suits were instituted by citizens of the town of Cen-

tral Covington to enjoin John Boske, sheriff of Kenton county, who is by law the collector of taxes therein, from collecting a tax of 18 cents on each \$100 worth of property in Kenton county lying outside the boundaries of the city of Covington, which, as alleged, was levied by the fiscal court of Kenton county for the purpose of keeping in repair the public roads and bridges of the county outside the incorporated cities and towns situated within the county. The relief was denied and the petitions dismissed by the circuit judge.

This is the identical tax which was declared illegal in the case of *Wilson v. Boske*, at the suit of certain citizens of Kenton county who resided outside of Covington, reported in 64 S. W. 919. In that case this court held that the burden of maintaining and keeping in repair the public roads and bridges of the county was an expense which should be borne by the entire county, including the city of Covington, and that the sheriff should have been enjoined from collecting the tax of 18 cents upon each \$100 which had been levied by the fiscal court of Kenton county exclusively upon the owners of the property in the county outside of the city of Covington, upon the ground that the act of October, 1892, which is now embraced in sections 1833 to 1851 of the Kentucky Statutes, defined the powers and duties of the fiscal court with relation to public roads, and repealed all acts inconsistent therewith; and the judgment in that case is conclusive of appellants' right to relief in this action. Whilst appellants do not seek relief upon the same ground upon which the *Wilson Case* is decided, yet the averments of the petitions and the admitted facts show that the fiscal court of Kenton county had levied a tax of 18 cents on each \$100 of property of Kenton county outside of the boundaries of the city of Covington; and it is alleged that the tax is an unjust discrimination against them in favor of citizens owning property in the city of Covington, and they wind up their petitions with a prayer for all proper relief. We think there is enough in the petitions and the agreed facts to authorize the relief sought.

For reasons indicated in the opinion in the case of *Richardson v. Boske* (Ky.) 64 S. W. 919, and *Wilson v. Same, Id.*, the judgments in both cases are reversed, and the cause remanded, with instruction to grant the relief sought.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

WILLIAMS v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 5, 1902.)
HOMICIDE—SELF-DEFENSE—INSTRUCTIONS TO JURY.

1. Defendant cannot complain that the instruction as to self-defense did not submit the question whether he had a right to believe himself in danger from the sons of deceased, as he did not by his testimony claim that he believed himself to be in danger from that source.

2. Defendant was not prejudiced by an instruction telling the jury they could not acquit on the ground of self-defense if they believed "that the defendant commenced or mutually and willingly engaged in the conflict with the deceased with intent to inflict on him some bodily harm, and continued and urged said conflict up to and including the time that the defendant shot and killed deceased."

3. Defendant cannot complain of the court's failure to preface the ordinary instruction as to self-defense with the statement, in substance, that if deceased had repeatedly threatened his life, and had, in company with his son, aided and encouraged the son to assault defendant with a deadly weapon, then defendant had a right to arm himself and go about his usual vocation, as it must be presumed that the jury, in determining whether defendant believed, and had reasonable grounds to believe, that he was in danger at the time of the killing, considered the evidence as to the previous conduct of deceased and of those acting with him.

Appeal from circuit court, Rowan county.
 "Not to be officially reported."

John T. Williams was convicted of murder, and he appeals. Affirmed.

A. T. Wood, for appellant. R. J. Breckinridge, for the Commonwealth.

HOBSON, J. Appellant was indicted in the Rowan circuit court for the willful murder of F. M. Fraley. He was found guilty, and his punishment fixed at imprisonment for life. The deceased, Fraley, was the father-in-law of the appellant, Williams. There had been bad feeling between them for some time before the homicide, which occurred on May 7, 1900. A short time before that, Fraley was punishing his daughter Mary, and she cried out for help. Williams, who lived a short distance away, ran to Fraley's house, armed with a shotgun, and took the girl away. He shot at Fraley, but did not hurt him, and one of Fraley's sons shot several times at him. A few days after this, while Fraley and his son were passing near Williams' house and going along the road, two shots were fired,—the first from the house, and the second from the road by Fraley's son; Fraley himself not being armed. The proof is conflicting as to the details of both these occurrences, and we do not deem it particularly material to elaborate it. After the second shooting, Williams borrowed a Winchester rifle which shot 12 times, promising to return it the following Tuesday, and on the same day told two persons that, if Fraley's son bothered his chickens any more, he would shoot him right between

the eyes, and that he would shoot Fraley in the belly. This was on Saturday. There had been a dispute about the cutting of certain timber, and on Monday morning, early, Williams and two other persons went to the timber and began sawing down a tree; Williams sitting there with his Winchester, while the other two sawed. The proof by the commonwealth is to the effect that Fraley, accompanied by two of his boys, came along the road; and, when they got about 35 yards off, Fraley said he did not want that timber cut, and, if they would come along with him, he would show them the line. He was unarmed, with his right hand in a sling. His two boys with him had their guns. Without waiting for anything further, Williams raised his Winchester and shot Fraley in the side. Fraley died from the wound in a few moments. The two men who were sawing at the tree, and the two sons of Fraley who were with him, all give substantially this version of the transaction. Williams says that Fraley said that anybody who cut that tree would die at the roots of it, and drew a pistol and was about to shoot him, when he raised his Winchester and fired. This statement of his is not substantiated by any other witness. There is proof, however, for him, of some threats made by Fraley before this. Immediately after the shooting, Williams left, and was not arrested for some time. The circumstances attending the transaction do not sustain his version of it.

The chief ground of complaint on the appeal is on account of the third and fourth instructions given to the jury by the court: "(3) Although the jury may believe from the evidence, beyond a reasonable doubt, that the defendant, in Rowan county, Kentucky, before the finding of the indictment, shot at and killed F. M. Fraley with a gun loaded with powder and leaden ball, or other hard and combustible substance, yet if the jury believe from the evidence that at the time the defendant shot at and killed deceased, Fraley, if he did shoot at and kill him, the defendant in good faith believed, and had reasonable grounds to believe, that the deceased was then about to inflict on him immediate death or great bodily harm, then the defendant had the right to use such means at his command as were necessary, or reasonably appeared to him to be necessary, to avert such danger or apparent danger, and no more. And such danger or apparent danger need not have been actual and real. It was sufficient if the defendant in good faith believed, and had reasonable grounds to believe, such danger or apparent danger to have been actual and real at the time; and, if the jury so believe from the evidence, then they will acquit the defendant upon the grounds of self-defense and apparent necessity. (4) The court further instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant com-

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menced or mutually and willingly engaged in the conflict with the deceased, Fraley, with intent to inflict on him some bodily harm, and continued and urged said conflict up to and including the time that the defendant shot at and killed deceased, if he did shoot at and kill him, then the jury cannot acquit the defendant upon the grounds of self-defense and apparent necessity, as defined in the third instruction herein given."

Appellant testified that he shot Fraley because he had a pistol drawn on him, and he thought Fraley was about to shoot him. Instruction 3 aptly presented to the jury this defense. It is complained that it did not submit to the jury the question whether he had a right to believe himself in danger from the sons of Fraley. If the jury did not believe appellant's version of the transaction, they would have found the same verdict if the instruction had been given in the form now insisted on. If they had believed his version of the transaction, they would have acquitted him under the instruction as given by the court. Their finding is, therefore, in effect, a finding against him on his version of the transaction, and in favor of the version of it given by all four of the other witnesses present at the time. We are unable, therefore, to see that he was prejudiced by the form of the instruction, and this conclusion is confirmed by the fact that his distinguished counsel did not ask on the trial any such modification of the instruction as is now insisted on.

As to instruction 4, we are referred to a number of decisions of this court condemning an instruction in effect telling the jury that, if the defendant brought on the difficulty or commenced it, he could not be acquitted on the ground of self-defense. These decisions are based on the ground that the words were misleading, and that the expression should have been qualified so as to show how he brought on the difficulty; for otherwise the jury might have inferred that his presence at the time, or what he had said or done on some previous occasion, or the like, if the primary cause of the difficulty, would deprive him of the right of self-defense. In *Utterback v. Com.*, 49 S. W. 479, this court said: "There was evidence by the commonwealth tending to show that appellant and Clinkenbeard both began shooting simultaneously when Clinkenbeard appeared, and without either waiting for a demonstration by the other. On this phase of the case, the court should instruct the jury that if appellant commenced the difficulty by making the first demonstration to shoot, or if both appellant and deceased went on the premises armed, determined on a conflict, and, on meeting, the combat was by mutual consent, then, in either event, appellant could not rely on the right of self-defense, unless," etc. The instruction in

question was aimed by the court to convey the same idea, and, under the facts of this case, could not have been prejudicial. Fraley was 35 yards off when he was killed by appellant with the Winchester rifle. If appellant commenced the conflict with Fraley "with intent to inflict on him some bodily harm, and continued and urged said conflict up to and including the time that the defendant shot at and killed the deceased," he could not be acquitted on the ground of self-defense. The phraseology of the instruction, under the facts of the case, could not have misled the jury.

Appellant also complains that the court did not instruct the jury, in substance, that if the deceased had repeatedly threatened his life, and had, in company with his son, aided and encouraged him to assault the defendant with a deadly weapon, then he had a right to arm himself and go about his usual vocations, and if, at the time he shot and killed the deceased, he then, by the exercise of a reasonable judgment, believed, and had reasonable grounds to believe, that the deceased, or those acting with him, were about to take his life or do him great bodily harm, he had the right to use such means at his command as were apparently necessary to protect himself, even to the taking of the life of the deceased. Self-defense is the law of necessity. Whether the defendant at the time believed, and had reasonable ground to believe, he was in danger of losing his life or suffering great bodily harm, is the question the jury is to determine. In determining this question all the previous conduct of the deceased, or those acting with him, their character, and statements made by them in the way of threats, may be given in evidence; and then, on all the evidence, the question of the apparent necessity for the accused to slay the deceased is to be determined by the jury. The general rule is that the court ought not to single out specific facts and give them prominence in the instructions; and without determining whether such an instruction as that indicated would be proper, or not, under the peculiar facts that might be shown in other cases, we are of opinion that the failure to give it in this case was not prejudicial, for the reason that the defendant's real defense was fairly submitted to the jury by the instructions that were given, and the jury have found against him on that issue.

It is also objected that one of the jury was related by marriage to the family of the deceased. This objection was first presented on the motion for a new trial, and it has been held by this court in a number of cases that we have no jurisdiction to revise the ruling of the circuit court on a matter first presented in the motion for new trial.

Judgment affirmed.

DOTSON v. FITZPATRICK et al.¹

(Court of Appeals of Kentucky. Feb. 5, 1902.)

COUNTIES—POWER OF LEGISLATURE TO ESTABLISH BOARD OF COMMISSIONERS—LOAN TO COUNTY—USURY—LIABILITY OF COUNTY TREASURER—ORDER TO SHERIFF TO MAKE PAYMENT OUT OF COUNTY LEVY—LIABILITY OF COUNTY ON SHERIFF'S FAILURE TO COMPLY—RELEASE OF COUNTY BY INDULGENCE TO SHERIFF.

1. As the constitution of 1851 did not require the legislature to associate the justices of the peace with the county judge in holding the court of claims, and authorized the legislature to create such other courts from time to time as it deemed necessary, the act of April 13, 1886, establishing a board of commissioners for Floyd county, to take the place of the court of claims, was not unconstitutional.

2. An order by the board directing the sheriff to pay plaintiff \$3,125 "out of the court-house fund for the year 1891, when the same becomes due," and reciting that it was for the sum of \$3,000 that day paid by plaintiff to the county treasurer to be expended in the erection of the court house under construction, and that \$125 was for interest for five months, was not a sale to plaintiff of that much of the county levy, but evidenced a loan by plaintiff to the county; and the transaction was legal, except as to the agreement to pay 10 per cent. interest, which was not enforceable.

3. As the act required the sheriff to pay taxes, when collected, to the treasurer of the board, "or those entitled to receive same," the board had authority to direct the sheriff to make payment directly to plaintiff.

4. The county treasurer was not responsible to plaintiff on account of the \$3,000 paid into the treasury by him, as the treasurer held the money simply as custodian for the county; and having paid it out, under the orders of the board, to the court-house contractors, pursuant to the arrangement under which it was paid to him, and without notice of any objection, plaintiff has no cause of action against him.

5. As the county was primarily liable to plaintiff, the order for the sheriff to pay was simply a mode of discharging its debt, and mere passive indulgence by plaintiff to the sheriff would not have released the county; but as plaintiff made an arrangement with the sheriff by which the latter for two years paid him interest at the rate of 10 per cent. in advance, and, in consideration of those payments, plaintiff agreed to wait on the sheriff, and did wait on him until he failed and his sureties were released, the county was thereby released.

Guffy, C. J., and Paynter, J., dissenting.

Appeal from circuit court, Floyd county.

"Not to be officially reported."

Action by L. M. Dotson against H. H. Fitzpatrick and others to recover money. Judgment for defendants, and plaintiff appeals. Affirmed.

James Goble and W. S. Pryor, for appellant. Walter S. Harkins, for appellees.

HOBSON, J. On April 13, 1886, the legislature passed an act establishing a board of commissioners for Floyd county, to take the place of the court of claims. The board was composed of the county judge and three commissioners elected by the people of the county. See 1 Acts, 1885-86, p. 1323. At their October term, 1890, the board made a

levy for the ensuing year, to be applied to the erection of a court house and clerk's offices. On May 4, 1891, the board made the following order: "The court-house fund being about exhausted, and it being necessary to raise money in order to carry out the contract with Haley and Wilson, it is therefore ordered that the sheriff of Floyd county pay to Lewis M. Dotson \$3,125.00 out of the court-house fund for the year 1891, when the same becomes due; it being for the sum of \$3,000.00 this day paid to H. C. Fitzpatrick, treasurer of Floyd county, which is to be expended in the erection of the new court house which is now under course of construction by Haley and Wilson per contract. \$125.00 of the above amount is for the interest on the \$3,000.00 for the period of five months; and when the said sheriff shall pay the said sum to L. M. Dotson or assigns, and take his receipt for same, he shall have a credit for said amount on his settlement with the treasurer of Floyd county." The money was not paid Dotson by the sheriff on October 1st; but he agreed with the sheriff, Allen, that Allen should pay him the interest at 10 per cent., and not pay him the money. Pursuant to this arrangement, Allen paid him on February 1, 1892, \$229.16, and took his receipt for that sum as "interest to date on \$3,125.00 due me from Floyd county." On August 1, 1892, Allen paid him \$300 interest up to February 1, 1893. On March 6, 1893, he paid him \$75 interest to May 6, 1893, and at that time he paid him \$125 interest to October 1, 1893. All these payments were made on the basis of interest at 10 per cent. The sheriff at no time took Dotson's receipt for the amount allowed him by the commissioners, but, notwithstanding he had no receipt, he was credited by them with the amount in his settlement with the treasurer of the county. Some time after this, Allen failed, and Dotson sued on his bond as sheriff. The sureties defended, pleading that, without their knowledge or consent, he had given time to Allen, and thus released them. On this issue there was a trial before a jury, which returned a verdict for the defendants. No appeal was taken from this judgment, and Dotson then filed this action against Floyd county and the heirs of the county treasurer, who had died in the meantime. He charged that the board of commissioners had no legal existence, because of the unconstitutionality of the act creating it; that it had no authority to borrow money, and the treasurer no authority to take the \$3,000. He sought to hold both the county and the treasurer liable to him. The defendants denied the allegations of the petition. The heirs of the treasurer also pleaded that he had paid out the \$3,000 at the time to the contractors, Haley & Wilson, under the orders of the board, and relied on the statute of limitation. The county defended the suit on the idea that Dotson was to look only to the sheriff, that by his

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indulgence to the sheriff he had released the sheriff's sureties and lost the fund, and that the loss should not now be thrown upon the county. On final hearing the court dismissed the petition, and Dotson appeals.

The act creating the board of commissioners was not in violation of the constitution of 1851, which allowed, but did not require, the legislature to associate the justices of the peace with the county judge in holding the court of claims. Article 4, § 37. That constitution authorized the legislature to create such other courts as from time to time it deemed necessary. Article 4, § 1. The order of the board was not a sale by it to Dotson of that much of the county levy for \$3,000. The board had no authority to sell the county levy, although, under the plenary powers conferred on it by the act, it might borrow money for temporary purposes until the levy could be collected by law. The levy was payable on the 1st of October. So the order was simply a borrowing of \$3,000 at 10 per cent. The agreement to pay 10 per cent. was illegal, and not enforceable. The act did not require the sheriff to pay the taxes when collected, in all cases, to the treasurer, but required him to "pay over to the treasurer of said board of commissioners or those entitled to receive same" all the money collected for taxes. The board had authority to order the sheriff to pay certain money directly to Dotson, as it had, under the act (section 12), all the power which had previously been vested in the court of claims under the General Statutes then in force. The county treasurer was not responsible to Dotson on account of the \$3,000 paid into the treasury by him. The treasurer received and held the money simply as custodian for the county, and having paid it out under the orders of the board to the court-house contractors pursuant to the arrangement under which it was paid to him by Dotson, and without notice of any objection, the court properly dismissed the petition as to his estate.

The question of liability of the county is of more difficulty. There was nothing illegal about the arrangement, except the promise to pay interest at 10 per cent.; and this does not affect Dotson's right to have his money, with interest at 6 per cent. The order of the board of commissioners only placed the claim, in legal effect, in the same position as an ordinary allowance by the court of claims under the General Statutes, to be paid out of the county levy. When the sheriff paid such an allowance, he was entitled to credit for it; and, when he failed to pay Dotson on the 1st of October, he stood just as if he had failed to pay an ordinary allowance made by the court of claims, which it was his duty to pay. He was entitled to credit with the county by all allowances which he had

in fact paid, and the balance in his hands over and above his actual payments was the money of the county. The county was primarily liable to Dotson. The order for the sheriff to pay was simply a mode of discharging its debt. By the terms of the order of the commissioners, the sheriff was not entitled to credit for the amount of the order on his settlement with the treasurer until he paid the money to Dotson and took his receipt. When he had no receipt, he should not have been credited by the amount in his settlement; for the fact that he had no receipt for the money was sufficient to put the county authorities on notice that he had not paid it. If there was nothing more in the case than this, we are of opinion that the county would be liable to Dotson on the ground that mere passive indulgence on his part to the sheriff, of which the county had notice, would not release it from liability. But he did not stop here. He made an arrangement with the sheriff by which the latter for two years paid him interest at the rate of 10 per cent. per annum in advance, and in consideration of these payments he agreed to wait on the sheriff, and did wait on him until he failed. He thus released the sheriff's sureties from liability to him. The case then comes to this: The county owed Dotson \$3,000. It had made a levy which was for the payment of the debt. It gave him an order on the sheriff for his money, with interest. The sheriff collected the taxes from the people, and had the money to pay Dotson, and would have paid him but for his interference with the regular course of things for the purpose of getting 10 per cent. per annum on his money; and by reason of this a loss is to be thrown either on him or the taxpayers of the county. The question is, shall they be compelled to pay a second tax levied for the payment of this debt, when they have already paid one tax for this purpose, which has been lost by the fault of Dotson? It is a maxim of equity that he who trusts most must bear the loss. If A. gave an order to B. on C. for \$5,000, payable on demand, and B., instead of collecting his money from C., should make an arrangement with him to let him keep the money in consideration of interest paid in advance at 10 per cent. until C. became insolvent, it would hardly be doubted that B., by this arrangement, in legal effect made C. his debtor, and that he would not be allowed to throw on A. the loss which his own conduct had brought about. We see no reason why the same rule should not apply between a county and one of its creditors. *Garcia v. Gray*, 67 Tex. 282, 8 S. W. 42.

Judgment affirmed.

GUFFY, C. J., and PAYNTER, J., dissenting.

PRATT v. BRECKINRIDGE.

(Court of Appeals of Kentucky. Jan. 29, 1902.)

"To be officially reported."

Petition for rehearing. Denied.

For former report, see 65 S. W. 136.

GUFFY, O. J. The reasons and authorities in the opinion rendered herein, as to the power of the legislature to appoint election commissioners, are so conclusive of the question that I shall not make any response to the petition, in so far as it assails the opinion on that question. The power of the legislature to create separate courts or tribunals, for the sole purpose of trying contested elections, and rendering final judgment therein, is of so much practical and far-reaching importance that I deem it proper to respond to some of appellee's contentions, and to discuss some of the former decisions of this court relied on by appellee.

It is the contention of appellee that the constitutionality of the act creating the election board and conferring upon it the powers in question has been decided by this court and its constitutionality upheld (referring to *Purnell v. Mann*, 48 S. W. 407, 50 S. W. 264), and that the constitutionality was again affirmed by this court in the case of *Sweeney v. Coulter*, 58 S. W. 784; and it is insisted for appellee that numerous cases have been decided since the adoption of the present constitution upholding the exercise of judicial power by the contest board. It is also suggested that so many decisions upholding this board of contest should be conclusive of the constitutionality of the board. It is further contended that section 153 of the constitution expressly authorized the legislature to create a board for the trial of contested elections. Said section reads: "Except as otherwise herein expressly provided, the general assembly shall have power to provide by general law for the manner of voting, for ascertaining the results of elections and making due returns thereof, for issuing certificates or commissions to all persons entitled thereto, and for the trial of contested elections."

Appellee cites *Purnell v. Mann* (Ky.) 48 S. W. 407. The question presented for decision in that case was as to the power of the county commissioners to exercise the authority conferred upon them by the state commissioners. That question, of course, involved the question of the power of the state commissioners to make the appointments. It is true that the court seems to have held the entire act constitutional. But courts do not feel bound by decisions or opinions on questions not before the court at the time for decision. The opinion in the case does decide that the act authorizing the state commissioners to appoint county commissioners is constitutional, and it thus became

certain that they were executive officers; and, this being true, it may well be argued that they could not exercise judicial power because forbidden by sections 27 and 28 of the constitution, which sections are as follows:

"Sec. 27. The powers of the government of the commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

"Sec. 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

It is a familiar rule of law that part of an act of the legislature may be held valid and the residue invalid. It might be conceded, but I do not concede it, that all the powers attempted to be conferred by the act in question were valid except the power to try contested elections, and still the judgment appealed from might properly be held void because the board had no power to try and determine the contest. We deem it not improper to remark that the decision in the case *supra* was by a divided court, three of the judges dissenting. It is, however, urged for appellee that, under the former constitution, certain executive officers were authorized to hear and determine contested elections, and that the validity of the same was never questioned, and the former constitution had the same provisions as now appear in sections 27 and 28 of the present constitution. It must, however, be remembered that the validity of the act was never called in question, at least not directly denied, in any proceeding. We call to mind but one contested case that ever came before the board under the former constitution, viz., the *Cochran-Jones Case*. It may be that this court recognized the validity of the act in discussing the case of *Com. v. Jones*, 10 Bush, 725. The board had decided that Jones was ineligible to the office of clerk of the court of appeals because he had accepted a challenge to fight a duel, and therefore declared the office vacant. Jones continued to discharge the duties of the office, and was indicted for usurpation. The court, as I understand the decision, had but one question before it for decision; viz., did the board have authority to hear and determine whether Jones had violated the law against dueling, and, if he had done so, to adjudge him not entitled to the office? The court held that the board had no such authority, and Jones continued to hold the office. No other question was involved in the decision of the board, and no other question could be involved in the decision. The opinion expressed by the court in discussing the ques-

tion is entitled to much respect, but is no authority.

Attention is also called to the fact that since the adoption of the present constitution the legislature enacted the same or a similar law, and that its validity remained unquestioned. It is true that such a law was enacted, and one contested election case tried by it. The question of its constitutionality was not raised before the board, nor was the case or question before any court. It may, however, be safely said that some lawyers questioned the constitutionality of the act during the pendency of that contest. The contestant failed, and the successful candidate resigned the office; hence there was no reason for an appeal to the courts.

The opinion in *Poyntz v. Shackelford* (Ky.) 54 S. W. 855, does not affect the question under consideration. After the commissioners had issued certificates of election to the state officers, including appellant, who had received the greatest number of votes according to the returns, two of the commissioners, Messrs. Pryor and Ellis, resigned, and Poyntz appointed Judge Fulton, and he and Fulton appointed Mr. Yonts to fill the vacancy. Gov. Taylor also appointed Messrs. Mackoy and Cochran. Poyntz brought suit to enjoin Shackelford from administering the oath of office, etc., to Cochran and Mackoy. The circuit judge granted the injunction, and in the same order dissolved it, and Poyntz applied to a judge of this court to reinstate the same. By consent of the judges, the motion was heard by the whole court as a court. Two questions only were presented for decision, and only two were decided, viz.: Had there been an injunction granted and dissolved? or, in other words, was the action of the circuit judge such as to present a case for reinstatement of an injunction? The court in a majority opinion decided in favor of Poyntz, which decision has, however, been overruled in a later opinion by a majority of the court. The other question was as to whether the appointing power vested in the governor or in Poyntz, and the court decided that question in favor of Poyntz.

The case of *Sweeney v. Coulter* (Ky.) 58 S. W. 784, is also cited. The principal question discussed in the opinion was the right of appellant to dismiss his appeal without prejudice. The judgment in that case had been rendered at the same term of the circuit court that the judgment in the case at bar was rendered. Sweeney appealed, and superseded the judgment. Soon thereafter appellee, Coulter, procured a copy of the record, and filed it in the clerk's office of this court, and soon afterwards moved to affirm as a delay case, and appellant moved to dismiss the appeal without prejudice. The court refused to sustain either motion, but finally advanced the case, and decided that appellee was entitled to have the case

tried, and that appellant could not dismiss the appeal without prejudice. The judgment appealed from was affirmed. The question of the constitutional power of the board to hear and determine the contest does not seem to have been discussed at length. The court, however, assumed that this court in *Purnell v. Mann* had decided that the commissioners could lawfully hear and decide the contest. So it may be taken that this court, by a bare majority, did hold that act to be valid in a case where and when it was directly in issue. The decision supra was rendered October, 1900. If the decision was not a correct exposition of the law at the time, we are unable to perceive any good reason why it should be adhered to.

Courts sometimes refuse to overrule a former decision for the reason that contracts had been made upon the faith thereof, and that all persons had a right to rely upon the soundness of such opinion, and had parted with valuable rights upon the faith of such decision. But no such reason exists in this case. The appellee had selected the board in question, or the tribunal, to try his contest, months before the rendition of the opinion in *Sweeney v. Coulter*. The board had decided in his favor, and he had obtained the judgment appealed from, before the rendition of said opinion. No other case will be affected by the decision in this case. The board no longer exists; hence no other case can arise involving the question now before us, at least not while the present law remains in force.

If a majority of this court believe that the appellant in *Sweeney v. Coulter* was wrongfully deprived of an office, and if we also believe that the appellant in this case was elected to the office in contest, and that the board of contest had no constitutional right to try and decide the contest, ought we to affirm the judgment simply because of former decisions of this court? We think not.

It is further argued for appellee that since the adoption of the present constitution this court has recognized the validity of the act in respect to county contest boards, and several cases are cited. It will be seen by examination of the Acts of 1891-93 that the county contest board was to be composed of the county judge and the two justices of the peace residing nearest the court house; but if any of said persons were absent from the county, or could not properly act, then the vacancy should be filled by the county clerk. It is further provided that if either party shall make affidavit, etc., as to either or both of the justices, to the effect that they will not give fair and impartial trial, then the board shall be filled by other justices. An appeal from the decision was allowed to the circuit court, and thence to this court. It will be seen that primarily the members of the county board are all judicial officers, except in a contingency

the county clerk might become a member. Several cases of contested elections from different counties have reached this court by appeal within the last few years. No question as to the jurisdiction of the county boards was ever raised in this court, nor ever decided by this court, since 1891. If the parties to the contest failed to object at the time to the jurisdiction of the county board, it may well be doubted whether such objections would have been considered on appeal. Moreover, as the county board was primarily to be composed of judicial officers elected by the people of the county, and a right to appeal from the decision given, it became a matter of little importance whether the board was constitutionally created or not. The act creating county boards of contest was not in violation of the former constitution, except in so far as it imposed duties upon the county clerk, and, as that part only became effective in a contingency, that question was of little concern; hence never objected to, so far as we are advised. Moreover, under the former constitution, the legislature, by article 4, § 1, was authorized to establish courts (inferior to the supreme court) in their discretion and without limit.

It is further contended for appellee that section 153 of the constitution authorized the legislature to create the contest board and confer the power in question. The section reads as follows: "Except as otherwise herein expressly provided, the general assembly shall have power to provide by general law for the manner of voting, for ascertaining the result of elections and making due returns thereof, for issuing certificates or commissions to all persons entitled thereto, and for the trial of contested elections." Mr. Bouvier's definition of "court" is, "A body in the government to which the public administration of justice is delegated." One definition given in Mr. Webster's International Dictionary is, "A tribunal established for the administration of justice." We do not think that the section supra sustains the contention of appellee. It is clear that the commissioners, sitting as a board of contest, are a court, if anything, invested with original, supreme, and final power to adjudicate and determine judicial rights and privileges of the utmost importance to the parties to the contest, and also to the public. We cannot believe that the framers of the organic law ever intended to invest the legislature with such power, and we are sure that no such intention is clearly expressed, nor can it be fairly implied from the language used. It will be seen that the section provides that the legislature may provide for the manner of voting, etc., naming several things, and concluding with the words, "and for the trial of contested elections." Evidently the last part of the section should be read as if the word "manner" followed the word "and." It is manifest that the intent and meaning of the section is that the legislature should

have the power to prescribe the manner of proceeding to obtain a decision in such cases in some of the courts established by the constitution. The section seems to recognize that some constitutional provisions had been or would be adopted touching the subjects mentioned in said section 153; hence it follows that the authority conferred by section 153 is subject to the other provisions of the constitution.

Section 109 of the constitution provides that "the judicial power of the commonwealth, both as to matters of law and equity, shall be vested in the senate when sitting as a court of impeachment, and one supreme court (to be styled the court of appeals), and the courts established by this constitution." Section 135 reads: "No courts, save those provided for in this constitution, shall be established." Section 110 refers again to the court of appeals, and provides for the election of its judges. Section 125 establishes a circuit court for each county. Section 139 established quarterly courts. Section 140 created county courts, and sections 142 and 143 provided for justice and police courts, and section 144 provided for fiscal courts. It will be seen that the constitution has established a number of courts, naming them, and section 135 prohibits the establishment of any courts not provided for by the constitution.

It is clear to us that the board of contest under consideration, if anything, is a court, under any definition of a "court" that can be given or imagined. Not only so, but it is a supreme court. It has greater power in regard to some of the most vital and important questions than the court of appeals. It has been given original jurisdiction to hear and determine a contest as to the right to hold all the important offices of the state except governor and lieutenant governor, and no appeal can be taken from its decisions. It might determine that a judge or judges of this court who had been upon the face of the returns elected, and who held the certificate thereof and commission, should not hold the office, and adjudge another entitled thereto, and such decision would be final and conclusive.

It has been suggested that precinct officers of election exercised judicial power. It is true that they hold the election, but the constitution prescribes the qualification of voters. It necessarily follows that the officers must in a summary way determine whether the person offering to vote has the prescribed qualifications. So a sheriff in taking a replevy or bail bond must determine the sufficiency of the surety, and thereby the rights of the party are determined. The same may be said of the clerk of a court in respect to many of his duties. The duties of the election officers are quite similar to those above named.

The power of the legislature to create or provide for state officers is to be found in

section 93. The first of that section provides for the election of treasurer, auditor, secretary of state, commissioner of agriculture, attorney general, superintendent of public instruction, and register of the land office. The last of the section provides as follows: "Inferior state officers, not specially provided for in this constitution, may be appointed or elected in such manner as may be prescribed by law for a term not exceeding four years, and until their successors are appointed or elected and qualified." Thus it will be seen that only inferior state officers can be created. The contest board, as we have already seen, are superior officers, and their appointment cannot be upheld under the authority of the section *supra*. If, however, section 153 gives the legislature the plenary power contended for by appellee, then, of course, one man might be appointed with power to appoint all the county officers to hold the elections, and then this same commissioner to receive the returns, count the votes, issue the certificates, and then sit as a contest board or court for the trial of contested elections. It would be strange, indeed, if the framers of the constitution, after manifesting much desire for the protection of the rights of the people, the purification of elections, and for the enforcement of the will of the voter expressed at the polls, should invest the legislature with such an arbitrary power as the contention of appellee implies, and, too, in respect to so important a question as is therein involved. Our opinion is that so much of the act in question as attempted to confer power upon the election commissioners to hear and decide contested election cases is and was unconstitutional and void, and that the attempt to exercise such power was unlawful, and the decision of the commissioners in the case under consideration was and is null and void and of no effect; and, this being so, the judgment appealed from is erroneous.

But it is said for appellee that, the validity of the law having been upheld by this court, we ought not now to overrule or disregard that decision, and we are referred to *Cooley, Const. Lim. (6th Ed.) p. 64*. The quotation reads as follows: "Mr. Cooley, in his work on Constitutional Limitations, quoting from Chancellor Kent, says: 'A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence that we can have of the law applicable on the subject; and, further, where a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, for the most urgent reasons and upon a clear manifestation of error, and if the practice were otherwise it would leave us in a perplexing uncertainty as to the law.'" We think that the rule announced in the quotation would not be violated by overruling or departing from the

decisions relied on by appellee. But, be that as it may, we do not think that this case comes within the rule announced by the learned author. It cannot be said that the decision was solemnly and deliberately adopted, in the sense which the author thinks should be so obligatory. All the decisions in support of the law were rendered by a bare majority of the court, and from the passage of the law in 1898 to its repeal last year it was vehemently assailed by a large portion of the people and press of the country.

It is proper to remember that the constitution of 1849-50 remained in force for more than 40 years, and that the constitution of 1891 made many radical changes; hence it might be reasonably expected that the legislature, in the hurry and excitement incident to the new order of things, would occasionally enact some laws in conflict with the new constitution. It may also be observed that this court overruled quite a number of decisions rendered since the adoption of the present constitution other than those cited in the opinion herein. Appellee in his petition cites the following cases in support of his contention that this court has frequently sustained the power of the legislature as contended for by him, to wit: *Steele v. Meade*, 98 Ky. 614, 33 S. W. 944; *Wilson v. Hines*, 99 Ky. 221, 35 S. W. 627, 37 S. W. 148; *Strong v. Jones (Ky.)* 42 S. W. 752; *Banks v. Sergeant (Ky.)* 48 S. W. 149; *Patrick v. Runyon (Ky.)* 50 S. W. 538; *Creech v. Davis (Ky.)* 51 S. W. 428; *Smith v. Patton (Ky.)* 45 S. W. 459; *Anderson v. Likens (Ky.)* 47 S. W. 867; *Booe v. Kenner (Ky.)* 49 S. W. 330; *Major v. Barker*, 99 Ky. 305, 85 S. W. 543; *Sweeney v. Coulter (Ky.)* 58 S. W. 784; *Purnell v. Mann (Ky.)* 50 S. W. 264; *Poyntz v. Shackelford (Ky.)* 54 S. W. 855; *Broadbuss v. Mason*, 95 Ky. 421, 25 S. W. 1060.

I have carefully examined the decisions above referred to, and not one of the contests originated or was tried after the enactment of the election law under consideration, known as the "Goebel Election Law of 1898." The cases of *Sweeney v. Coulter*, *Purnell v. Mann*, and *Poyntz v. Shackelford* were not appealed from the contest board, but were tried under the provisions of the election law of 1898, and have heretofore been discussed in this response.

As before stated herein, the law providing for these contest boards prior to 1898 provided it should be composed of judicial officers, with only a bare chance that one of the board might be the county clerk, and it would by no means follow that if such a board was held to be constitutional that such holding would mean or imply that the boards provided for in the act of 1898 would be constitutional. Moreover, in all these appeals from the contesting board to the circuit court, and thence to this court referred to by appellee, no question as to the con-

stitutional power of the legislature to create and establish such boards was ever questioned or discussed. Hence it necessarily follows that this court has never passed upon the constitutionality of such boards since the adoption of the present constitution. It therefore follows that the decisions referred to are not at all binding upon this court, for the reason that the question here presented was not involved or decided in the cases relied on by appellee. It may be further remarked that, inasmuch as the parties to these contests have willingly gone before the county contest boards and submitted their case under a provision of the statute for an appeal to the circuit court, and thence to this court, this court would have had no power to have adjudged the action of a county board null and void for the purpose of dismissing the appeal from the circuit court.

The case of *Thompson v. Koch*, 98 Ky. 400, 33 S. W. 96, was an appeal from the decision of the circuit court of Jefferson county rendered upon an appeal taken to it from a judgment or order of the license board of the city of Louisville, which had refused to grant liquor license to an applicant. In that case it appears that the applicant for the license insisted that no appeal could be taken from the judgment below to this court; that the board of license was merely advisory, or, at best, a tribunal with special and limited power, and cannot in any sense be deemed a court, because the present constitution prohibits the creating of any other courts than those mentioned in that instrument. This court in response said, in substance, that there could be no objection to that character of legislation requiring or granting appeals from the judgments of boards of cities and towns, whether of the one class or the other, where those boards are vested with the power of determining questions affecting the rights of citizens. It is further held, in effect, that the power to grant license must be vested in some body connected with the municipal government; and, besides, this appeal comes from the circuit court, and its judgments are subject to the revisory power of this court, unless prohibited by law. It is further said that an appeal lies to this court from judgments of circuit courts in all cases other than those executed by statute. It will thus be seen that this court has, in effect, decided that, without any regard to the legality of the board or tribunal of first instance, if an appeal is allowed by law to the circuit court, and if the circuit court tries and decides the matter, an appeal lies therefrom to this court. I do not wish to be understood as intimating that the legislature, under the present constitution, could constitutionally establish such county boards as were in existence prior to the law of 1898, but have deemed it necessary to discuss these questions as indicated, for the

purpose of showing the fallacy of appellee's argument.

A few days since appellee filed a supplemental petition, in which it is suggested that this court, in an opinion delivered by the Chief Justice on the 15th January, 1902, in *Tousey v. Stites* (Ky.) 66 S. W. 277, upheld the legality of the board in regard to a local option election. The writer of the petition has fallen into an error of fact as well as an error of law. The Chief Justice did not deliver the opinion, but the opinion referred to was delivered by Judge White. There was no reference made to the constitutionality of the election law in question, nor to the legality of the board to try such contested election, either before the board of contest or the circuit court. No such question was considered by the court, nor is it referred to in the opinion delivered by Judge White. The writer of this opinion, Judge O'Rear, and Judge Du Belle were, it is true, present. The sole question involved in the appeal was whether the election held in a part of the Cloverport magisterial district had the effect to authorize the sale of spirituous liquors in the precincts so voting, the entire magisterial district having theretofore voted in favor of prohibition, and the election in dispute having been held within less than three years after prohibition had been voted in the entire magisterial district. The circuit court held that the election was null and void, and from its judgment *Tousey* appealed, and this court affirmed the judgment of the circuit court, thereby holding that, after the entire magisterial district had by vote prohibited the sale of intoxicating liquors, a subdivision thereof could not, by a separate vote, authorize such sale within such subdivision; citing *Com. v. Bottoms* (Ky.) 57 S. W. 493.

For the reasons given in *Thompson v. Koch*, this court could have taken jurisdiction of the appeal from the circuit court, although it might have been of opinion that the contest board had no original jurisdiction to determine the question involved, the sole question being as to whether a vote could be taken in reference to the subject at all; or, in other words, whether the holding of the said election was not in law a nullity, the case having been appealed to the circuit court, and there tried out, without any objection as to the means or manner in which a trial was asked. The opinion in *Hughes' Adm'r v. Hardesty*, 13 Bush, 366, is conclusive as to this question, and is also applicable to all the cases that have reached this court through the circuit court, referred to by appellee either in his brief or petition. In the case last referred to the appellee had prosecuted an appeal direct to the circuit court from a judgment of a justice's court quashing a replevin bond. The case was heard by consent in the circuit court, and the order quashing the bond reversed, and from that judgment the appellant prosecuted

an appeal to this court. This court, in considering the case, said: "It is contended that the act of the general assembly, under which the appeal was prosecuted directly to the circuit court, having been held to be unconstitutional (*Jones v. Thompson's Ex'r*, 12 Bush, 304), the circuit court had no jurisdiction to reverse the order of the justice's court quashing the bond. The appellant did not move to dismiss the appeal, or otherwise object to the jurisdiction of the court, but consented to a submission and trial of the case. The case was one of the subject-matters of which the circuit court had jurisdiction, and the objection to the jurisdiction, because the case had been brought directly from the justice's court to the circuit court instead of being brought there through the quarterly court, was waived by the failure to move to dismiss, and the consent of appellant to a trial by the circuit court."

It seems to be the contention of appellee that, in the absence of any statute providing for the trial of contested elections, the courts would, upon proper proceeding, have jurisdiction to hear and determine as to who was entitled to an office in dispute. The parties in the circuit court upon all those appeals having failed to object to the jurisdiction of the circuit court to hear and determine the cases, or to object to the jurisdiction of the contest board from which the appeals were taken, they could not be heard in this court to raise that question, or, in other words, were estopped to raise it for the reason given in the case *supra*. It may be further observed that, prior to the passage of the law of 1898, the various contest boards had been composed of officers elected by the people, and in whom the people, courts, and litigants had confidence; hence, during the short time since the adoption of the present constitution, neither the attention of the people nor of the courts was called to, or had any particular reason to investigate or determine as to, the constitutionality of such boards. It is worthy of note, too, that this court has never unanimously sustained the constitutionality of any part of the election law of 1898, nor can it be said that the country at large ever adopted as correct the few decisions given sustaining said law. Hence it follows that there is no force in the argument of appellee that the constitutionality of the act in question has ever been admitted so long that it ought to be considered settled, and not disturbed or questioned. The truth is that a large portion of the people and of the press constantly, vociferously, and vehemently demanded a repeal of the law until the same was repealed, and a law enacted giving to the courts exclusive jurisdiction of contested elections.

There is no force in the argument that it was intended by the framers of the constitution or the legislature to keep election contests out of the courts in order to keep po-

litical questions separate from judicial matters, because under the old board, as well as under the new, the great majority of contested cases were or could be appealed to the circuit court, and thence to the court of appeals.

I think the petition for rehearing should be overruled.

RECCIUS v. CITY OF LOUISVILLE.¹

(Court of Appeals of Kentucky. Jan. 24, 1902.)

JUDGMENT—ERROR IN RENDERING JUDGMENT FOR MORE THAN AMOUNT CLAIMED—ACTION TO RECOVER TAXES—BURDEN OF PROOF.

1. In an action by a city to recover taxes, it was error to give judgment for taxes for years as to which the action had been dismissed on plaintiff's motion.

2. In an action by a city to recover taxes, the burden of proof was on plaintiff to show that the tax bills were properly authenticated; that fact being denied by the answer.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by the city of Louisville against J. W. Reccius to recover taxes. Judgment for plaintiff, and defendant appeals. Reversed.

Lane & Harrison, for appellant. H. L. Stone, for appellee.

PAYNTER, J. By this action the city sought to enforce its lien upon certain property for the taxes for the years of 1882, 1883, and 1884, and other years. Subsequently, upon motion of the plaintiff, the action was dismissed as to the taxes for the years 1882, 1883, and 1884. Notwithstanding the action stood dismissed as to the years mentioned, the court gave judgment for the taxes for the years 1883 and 1884. This was error, as the court could not properly render judgment for more than was claimed by the plaintiff. *Preston v. Roberts*, 12 Bush, 585.

The question as to the burden of proof under the state of pleadings in this case was decided by this court in the case of *City of Louisville v. Kimbel* (opinion delivered the 22d of this month) 66 S. W. 608.

The judgment is reversed for proceedings consistent with this opinion.

AFRICAN BAPTIST CHURCH OF LEBANON et al. v. WHITE et al.¹

(Court of Appeals of Kentucky. Feb. 4, 1902.)

INJUNCTION—REINSTATEMENT BY COURT OF APPEALS PENDING APPEAL—FAILURE TO GIVE NOTICE OF MOTION TO REINSTATE—FAILURE TO MAKE MOTION WITHIN TIME ALLOWED.

1. Under Civ. Code Prac. § 747, the court of appeals has no power, upon appeal from an order dissolving an injunction on final hearing, to reinstate the injunction pending the appeal, except after reasonable notice to appellee of the motion to reinstate.

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

2. Where final judgment dissolving an injunction was rendered December 18th, and 20 days was given appellant in which to apply to the court of appeals to reinstate the injunction pending the appeal, a motion filed in the clerk's office of the court of appeals January 6th, but not entered in court until January 8th, was too late.

Appeal from circuit court, Marion county.
"To be officially reported."

Motion to set aside order reinstating injunction. Granted.

S. A. Russell, for appellants. John McChord, for appellees.

GUFFY, C. J. The appellants, Moses Ray and others, trustees of the African Baptist Church, instituted suit in the Marion circuit court against Frank White, etc., the object of which seems to have been to enjoin the defendants from preventing the plaintiffs from exercising certain rights in and to the house of worship belonging to said plaintiffs, and to recover \$1,000 damages for alleged illegal acts committed by the defendants in respect to said church property. Such proceedings were had that on the 18th day of December, 1901, the circuit court adjudged that plaintiffs' petition be dismissed, and that the order of injunction be dismissed and dissolved. It further provided that the plaintiffs should have 20 days in which to apply to the court of appeals, or a judge thereof, for a reinstatement of the injunction therein dissolved. To the order of dismissal and dissolution the appellants excepted, and prayed an appeal to this court, which was granted. On the 6th of January, 1902, the appellants filed a transcript of said record in the clerk's office of the court of appeals, and on January 6th filed in the clerk's office a motion for a reinstatement of said injunction, which motion appears to have been entered on the 8th day of January, 1902, and afterwards sustained by the court, and an order to that effect made. On the 23d of January, 1902, the appellees entered a motion to set aside said order of reinstatement. The order of reinstatement was made without the attention of the court being called to the absence of any notice to appellees of the intention of appellants to make such motion. It is insisted for appellees that no motion to reinstate the injunction could be legally made or considered by this court unless appellees had been notified thereof, and section 747 of the Civil Code of Practice is cited in support thereof. It is provided in said section that the provisions of the Civil Code concerning supersedeas on appeal shall not apply to judgments granting, modifying, perpetuating, or dissolving an injunction. It is further provided that when an appeal shall be taken from any judgment granting, modifying, perpetuating, or dissolving any injunction, the court which rendered the judgment may, in its discretion, if the ends of justice so require, at the time the appeal is taken, make an order suspending, modifying, or

continuing the injunction during the pendency of the appeal upon such terms as to bond or otherwise as may be proper for the security of the rights of the other party. It is provided that either party, within 20 days after the entry of such an order, may take a transcript of the record, or parts thereof appertaining to the injunction, and upon reasonable notice in writing to the opposite party to move the court of appeals, or, if in vacation, any judge thereof, to revise the order of the lower court, and finally determine how far the injunction shall be suspended, modified, or continued pending the appeal. It is also provided that pending such application, but not longer than for 20 days, the status existing immediately before the entry of the judgment appealed from shall be maintained, and the lower court shall so provide in the judgment upon the request of either party. It will be seen from the record in this case that the court upon final judgment in this case gave to the appellants 20 days to make an application, as provided in the section supra. It will also be seen from this record that, although filed on the 6th of January, 1902, the motion was not in fact entered until the 8th day of January. Furthermore, no notice appears to have been given to the appellees.

It therefore follows that the order of the court reinstating the injunction should not have been made, and the same is now set aside, and held for naught, and the motion to reinstate the injunction is now overruled.

GREENWICH INS. CO. v. LOUISVILLE & N. R. CO. et al.¹

(Court of Appeals of Kentucky. Feb. 4, 1902.)

RAILROADS—LICENSE TO CONSTRUCT BUILDING ON RIGHT OF WAY—CONDITION AGAINST LIABILITY FOR LOSS BY FIRE—INSURANCE—MISTAKE AS TO TITLE.

1. Where a railroad company grants permission to another to construct a building on its right of way on condition that it shall not be liable for loss by fire from its locomotives, the condition is valid, and neither the owner of the building nor an insurance company which has paid the loss can recover of the railroad company for the loss of the building by fire unless there was wanton or willful negligence on the part of its servants.

2. One who was permitted by a railroad company to construct a building on its right of way upon condition that the company should not be liable for loss by fire had, notwithstanding that condition, an insurable interest in the property, and an insurance company from which he procured insurance thereon, having paid the loss, cannot recover the money paid on the ground that it was paid in ignorance of the terms of the lease and under a mistake of fact, there being no allegation that the mistake was mutual.

Appeal from circuit court, Marion county.
"To be officially reported."

Action by the Greenwich Insurance Company against the Louisville & Nashville

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Railroad Company and the Frank Fehr Brewing Company to recover damages for loss by fire. Judgment for defendants, and plaintiff appeals. Affirmed.

Lafe S. Pence, for appellant. John McChord, for appellee Frank Fehr Brewing Co. W. C. McChord, Lisle & McChord, and Edward W. Hines, for appellee Louisville & N. R. Co.

O'REAR, J. The New South Brewing & Ice Company was granted the privilege by appellee the Louisville & Nashville Railroad Company to build a cold storage house upon the latter's right of way near Lebanon Station. Among the conditions of the lease was the following: "And whereas, such use of the right of way or the lands of said railroad company is solely at the instance of said brewing and ice company, and for its accommodation, and without charge on the part of said railroad company; and whereas, said railroad company would not give its permission or consent to the erection or use aforesaid on its said right of way or lands except upon the express condition that: That, in consideration of the premises, said railroad company, its officers, and agents, or other companies operating its railroad, be released and held harmless from, and indemnified against, all claim or demands of said New South Brewing & Ice Company or others on account of any injury or loss whatever to said house or its contents, by reason of fire from locomotives, or from any cause whatsoever." This contract was subsequently assigned by the consent of the railroad company to the Frank Fehr Brewing Company, who assumed it subject to the conditions above quoted. By the negligence of appellee railroad company's employes a fire is alleged to have occurred, caused by sparks from its locomotives. The fire originated in a building not on appellee's right of way, and owned by another not a party to the above contract nor to this suit. The cold storage house was burned in the same conflagration. It had been previously insured by appellant, who paid the owner for the loss, and brought this action against the railroad company, claiming it was entitled by subrogation to recover as the lessee, the owner of the cold storage house, would have been. This last statement we accept as true. The question is whether under the contract above quoted appellee railroad company was exempt from damages to the building in question by reason of fire caused by its negligence. The circuit court held that it was.

It is argued for appellant that the railroad company cannot contract against the consequences of its own negligence, as to do so is not only against public policy, but prohibited by section 196 of the constitution, which in part provides, "No common carrier shall be permitted to contract for relief from

its common law liabilities." The court is of opinion that appellee railroad company is not liable for the destruction or damage to the building under the contract quoted, except for willful or wanton negligence of its servants. For mere carelessness, however gross, short of wantonness or willfulness, it will not be liable. It is a matter of common knowledge, and from the language employed in this case we may assume was known to the parties herein, that by the aid of the best contrivances so far known and in use it is impossible to altogether prevent fire caused by sparks and cinders from locomotives. Of course the nearer the railroad track a combustible object may be the greater is the danger to which it is subjected from this source. Railroad operators are held liable for damages to the public occasioned by their negligence in failing to provide suitable spark arresters for their locomotives in so far as they reasonably can be had. The company is under no obligation as a common carrier to the public or any member of the public to permit them to erect on its right of way any sort of structure, and if one should erect such building on the company's right of way the company would owe no duty to its owner, save to refrain from willfully or wantonly destroying it. The doctrine upon which the law and the section of the constitution above relied upon are based, prohibiting common carriers from contracting against their own negligence by their servants, is, as suggested, that to do so is against public policy. They can operate their trains only by the employment of servants. To permit employers to contract with their servants that they will not be liable for their negligence, by which an inducement would be offered for carelessness towards the lives of so many people, could not be and is not supported in the law. Common carriers are required to transport passengers and freight, the former with the utmost, the latter with ordinary, care looking to their safety. So passengers are compelled frequently to travel by railroad or not at all, and freight is required to be shipped by that means or not at all. The common carriers, by the conditions under which they exist, and to some extent by operation of the law, have the practical monopoly of this business. They are not upon an equal footing with their customers in the matter of making such contracts, as where they undertake to secure in advance indemnity against the result of their own negligence. Such contracts are clearly against the public policy. But in the case at bar no such necessity exists to the owner of the building that he should erect it upon the company's right of way, nor is the company compelled under any state of case to permit him to do so. It is under no obligation to extend its liabilities. It certainly could not be expected to voluntarily do so. Therefore the parties, when they

come to contract with reference to the location of such a building, are dealing at arm's length, and upon an equal footing. The railroad company can well say, "While we are unwilling to assume any additional risks, we are willing to suffer you for your own convenience to build this house upon our right of way within the zone of recognized and peculiar danger from fires; but it must be understood that, if you accept the privileges of this grant, you alone must bear its burdens and casualties." It is not so much that the railroad company contracts against its own negligence as that the brewing company agrees to alone bear all risks from fire. It receives a consideration for doing so. We cannot see that the public are in any wise affected by such a contract, nor can they be. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 17 C. C. A. 62, 70 Fed. 201, 30 L. R. A. 193; *Id.*, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; *Griswold v. Railroad Co.* (Iowa) 53 N. W. 295; *Stephens v. Southern Pac. Co.* (Cal.) 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; *King v. Same* (Cal.) 41 Pac. 786, 29 L. R. A. 755.

Plaintiff also joined the Frank Fehr Brewing Company as a defendant, and by an amended petition claimed that defendant had misrepresented its title to the plaintiff, and that plaintiff had paid the insurance under a mistake of fact; that it did not know that the brewing company had executed a lease with the railroad company by which the brewing company assumed the dangers incident to the extraordinary risk of fire from the near exposure of the building to the passing locomotives. It appears that the brewing company had an insurable interest in the property, and it is not alleged that the mistake was mutual. We are of opinion that the demurrer to the petition should have been sustained.

The judgment dismissing the case as to both of the defendants is affirmed; the whole court sitting.

FIRST NAT. BANK OF CARLISLE v. LEE et al.¹

(Court of Appeals of Kentucky. Feb. 4, 1902.)

TRUSTS AND TRUSTEES—POWER OF TRUSTEE TO SELL AND CONVEY—LIFE TENANT NOT ENTITLED TO INCREASE IN VALUE AS "PROFITS."

1. A trustee with title, and invested by the instrument creating the trust with power to change the investment, has the right to sell and convey the title to the trust property.

2. Where a testator provided by his will that his wife should have the interest and profits annually accruing from the sum of \$4,000, "which she may loan out or otherwise invest from time to time as she may deem best," and after her death to descend to testator's daughter in trust, "the interest and profits to be paid

to her annually" by a trustee appointed by the proper tribunal, and at her death to go to her surviving children, the daughter's trustee, after the widow's death, had the same power to change the investment which the widow had.

3. Property in which the \$4,000 was invested having sold for \$7,000, the daughter, as life tenant, was not entitled to the increase in value as "profits," but the entire proceeds should have been reinvested, and the entire income therefrom paid to her.

Appeal from circuit court, Nicholas county.

"Not to be officially reported."

Action by J. W. B. Lee, trustee of Mary E. Lee, against Mary E. Lee and others, seeking a confirmation of plaintiff's action in selling the trust property for reinvestment. Judgment decreeing specific performance of contract, and the First National Bank of Carlisle, the purchaser, appeals. Reversed.

Winfield Buckler, for appellant. S. Holmes, for appellee trustee. C. W. Wood, for appellee E. W. Lee.

O'REAR, J. The last will of Harvey Wilson devised \$4,000 in trust for the use of his daughter, Mrs. Mary E. Lee, for her life, then to her surviving children. The provision is as follows: "It is my will and desire, after the payment of my funeral expenses and just debts, that my beloved wife, Amelia Wilson, shall have the interest and profits annually accruing from the sum of \$4,000, which she may loan out or otherwise invest from time to time as she may deem best, but in no event to use any of the principal. After the death of my said wife it is also my will that the said sum of four thousand dollars shall descend to and belong to my daughter, Mrs. Mary E. Lee, in trust, the interest and profits of which I wish to be paid to her annually by some reliable and trustworthy person that the proper tribunal may appoint for that purpose, and at the death of my said daughter I wish the principal or said sum of \$4,000 to be equally divided between her surviving children." The \$4,000 in question was invested by a trustee appointed for Mrs. Lee and her children by the proper tribunal. With it he purchased a brick business house and lot in Carlisle, Ky., paying for it \$4,300, \$300 being contributed by her husband. The title was taken to the trustee and his successors in trust for the use and benefit of Mrs. Lee for life, with remainder to such of her children as may survive her, "as provided by the will of said Harvey Wilson, deceased." The property has come into demand for a peculiar use, giving it for the time an extraordinary selling value. The trustee contracted to sell it to appellant at the price of \$7,000,—fully its value in any view of the situation. He then brought this suit in the circuit court of Nicholas county against the life tenant and remainder-men in esse, seeking a confirmation of his action. It was averred and sufficiently shown that the sale was an advantageous one. To this

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

suit the purchaser, appellant, intervened, raising the question of the right of the trustee to make the sale. The circuit court adjudged the contract enforceable, and decreed its specific performance. The court further adjudged that \$4,000 of the purchase price be paid into court for reinvestment, under the will of Wilson, and that the remaining \$3,000 be paid to the life tenant, Mrs. Lee. The questions for decision are: (1) Did the trustee have the power to sell and convey title to the lot? and (2) was the whole of the purchase price realized the principal fund, or was the excess above the original \$4,000 "profits," as contemplated by the will?

A trustee with title, and invested by the instrument creating the trust with the power to change the investment, has the right to sell and convey the title to the trust property. *Taylor v. King*, 8 Am. Dec. 746; *Reece v. Allen*, 48 Am. Dec. 336; *Gale v. Mensing*, 64 Am. Dec. 197; 1 *Perry, Trusts*, 321, 334, 335; 2 *Perry, Trusts*, 787; *Bank v. Jefferson*, 88 Ky. 651, 11 S. W. 767. We are of the further opinion that the will above quoted gave to the trustee the same power and control over the trust fund as it gave the widow of the testator. It is manifest that the testator intended that the income, only, from the principal fund should be available to the life tenants. He uses the words "interest" and "profits" as synonymous terms. He provides that "the interest and profits" shall be paid to the life tenant "annually." If the trustee had continued to hold the house and lot until the life tenant's death, it would not be doubted that the remainder-men would take it under the will, without reference to its then value, whether greater or less than \$4,000; for it represented, and indeed was, the principal set apart to them by the will. If the money had been used in buying a farm, and, after the purchase, values of such land had increased so as to double the cost, would it be supposed that in such event the land would be divided, and the life tenant given one-half of it as profits? No more so than, if values had shrunk, would she have been expected to make good the losses. Suppose the investment had been made in gold coin at par, which had for any reason risen to a high premium. It is not to be supposed that the premium would have belonged to the life tenant. Such accretions are to be considered part of the capital, the use, rents, or interest of which will go to the life tenant, and the enhanced capital to the remainder-men. *Underh. Trusts*, 229; 2 *Perry, Trusts*, 547; *Van Doren v. Olden*, 97 Am. Dec. 650; *Hite's Devisees v. Hite's Ex'r*, 98 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189.

The judgment, in so far as it decrees a specific performance of the contract of sale, is affirmed. In so far as it adjudges \$3,000 of the purchase price to the life tenant, it is reversed. Cause is remanded for proceedings consistent herewith.

RAILEY v. RAILEY (two cases).¹

(Court of Appeals of Kentucky. Jan. 31, 1902.)

ABSENT DEFENDANTS — WARNING ORDER — FALSE STATEMENT IN AFFIDAVIT AS TO NONRESIDENCE OF DEFENDANT — VALIDITY OF JUDGMENT — NOTICE TO TAKE DEPOSITIONS — SERVICE ON CORRESPONDING ATTORNEY — VALIDITY OF APPOINTMENT OF CORRESPONDING ATTORNEY.

1. In an action by the wife for a divorce, her residence in the county gave the court jurisdiction of the subject-matter, and a warning order having been made against defendant upon an affidavit filed by plaintiff to the effect that defendant was then a nonresident of the state, and believed by affiant to be absent therefrom, a judgment granting the relief sought will not, in the absence of fraud, be declared void upon the ground that defendant was in fact not a nonresident, it being provided by Civ. Code Prac. § 58, subsec. 6, that the affidavit for a warning order "unless it be controverted by defendant's affidavit, shall be sufficient evidence of the facts therein as stated for the support of the action, as well as of the warning order."

2. Defendant's motion to modify the judgment was properly overruled, as he sought to open the judgment only as to the custody of the child of the marriage, and failed to show any reason why the mother, to whom the custody of the child had been awarded, was not a proper person to have control of the child, or that he was able or prepared to care for the child.

3. Though defendant was in the county when notice to take depositions was served, it was proper to serve the notice on the corresponding attorney, as defendant had not entered his appearance.

4. The fact that the corresponding attorney had a desk in the office of plaintiff's attorneys is not sufficient to avoid the judgment, there being no improper conduct in the matter of his appointment, or in the discharge by him of his duties.

Appeal from circuit court, Fayette county.
"To be officially reported."

Action by Mary Railey against Charles Elmer Railey for divorce, and action by Charles Elmer Railey against Mary Railey for divorce. Judgment overruling motion to vacate judgment for plaintiff in first-named action, and judgment for defendant in second-named action, and Charles Elmer Railey appeals. Affirmed.

Breckinridge & Shelby, for appellant.
Morton & Darnall and Hazelfigg & Chenaunt, for appellee.

O'REAR, J. These parties were married in 1894, and separated in 1898. A male child is the sole issue of the marriage. Appellant left Kentucky in October, 1898, for New York, without informing his wife of the fact or of his intentions. He remained out of the state, saving one or two short visits, till January, 1900. In November, 1899, about 13 months after the abandonment, appellee, who continued to reside at Lexington, Ky., their former home, brought this suit for divorce and custody of the child, alleging the abandonment, and that appellant had failed to provide support either for his wife

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

or child. He was proceeded against as a nonresident, the requisite affidavit being filed, and warning order regularly made by the clerk, and an attorney appointed to correspond with the defendant. The corresponding attorney's letter to defendant apprising him of the pendency and nature of the suit was returned uncalled for and unopened. Defendant in fact had no notice of the pendency of the suit. He returned to Kentucky, and was known by appellee to have returned, before the case was finally prepared. Notice to take depositions against him was executed on the corresponding attorney, and defendant was not given actual notice of the proceedings. The case thus prepared was decided in favor of appellee, and she was granted an absolute divorce and custody of the child. A few days thereafter, and while the court yet had control over the judgment and the case, appellant appeared in court by counsel and moved the court to set aside so much of the judgment as awarded the custody of the child to appellee, suggesting that the judgment was void; that he had never heard of the pendency of the suit till he saw a newspaper account that the judgment had been rendered; that as a matter of fact he had never been a nonresident of Kentucky, but had been temporarily absent on business. Affidavits were filed in support, and in resistance, of appellant's motion. On final hearing the court declined to set aside the first judgment, and rendered a judgment for costs against appellant. To revise the last-named judgment the first of these appeals is prosecuted.

It is earnestly insisted that this record shows: (1) That appellant was not in fact a nonresident when the suit was filed and judgment rendered; (2) that it is the fact, and not the statement of it in the plaintiff's affidavit, that gives the court jurisdiction to proceed by warning order; (3) that this fact may be shown contrary to the recitals of the record, and that the judgment is consequently void. These propositions are said to involve that fundamental tenet that no man shall be deprived of his life or property without due process of law, which means, according to the argument, "his day in court." The residence of the wife gives the court jurisdiction of the subject-matter of this suit (Ky. St. § 2120), and the defendant may be before the court for the purposes of the suit by actual service of summons on him by an officer authorized by law to serve it, or by his voluntary appearance, or by warning order. Section 58, Civ. Code Prac. The last method is authorized only in case the defendant is a nonresident (and in other instances not pertinent to this case). Whether the defendant is a nonresident is a fact to be determined by the court trying the case, as is every other fact in that case. The law of this state has provided how the defendant's person may be subjected to the

jurisdiction of the courts. The process commonly called "publication" is an order indorsed by the clerk upon the petition, warning the defendant to appear and defend the action within the time prescribed by the Code, and appointing some attorney of the bar to correspond with the defendant, that he may have actual notice of the pendency of the suit, and of its character. Before the clerk is authorized to enter such an order, the plaintiff must file, or there must be filed for him, an affidavit stating that the defendant is a nonresident of the state, and believed by the affiant to be absent therefrom, and giving, if known, his post office address. Subsection 6 of section 58 of the Code thus provides: "An affidavit made pursuant to the foregoing provisions of this section, unless it be controverted by the defendant's affidavit, shall be sufficient evidence of the facts therein stated for the support of the action, as well as of the warning order." This affidavit, duly made and filed, is expressly made the proof of its own truthfulness, unless denied by defendant's affidavit. This fact, claimed to be a jurisdictional one, is thus established in the manner provided by law. Being so established, can it be attacked otherwise than as permitted in the section quoted above, or, at furthest, as provided by sections of the Code allowing applications for new trial. Sections 342-344, 518. It is argued that it would be a monstrous doctrine to say that one in fact not a nonresident may have a valid judgment rendered against him by a court of this state, without service of process, without his appearance, and without his knowledge of the pendency of the action; that to allow it is to authorize his property to be taken without his having had a "day in court,"—without due process of law as guaranteed to him by the constitution. Constructive service of process, though not employed as now generally in use, was nevertheless known to the common law. 3 Bl. Comm. 283-344. It is therefore a proceeding "according to the course of the common law." *Hahn v. Kelly*, 34 Cal. 417, 94 Am. Dec. 758. The law of the land recognizes it as one of the authoritative methods of acquiring jurisdiction of the person of the defendant who is interested in the subject-matter of litigation already within the court's jurisdiction. When and how it shall be employed are matters of statutory regulation. The proof necessary to sustain such a proceeding must be passed upon by the court trying it, as would the proof in case of alleged actual service of process. When this proof satisfies the court as to the existence of jurisdictional facts, whether to support actual or constructive service, it must be taken as conclusive till judgment is reversed or vacated in a direct proceeding. To hold otherwise would be to subject every domestic judgment of courts of superior jurisdiction to liability to collateral attack at any time, and recitals

of the record would be of no value, and afford no protection. Titles resting upon, or growing out of, judicial proceedings would be the least secure of all. The defendant is not without remedy. In all cases except when divorce is granted, and in so far only as the divorce is concerned, the defendant may within a limited time prosecute an appeal to reverse the judgment if erroneous, or for a new trial after the term has expired; and, of course, in any case for a new trial during the term. Society has found no safer way to adjust conflicting claims and disputes of litigants than by submitting them under certain formalities to the decision of such tribunals, disinterested, learned, and painstaking. The presumption is the courts will not adjudge against a party unless the facts shown in the record, and the law, justify it. We know that justice frequently, too frequently, miscarries, whether by the erroneous judgment of the court, the bias of the jury, the false evidence of the litigant, or innocent mishap destroying or preventing evidence of the truth. To the loser it is all alike, whatever the cause. Could it be safely asserted that the error of the court in finding a fact to exist that in reality did not should vitiate a judgment more readily than any other cause by which an erroneous conclusion may have been reached? "As the law cannot administer abstract justice to all the parties, it is at liberty to pursue such a course as will best subserve public policy. * * * The hardship arising from an erroneous or inadvertent decision upon jurisdictional questions is no greater than that issuing from an erroneous or inadvertent decision upon other matter." *Freem. Judgm.* § 134. The interests of the individual must yield to the interests of society when they come into conflict. It is of more importance to society that the verity of judgments of courts of record should be upheld when rendered in apparent conformity to legal requirements than that abstract justice may be done to the particular litigant. We do not decide that for a fraud practiced by the successful party in procuring a judgment it may not be set aside in a proper proceeding for that purpose by the injured one, nor do we decide that if the appellee in this case had known in fact that the appellant was not a nonresident when her suit was brought, and had misstated that fact for the purpose of preventing his knowing of the pendency of the action and making defense thereto, that the judgment would have been conclusive against him in a direct attack upon it to set it aside because of these facts. We conclude that while it is the fact of nonresidence that authorizes a warning order, in lieu of actual service, yet the proof of the existence of that fact must be passed upon first by the court in which the suit is brought; and, under the Code, the uncontroverted affidavit of the plaintiff (whether it be

subsequently shown that it was not true) is such proof as to authorize the court to pass judgment on the case; and that then the defendant's remedy is by appeal, or motion to vacate, or for a new trial, where these remedies are applicable. *Newcomb's Ex'rs v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222, we think is in accord with these views, though the main question there decided is not here presented.

While the circuit court had power to vacate the judgment in this case appellant's motion for that purpose was made, and his defense heard and considered. The evidence was conflicting whether he was in fact a nonresident. There was no allegation, nor effort to prove, a fraudulent concealment of the truth, or perversion of the facts, so as to deceive the court into taking jurisdiction of the case. Certainly appellant's conduct was such as to reasonably lead appellee to believe that he had taken up his residence in New York. She did believe it. The suit appears to have been begun in good faith and in every way to have met the requirements of the law. After appellant's appearance, which he said was for the sole purpose of opening the judgment as to the custody of the child, then about two years old, he failed to show any reason why his mother was not a proper person to have control of it, nor that he was able or prepared to care for it. Being then before the court, and being unable to show any reason why the court should have entered a different judgment from the one of which he was complaining, it was not improper for the court to dispose of the matter by merely overruling his motion to modify.

Although the defendant was in the county when the depositions were being taken, and when the notice was served, it was proper and necessary, under section 630 of the Civil Code of Practice, that, where the defendant had not appeared in the action, the service should have been upon the corresponding attorney appointed by the clerk. The corresponding attorney was a young lawyer, Mr. Gastineau, having a desk in the office of plaintiff's attorneys. He was appointed by the clerk, without suggestion from the plaintiff or her counsel, so far as is shown, and appears to have done all that any other probably could to notify defendant of the suit. There is no suggestion of improper conduct either in the matter of the appointment of, or in the discharge of the duties by, this attorney. And while it would have been better, perhaps, for the clerk to have appointed some one for this office entirely removed from the appearance of influence of plaintiff's counsel, the mere fact that he was officing with them cannot operate to avoid the judgment in the case.

The second suit, and appeal, grow out of the same facts as the first one decided above. In which appellant sued for a divorce from appellee, alleging abandonment and seeking

the custody of the child. In this suit, appellant treats the former judgment as void. It, however, is pleaded in bar. The petition was dismissed.

It follows from what has been said above that both judgments must be affirmed.

ILLINOIS CENT. R. CO. v. HANBERRY.¹

(Court of Appeals of Kentucky. Jan. 29, 1902.)

CARRIERS—DUTY TO PASSENGER—ALIGHTING FROM TRAIN BEFORE REACHING STATION—SPECIAL DAMAGES.

1. Plaintiff having taken passage on a train which did not stop at the station for which he had a pass, the conductor told him that the train would slow up there, so that he might get off safely, and later told him that they were nearly to the station, soon after which the engine whistled, and the conductor beckoned to him from the end of the coach. Going to the end of the coach, and not seeing the conductor, but finding the door open, he swung off in the dark, thinking they were near the station, when in fact they were two or three hundred yards from that point, and the train was crossing a high trestle at the rate of about 20 miles an hour. *Held*, that there was no negligence on the part of the carrier.

2. Evidence as to doctors' bills paid by plaintiff was not admissible, and it was error to instruct the jury to include them in its verdict, in the absence of any allegation of such special damages in the petition.

Appeal from circuit court, Lyon county.

"Not to be officially reported."

Action by T. T. Hanberry against the Illinois Central Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

Wilson & James, Darby & Gates, and Pirle & Trabue, for appellant. Molloy & Utley, Jno. K. Hendrick, and Hazelrigg & Chenault, for appellee.

O'REAR, J. Appellee was a passenger on appellant's south-bound night train from Louisville, with a pass for Eddyville, at which place the train was scheduled not to stop. Appellee offered to pay the fare from Eddyville to Kuttawa, where the train would stop, which was about 2½ miles beyond Eddyville. The conductor waived the right to collect the fare. At Princeton an order was received to meet the north-bound train at Eddyville, and after leaving Princeton the conductor told appellee of the order, and that if the north-bound train should not stop on the siding at Eddyville when he arrived there his train would have to stop there, and appellee could get off. So far there is no dispute as to the facts. Appellee avers in his pleading and testified on the trial that the conductor also told him that, if the north-bound train should be at Eddyville when he arrived there, his train would not stop, but would slow up so he might get off safely. Later, he (the conductor) told him they were

nearly to Eddyville, and not to go to sleep again, and that soon after that the engine whistled, and the conductor beckoned to him from the end of the coach. Appellee went to the end of the car where he had last seen the conductor, but he was not in sight. He found the door open, and, thinking they were near the station, he swung off in the dark. The train was travelling at the rate of about 20 or 25 miles an hour. Instead of being at the station, the train lacked two or three hundred yards of having reached that point, and at the time of appellee's leap was crossing a high trestle. Appellee said that he at once realized his mistake, and lost consciousness. This was about 3 o'clock in the morning. He was found about 6 o'clock in the morning by track walkers, lying under the trestle, with both legs broken between the knees and the hips, elbow fractured, and an injury upon his head. The terrible accident has left him a complete cripple, at least for a number of years.

This was all the evidence for appellee, and all the evidence as to neglect against the company. The appellant at this stage of the trial moved the court for peremptory instruction to find for it, which was overruled. We are of opinion that this was error. The facts stated, as shown by appellee's evidence, were totally insufficient to fasten any degree of negligence upon appellant.

In the petition and amended petition where negligence is charged, and the permanent injury and the sufferings of plaintiff are stated and relied on as a basis of a recovery herein, no effort was made to charge the defendant with special items of expense in the nature of special damages, such as doctors' bills. On the trial the court permitted testimony that the bills of the physicians attending appellee on account of this injury were reasonably worth \$500, and instructed the jury to find for appellee such sum as he may have sustained in damages, including necessary expenses incurred for medical attention brought about by reason of the injuries sustained. This was error.

The judgment is therefore reversed, and this case is remanded, with instructions to award appellant a new trial of this action, and for further proceedings not inconsistent herewith. Whole court sitting.

BOARD OF INTERNAL IMPROVEMENT FOR LINCOLN COUNTY v. MOORE'S ADM'R.¹

(Court of Appeals of Kentucky. Jan. 30, 1902.)

HUSBAND AND WIFE—COMPETENCY AS WITNESSES—RIGHT TO FILE AMENDED ANSWER—TAKING JURY TO COURT HOUSE YARD TO RECEIVE EVIDENCE—EXCESSIVE VERDICT.

1. Under Civ. Code Prac. § 608, providing that neither husband nor wife shall testify for the other, "except in an action for lost baggage or its value against a common carrier,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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an innkeeper, or a wrongdoer," and "except in actions which might have been brought by or against the wife if she had been unmarried," the wife may testify for plaintiff in an action by the husband as administrator to recover damages for the death of their infant child, alleged to have resulted from defendant's negligence, as she might, if unmarried, have qualified as administrator and brought the action, or a stranger might have qualified as administrator and brought the action, in either of which events she would have been a competent witness for plaintiff; and this is true though she and the husband are joint beneficiaries of the recovery, as she may testify in her own behalf, and the fact that the husband has an equal interest with her does not render her incompetent as a witness.

2. It seems that the mere fact that the action is against a "wrongdoer" is sufficient to render the wife competent as a witness, aside from any other reason.

3. In an action against a turnpike road company to recover damages for a death resulting from negligence in the management of defendant's toll gate, defendant having by its original answer alleged that it was in charge of the road and gate at the time of the negligence complained of, the court did not abuse its discretion in refusing to permit defendant to file an amendment alleging that the persons in charge of the gate at that time had no authority to handle it, as the amendment was not offered until after one trial had been had, and defendant did not offer on that trial to prove by its witnesses who were in charge of the gate that they did not have authority to handle it.

4. The court did not abuse its discretion in permitting the jury to be taken to the court house yard to see a horse and phaeton offered by plaintiff as evidence.

5. A verdict for \$15,000 for the death of a girl 14 years of age is so excessive as to indicate passion or prejudice.

Appeal from circuit court, Casey county.
"Not to be officially reported."

Action by the administrator of Della Moore against the board of internal improvement for Lincoln county to recover damages for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Reversed.

R. J. Breckinridge, W. G. Welch, and C. R. McDowell, for appellant. Robt. Harding, John W. Rawlins, Stone & Stone, and Emmet V. Puryear, for appellee.

PAYNTER, J. Della Moore, a girl about 14 years of age, in company with her mother, was riding in a phaeton over appellant's turnpike road, and while in the act of driving under its gate the top of the phaeton was caught by the pole, which lifted the front wheels from 18 to 20 inches above the ground; whereupon the girl either jumped or was thrown to the ground, receiving injuries from which she shortly died.

The testimony offered by the appellee tended to show that the party in charge of the pole raised it so as to admit the safe passage of horse and phaeton, but after the horse had passed under it he pulled the pole down so as to catch under the top of the phaeton, and against the upright pieces which supported it, thus causing the injury. The appellant offered testimony which con-

duced to show that Della Moore was driving the horse; that she approached the gate at a speed from six to eight miles per hour; that before the pole could be raised sufficiently high to admit the passage of the horse and phaeton, and while at the speed stated, she struck the pole.

There were facts and circumstances developed in the case which tend to support the theory of the appellee as to how the injury was received. The phaeton was offered in evidence with the view of showing that it could not have struck the pole while being drawn at the rate of speed claimed by the appellant without receiving more injury than it bore evidence of having received, for it seemed to have been injured very slightly.

Several grounds are urged for a reversal, and we will notice them in the order presented. It is insisted that the verdict is flagrantly against the weight of the evidence. Juries, under our system of laws, are made the judges of the facts in common-law actions. They see and hear the witnesses testify, and weigh all circumstances and physical facts admitted in evidence, and circumstances or physical facts may sometimes serve to demonstrate the inaccuracy of the testimony of several witnesses. A jury may render a verdict based upon the testimony of one witness, supported by circumstances, although the testimony of several witnesses tends to support the opposing conclusion. In such cases the court should not disturb the finding of the jury. We do not think that the verdict is so against the weight of the evidence, if at all, that we should set it aside for that reason.

The father of the decedent qualified as her personal representative. The father and mother are each entitled to one-half of the amount of any recovery which may be had in this case. The mother is equally interested in the case. Had she been a widow or never married, she would have been entitled to all the recovery in the action. In such case she would have been entitled to qualify as the personal representative. It is insisted that she is not a competent witness, because her husband is interested in the recovery. Section 605, Civ. Code Prac., provides that, subject to the exception and modification contained in section 606, every person is competent to testify for himself or another. In reference to the testimony of husband and wife, section 606, Id., reads as follows: "Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage or its value against a common carrier, an innkeeper, or a wrongdoer, and in such action either or both of them may testify; and, except in actions which might have been brought by or against the wife, if she had been unmarried, and in such actions either, but not both, of them may testify. And except that when a husband or a wife is act-

ing as agent for his or her consort, either of them may testify as to any matter connected with such an agency." If the position of counsel for the appellant be correct, then both husband and wife would be incompetent to testify in the action for the joint benefit of both, with certain exceptions specified in the section quoted. But that section expressly provides that, in actions which might have been brought by the wife if she had been unmarried, either she or her husband may testify. As we have said, had the wife been unmarried, she could have qualified as the personal representative and maintained the action, and, this being true, she is a competent witness in the case. The husband is acting in a fiducial capacity, and prosecuting the action for the benefit of himself and wife. The wife is a competent witness in this case, the same as if she would have been had the action been brought by herself and husband. Her relation to the subject of the controversy is exactly the same as it would have been had some other than her husband qualified as personal representative. From the nature of the case, the interest of the husband and wife cannot be severed in the prosecution and recovery in the action. It cannot be that the legislature meant to exclude the wife as a competent witness in her own behalf, simply because the husband has a joint and equal interest in the recovery. To so hold would do violence to the language and spirit of the section, which authorizes a married woman to testify for herself. We think that the conclusion we have reached finds support in *Wise v. Foote*, 81 Ky. 14. If we were incorrect in the conclusion we have reached, it could be plausibly argued that she was a competent witness, because this is an action against an "alleged wrongdoer." Under section 606, Civ. Code Prac., both of them may testify in an action against a wrongdoer.

It is urged that the court erred in refusing to permit the amendments to the answer to be filed, one of which was offered December 8, 1898, and the other April, 1899. In the petition as amended it was averred that at the time of the accident the defendant was then and there in charge of the road and gate, and engaged in the management of same. This case was first tried in August, 1898, at which time the averment quoted had been made. By the amendments offered, the defendants sought to escape liability by denying the authority of the party in charge of the gate to manipulate it at the time the injury was inflicted. In the first amendment offered no reason was given for failing to sooner present it. In the second amendment it is said the failure to sooner file it was the result of a "mistake or inadvertence." On the first trial the parties in charge of the gate were witnesses for the appellant, and it did not even offer to prove by them that they did not have authority to handle the gate and collect tolls. The appellant knew the

day the accident occurred, as well as on the days on which the amendments were offered, whether or not those in charge of the gate at the time of the accident were so authorized to be. In our opinion, the court did not abuse its discretion in denying appellant the right to file the amendments to its answer.

It is urged that the court erred in taking the jury to the court house yard to see the horse and phaeton, and hear the proof of its identification, as the one which was in use at the time of the accident. The attorneys for the appellant were present at the time the jury looked at the horse and phaeton, and heard the testimony as to their identification. Counsel for the appellant supposed that the court allowed the jury to see the horse and phaeton by reason of section 318, Civ. Code Prac., which reads as follows: "Whenever, in the opinion of the court, it is proper for the jury to have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person, other than the person so appointed, shall speak to them on any subject connected with the trial." Real property was not in litigation; therefore the jury was not taken to see real property in litigation, nor was it taken to the place where any material fact occurred. The court was not acting under section 318, Civ. Code Prac. The plaintiff was simply offering the horse and phaeton in evidence before the jury, just upon the same principle that a map or block from a tree may be offered in evidence. The court could have commenced and concluded the case in the court house yard or in any room of the court house he chose to select. We do not think that the court erred in the exercise of its discretion.

There is but one question remaining, and that is as to whether the verdict should be set aside upon the ground that it was excessive. The verdict was for \$15,000. Under the facts proven in this case, we are of the opinion that the verdict indicates that it is the result of prejudice or passion, and therefore the judgment is reversed for proceedings consistent with this opinion.

SHACKELFORD, Clerk, v. PHILLIPS.¹
(Court of Appeals of Kentucky. Jan. 29, 1902.)

FEE—CORRECTION OF ILLEGAL FEE BILL—
INJUNCTION—APPELLATE JURISDICTION—
CHARGE BY CLERK OF COURT OF APPEALS
FOR LOAN OF TRANSCRIPT AS FOR COPY.

1. While the circuit court has no jurisdiction to enjoin the collection of an execution for costs issued upon a judgment of the court of

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

appeals, it has jurisdiction to enjoin the collection of a fee bill issued by the clerk of the court of appeals on the ground that it contains an item for which the services have not been rendered; and this is true notwithstanding Ky. St. §§ 1758, 1759, provide a summary remedy by application to the circuit judge, without pleadings, for the correction of an illegal fee bill of any officer, and for an order to stay proceedings on such fee bill, as that remedy was not intended to be exclusive.

2. As a judgment restraining the collection of a fee bill is not a judgment for the recovery of money or property, an appeal lies therefrom though the value in controversy be less than \$200.

3. The clerk of the court of appeals may charge for a copy of the transcript, though no copy was in fact made, if there was instead a loan of the original transcript.

Appeal from circuit court, Marion county. "To be officially reported."

Action by Eusebia Q. Phillips against S. J. Shackelford, clerk, to enjoin the collection of a fee bill. Judgment for plaintiff, and defendant appeals. Reversed.

Thompson & Spalding and Hazelrigg & Chenault, for appellant. John McChord, for appellee.

DU RELLE, J. In April, 1900, appellant, as clerk of the court of appeals, issued a fee bill against appellee, Phillips, for fees claimed to be due appellant amounting to \$114.05, on the appeal of Eusebia Q. Phillips against R. A. Burton, reported in 52 S. W. 1004. Before the fee bill was placed in the hands of the sheriff appellee paid the clerk all of the bill except the item of \$105.30 charged for copy of transcript, conceded not to have been made by the clerk; the actual service being a loan of the original transcript to counsel for appellee, who was appellant in that case. The sheriff of Marion county, under the direction of the clerk, levied the fee bill upon Mrs. Phillips' horse and buggy, whereupon she and her husband brought suit in the Marion circuit court to enjoin Shackelford and the sheriff from proceeding to a sale under the levy. A recovery for damages was also sought. Upon final hearing, the trial court perpetuated the temporary injunction which had been granted.

The first question is as to the jurisdiction of the Marion circuit court, it being argued that a motion to dismiss for want of jurisdiction should have been sustained, and that the only remedy was by motion before this court to correct the fee bill. If this were an execution for costs, a suit to restrain a levy and sale under it would be prohibited by writ from this court, as held in *Shackelford v. Patterson*, 62 S. W. 1040. But the fee bill in this case has none of the elements of a proceeding under a judgment. The officer issuing such a fee bill has by statute the right to the extraordinary remedy of distress to enforce its collection, but in granting this remedy the legislature has held the officer to extraordinary accuracy, and in section 1754 et seq. Ky. St., has provided that

a single illegal charge shall render the whole bill void, has imposed a penalty for an illegal or double charge, has made such charge a high misdemeanor, and in section 1757 has provided for an action for damages for a distress made by virtue of a fee bill "if it contains any illegal or improper item, or an item for which the services have not been rendered," etc. In sections 1758 and 1759 a summary remedy is provided by application to the circuit judge, without pleadings, for the correction of illegal fee bills of any officer, and for an order to stay proceedings on such fee bill upon the presentation to the judge of a copy of the fee bill containing the illegal charge. We do not think that the grant of power to the circuit judge by such summary proceedings to stay proceedings under the distress until the matter is determined in court can be held to deprive the court of power upon a regular suit in equity to enjoin the collection of such a fee bill, to grant relief by injunction.

The next question is as to the jurisdiction of this court on appeal, it being claimed by appellee that as the judgment restrained the collection of a fee bill less in amount than \$200 this court has no jurisdiction. Upon this question it seems to us we have only to determine whether a judgment enjoining the collection of a fee bill is a judgment for the recovery of money or property. If not, the court has jurisdiction; for, under the statute, it had appellate jurisdiction over the final orders and judgments of all courts in all other civil cases except "appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than \$200," etc. Ky. St. § 950. In *Ex parte Herrick*, 78 Ky. 24, it was held that an order allowing and certifying a witness' claim to the auditor for payment was not a judgment for money or personal property, within the meaning of the statute, and therefore that an appeal lay from such an order. We are clearly of opinion that a judgment enjoining a sale under distress by virtue of a fee bill is not a judgment for the recovery of money or personal property, within the meaning of the statute.

There remains for consideration the question whether the charge in this case was an illegal one. It is urged on behalf of appellee that it is clearly forbidden by the statute, as being "an item for which the services have not been rendered," and that the service which was actually rendered, and compensation for which is sought under a charge for copy of transcript, viz., the loan of the original transcript from the office, was in violation of the clerk's oath of office. The majority of the court, however, are of the opinion that, whatever might have been their view upon this question as an original proposition, the opinion of Judge Hines in *Parrish v. Ferguson*, 83 Ky. 18, and the opin-

ion of Judge Paynter in *Minor v. Christie* (Ky.) 65 S. W. 826, are conclusive in favor of the clerk's right to make such charge for the loan of the original transcript. The writer does not concur in this conclusion.

For the reasons given, the judgment is reversed and cause remanded, with directions to dismiss the petition.

**CENTRAL TRUST & SAFE DEPOSIT CO.
et al. v. RESPASS.¹**

(Court of Appeals of Kentucky. Feb. 4, 1902.)

PARTNERSHIP IN TRAINING AND RACING HORSES—CREDIT TO SURVIVING PARTNER FOR MONEY PAID OUT AFTER DISSOLUTION—MONEY LOST AT GAMING—ACCOUNTING OF PROFITS IN ILLEGAL BUSINESS.

1. The business of breeding, training, and racing horses for purses being legal, a partnership for that purpose may be settled by the chancellor.

2. A surviving partner in such business was entitled, in a settlement, to credit by money paid out by him after the death of his copartner for training horses of the firm, as it was proper to keep them in condition for racing, that they might sell to better advantage for settlement purposes; and he was also entitled to credit for money paid for entering the horses in stakes after his copartner's death, as the payment put them in readiness to be raced, and thus added to their value in the market.

3. A partner in the business of racing horses is not entitled, in a settlement, to credit by money lost and paid by him on a bet made for the firm; betting upon horse races being illegal.

4. A court of equity will not entertain a bill for an accounting of profits in the case of a partnership in the business of "bookmaking," or of making wagers on horse races; the business being illegal.

Appeal from circuit court, Kenton county.
"To be officially reported."

Action by Jerome B. Respass against the executors of Solomon L. Sharp for a settlement of partnership accounts. Judgment granting relief sought, and defendants appeal. Reversed.

Wilby & Wald, Wm. A. Byrne, and L. J. Crawford, for appellants. B. F. Graziani, for appellee.

DU RELLE, J. Jerome B. Respass and Solomon L. Sharp appear to have formed a copartnership, extending over several years, in the business of managing a racing stable, and, in connection with that business, were engaged in "bookmaking," or making wagers upon race horses. They seem, also, to have had an interest in a pool room at Newport. For the book business a separate account was kept by a cashier employed for the purpose. They had no regular time for making settlements with each other, but at various times, when requested, the cashier made out statements of the booking business of the firm. It appears from the testimony of Bern-

ard, the cashier, that Sharp in November, 1897, handed him \$4,724, and told him to deposit it to his (Sharp's) credit in the Merchants' National Bank of Cincinnati, Ohio, which was done. Sharp appears to have stated at the time that one-half of this fund belonged to Respass. It appears further that this was the "bank roll" of the book-making concern, in which each partner had an equal interest. At the same time he remarked that Respass had paid out \$1,500 for the firm, and that he would see him in a few days and settle with him. Sharp died suddenly, before any such settlement was made. The money in the bank roll was on deposit to Sharp's credit. The racing business of the firm seems to have been almost entirely in the hands of Respass, who attended to the horses, trained them, entered them in races, and at times wagered on them for the benefit of the firm, which divided the profits or shared the losses, as the case might be. Respass brought suit against Sharp's executors for a settlement of the partnership accounts. The horses in the racing stable were sold under order of court, and various claims against the fund in court were made by Respass for expenses incurred in keeping, shoeing, clipping, training, and caring for the various horses, as well as for entering certain of the horses in stakes, and for wagers paid upon the horses "Fair Deceiver" and "Shannon." The business of breeding, training, and racing horses for purses is legal. The partnership for that purpose can undoubtedly be settled by the chancellor. The only question presented as to this matter is upon the correctness of the settlement made.

The item of \$2,815 in the claim of Respass against the firm assets, and which was allowed by the trial court, is, in part, a charge for training and keeping 10 horses of the firm from November 10, 1897, to April 9, 1898,—149 days,—at \$1.50 per day for each horse, and is objected to as being in great part for expenses incurred in carrying on the partnership after it had been dissolved by the death of one of the partners. These charges would seem to an outsider to be somewhat exorbitant. But the trial court appears to have allowed them upon the theory that the horses being race horses, and unfit, or, at all events, less valuable, for any other purpose than that of being either raced, or sold for racing purposes, it was proper to keep them in condition for racing, as only by doing so could they be kept in good condition for a sale for settlement purposes. We are not inclined to disturb the chancellor's finding in this behalf.

The same objection is made to a charge of \$80 paid for entering the horses in stakes after Sharp's death; and while we should not have been inclined to disturb the chancellor's ruling, had he disallowed this item, we think it may possibly be justified upon the same theory upon which we have allowed the charge for training the horses,—that

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

is, that the most profitable market for race horses is that in which they are sold to be raced; that, to supply the demand for this market, it is requisite that they should be ready to be raced,—not only in physical condition, but ready in the further fact that their entrance fees in stake races have been paid, which secures them the privilege of running in those races, and which payment seems required to be made at fixed periods before the races are run. Upon this item, and the item for shoeing the horses with racing plates, we shall not disturb the finding of the chancellor, but shall assume them to be, as he found them, charges for conditioning the horses for sale at the highest price in the most profitable market.

Another item to which exception is taken consists of \$700; being the amount of two bets made, lost, and paid by Respass on the horses "Fair Deceiver" and "Shannon." In view of the statutory law of Kentucky (see section 1855 et seq., Ky. St.), we are unable to see how any legal consideration can exist for a promise to reimburse to a partner any portion of any sum lost upon a bet on a horse race. In *Lyons v. Hodgen*, 90 Ky. 260, 18 S. W. 1078, it was held, in an opinion by Chief Justice Lewis, that this statute, providing that "every contract, conveyance, transfer or assurance, for the consideration, in whole or in part, of money, property or other thing won, lost or bet in any game, sport, pastime, wager, or for the consideration of money, property or other thing lent or advanced for the purpose of gaming, or lent or advanced at the time of any betting, gaming or wagering to a person then actually engaged in betting, gaming or wagering, shall be void,"—applied to dealing in "futures"; that the process by which the money was won or lost was a wager, within meaning of the statute, which was designed to embrace every species of wagering, whether practiced at the time the statute was enacted, or since derived. And in the opinion by the same judge in *Sharp v. Com.* (from Kenton county) 98 Ky. 574, 35 S. W. 553, it was held that betting upon horse races was gaming and illegal. We think it is well settled that a man who lends money to another, to be then bet on a horse race, cannot recover it back. And so it would seem that if A. agrees with B. that B. shall advance the money, and himself bet upon a horse race for their joint account, no action will lie by B. to compel A. to respond for his share of a bet which is lost. The statement of this proposition seems to decide it. It is a contract for an illegal venture. The whole contract is illegal. No right of action can arise out of that contract. This is exactly the position of Respass as to the two bets. He advanced the money to make them for himself and Sharp, relying upon Sharp's express or implied agreement to pay half the losses if loss should be incurred. Such a contract cannot be enforced in this state.

A closer question is presented by the claim for a division of the "bank roll." This \$4,724 was, as found by the chancellor, earned by the firm composed of Respass and Sharp in carrying on an illegal business—that of "bookmaking"—in the state of Illinois. But though this amount had been won upon horse races in Chicago, it is claimed that, though secured illegally, "the transaction has been closed, and the appellee is only seeking his share from the realized profits from the illegal contracts, if they are illegal." On the other hand, it is claimed for appellants that, as to the bank roll, this proceeding is a bill for an accounting of profits from the business of gambling.

It does not seem to be seriously contended that the business of "bookmaking," whether carried on in Chicago or in this commonwealth, was legal, for by the common law of this country all wagers are illegal. *Irwine v. Williar*, 110 U. S. 510, 4 Sup. Ct. 160, 28 L. Ed. 225. One of the most interesting cases upon this subject is that of *Everet v. Williams*,—the celebrated Highwaymen's Case,—an account of which is given in 9 Law Quart. Rev. 197. That was a bill for an accounting of a partnership in the business of highwaymen, though the true nature of the partnership was veiled in ambiguous language. The bill set up the partnership between defendant and plaintiff, who was "skilled in dealing in several sorts of commodities"; that they "proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch"; that defendant had informed plaintiff that Finchley "was a good and convenient place to deal in," such commodities being "very plenty" there, and if they were to deal there "it would be almost all gain to them"; that they accordingly "dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things, to the value of £200 and upwards"; that a gentleman at Blackheath had several articles which defendant thought "might be had for a little or no money, in case they could prevail on the said gentleman to part with the said things"; and that, "after some small discourse with the said gentleman," the said things were dealt for "at a very cheap rate." The dealings were alleged to have amounted to £2,000 and upwards. This case, while interesting, from the views it gives of the audacity of the parties and their solicitors, sheds little light upon the legal questions involved, for the bill was condemned for scandal and impertinence; the solicitors were taken into custody, and "fyned" £50 each for "reflecting upon the honor and dignity of this court"; the counsel whose name was signed to the bill was required to pay the costs; and both the litigants were subsequently hanged, at Tyburn and Maidstone, respectively; while one of the solicitors was transported. This

case is found referred to in the cases of *Sykes v. Beadon*, 11 Ch. Div. 170, 195, and *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 48 L. Ed. 1117. In the *Sykes* Case it was held, in the opinion by Sir George Jessel: "It is no part of the duty of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other." In *Watson v. Fletcher*, 7 Gratt. 1, the business of the firm had been the operation of a faro bank. One of the partners having died, the survivor sought an accounting of profits earned. The syllabus reads: "A court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling. Nor will it give relief to either partner against the other, founded on transactions arising out of such partnership, whether for profits, losses, expenses, contribution, or reimbursement." To the same effect is *Shaffner v. Pinchback*, 133 Ill. 410, 24 N. E. 867, 23 Am. St. Rep. 624. In *McMullen v. Hoffman*, *supra*, it appeared that a partnership was formed for the purpose of obtaining a public contract by unlawful means, upon the terms of sharing the profits equally, and that the profits came into the hands of one partner. The other filed a bill for an accounting, and was denied relief. Said the court: "We must therefore come back to the proposition that to permit a recovery in this case is, in substance, to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for defendant who sets it up, but only on account of the public interest. * * * To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined they will be to enter into them. In that way the public secures the benefit of a rigid adherence to the law." See, also, the cases of *Snell v. Dwight*, 120 Mass. 9; *Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Watson v. Murray*, 23 N. J. Eq. 257; *Gould v. Kendall*, 15 Neb. 549, 19 N. W. 483; *Craft v. McConoughy*, 79 Ill. 348, 22 Am. Rep. 171; *Northrup v. Phillips*, 99 Ill. 449; *Wiggins v. Blsso*, 92 Tex. 210, 47 S. W. 637, 71 Am. St. Rep. 837; *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.*, 9 C. C. A. 659, 61 Fed. 983; *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. 660, 21

Am. St. Rep. 819; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124.

Upon the other hand, a large number of cases are relied on on behalf of appellee. Many of these cases do not seem to us to bear directly upon the question here involved. We shall first consider the Kentucky cases: In *Bibb v. Miller*, 11 Bush, 306, the contest was between two persons, each of whom claimed title to the proceeds of a winning lottery ticket. The court was careful to say: "The question as to the legality of the sale of tickets and the distribution of prizes arises collaterally, and derives its importance solely from the fact that the plaintiffs in the action are compelled to rely on such sale and distribution in order to make out their title to the fund in controversy." In that case the corporation had recognized its obligation to pay, and voluntarily paid into court the amount claimed to be due on the coupon. The question there was whether the library company was acting pursuant to legal authority in selling the ticket and paying the prize distributed to that ticket; and the court held that, "in the absence of proof to the contrary, we must assume that it acted within the scope of the powers granted it by its act of incorporation." In *Martin v. Richardson*, 94 Ky. 183, 21 S. W. 1039, 19 L. R. A. 692, 42 Am. St. Rep. 353, a lottery ticket owned by one man had been fraudulently obtained from him by another, and the proceeds collected. It was held that, the purchase of the ticket not being shown to have been made in a state where such purchase was illegal, the presumption was in favor of its legality. In *Irwin v. Irwin* (Ky.) 52 S. W. 927, a lottery ticket, or its proceeds, was given by a husband to his wife, and invested in real estate. It was held that, "whether the purchase was illegal or not, such transfer comes distinctly within the meaning and purview of the peremptory statute which requires the restoration of property obtained directly or indirectly from or through the other party by reason of the marriage." So, in *Maize v. Bradley* (Ky.) 64 S. W. 655, where, in an action to recover money had and received, it was claimed the fund had been placed in the hands of defendants to avoid taxation, it was held this defense was not available, as the fund had been reinvested, and a new contract entered into between the parties, untainted by the illegality of the original transaction. In the case at bar there was no division of the unlawful gains made by Sharp at Chicago. There was no new transaction with reference to them, such as the investment of the fund, or any part of it, in horses, for their joint account. There was not even an accounting of the gains, accompanied by a promise to pay to *Respas* the amount ascertained to be due him under the terms of the illegal partnership agreement. There was simply a termination by death of an illegal partnership, with unlawful gains in the hands of

one of the partners, an accounting for which is here sued for. We are cited to but two cases which seem to come up to the requirements of appellee's contention. Both of those cases have been subsequently questioned. There are many cases which come within the general terms of the doctrine laid down in *Norton v. Blinn*, 39 Ohio St. 145: "Public policy does not require that one engaged in an unlawful enterprise should, by pleading it, shield himself from liability for the wages of his employes, agents, or servants. * * * It is contrary to public policy and good morals to permit employes, agents, or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify such a lowering of the standard of moral honesty required of persons in these relations. And again, if parties to an illegal contract waive the illegality and honestly account as between themselves, no other person can be heard to complain of such accounting. Hence we think that, if in making such settlement, one of the guilty parties should deliver property or money to an agent of another, to be delivered by the agent to his principal, such agent is bound to account therefor to his principal." It seems clear, also, that a wrongdoer who, by force or fraud, obtains money or property from another, or violates a trust imposed in him, cannot be heard to charge his victim with wrongdoing in the original obtention of the money or property. To this class belong the cases of *Farmer v. Russell*, 1 Bos. & P. 295; *Tenant v. Elliott*, Id. 2; *Catts v. Phalen*, 2 How. 376, 11 L. Ed. 306. And see *Pol. Cont.* 334, note. The doctrine as to such cases is aptly stated in *Catts v. Phalen*, supra: "Phalen & Morris had in their possession twelve thousand five hundred dollars, either in their own right, or as trustees for others interested in the lottery. No matter which, the legal right to this sum was in them. The defendant claimed and received it by false and fraudulent pretenses, as morally criminal as by larceny, forgery, or perjury; and the only question before us is whether he can retain it by any principle or rule of law." The cases which come nearest to supporting the contention of appellee are *Sharp v. Taylor*, 2 Phil. Ch. 801, and *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732. The former case was a partnership in a vessel registered in violation of the laws of both Great Britain and the United States. Her voyages were profitable, but one partner, colluding with an outsider, obtained possession of the profits and refused to account. The illegality of the traffic was relied on by him as a defense to an accounting. Said Lord Cottenham: "He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor [the defendant] received the money, and plaintiff is now only seeking payment for his

share of the realized profits. * * * As between these two, can this supposed evasion of the law be set up as a defense by one as against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that in realizing it some provision in some act of parliament has been violated or neglected? * * * The answer to this, as to the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties." This doctrine comes very close to appellee's contention, but, on examination, can be distinguished from the case at bar, and had been criticised and denied by Sir George Jessel, master of the rolls, in *Sykes v. Beadon*, supra, as well as in the case of *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117. The case of *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732,—much relied upon by appellee,—is explained and qualified by the supreme court in *McMullen v. Hoffman*, supra, page 668, 174 U. S., page 860, 19 Sup. Ct., and page 1128, 43 L. Ed., in the opinion by Mr. Justice Peckham: "The action was sustained upon the theory that the purpose of the partnership agreement had been fully closed and completed, that substantially all the profits arising therefrom had been invested in other securities or in lands, and that therefore it did not lie in the mouth of the partner who had by fraudulent means obtained possession and control of these funds to say to the other that the original contract was illegal." The case is also criticised in *King v. Winants*, 71 N. C. 473, 17 Am. Rep. 11, as follows: "Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveler the other rifles his pocket of \$1,000, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now, if the robbers had taken the \$1,000 and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks v. Martin*, supra, so much relied on by plaintiff." See, also, *Snell v. Dwight*, 120 Mass. 9, 19; *Morrison v. Bennett*, 20 Mont. 560, 572, 52 Pac. 553, 40 L. R. A. 158; *Gould v. Kendall*, 15 Neb. 549, 556, 557, 19 N. W. 483; *Wiggins v. Bisso*, 92 Tex. 219, 225, 47 S. W. 637, 71 Am. St. Rep. 837.

We conclude that in this country, in the case of a partnership in a business confessed-

ly illegal, whatever may be the doctrine where there has been a new contract in relation to, or a new investment of, the profits of such illegal business, and whatever may be the doctrine as to the rights or liabilities of a third person who assumes obligations with respect to such profits, or by law becomes responsible therefor, the decided weight of authority is that a court of equity will not entertain a bill for an accounting.

The judgment of the chancellor is therefore reversed, and the cause remanded, with directions to enter a judgment in accordance with this opinion.

GERMAN SECURITY BANK v. COULTER,
Auditor.¹

(Court of Appeals of Kentucky. Jan. 30, 1902.)

TAXATION—PAYMENT OF TAXES INTO STATE TREASURY—POWER OF STATE AUDITOR TO CORRECT ASSESSMENT—RECOVERY OF TAXES PAID UNDER MISTAKE OF LAW.

1. The state auditor may be required by mandamus to draw his warrant on the treasury in favor of a bank for an excess of taxes paid by it into the treasury by reason of a mistake as to the rate of taxation upon the amount assessed, but not for an excess of taxes paid by reason of an erroneous assessment; the auditor having no power to correct erroneous assessments.

2. Municipal and executive officers can be required by mandamus to perform only such duties as are imposed upon them by law.

3. Taxes voluntarily paid cannot be recovered on the ground that they were not due, where payment, if they had been due, could not have been enforced except by suit.

Appeal from circuit court, Franklin county.

"To be officially reported."

Action by the German Security Bank against Gus G. Coulter, auditor, for a mandamus. Judgment for defendant, and plaintiff appeals. Affirmed.

Helm, Bruce & Helm, for appellant. John W. Ray and R. J. Breckinridge, for appellee.

PAYNTER, J. The appellant seeks to recover a part of the taxes which it paid the state of Kentucky for the years of 1897 and 1898. It paid \$1,786.99 in 1897, and \$1,773.52 for the year of 1898. These sums were paid under and in accordance with the provisions of the Hewitt law, which was enacted in 1886 (Gen. St. 1886, c. 92). It is averred by the appellant that it regularly made its reports to the auditor of public accounts, and paid the taxes under that law up to and including the year 1898; that by the terms of that law the plaintiff was required to pay 75 cents on each share of its capital stock, equal to \$100, and in addition thereto to pay the same rate on each \$100 of so much of its surplus, undivided surplus, and undivid-

ed profits as exceeded an amount equal to 10 per cent. of its capital stock, and also paid the same rate of taxation on its real estate that was paid by other persons on like property; that by the terms of the Hewitt law the amount so paid was in full of all state, county, and municipal taxes, except that the building in which the bank did business was taxed for municipal purposes. From the averments of the petition it appears that the question arose whether or not banks situated like the appellant should pay taxes under the Hewitt law, or under the general revenue law of 1892 (Ky. St. 1894, c. 108). In order to settle it, a part of the banks brought suit, with the view of testing the question. Three banks were chosen, each to represent a class, for the purpose indicated. The suits were filed, and finally reached this court for the review of the judgments rendered in the court below. This court held (June 1, 1895; 31 S. W. 1013) that the banks which accepted the provisions of the Hewitt law should pay taxes under it, and were not affected by the general revenue law of 1892. In the spring of 1897 the question again arose in this court, and the court overruled its former opinion, and held that the banks did not have an irrevocable contract under the Hewitt law; that they were compelled to pay the state the same rate of taxes paid by other taxpayers, besides paying county and municipal taxes at the same rate imposed upon other taxpayers. Subsequently, in the year of 1898, certain banks filed suits in the United States circuit court to enjoin the collection of taxes, except such as were imposed under the Hewitt law. That court passed upon the question in June, 1898 (88 Fed. 383), and held that all the banks which were parties to the proceedings in which the 1895 opinion of this court was delivered were entitled thereto under the terms of the Hewitt law, by the reason of the doctrine of *res judicata*. For the same reason they held that the banks which were not parties to that proceeding, but had agreed with the attorney for the city of Louisville to abide the result, were required to pay under the Hewitt law. That case was appealed to the supreme court of the United States (21 Sup. Ct. 753), which, like the circuit court of appeals, held that the banks which accepted the provisions of the Hewitt law did not have an irrevocable contract, but that the banks which were parties to the proceeding in which this court rendered its opinion in 1895 were only required to pay taxes under the Hewitt law, but that the banks which were not parties to that proceeding (appellant being one of them) were not entitled to the benefit of the provisions of the Hewitt law, as they were not protected by the doctrine of *res judicata*. The tax which the plaintiff alleged to have paid was an assessment under the Hewitt law, which was on the shares of the capital stock of the bank, on surplus and certain un-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

divided profits, and its real estate. These taxes were voluntarily paid. In fact, the appellant insisted that it was entitled to pay under the Hewitt law. The rate of taxation levied for state purposes on the years in question was 52½ cents on each \$100 of the assessed value of property. The state received on the assessed value in excess of what it should have collected from appellant the difference between 52½ cents and 75 cents on each \$100 of the assessment. The plaintiff avers that, if it had paid its taxes for the years of 1897 and 1898 to the state under the revenue act of 1892, it would have been bound to pay and would have paid on the aggregate of its capital and surplus, less the amount of its assets invested in nontaxable securities. This averment is followed by the statement that some of its assets were invested in certain stocks which were not taxable. Therefore it is claimed that assessments were excessive, and that it is entitled to have them corrected, and have the auditor issue his warrant for the excess of taxes paid by reason of the alleged error in the assessments.

From our view of the case, it is not necessary to consider the question as to whether there was an error in the assessments, or the question whether any authority could have corrected them if the application had been made therefor in proper time. The auditor makes no question as to the right of appellant to collect the difference between 52½ and 75 cents paid on each \$100 of the value of its property as ascertained by the assessment under the Hewitt law. The amount of this difference was not due the state, and therefore was paid when not due. This brings the transaction within the terms of section 162, Ky. St., according to the interpretation in *Bank v. Stone* (Ky.) 56 S. W. 683, and subsequent cases, which reads as follows: "When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed." The balance of the claim asserted in this action does not come within the provisions of the statute, as will be hereinafter shown. This is not an action against the state. If it was, it could not be maintained, because the state has not, by the statute quoted or any other statute, given consent to be sued. The primary intention of the statute was to authorize the auditor to refund to officers who collected taxes due the state, and paid more into the treasury than was in fact due

from them. It was not intended to authorize the auditor to correct assessments made of the property of taxpayers, and refund the amounts he may determine are due them; for the statutes clearly provide whose duty it is to make assessments of property, how they may be corrected, and the time in which it may be done. The auditor is not the official upon whom the law confers such authority. This court held in the case of *Bank v. Stone* that the difference between the 52½ and 75 cent rate should be refunded by a warrant of the auditor. The court did not intend to, nor did it, hold that the auditor could make any corrections of the assessments, and thus ascertain what amount of taxes had been paid into the treasury which was not due, and draw his warrant therefor. The court did not intend to, nor did it, change the rule of this court to which we will hereafter refer, which is that when taxes, the collection of which can only be coerced by suit, are voluntarily paid, they cannot be recovered. This is a mandamus proceeding to compel the auditor of public accounts to issue his warrant for the sum alleged to be due the appellant for an excessive payment of the taxes which resulted from excessive assessment. It is not an action to recover all the taxes paid, but the difference between the amount collected, and the amount which it claimed should have been collected on a correct assessment. This action cannot be maintained. There is a rule of universal application, that ministerial and executive officers can only be mandamus to perform duties imposed by law. The auditor had no authority when the assessments were made, or now, to either assess or correct the assessments of banks. This is the business of the board of valuation and assessment. To show that the auditor is refusing to perform a duty imposed by law, it is essential to show that he both has the authority and that it is his duty to do so. Neither is or can be shown; hence appellant is not entitled to a mandamus.

The appellant concedes that its property was assessed, and the right of the authority which made the assessment to do so is not questioned. The proper inference to be drawn from the petition is that the appellant claimed the right to have, and did insist on, the assessments being made as they were made. On these assessments the appellant voluntarily paid the taxes in question. The payment of the taxes assessed could not have been enforced, except by suit. When such taxes are voluntarily paid, then, under the adjudications of the court, an action to recover them cannot be maintained. *Louisville & N. R. Co. v. Hopkins Co.*, 87 Ky. 605, 9 S. W. 497; *Same v. Com.*, 89 Ky. 539, 12 S. W. 1064. The rule is otherwise when the payment of the taxes can be coerced by summary levy and sale of property by the collecting officer.

The judgment is affirmed.

LOUISVILLE CITY NAT. BANK v. COULTER, Auditor.¹

(Court of Appeals of Kentucky. Jan. 30, 1902.)

TAXATION—PAYMENT OF TAXES INTO STATE TREASURY—POWER OF STATE AUDITOR TO CORRECT ASSESSMENT—RECOVERY OF TAXES PAID UNDER MISTAKE OF LAW.

1. The state auditor may be required by mandamus to draw his warrant on the treasury in favor of a bank for an excess of taxes paid by it into the treasury by reason of a mistake as to the rate of taxation upon the amount assessed, but not for an excess of taxes paid by reason of an erroneous assessment; the auditor having no power to correct erroneous assessments.

2. Municipal and executive officers can be required by mandamus to perform only such duties as are imposed upon them by law.

3. Taxes voluntarily paid cannot be recovered on the ground that they were not due, where payment, if they had been due, could not have been enforced except by suit.

Appeal from circuit court, Franklin county.

"To be officially reported."

Action by the Louisville City National Bank against Gus G. Coulter, auditor, for a mandamus. Judgment for defendant, and plaintiff appeals. Affirmed.

Helm, Bruce & Helm, for appellant. Jno. W. Ray and R. J. Breckinridge, for appellee.

PAYNTER, J. This is not an action against the state to recover taxes which have been paid into the treasury. If it was, it could not be maintained, as the state has never given consent to be sued. It is not an action to restrain officers of the state from collecting taxes under an alleged improper or illegal assessment. It is an action against the auditor for a mandamus to compel him to issue his warrant for taxes claimed to have been paid in consequence of an illegal assessment. First, there is no law in this state authorizing the auditor to correct the assessment; second, there is no law authorizing the auditor to refund amount claimed to have been paid on an illegal assessment; third, the auditor cannot be compelled by a mandamus to do an act not imposed by law. Again, if it were an action to recover taxes, and the state could be sued, it could not be maintained, because it was voluntarily paid, and, under the well-settled rule of this court, taxes so paid cannot be recovered. An opinion was delivered by this court to-day in *Bank v. Coulter*, 66 S. W. 425, involving substantially the same question that is before us in this case. The court in that case said: "From our view of the case, it is not necessary to consider the question as to whether there was an error in the assessments, or the question whether any authority could have corrected them if the application had been made therefor in proper time. The auditor makes no question as to the right of appellant to col-

lect the difference between 52½ and 75 cents paid on each hundred dollars of the value of its property, as ascertained by the assessment under the Hewitt law. The amount of this difference was not due the state; therefore was paid when not due. This brings the transaction within the terms of section 162, Ky. St., according to interpretation in *Bank v. Stone* (Ky.) 56 S. W. 683, and subsequent cases, which reads as follows: 'When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.' The balance of the claim asserted in this action does not come within the provisions of the statute, as will be hereinafter shown. This is not an action against the state. If it was, it could not be maintained, because the state has not by the statute quoted, or any other statute, given consent to be sued. The primary intention of the statute was to authorize the auditor to refund to officers who collected taxes due the state, and paid more into the treasury than was in fact due from them. It was not intended to authorize the auditor to correct assessments made of the property of taxpayers, and refund the amounts he may determine are due them; for the statutes clearly provide whose duty it is to make assessments of property, how they may be corrected, and the time in which it may be done. The auditor is not the official upon whom the law confers such authority. This court held in the case of *Bank v. Stone* that the difference between 52½ and 75 cent rate should be refunded by a warrant of the auditor. The court did not intend to, nor did it, hold that the auditor could make any corrections of the assessments, and thus ascertain what amount of taxes had been paid into the treasury which was not due, and draw his warrant therefor. The court did not intend to, nor did it, change the rule of this court, to which we will hereafter refer, which is, when taxes, the collection of which can only be coerced by suit, are voluntarily paid, they cannot be recovered. This is a mandamus proceeding to compel the auditor of public accounts to issue his warrant for the sum alleged to be due the appellant for an excessive payment of the taxes which resulted from excessive assessment. It is not an action to recover all the taxes paid, but the difference between the amount collected and the amount which it claimed should have been collected on a correct assessment. This action cannot be maintained. There is a rule of universal

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application, that ministerial and executive officers can only be mandamusd to perform duties imposed by law. The auditor had no authority when the assessments were made, or now, to either assess or correct the assessments of banks. This is the business of the board of valuation and assessment. To show that the auditor is refusing to perform a duty imposed by law, it is essential to show that he both has the authority, and that it is his duty to do so. Neither is or can be shown; hence appellant is not entitled to a mandamus. The appellant concedes that its property was assessed, and the right of the authority which made the assessment to do so is not questioned. The proper inference to be drawn from the petition is that the appellant claimed the right to have and did insist on the assessments being made as they were made. On these assessments the appellant voluntarily paid the taxes in question. The payment of the taxes assessed could not have been enforced except by suit. When such taxes are voluntarily paid, then, under the adjudications of the court, an action to recover them cannot be maintained. *Louisville & N. R. Co. v. Hopkins Co.*, 87 Ky. 605, 9 S. W. 497; *Same v. Com.*, 89 Ky. 539, 12 S. W. 1064. The rule is otherwise when the payment of the taxes can be coerced by summary levy and sale of property by the collecting officer." It will be observed in this, as in the case from which we have quoted, the lower court ordered the auditor to refund the amount of the difference between 52½ and 75 cent rate, and from that order no appeal was prosecuted.

The judgment is affirmed.

STATE v. BATY.

(Supreme Court of Missouri, Division No. 2.
Feb. 4, 1902.)

CRIMINAL LAW—BILL OF EXCEPTIONS—RECORD—SUFFICIENCY—PRESUMPTIONS AS TO JURISDICTION.

1. Where, in a criminal case, there was nothing in the record proper which preceded and identified what supposedly was the bill of exceptions, and in the concluding entry, after entitling the case, there was a recital made in vacation, "And now comes defendant by his attorney and files his bill of exceptions," the bill was not properly identified, and the evidence could not be considered.

2. Where the record of a court of general jurisdiction is silent about a matter necessary to confer jurisdiction, the existence of such matter, nothing appearing to the contrary, will be presumed.

3. The record of the circuit court showed that a criminal cause was, by agreement made during the August term, set for trial on the first Monday in October. It showed that the court met on October 1st, that being the 7th day of the August term and the first Monday in October, and that it so met pursuant to adjournment. Held sufficient, though not showing an adjournment to the first Monday in October; it being presumed, in support of jurisdiction, that the want of the entry was the misprision of the clerk.

Appeal from circuit court, Osage county; R. S. Ryors, Special Judge.

Daniel Baty was convicted of crime, and appeals. Affirmed.

Frank H. Farris, E. M. Zevely, and A. K. Monroe, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

SHERWOOD, P. J. The defendant, on a charge of murder in the first degree, was convicted of the second degree of that crime, and his punishment assessed at 10 years in the penitentiary. The indictment charged that defendant killed George H. Hopkins, by giving him three mortal wounds on the head by striking, hitting, and beating him on the head with a rock. The evidence in this case cannot be looked into by reason of the fact that the bill of exceptions has not been properly identified,—nothing in the transcript to show where it begins. There is nothing in the record proper which precedes and identifies what may be supposed to be the bill. And in the concluding entry, after entitling the case, there is this recital made in vacation: "And now comes defendant by his attorney, A. K. Monroe, and files his bill of exceptions as per rule of court." Under the ruling in *Reno v. Fitz Jarrell* (Mo.) 63 S. W. 808 (in which is given the usual and proper formula for identifying the bill of exceptions), the bill here has not been properly identified.

As to the record proper, no error has been discovered in that. In reference to the record entries pertaining to this cause, the record shows that this cause was by agreement set for trial on the first Monday of October, 1900. This agreement was made on the 25th day of August, 1900, during the regular August term of the circuit court of Osage county. The defendant asserts that the record does not show the adjournment of the court from the month of August, or at any date, to meet on the first Monday of October. The record does show, however, that court met on the 1st day of October, 1900, it being the seventh day of the regular August term, 1900, and being the first Monday in October, and that it so met pursuant to adjournment. Every presumption will be indulged in favor of the correctness of the action of a court of general jurisdiction, and that it proceeds by right, and not by wrong. *Huxley v. Harrold*, 62 Mo. 516, and cases cited; *State v. Harkins*, 100 Mo. 666, 13 S. W. 830.

If the record is silent about a matter necessary to confer jurisdiction, or, more properly, to cause it to attach in the particular instance, the existence of such matter (nothing appearing of record to the contrary) will be presumed; and it will be presumed that where some regular and formal intermediate entry should have been made, which does not appear in the transcript, such absence was occasioned by the misprision of the clerk.

and will not, therefore, operate a reversal of the judgment.

For these reasons, judgment affirmed. All concur.

STATE v. FLUTCHER.

(Supreme Court of Missouri, Division No. 2.
Feb. 4, 1902.)

MURDER — EVIDENCE — SUFFICIENCY — NEW TRIAL—MOTION—AFFIDAVITS—BILL OF EXCEPTIONS—TIME FOR FILING.

1. In a criminal prosecution, defendant's motion for a new trial on the ground of newly-discovered evidence, not supported by affidavit either of defendant or a third person, was properly denied.

2. Defendant, a negro, had passed a saloon, when several parties came out, calling out, "Hurrah for McKinley," etc. He immediately turned, drew a revolver, and threatened to shoot decedent's brother, who had been standing near the saloon; stating that he thought the brother was the one that hallooed at him. The next day, as decedent was passing out of an alley, the negro shot him; saying that he missed his brother the night before, but would not miss decedent. Defendant's evidence, corroborated to some extent, tended to show that he was assaulted by decedent, and shot in self-defense. *Held* to support a conviction of first-degree murder.

3. Where the time for filing a bill of exceptions is extended "up to" June 28th, a bill filed on that day is in time.

Appeal from St. Louis circuit court; H. D. Wood, Judge.

Henry Flutcher was convicted of crime, and appeals. *Affirmed*.

James H. Staubus, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

SHERWOOD, J. Defendant was indicted for murder in the first degree because he shot Louis Roth to death with a revolver on the 27th day of August, 1900. On behalf of the prosecution the testimony disclosed, in substance and effect, this state of facts: Defendant is a negro, and had been for some time prior to the commission of this crime a resident of the city of St. Louis, and is about 5 feet 6 inches tall, and weighs about 150 pounds. Louis Roth was a young man, and made his home with his father and mother, who resided at the corner of 2858 St. Louis avenue. He was 23 years old, and 5 feet 7 inches tall, and would weigh about 165 pounds. He had two brothers, one of whom was older, and one (Edward Roth) who was younger, than himself. On Sunday, the day before the commission of this homicide, Edward Roth and a number of boys about his age (17 years) at about 8 o'clock in the evening were standing on the southwest corner of Glasgow and Montgomery streets. The defendant, with a negro woman, came west on the south side of Montgomery street. The young men were standing in front of a grocery store and saloon, but none of them had been in the sa-

loon. In the saloon were several men, who were, from all appearances, having a "good time." The defendant and this negro woman had barely passed this corner, when these men who were in the saloon came out and went east on Glasgow street. As they came out of the saloon, some of their number hallooed, "Hurrah! Hurrah for McKinley!" and others of their number hallooed things similar to that. The defendant, as above stated, was only a few steps away, but he turned around, drew a 38 revolver out of his pocket, rushed back to where Edward Roth was standing (he being a little to the west of his companions), thrust the revolver into his face, and said: "You white bastard! I'll make you respect my color as well as I respect yours. You white son of a bitch! I'll kill you. I'll make all of you white bastards respect me, regardless of nationality." Young Roth attempted to back away from the weapon, saying: "Mister, don't shoot me. I have done nothing." The negro followed him, keeping the weapon in his face, saying: "I think you are the one that hallooed at me." Roth retreated to the middle of the street, all the while saying: "Mister, don't shoot me. I never done nothing." When they reached the middle of the street the defendant ceased his assault and rejoined his companion, who was waiting for him, and passed on. This was the second time that Edward Roth had seen the defendant. Once before that he had seen him engaged in a game of craps, but, even when this occurrence took place, did not know his name. There is an alley running north and south from St. Louis avenue to Madison street, intersecting Montgomery and Benton streets. Shortly before sundown on the 27th day of August, 1900, Louis Roth went into a cigar store then standing at 2710 St. Louis avenue, at the corner of this alley. There he met an acquaintance, John Barry. After talking a few minutes they started to Mr. Tierney's home, which is at Eleventh and Franklin avenue. Roth was a carpenter by trade, and belonged to the carpenters' union. Tierney was the treasurer of that institution, and Roth was going to his home for the purpose of paying his dues in that organization. To lessen the distance, the two men undertook to pass through the alley above mentioned. They got into the alley about 100 feet, when the defendant and two other negroes came out of what was termed a "gangway" on the west side of the alley into the alley, and passed south through the alley about 15 feet ahead of Roth and Barry. The three negroes on reaching Montgomery street turned west, and just as Roth passed from the alley into Montgomery street the defendant, who had turned around and was waiting for his victim, took deliberate aim at Roth, and, saying to him, "I missed your brother last night, but, you son of a bitch, I'll not miss you," fired. Roth threw up his hands, turned to his friend, and said, "Jack, I am

shot." He staggered about 15 feet west from the alley and fell. The defendant, unsatisfied with the murderous work he had accomplished, fired his weapon at deceased twice more; but an express wagon had dashed between the men, and his aim was faulty. Roth was taken to the hospital, but died as soon as reaching there. The ball (a 38-caliber bullet) had entered the right side at about the eleventh rib, right at the juncture where it stops. It ranged slightly backwards, escaping the right kidney, passed through the colon or large gut, through some of the small intestines, and then into the left kidney, where it severed a vein and an artery, and at the same time shattered a kidney. After firing the three shots, the defendant crossed the street and ran on south through the alley, and then through a vacant lot on Leffingwell avenue, where there was a lot of weeds; and he thus escaped the officer, who had pursued him for some distance and had fired three shots at him. The next morning an officer was delegated to watch at the place where defendant had been at work. A negro woman appeared there and demanded the pay that was due him. She was shadowed to 909 South Ewing street, which is in the south lower part of the city, where the defendant was found in bed. He was immediately placed under arrest, and the weapon he had used was found under his pillow. He pleaded not guilty, and also pleaded self-defense. On the part of the defense there was the testimony of defendant, corroborated to a greater or less extent by several other witnesses, that defendant was assaulted by Louis Roth, struck twice with a baseball bat, and knocked to his knees, when he fired in self-protection the shot which killed Louis Roth. The court below gave an excellent set of instructions, embracing murder in the first and second degrees, manslaughter in the fourth degree, and the law of self-defense. These instructions were so full and accurate as to leave naught to be desired, so that the exception of defendant, at the close of the giving of the instructions given by the court, "on the ground that they did not cover all phases of the evidence in the case," cannot prevail. The jury returned a verdict of guilty of murder in the first degree.

The point is made in the motion for a new trial that "new evidence has been discovered which is material to the issues in the case, and that said evidence is not cumulative, and has come into the possession of this defendant since the verdict in the case was rendered." This point was properly ruled against defendant, because the ground stated met with no support by affidavit either of defendant or others. *State v. McLaughlin*, 27 Mo. 111; *State v. Campbell*, 115 Mo. 391, 22 S. W. 367; *State v. Nettles*, 153 Mo. 464, 55 S. W. 70; *State v. Ray*, 53 Mo. 345; *State v. Musick*, 101 Mo. 280, 14 S. W. 212; *State v. Welsor*, 117 Mo. 570, 21 S. W. 443; *State v. Miller*, 144 Mo. 26, 45 S. W. 1104; *State*

v. Tomasitz, 144 Mo. 86, 45 S. W. 1106; *State v. Lucas*, 147 Mo. 70, 47 S. W. 1067.

There is abundant testimony, as already set forth, to warrant and support the verdict returned; and the fact that the testimony for the defense conflicts with that of the state has no bearing on the force and effect of the verdict.

The last order of record in reference to extension of time for filing the bill of exceptions is in these words, "be again extended up to the 28th day of June, 1901," and the state contends that, inasmuch as the bill was filed on that date, such filing was too late. We do not favor this view. The words "up to" constitute a colloquial expression,—a slang phrase. Volume 6, Cent. Dict. The word "to," which was evidently the controlling word in this connection and instance, is sometimes a word of "inclusion." Cent. Dict. In this sense we hold it was thus used in the case at bar, and therefore that the bill was filed in time.

In conclusion, we make no doubt that defendant was in all respects fairly tried, and convicted on testimony amply sufficient, so that it only remains for us to affirm the judgment, and to direct that the sentence of the law be executed. All concur.

STATE v. SHELLEY.

(Supreme Court of Missouri, Division No. 2.
Feb. 4, 1902.)

FALSE IMPERSONATION OF VOTER—EVIDENCE AS TO STATUS OF PARTY PERSONATED—REGISTRATION BOOK—PRESUMPTION.

In a prosecution under Rev. St. 1899, § 7261, for falsely personating an elector, the book of registration, in which the name of the party personated appears as a voter, is not prima facie evidence that such person was an elector and entitled to vote in the precinct, sufficient to support a conviction, since the presumption that the registration proceedings were regular cannot overcome the presumption of innocence.

Appeal from St. Louis circuit court; Horatio D. Wood, Judge.

Dan Shelley was convicted of falsely personating an elector, and appeals. Reversed.

T. J. Rowe and S. S. Bass, for appellant.
The Attorney General and Jerry M. Jeffries, for the State.

SHERWOOD, J. Dan Shelley was prosecuted under the provisions of section 7261, Rev. St. 1899; he being indicted for that he falsely, fraudulently, and feloniously impersonated one Joseph Conley, an elector duly registered, etc. The section on which the indictment is founded is, so far as necessary to quote it, the following: "Any person who shall falsely personate an elector, or other person, and vote, or attempt or offer to vote in or upon the name of such elector or other person; or shall vote, or attempt to vote, in or upon the name of any

other person, living or dead, * * * shall, upon conviction, be guilty of a felony and punished for every such offense by imprisonment in the penitentiary not less than two years." Defendant stood his trial, which resulted in a verdict of guilty, and punishment assessed at imprisonment in the penitentiary for the term of two years. There was no evidence offered in support of the allegation that Joseph Conley was an elector, etc., other than the book of registration offered in evidence, and showing such name having been registered as resident at a certain number. Defendant demurred to the evidence, but was unsuccessful in so doing, whereupon the court gave, among others, this instruction: "Third. The court instructs the jury that, if they believe from the evidence that the name of Joseph Conley appeared upon the registration book of the precinct mentioned in the indictment and offered in evidence, then this fact is prima facie evidence that said Conley was an elector and entitled to vote in said precinct."

The dominant question in this cause is whether the name of Joseph Conley, appearing on the registration book as an elector of that precinct, was sufficient evidence of the fact that he was an elector. The court, in the quoted instruction, ruled that the registration of Conley's name upon the registration book was prima facie evidence that Conley was an elector. The correctness of this position, as regards the charge here preferred, is now to be examined. Greenleaf says: "A distinction is to be noted between civil and criminal cases in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the government. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt. But in criminal trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is therefore a rule of criminal law that the guilt of the accused must be fully proved. Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt. * * * And this degree of conviction ought to be produced when the facts proved coincide with, and are legally sufficient to establish the truth of, the hypothesis assumed, namely, the guilt of the party accused, and are inconsistent with any other hypothesis. For it is not enough that the evidence goes to show his guilt. It must be inconsistent with the reasonable supposition of his innocence." 3 Greenl. Ev. (14th

Ed.) § 29. The instruction under review evidently rests its taproot upon the idea that inasmuch as it will be presumed that the registration officer, in registering the name of Joseph Conley as an elector, did his duty in the premises, from thence the presumption arises that Joseph Conley was an elector; but such a presumption cannot either overlook or overcome the presumption of innocence, which in every case is to be regarded by the jury as matter of evidence, to the benefit of which the party is entitled. 1 Greenl. Ev. § 84. One presumption cannot overthrow another; nor, as a rule, can a man be convicted of a crime upon a mere prima facie case being established in a criminal prosecution, because such prima facie case does not generally rebut the presumption of innocence or shift the burden of proof. 3 Rice, Ev. 427. It is true that the legislature may, to a certain extent, declare what shall be presumptive evidence of any fact. 3 Rice, Ev. 38, and cases cited; State v. Buck, 120 Mo. 479, 25 S. W. 573. But there has been no legislative declaration as to what shall be presumptive evidence in the class of crimes now under discussion; or perhaps it might be beyond the legislative power to declare that the presumption that a registration officer has done his duty should be presumptive evidence that another man had committed a crime; and yet, in substance and effect, this is what the instruction in question told the jury. In circumstances such as here presented, the establishment of inferences, however strong, or probabilities, however great, will not warrant a conviction. The doctrine of chance does not apply here. Ogletree v. State, 28 Ala. 693; Am. Lead. Cas. 659; Com. v. McKie, 1 Gray, 61, 61 Am. Dec. 410. Besides, this prosecution was instituted on the hypothesis that Joseph Conley was a living elector, whom Daniel Shelley endeavored to personate, since the indictment does not state that Conley was dead at the time he was personated, which it would have had to do, had such been the fact. But Conley, though an elector at the time of his registration, may not have been alive at the time he was personated, or at that time may have been a nonresident of the alleged precinct, in which case, of course, no conviction could have been had. And the burden was on the state to establish by something more than a mere presumption—to establish beyond a reasonable doubt—that Joseph Conley was an elector of the particular precinct alleged in the indictment at the time Dan Shelley is charged with having personated him.

For these reasons, the judgment will be reversed, and the cause remanded. All concur.

STANLEY v. AETNA INS. CO.

(Supreme Court of Arkansas. Jan. 18, 1902.)

EVIDENCE—WITNESSES—IMPEACHMENT—INSURANCE—ACTION ON POLICY—EVIDENCE OF PREVIOUS LOSS—INDICTMENT FOR ARSON.

1. Under Sand. & H. Dig. § 2959, providing that a witness may be impeached by showing that his general reputation for truth and immorality renders him unworthy of belief, but not by evidence of particular wrongful acts, evidence that plaintiff, in an action on a fire policy, had before owned an insured house, which burned, was inadmissible.

2. Admission of evidence that plaintiff and others had been indicted for the burning of the house referred to was reversible error.

Appeal from circuit court, Jefferson county; John M. Elliott, Judge.

Action by Mrs. E. E. Stanley against the Aetna Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

White & Street and Carroll & Pemberton, for appellant. Austin & Taylor, for appellee.

BUNN, C. J. This is a suit on a fire insurance policy, instituted in the Jefferson circuit court on the 13th day of February, 1896, by the appellant, Mrs. E. E. Stanley, the holder of the policy, against the appellee, the Aetna Insurance Company of Hartford, Conn., for the sum of \$1,370, damages for the total loss of her house and furniture, and injury to the fencing,—her residence in Pine Bluff, Ark.,—by fire, on the night of the 6th December, 1895. The defendant company answered, admitting the issuance and delivery of the policy of insurance to the plaintiff, and the occurrence of the fire and destruction of the residence building, but denying that the loss to the furniture and other articles of personal property was to the extent claimed in plaintiff's complaint, and any damage whatever to the fencing, and alleged not only gross negligence on the part of the plaintiff in the care of said property and the protection of the same, but complicity in, and connivance at, said burning, to obtain the insurance thereon as aforesaid. On the trial of the cause, and on the cross-examination of the plaintiff as a witness, she was asked various questions touching her past life, covering a period of 12 or 15 years; and, among other things in this connection, she was asked if, while residing in Lexington, Ky., she did not have insurance upon her residence there, and if the same was burned down while under such insurance. This question she answered in the affirmative, with the additional or qualifying statement that she had on the house a very small amount of insurance. After further questioning and answering, plaintiff's counsel objected to the evidence thus adduced, and moved the court to exclude the same from the jury, which motion the court overruled, and permitted the evidence to go to the jury; to which evidence the plaintiff objected,

and to the refusal to reject the same she excepted. Similar interrogations were propounded to her as to the insurance on and burning of another house in Pine Bluff, upon which there were like rulings of the court, and exceptions taken. Our attention is called to the ruling of this court on an identical state of facts in *Insurance Co. v. Stanley*, the plaintiff in this cause, reported in 62 S. W. 66. It will be seen, however, that the question there was differently presented from what it is in this case. For instance, the questions and answers were not excepted to in the court below; in the next place, the case was decided in the court below in favor of the plaintiff, showing that the jury were not influenced by that evidence; and, in the third place, the question in that case arose upon an instruction in which that particular point and another were involved, which latter itself was material, and touching which the court held that the court committed a reversible error, to wit, in not giving the instruction to consider the interest of witness. So that it does not appear that any positive ruling upon the admissibility of this evidence by this court in that case was made, and for that reason, in a case like this, where the facts are somewhat different, we are left free to rule upon the question as presented now. This character of cross-examination is only permissible where its object and tendency is to affect the credibility of the witness under cross-examination.

In section 2959, Sand. & H. Dig., it is provided that "a witness may be impeached by the party against whom he is produced by contradictory evidence, by showing [among other things] that his general reputation for truth and immorality renders him unworthy of belief, but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of a felony." This statute is quoted only because its provisions are incidentally referred to in the case now cited.

The leading case of this court, on the subject of the admissibility of such evidence as we have now under consideration, is that of *Hollingsworth v. State*, 53 Ark. 387, 14 S. W. 41, in which the court said: "This shows that upon a cross-examination of a witness, with a view of testing his credibility, inquiries are proper as to facts not competent to be proved in any other way. Such inquiries do not relate to the issue directly upon trial, but relate only to the credibility of the witness. They are entirely collateral to the principal issue. As to the former, the same strictness is not required when the evidence is confined to the cross-examination of the witness introduced by the opposite party. In such examination the presumption is strong that the witness will protect his credibility, as far, at least, as the truth will warrant. All experience shows this to be so. It would be productive of great injustice often, if, when

a witness is produced of whom the opposite party has never heard, and who gives material testimony, and from some source, or from the manner and appearance of the witness, such party should learn that most of the life of the witness had been spent in jail and other prisons for crimes, if this fact could not be proved by the witness himself, but could only be shown by the record existing in distant counties and states, which for the purposes of the trial are wholly inaccessible." In conclusion, says Judge Hemingway, speaking for the court: "My conclusion is that a witness upon cross-examination may be asked whether he has been in jail, the penitentiary, or state prison, or any other place that would tend to impair his credibility, and how much of his life he has passed in such places. When the inquiry is confined as to whether he has been convicted, and of what, a different rule may apply." Thus, while the statute does not permit a witness to be impeached by evidence of mere isolated acts on his part, yet in the case cited evidence of habits of life,—associations,—which go to show habitual immorality and the probable disregard of truth generally, is not in conflict with the statute, and is admissible, notwithstanding that, in order to determine this general fact, particular acts in keeping with the general habit may be shown. They are circumstances, says the court, "proper for the jury to consider in determining his credibility." That such a life tends to discredit the testimony of the witness no one can deny. When disclosed on cross-examination, it is exclusively for the jury to determine whether any truth can come from such source, and, if so, how much. "The right to impair the evidence of a witness by cross-examination must not be confounded with the right to impeach a witness by evidence introduced by the opposite party. * * * Such evidence must go to his general character." After all, such evidence must tend to affect the credibility of the witness or it is not admissible; for evidence which merely reflects on the character of a witness, or calls his general character in question, which has no reference to his character for truth or immorality, is not admissible, for such can only prejudice the minds of the jury against him.

This being the law as heretofore defined by this court, we are of the opinion that the evidence so adduced in this case was not admissible, seeing that its effect could not be to impeach the witness or lessen her credibility, as the mere fact of having an insured house burned on one or more previous occasions proves nothing against her credibility. It should have been excluded.

In the further progress of the trial she was asked "if you, Thomas Stanley, and your husband, Frank Stanley, were indicted by the grand jury of Jefferson county, Arkansas, charged with the burning of this building." This question was objected to, but the

court overruled the objection. She, being required to answer, said: "I understand, through my attorneys;" and in answer to further questions on the subject, and by way of explanation, said she herself was never arrested, and was finally discharged by the sheriff at his office. Having been charged by the grand jury with the commission of the crime of arson shows nothing against her, and the object of such testimony could operate only to cast a slur upon her before the jury. It was highly prejudicial, and should not have been permitted to go to the jury, and the error was a reversible one.

In the course of the trial the court gave, at the request of the defendant, the third instruction, which is objectionable, under the peculiar facts of this case, because it failed to say if the plaintiff intentionally or willfully caused the burning of the building.

The seventh instruction, given at the instance of the defendant, is too general, and left to the jury too much latitude in determining what constituted failure of plaintiff in keeping all the covenants contained in the policy. As the case will be reversed for other errors named above, these last references to instructions are in the way of suggestions to the court on another trial.

Reversed and remanded for the improper admission of testimony as set forth in the foregoing.

NORMAN v. POOLE.

(Supreme Court of Arkansas. Jan. 18, 1902.)

APPEAL—RECORD—PRESUMPTION—GARNISHMENT—FINAL JUDGMENT AGAINST GARNISHEE—ABSENCE OF JUDGMENT AGAINST PRINCIPAL DEFENDANT.

1. Where the evidence is not in the record, it will be presumed that it was sufficient to support the judgment.

2. Where a writ of garnishment is issued in the course of an action against the principal defendant, final judgment cannot be rendered against the garnishee in the absence of a judgment against the principal defendant.

Appeal from circuit court, Union county; Chas. W. Smith, Judge.

Action by T. P. Poole against G. H. Parker, in which F. R. Norman was garnished. From a judgment against the garnishee, he appeals. Reversed.

Pugh & Wiley, for appellant. Thornton & Thornton, for appellee.

RIDDICK, J. T. P. Poole brought an action before a justice of the peace against G. H. Parker, and had F. R. Norman, the appellant here, summoned as garnishee. On the return day of the writ of garnishment the garnishee failed to appear, and the justice of the peace gave judgment against her by default. From this judgment the garnishee appealed to the circuit court, and, on a trial there, judgment was again rendered against them, and she appealed to this court. No bill of exceptions was filed, and the evi-

dence before the circuit court is not before us. We assume that the evidence was sufficient to support the judgment, and the only question here is whether there is error upon the face of the record.

The appellant contends that no judgment could be rendered against her in the action against the defendant Burke, and that the judgment was void for the reason that no separate action was commenced against her, and for the further reason that there was at the time of its rendition no judgment against the principal defendant, Burke. It has been frequently held in this state, since the adoption of the Civil Code, that a final judgment against one summoned as a garnishee in an attachment proceeding cannot be rendered in the original action, but that the proper practice, when the garnishee makes default or refuses to pay over the proceeds in his hands, is to commence an original action to recover judgment against him. *Railway Co. v. Richter*, 48 Ark. 350, 3 S. W. 56; *Giles v. Hicks*, 45 Ark. 271. These decisions were rendered before the passage of the act of April 8, 1889, in reference to judicial garnishments, and the amendatory act of April 19, 1895. Under the practice as regulated by these two acts, it is no longer necessary in all cases to commence a separate action against the garnishee in order to authorize the court to render a final judgment against him, but, in the cases covered by these acts, final judgments may be rendered against the garnishee upon default made by him, or when on a trial the court finds that he is indebted to the defendant in the original judgment. It is difficult for us to say from the record in this case whether the plaintiff bases his garnishment proceeding on the acts referred to or not; but conceding that this is so, and conceding that it was unnecessary to institute a new action against the garnishee, it was still necessary for the record to show a judgment against the defendant before a final judgment can be rendered against the garnishee. The proceeding against the garnishee is ancillary to that against the defendant. As the object of the garnishment is to reach money or property in the possession of the garnishee, and subject it to the payment of the judgment which the plaintiff may recover against the defendant, it follows that there can be no lawful judgment against the garnishee until after the judgment has been recovered against the defendant. *Drake, Attachm.* § 460; *Commission Co. v. Bloom*, 62 Ark. 616, 37 S. W. 305. When, as in this case, no new action is begun against the garnishee, but the proceeding against him is in the same action as that against the principal defendant, the judgment against such defendant is a part of the record in the garnishment proceeding. The record in the proceeding against the garnishee should show that a judgment has been rendered against the principal defendant, for that is the founda-

tion upon which the judgment against the garnishee rests. We do not say that it is necessary that the judgment against the principal defendant should be copied in full in the record, but it should appear from the record in some way that a judgment has been rendered against the defendant. Now, we have carefully examined the transcript in this case, and there is nothing to show or indicate that there has been any judgment against the principal defendant, except for costs in the justice's court. Neither the judgment against the garnishee rendered in the justice's court, nor that rendered in the circuit court, recites or refers to any such judgment. It may be that this defect in the record here is due to oversight of the clerk who prepared the transcript, but the point was made in the brief of appellant, and no attempt has been made to remedy such defect in the transcript, if it exists. We must therefore take it that the transcript reflects the facts, and we are of the opinion that the circuit court erred in giving final judgment against the garnishee, when there was no judgment against the principal defendant.

We have not overlooked the contention of counsel for appellee that the judgment appealed from was rendered by consent of the garnishee, but the record does not support such a contention. The record shows a judgment by default before the justice, and a trial de novo and judgment for plaintiff in the circuit court, from which the garnishee appealed. If the judgment was by consent, it should have been amended. As it stands here, the record shows to the contrary.

For the error indicated, the judgment is reversed, and new trial granted.

RUST LAND & LUMBER CO. v. ISOM.

(Supreme Court of Arkansas. Jan. 11, 1902.)

APPEAL—JUSTICES OF THE PEACE—AFFIDAVIT—SUFFICIENCY—REPLEVIN—EVIDENCE—INSTRUCTIONS—MINGLING OF GOODS.

1. Under Sand. & H. Dig. § 4438, providing that appeals from justices of the peace shall not be dismissed because of any defect in the affidavit, an affidavit for appeal from a justice of the peace is not insufficient because made on the day before the rendition of the verdict and judgment.

2. In replevin for staves cut from certain land, where defendant claimed that he purchased the timber from a certain person who owned contiguous land, but such person did not testify that he owned the land from which the staves were cut, which the undisputed evidence showed was wild and unoccupied, a charge to find for defendant if it was found that the person who sold him the staves had adversely possessed the land for the statutory period was without foundation in the evidence, and erroneous.

3. Testimony of the seller of the staves that he held adverse possession of the land adjacent to that from which the staves were cut was not within the issues.

4. In replevin for staves cut by defendant from certain land, where defendant introduced

a deed of adjoining land to the person from whom he claimed to have bought the timber, failure to instruct that the deed could only be considered to show that defendant had a right to cut timber on the adjoining land, and might have innocently misapprehended the boundary, and that the deed was no evidence of title to the land from which the staves were cut, was error.

5. Where property which is the subject of replevin is so mixed with property of the defendant as to be indistinguishable, it is not necessary for plaintiff to show that the property was so mingled with the intention of preventing identification.

6. In replevin for property which has innocently been mingled with defendant's property of the same nature and quality as that sued for, plaintiff may recover the quantity to which he is entitled from the common mass, if the separation may be made without injury.

Appeal from circuit court, Ashley county; Zachariah T. Wood, Judge.

Action by the Rust Land & Lumber Company against G. W. Isom. From a judgment in favor of defendant, plaintiff appeals. Reversed.

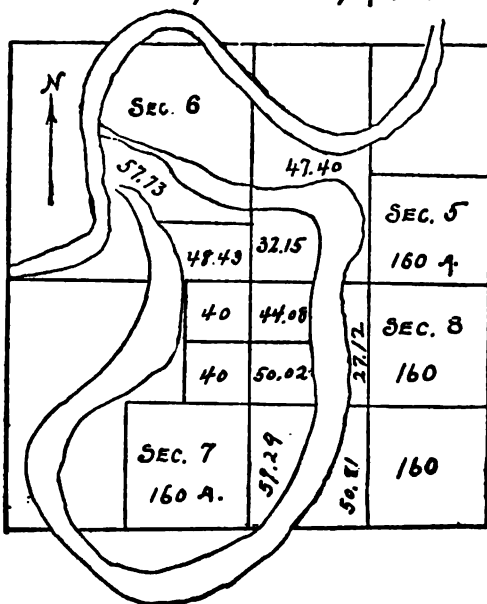
The plaintiff, Rust Land & Lumber Company, brought suit to recover staves which it claimed had been made by defendant from timber wrongfully cut from its land. On the trial plaintiff introduced in evidence deeds showing that it had title to the following land, from which it claimed the timber had been wrongfully cut, to wit: All of section 8 lying west of Lake Grampus, in township 16 S., range 4 W., containing 153.39 acres. It also introduced a plat of section 8, township 16 S., range 4 W., shown to be a correct transcript of the United States survey of that section, as shown by the records of that survey:

The defendant claimed to have purchased the timber from one Thornton, and introduced deeds conveying to the ancestor of Thornton the following land in section 8, to wit: W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 8, containing 80 acres; east fractional part of N. W. $\frac{1}{4}$ section 8, containing 27.12 acres; N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 8, containing 20 acres; and 15 acres to be surveyed off N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 8, east of Lake Grampus, township 16, range 4 W. Thornton, a witness for defendant, was permitted to testify, over the objection of the plaintiff, that his father, under the deed to him, took possession of the lands described in his deed in 1883, and that his father, and his heirs after him, had held actual possession of such lands since that time, cultivating a part of them. It was admitted by both parties that all of the lands west of Lake Grampus claimed by plaintiff were wild and unimproved; and W. T. Martin, a surveyor introduced as a witness by plaintiff, testified that Lake Grampus was a meandered or surveyed stream, and that the lands described in plaintiff's deeds lay west of that lake, while those claimed by Thornton lay east of the lake. The other facts appear in the opinion. There were a verdict and a judgment for defendant, from which plaintiff appealed.

G. W. Norman, for appellant. Robert E. Craig, for appellee.

RIDDICK, J. (after stating the facts). This is an action of replevin brought by the Rust Land & Lumber Company against G. W. Isom to recover 2,200 pipe staves. The action was commenced before a justice of

TOWNSHIP 16 S., RANGE 4 W., ASHLEY COUNTY.



the peace, who gave judgment in favor of the plaintiff, and the defendant took an appeal to the circuit court. On the calling of the case in the circuit court the plaintiff moved the court to dismiss the appeal for want of a proper affidavit. The affidavit for appeal made by the defendant is in proper form, and was filed on the same day the justice gave judgment. But the trial before the justice of the peace commenced on the 3d day of June, though the judgment was not rendered until next day. It seems that the defendant, anticipating an adverse decision, made the affidavit for an appeal on the morning of June 3d, and left it with his attorney, who filed it after the rendition of the judgment next day. I am inclined myself to the opinion that this affidavit, being made before the rendition of the verdict and judgment, was premature, and feel doubtful as to its sufficiency; but a majority of the judges are of the opinion that the affidavit, though irregular, in having been made before the judgment, was a substantial compliance with the statute requiring the party asking for appeal "to make and file with the justice an affidavit that the appeal is not taken for the purpose of delay, but that justice may be done." Moreover, our statute regulating appeals from justices of the peace provides for amendments to bonds and affidavits executed for the appeal, "so that," to quote the language of the statute, "no such appeal shall be dismissed for want of jurisdiction because of any defect in the affidavit or obligation for the appeal or order granting the appeal, or any defective entry made or informal judgment rendered" by the justice. Sand. & H. Dig. § 4438. This provision indicates an intention of the legislature that appeals from justices of the peace should not be dismissed on narrow and technical grounds, when the applicant for the appeal has endeavored to comply with the statute regulating the manner of taking appeals. It thus appears that there are substantial reasons in favor of the ruling of the circuit court that the mere fact that an affidavit was made a short time before the judgment appealed from was delivered did not render it nugatory, where it was filed after the judgment, and in other respects conformed to the requirements of the statute. The contention of appellant on that point is therefore overruled.

On the trial the evidence showed that the defendant, without the consent of the plaintiff, cut timber upon its land, and converted it into staves. The defendant claimed that he purchased the staves from one Thornton. The circuit judge, at the request of the defendant, instructed the jury that if Thornton, and those from whom he claimed title, "had held actual, continuous, adverse, and uninterrupted possession of the lands from which the timber was cut for more than seven years before the institution of the suit,

the verdict should be for the defendant." This instruction, to the giving of which plaintiff saved proper exceptions, was entirely abstract. Thornton did not testify that he had ever held possession of the lands claimed by the plaintiff. On the contrary, the undisputed testimony was that those lands were wild and unoccupied. Thornton did testify that his father took possession of lands described in a deed from Moon to him, but that deed did not purport to convey the land claimed by the plaintiff. The only land in section 8 that such deed purported to convey was east of Lake Grampus, and possession of that land could not affect the title of plaintiff to lands west of the lake, even though Thornton believed that his deed covered that land also. There was, as we see it in the transcript, no evidence whatever to justify the jury in finding that Thornton had title to the land claimed by plaintiff, on which timber was cut, by statute of limitation or otherwise, and that question should not have been submitted to them for decision. The testimony of Thornton that his father and he had held adverse possession of lands conveyed by Moon to him was incompetent, for it had no bearing on the question at issue, which was whether the staves were cut from the lands owned by plaintiff west of the lake. Plaintiff did not claim the land conveyed by Moon to Thornton, and there was no question as to the title of those lands involved in the case. The tendency of this evidence of Thornton, and the instruction based on it, above noticed, was to becloud the real questions at issue, and mislead the jury; and we are therefore of the opinion that the evidence should have been rejected, and that the court erred in giving the instruction as to adverse possession.

The only legitimate basis for introducing the deed from Moon to Thornton was not to show title in Thornton to the lands claimed by the plaintiff, for, as before stated, that deed did not purport to convey such land, but to show that the defendant had the right to cut timber on the land adjoining those owned by plaintiff, and in connection with the evidence to show that he cut the timber of plaintiff innocently, under an honest misapprehension as to the location of the boundary line between the land of plaintiff and that of Thornton. The jury should have been admonished that the deed to Thornton was no evidence of title to the land claimed by the plaintiff, and that it could only be considered in determining the question as to whether the defendant was innocent of intentional wrong.

The evidence on the trial showed very clearly that at least a portion of the staves replevied were made by defendants from timber cut by him on plaintiff's land without its consent, and then converted into staves. The evidence tended to show that defendant piled these staves with other staves owned

by him, and they were thus so mingled that the particular staves owned by the plaintiff could not be identified. The court instructed the jury on this point that, before they could find for the plaintiff, it must be shown either that it was the owner of all the staves replevied, or, if it owned only a portion of the staves, it must be shown that those staves had been mixed and mingled by defendant with the staves belonging to him, "with the intention of preventing plaintiff from identifying the staves cut from its land." No doubt, the rule that where one willfully and wrongfully mixes his property with that of another, so that the property of neither can be distinguished, gives to the innocent party the whole of the mixed property, was intended to prevent fraud, and to take away from the evil-disposed the incentive to deprive another of his property by mixing it with his own so that it could not be identified. While the rule was intended to prevent a mixture for that purpose, it is not necessary for the innocent party to prove that the mixture was actually made with that intent, for in most cases that would be difficult to do. For instance, take this case as an illustration. If the defendant knew that the timber which he cut belonged to plaintiff or some other person, and that he had no right to cut it, and yet willfully and wrongfully entered upon this land, cut timber, and converted it to staves, and afterwards mixed these staves with staves belonging to himself, so that the property of neither could be identified or distinguished, it would certainly not be necessary for the plaintiff to go further, and show that the mixture was made to prevent plaintiff from identifying its staves. We apprehend that in such a case it would be entirely immaterial whether he mixed them for that purpose, or only for the purpose of making a more convenient shipment or sale. In either case the mixture would have been willfully and wrongfully made by defendant, and he should suffer the loss, if any be caused by such act. We are therefore of the opinion that the instructions given on this point placed a greater burden on plaintiff than the law required, and were to that extent erroneous and prejudicial.

Another question presented by the facts of this case, but which does not seem to have been discussed at the trial below, is whether, if the mingling was innocently done, and if the staves mingled were all of the same kind, quality, and value, replevin may not be maintained by plaintiff, notwithstanding the particular staves cannot be identified. If the staves are of the same kind, quality, and value, and if no advantage would result to either party by getting the identical staves owned by him, even if that were possible, the general rule is that replevin will lie for the number owned by the plaintiff, to be taken out of the mass, especially when the mingling was not brought about by his act.

This rule is generally followed by the courts of this country, including, it seems, the supreme court of the United States. *Eldred v. Oconto Co.*, 83 Wis. 141; *Peterson v. Polk*, 67 Miss. 163, 6 South. 615; *The Idaho*, 93 U. S. 575, 585, 23 L. Ed. 978; *Cobbey*, Repl. (2d Ed.) §§ 399-404. We do not understand that this court has ever distinctly decided to the contrary. The case of *Hart v. Morton*, 44 Ark. 450, may seem at first glance to be a decision of that question, but an examination of the facts of the case will show that this is not so. The plaintiff in that case purchased cotton from a tenant, subject to the lien of the landlord. At the time of his purchase the cotton was in the field, unpicked. Later, the landlord, who was the defendant in the case, also purchased the interest of the tenant. There had been no separation of the rent cotton from the other at the time of this purchase. Afterwards the landlord himself weighed out the cotton, to determine the amount of rent, and other cotton. But this was not a separation binding on either party, and the cotton was remixed after being weighed. It is very plain, we think, that the claim of the plaintiff in that case was for an undivided interest; and the court, speaking of it as an undivided share, properly held that replevin would not lie. But the headnote prefixed by the reporter to that case indicates that the court went further, and decided the question under consideration here; but we think the reporter was mistaken in this, and that his headnote is to that extent misleading. We have many other cases of that kind, holding that replevin will not lie by one tenant in common against his cotenant to recover his undivided share of the common property. The reason that underlies these decisions is that until division has been made neither of the parties owns any particular part of the property, more than the other, and neither has the right to the exclusive possession of any particular portion of it. We have also held that, when cotton has been innocently mixed and baled, replevin will not lie for a part of the bale; and this is clearly correct, for division in kind cannot then be made without injury to the other party. For, if the bale be torn to pieces, the cotton would have to be rebaled at additional expense. *Moseley v. Cheatham*, 62 Ark. 134, 84 S. W. 543; *Washington v. Love*, 84 Ark. 93; *McKennon v. May*, 39 Ark. 442. But this case belongs to neither of these classes of cases. The parties here are not tenants in common. The plaintiff owns a certain number of staves, which without its fault have been mixed by defendant with other staves of his own. Conceding that this was innocently done, yet if the staves mingled are of the same kind, quality, and value, a majority of us are of the opinion that plaintiff can in this action recover its staves, or an equal number to be taken from the common mass, if the separation can be

made without injury. The plaintiff, as we have stated, was not responsible for the mingling; and whether, if it had been, replevin would lie at its instance and for its benefit, we need not determine.

For the errors stated, the judgment is reversed, and the cause is remanded for a new trial.

GATENS et al. v. NEELY et al.

(Supreme Court of Arkansas. Jan. 18, 1902.)

LIMITATION OF ACTIONS—TRUST DEED—IMPLIED OBLIGATION.

Where a trust deed recited that the grantor was indebted to the beneficiary in a certain sum, evidenced by various notes, etc., upon which the beneficiary was liable either as indorser or acceptor, and that the beneficiary might have to pay the same, and that the grantor was desirous of securing the repayment to the beneficiary on or before a certain date, and that the beneficiary had agreed to make advances to the grantor, which advances were to be due on such date, a contention that the obligation of the grantor to make repayment to the beneficiary was an implied one, so that the beneficiary's claim was barred in three years from the maturity of the deed, was without merit.

Appeal from Phillips chancery court; Edward D. Robertson, Chancellor.

Action by Pat Gatens and others against J. C. Neely and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Jno. J. & E. O. Horner, for appellants. R. W. Nichols, I. M. Neely, and Norton & Prewett, for appellees.

HUGHES, J. On February 18, 1891, a deed of trust executed by J. T. Jefferson and his wife, Jennie Jefferson, to W. B. Nichols, as trustee for J. C. Neely et al., on the 9th of February, 1893, was filed for record to secure the payment of \$45,759.14 indebtedness to J. C. Neely, evidenced by various notes, acceptances, indorsements, and accounts, upon which and for which the said J. C. Neely was severally liable either as joint maker, indorser, or acceptor. On January 4, 1896, Nichols, the trustee, foreclosed said deed of trust by sale of the property described therein, by virtue of the power contained in said deed of trust, at which sale said J. C. Neely purchased the lands offered for sale thereunder, and afterwards received a deed of conveyance from Nichols, the trustee, for the said lands, which was duly filed for record. In 1893 Pat Gatens obtained judgment against J. T. Jefferson in the Phillips circuit court in the sum of \$1,735, and on same day Walter R. Jones recovered judgment against said J. T. Jefferson in said circuit court in the sum of \$1,531.25. At the commencement of the suits on February 23, 1891, attachments were issued and levied on the lands in controversy as the property of J. T. Jefferson. The at-

tachments were sustained, and the lands ordered sold. On the 17th September, 1895, the lands were sold, and Gatens and Jones bought them for \$1,000, \$500 of which was credited on Gatens' judgment, and \$500 of which was credited on Jones' judgment. The sale was reported to and confirmed by the court, and a deed for the lands was made to Gatens and Jones, the appellants. January 19, 1898, executions were issued on these judgments, and returned nulla bona. On 23d October, 1897, judgment in favor of Eugene Dupont et al. against J. T. Jefferson in Phillips circuit court for \$3,437.48. Execution issued January 18, 1898, and returned nulla bona. This suit was brought by the appellants to cancel the trust deed, and sale thereunder by the trustee under the power contained in said deed, by virtue of which deed and sale the appellee J. C. Neely claims that by purchase he had obtained title to the lands therein described. The theory of the complaint is that the trust deed was made to defraud creditors; that nothing had ever been paid to or for Jefferson, the grantor in the trust deed, when it was executed by him, or before the 1st day of January, 1892; that it was executed to indemnify Neely against loss from the payment of debts which he might have to pay for Jefferson, but had never paid. The complaint also averred that the claim of J. C. Neely was barred by limitation of three years, being only an implied obligation to reimburse Neely for such payments as he might make on Jefferson's account; that the demand of Brooks, Neely & Co. was barred by limitation, and had in fact been long since paid and satisfied by the application of payments made by Jefferson; that there was no appraisal of the property before sale; that it was sold for less than two-thirds of its appraised value. These are the material allegations in the bill, which shows, also, that the appellants had obtained judgment against Jefferson, and had bought in the lands, and claim that the trust deed to Neely by Jefferson, the sale thereunder, and purchase by and deed to Neely, constituted a cloud upon their title. After considering the testimony and exhibits to the complaint and answer of the defendants, denying the material allegations of the complaint, the court found that there was no equity in the complaint, and dismissed the same for the want of equity. The case comes up here upon appeal.

We are of the opinion that the complaint and the theory of the appellants as to J. C. Neely's claim are not sustained by the evidence, and that the decree of the chancellor is supported by the evidence in the case. Before the 1st of January, 1892, J. C. Neely, it appears, had paid for Jefferson some \$35,000 or more, which by the provisions of the deed of trust from Jefferson to Neely became due the 1st of January, 1892, to Jefferson, and which the deed of trust was

executed to secure. The provision in the deed of trust referred to in this behalf is as follows: "Whereas, the said first party, J. T. Jefferson, is justly indebted to the party of the third part, J. C. Neely, in the sum of forty-five thousand seven hundred and fifty-nine dollars and fourteen cents (\$45,759.14), evidenced by various notes, acceptances, indorsements, and accounts upon which and for which the said third party is severally liable either as joint maker, indorser, or acceptor; and whereas, the said first party is unable to pay them, or his share thereof, at the present time, or when the same shall become due and payable; and whereas, the said third party will or may have to pay the whole thereof; and whereas, the first party is desirous of securing the repayment thereof to the said third party on or before the first day of January, 1892, at which time said sum is to be due and payable; and whereas, it will be necessary for said first party to have supplies and money furnished and advanced by some one to enable him to bear his share of the expenses in planting, cultivating, and gathering the crops to be grown during the current year on the lands above herein described, which the said third party has agreed to make and advance in such amounts, quantities, and sum and at such times as may, in his judgment and discretion, seem right and proper, the amount thereof to be evidenced by the books of account of the said party of the third part, and to be due and payable on the 1st day of January, 1892; and whereas, the said party is also justly indebted to the firm of Brooks, Neely & Co. and the other third party in the sum of fifteen thousand dollars, evidenced by account for that sum now due, but the time of payment of which, in consideration of this conveyance and security, is extended to the first day of January, 1892, at which time the same is made due and payable." According to the terms of this portion of the deed of trust, Jefferson agreed and undertook to repay to J. C. Neely all sums Neely might pay for him before the 1st of January, 1892. The sale under the deed of trust, at which Neely bought the lands in controversy, took place on January 4, 1896. Less than five years—only four years and three days—had elapsed between the 1st of January, 1892, and the sale of January 4, 1896. Therefore the statute of limitations had not barred Neely's right to foreclose the trust deed when the sale was made under it for the debt which was due on the 1st of January, 1892, and which the deed of trust was made to secure. Neely bought in the property at the sale for \$30,000, having before the 1st of January, 1892, paid off Jefferson's debts,—over \$33,000. We think the debt of Brooks, Neely & Co. had been extinguished through the application of payments made by Jefferson before the 1st of January, 1892.

The decree of the chancellor is affirmed.

BERRY v. MEIR et al.

(Supreme Court of Arkansas. Jan. 18, 1902.)
HOMESTEAD—USE OF PROPERTY FOR BUSINESS PURPOSES—SEPARATION—ESTOPPEL—RELINQUISHMENT OF HOMESTEAD RIGHTS.

1. Defendant purchased one-third of a town lot, on which was a three-story building, and conducted therein the business of retail merchant. Subsequently he purchased the other two-thirds of the lot, erected a dwelling house thereon, and used it for residence purposes; the two parts of the lot being separated by a fence. *Held*, that there was no separation of the one-third used for business purposes from the two-thirds used for residence purposes, so as to disentitle defendant to claim the entire lot as a homestead.

2. The mortgaging of the residence portion of the lot by an instrument relinquishing the homestead rights of defendant and wife in that part did not show that only that part was claimed as a homestead, and hence was not an estoppel from claiming the entire lot.

3. Conveyance of the business portion of the lot to defendant's wife was not an indication that that part of the lot was not regarded as belonging to the homestead.

4. Statements by defendant to another than plaintiff that all the lot was subject to defendant's debts could not estop defendant from claiming the homestead as against plaintiff.

5. Under the statute requiring the consent of the wife to any conveyance or incumbrance of the homestead, such statement could not be a binding promise not to take advantage of the homestead exemption, in the absence of any showing that defendant's wife consented thereto.

Riddick and Wood, JJ., dissenting in part.

Appeal from circuit court, Monroe county; Geo. M. Chapline, Judge.

Action by E. F. Meir & Co. against E. F. Berry. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

E. F. Berry, a negro merchant, is the owner of lot 3 in block 14 in the town of Clarendon, Ark. The lot is 75 feet by 125 feet in depth, and of the value of \$900, including improvements. He purchased the north third of the lot, upon which was a storehouse, before he was married. He afterwards purchased the south two-thirds of the lot, built a residence on it, married, and lived there with his family. He built a barn and smokehouse on the north third of the lot, east of the store. A fence separated the residence part of the lot from that upon which the store was located, and there are gates from one lot to another. The store is used for his own business and convenience. E. F. Meir & Co. obtained a judgment against Berry, upon which execution was issued and levied upon the lot in question. Defendant thereupon gave notice, and filed with the clerk of the court a list of his property, and claimed the lot as his homestead and exempt. The clerk issued a supersedeas prohibiting the sale of the lot, and Meir & Co. appealed to the circuit court. In that court Meir & Co. filed a motion to quash the supersedeas as to the storehouse and north third of the lot on the ground that the defendant "held the same out to his creditors as a part of his assets, and the same was a basis upo

which credit was extended to him, and it is therefore segregated, and liable to the judgments of the plaintiffs." On the trial of the motion to quash it was shown that various other creditors had judgments against Berry on which executions had been issued. Louis Solomon, a traveling salesman for Solomon Bros. & Johnson, testified that Berry stated to him "that he owned the dwelling house and storehouse on lot 3, block 14, in Clarendon, and said it was all liable for his debts," and that he sold Berry goods on credit because he said "the storehouse and goods were liable for his debts." A salesman for the house of Newman & Son testified to a similar statement made by Berry to him. It was shown that Berry assessed his property as "N. $\frac{1}{2}$, lot 3, block 14, \$250.00; S. $\frac{1}{2}$, lot 3, block 14, \$400.00"; and that he mortgaged the south two-thirds of the lot to the Cumberland Building & Loan Association of St. Louis, and in this mortgage he and his wife expressly "waived and conveyed all their right of homestead in the land mortgaged." It was also shown that in the latter part of the year 1898 Berry conveyed the north one-third of the lot to his wife, the consideration being "love and affection." Berry testified in his own behalf, and said that he had purchased and improved the lot for a home; that he conveyed a part of the lot to his wife because he had promised her to do so; that the whole lot and improvement was worth about \$900, and that he claimed all of it as a homestead. On this evidence the court found that the north part of the lot, upon which was the storehouse having 25 feet front and running 60 feet back, "had been separated by the defendant Berry from the remainder of his homestead lot, if it had ever been a part thereof, and put into his mercantile business as so much capital." He thereupon quashed the supersedeas as to that part of the lot, and authorized its sale under the execution. Berry appealed.

C. F. Greenlee, for appellant. J. P. Lee, Parker & Parker, and M. J. Manning, for appellees.

PER CURIAM. The question presented by this appeal is whether the storehouse owned by the appellant, Berry, is a part of his homestead. He is the owner of lot 3 of block 14 in the town of Clarendon, and resides, with his family, in a dwelling house on that lot, all of which he claims as a homestead. Certain of his creditors had an execution levied on the lot, and contend that the north part of it, on which the storehouse is located, is not a part of the homestead, nor exempt from execution. Although this storehouse was used by the debtor himself in his own business, there are decisions by the courts of other states to the effect that such a storehouse, entirely separate from the residence of the owner, and not used as an appurtenance or convenience of the dwelling

house, is not a part of the homestead. In *Allen*, 78 Cal. 293, 20 Pac. 679. But a majority of the judges are of the opinion that this court is committed to a different view of the law. In *Gainus v. Cannon*, 42 Ark. 504, Mr. Justice Eakin, speaking for the court, said: "It is a strange and irrational idea sometimes advanced that a man ought to lose his homestead as soon as he attempts to make any part of it helpful in family expenses." To like effect, see remarks of the same judge in *Klenk v. Knoble*, 37 Ark. 298. This view of the law certainly works no injustice to the creditor where the value of the homestead, including the shop or store used for the business convenience of the owner, is small, as it is here, the whole being of the value of \$900. Under these circumstances a majority of the judges are of the opinion that the execution defendant can hold the entire lot as a homestead, including that part occupied by his storehouse, unless he has done something to estop him from doing so. After a careful reading of the transcript, we are all of the opinion that the evidence shows neither a waiver of this homestead right by appellant, nor anything to estop him from claiming such exemptions. The fact that he and his wife mortgaged the south two-thirds of the lot to a building and loan association, and released their right of homestead in the land mortgaged, does not show that they claimed only the portion mortgaged as a homestead, for they had the right to mortgage all or any portion of the homestead. To our mind, this mortgage shows nothing beyond the fact that the part mortgaged was thought to be at least a part of the homestead. Whether it was all or only a part cannot be determined from the mortgage, which throws no light on that question. The deed to his wife of the north third of the lot shows that he intended to convey that portion of the lot to her, but it does not show that it was not a part of the homestead at that time. If it was a part of the homestead, and the deed left any interest still in him, it could still be protected from sale under execution as a part of the homestead. The statement of the appellant made to Louis Solomon, and also to Will Thomason, that "he owned the dwelling house and storehouse on lot 3, block 14, and that it was all liable for his debts," and by which statement they say that they were induced to sell him goods, cannot control the decision in this case. In the first place, these statements were not made to Meir & Co., the plaintiffs; and, if they had been, they did not amount to a waiver of the appellant's homestead rights. It is often the case that men, when contracting debts, express their determination to pay them by saying that all they have is subject to their debts, but this species of boasting does not estop or preclude them from afterwards claiming their homestead and exemption rights, if they choose to do so. It will be

noticed that the statement alleged to have been made by the defendant was that the whole lot, including both the dwelling and storehouse, was liable for his debts. It did not, therefore, show any separation of the storehouse from the dwelling, for the statement puts both together. It was not an assertion that the storehouse was not a part of the homestead, but at most it was only a parol promise that he would not take advantage of the homestead laws. We doubt if, under any view of the law, it could be treated as a waiver or estoppel against the appellant; but, as the law does not now permit the husband to convey or mortgage his homestead unless his wife joins in the execution of such conveyance, the promise, if made, was of no effect, for his wife is not shown to have consented to it in any way. The case of *Klenk v. Knoble*, 37 Ark. 298, upon which counsel for appellees rely, was very different from this, for the debtor in that case gave the creditor a mortgage, and in the description of the property used the following words: "The same being the lots upon which the said Joseph Knoble now has a brewery, and not a part or parcel of the homestead." As the debtor had still remaining, besides the lots mortgaged, a dwelling house and a lot 75 by 140 feet, and as the lot mortgaged (to quote the language of the decision) "constituted no part of his actual residence," the court held that the statement in the mortgage showed an intention to contract the area of his homestead, and estopped him from claiming the part mortgaged as a homestead against the mortgagee. This decision was made before the passage of the act making it necessary for the wife to join in conveyances of the homestead. But the appellant in this case executed no mortgage to the creditor, nor was it shown that either he or his wife had ever stated to the creditor, or any one else, that this storehouse was not a part of the homestead. We find in the transcript nothing to estop him from claiming the whole of this lot as his homestead.

For the reasons stated, a majority of the judges are of the opinion that the defendant has the right to claim the entire lot as his homestead, and that the court erred in quashing the supersedeas as to the part occupied by the homestead. The judgment is therefore reversed, and the case remanded, with an order to overrule the motion to quash.

RIDDICK, J. (dissenting). I fully concur in so much of the opinion as holds that the evidence in this case shows nothing to estop the execution defendant from claiming the storehouse and that portion of the lot on which it was located as a part of the homestead. But whether this store and the land upon which it rested was in fact a part of the homestead is a different question, and, in my opinion, it was not. Our constitution

requires that the homestead shall be "owned and occupied as a residence," and, as this storehouse was not used as a residence, or as an outhouse in connection with the residence, and as a convenience to it, I think it was not exempt. The language of Mr. Justice Eakin in the cases referred to in the opinion of the court I admit is in conflict with this conclusion, but an examination of the cases will show that the question was not decided in either of those cases. In *Gainus v. Cannon* the court held that the owner of a house used as a home could rent a part of it for the purposes of a hotel without forfeiting the right to claim it as a homestead. That decision is in accordance with the usual rule that one who has a house actually used as a residence does not forfeit his homestead right by renting a part of it. To rent the whole of it temporarily would not necessarily work a forfeiture when there was no intention to abandon it as a home. In that case the house held to be exempt was used and occupied as a residence. In the other case of *Klenk v. Knoble* the court decided that under the facts proved the execution defendant was estopped to claim the building levied on by the creditors as a part of his homestead. The court, in other words, held that the building, under the facts proved, was not a part of the homestead, and the remarks of Mr. Justice Eakin on the point involved here must be treated as reflecting only his own views, for the question was not presented by the facts of that case. If we concede that the remarks of Mr. Justice Eakin in the cases cited were agreed to by the other learned judges on the bench at that time, they would still be only an expression of the opinion of judges on a question not before them for decision. While such an opinion is entitled to due consideration, it cannot be regarded as the decision of the court, or binding upon us as a decision would be. Looking, then, at this matter as an unsettled question in this state, I do not think the conclusion of the court in this case is correct. I admit that under the facts here there is not much ground for complaint, for the evidence shows that the whole property claimed as a homestead is not worth above \$1,000. But, if this rule is to be applied to cases where the property used for business purposes is of great value, grave injustice may be done to creditors in this state, for to say that a debtor shall be allowed to hold exempt from claims of his creditors buildings of great value, erected for business purposes only, because erected on land claimed as a part of his homestead, would, it seems to me, do violence to the provision in our constitution which requires that the homestead shall be "owned and occupied as a residence." Const. 1874, art. 9, §§ 4, 5. Under the rule applied in this case a cotton seed oil mill or other manufacturing plant worth \$100,000, if erected on a rural homestead by the owner thereof, when the homestead did

not cover more than 80 acres of land, could be claimed as a part of his homestead, and exempt; and so, in a city, a business house costing as much might be protected as a part of a homestead. I do not think that the framers of our constitution intended any such result. If it be said that the constitution does not limit the value of a homestead when it does not exceed 80 acres in the country or one-quarter of an acre in a town or city, I should reply that this was because the intention was to exempt only the home in the country and the land attached when used for farming or some kindred purpose, and to exempt only the home in a town and the grounds and buildings used in connection with the dwelling. When limited to such uses and purposes, it would be seldom that the homestead exempted would be of disproportionate value. People in cities, not able to pay their debts, seldom invest large sums in expensive dwellings, and 80-acre farms are not usually worth over two or three thousand dollars. For this reason the fact that there is no limit to the value of the rural homestead not over 80 acres in extent, and none to an urban homestead not over a quarter of an acre in extent, rarely works injustice to the creditor, so long as it is confined to property owned and used as a dwelling. But the case is different if the debtor is allowed to erect on the land claimed as a homestead buildings of any character, and for any purpose, and to hold them exempt from his creditors. The use of the property should be such as to notify the creditor of its homestead character; and when a store, factory, or other building is used exclusively for business purposes the creditor is not put on notice that it is a homestead, and it is unjust to him to allow such property to be claimed as exempt by the debtor. *Grosholz v. Newman*, 21 Wall. 486, 22 L. Ed. 471; *Thomp. Homesteads*, § 102. For these reasons I do not think that a building in a town or city, separate from the dwelling, and erected and used exclusively for business purposes, can properly be called a part of the homestead, and I am therefore not able to agree to the decision in this case, being of the opinion that the decision of the circuit court that the storehouse of the debtor levied upon was not a part of the homestead and exempt from execution is correct, and should be affirmed.

WOOD, J., concurs.

BROWN v. RUSHING.

(Supreme Court of Arkansas. Jan. 18, 1902.)
SCHOOL LANDS—SALE—PROCEEDINGS—PETITION—FORM—SUFFICIENCY—EVIDENCE.

1. A portion of the school lands located in a township was sold by the tax collector under Act March 22, 1881, requiring the collector to sell such lands on the petition of a majority of the male inhabitants of the township, and the sale was confirmed as required by law; the report of the sale, as so confirmed, reciting the

filing of a petition. *Held*, in a suit by a subsequent collector for damages against a bidder at a subsequent sale for failing to keep his bid good, after the loss of the original petition, that the confirmation record was sufficient to show the filing of the petition authorizing the sale of such lands, as the confirmation necessarily implied that a sufficient petition had been filed.

2. A petition for the sale of school lands under Act March 22, 1881, requiring the tax collector to sell the school lands located within a township on the petition of a majority of the male inhabitants, is not insufficient, in being directed to the sheriff, who is ex officio collector, as sheriff, and not as collector, as it is a mere mistake in form.

3. A petition signed by a majority of the electors of the township is in compliance with the statute, and it is not necessary to obtain the signature of a majority of all the male inhabitants, including minors.

4. Under Act March 22, 1881, authorizing the tax collector to sell school lands of any township on the written petition of a majority of the male inhabitants of such township, and providing that, if any tract is offered and not sold, it may be offered again on the first day of the next or any succeeding term of the county court, and so offered until sold, without a new petition, a petition so filed with the collector authorizes a subsequent collector to sell the lands, though they have not been offered for sale at intervening terms of the county court.

Hughes and Wood, JJ., dissenting.

Appeal from circuit court, Hot Spring county; Alexander M. Duffie, Judge.

Action by E. B. Toler, as collector of Grant county, against Joseph Brown, for damages for the failure of defendant to comply with a bid for certain school lands. The plaintiff died pending the trial, and F. W. Rushing was substituted as plaintiff. From a judgment in favor of plaintiff, and an order denying a new trial, the defendant appeals. Affirmed.

Wood & Henderson, for appellant. Hill & Auten and Geo. W. Murphy, Atty. Gen., for appellee.

BATTLE, J. This action was brought in the Hot Spring circuit court by E. B. Toler, as collector of Grant county, against appellant, Joseph Brown, under the provisions of subdivision 2, c. 139, Sand. & H. Dig. The complaint, omitting the caption, is as follows:

"Comes the plaintiff, E. B. Toler, as collector of Grant county, Arkansas, by his attorneys, W. D. Brouse and Hill & Auten, and complains of the defendant, Joseph Brown, and for cause of action says:

"That at the general election in 1894 he was duly elected sheriff and ex officio collector of Grant county, Arkansas, and afterwards duly qualified as such, and has been acting as such ever since.

"That at and prior to the 1st day of July, 1895, section 16, township 5 S., range 15 W., was school lands, subject to sale under the requirements of the law.

"That on said day, in the town of Sheridan, and in pursuance of notice duly advertised, plaintiff, as collector as aforesaid, of-

ferred separately for sale to the highest bidder three lots or 40-acre tracts of said land, as the law directs, after having divided and platted said section and numbered the 40-acre lots thereon from 1 to 16, substantially as shown in plat hereto attached, and marked 'Exhibit A,' and made part hereof. The lots offered for sale as above stated were numbered 4, 12, and 16 on said plat.

"That at said offering the defendant bid for lot 4 on said plat the sum of \$305, for lot 12 the sum of \$370, and for lot 16 the sum of \$120, which were the highest bids; and said lots were thereupon duly declared sold to defendant for said sums, respectively.

"But defendant failed and refused to pay any of said bids; and thereupon said lots were duly reoffered for sale, and the Hayward Timber Company became the purchasers of lot 4 at the sum of \$52.50, and of lot 12 at the sum of \$50, and lot 16 failed to sell at any price. The said Hayward Timber Company at said reoffering made the highest bid on said lots 4 and 12.

"That, in consequence of the said failure of defendant to pay his bids as aforesaid, the school fund lost \$252.50 on lot 4, \$320 on lot 12, and \$120 on lot 16; making in the aggregate the sum of \$692.50.

"Wherefore plaintiff asks judgment against the defendant for said sum of six hundred and ninety-two dollars and fifty cents, and interest thereon at 6 per cent. per annum from the 1st day of July, 1895, till paid.

"W. D. Brouse and Hill & Auten,
"Attorneys for Plaintiff."

Appellant filed his answer to said complaint as follows, omitting caption:

"That he denies that the plaintiff gave legal notice of the sale of said land as stated by him. He denies that he divided the said land in forty-acre tracts, as required by law.

"He admits that he bid on lots 4, 12, and 16 as stated in said complaint, but he does not remember the amount of his bids on the respective lots, and he denies that he bid the sums on said lots as stated in the complaint.

"He admits that the said lots were struck off to him by the sheriff at said sale, and that he refused to pay for the same, but he has no knowledge or sufficient information upon which to form a belief as to whether the plaintiff offered said tracts again for sale as required by law, and he denies that he did so offer said tracts, and that the same at such offerings only brought the sums specified in said complaint.

"He admits that said lot 16 failed to sell as stated in said complaint, and he denies that plaintiff has any right of action against him by reason of such failure.

"Defendant further says that, after making the bids for the land as herein stated, he became satisfied that the plaintiff had no authority to sell said land, and that the title which he would undertake to convey by said sale would be worthless, inasmuch as there

had been no petition presented to the said plaintiff, as collector, signed by the inhabitants of the township in which said section of land was situated, as required by law, requesting the sale of said land, and that the said sheriff was selling said land wholly without authority of law.

"He denies that the said plaintiff complied with the law in advertising and making said sale, and he denies that he had authority to advertise and offer the said land for sale at the time and in the manner as stated in said complaint, and he says that the acts of the plaintiff in selling said land were wholly unauthorized and void, and for that reason he has no cause of action against him herein.

"Wherefore he prays judgment herein for his costs and for other relief.

"Wood & Henderson,
"Attorneys for Brown."

On the 9th day of August, 1899, the death of Toler was suggested, and F. W. Rushing was substituted as plaintiff in his stead.

The case was then submitted to the court, sitting as a jury, in part, upon the following evidence:

First. The deposition of E. B. Toler, taken in his lifetime, as follows: "I am sheriff of Grant county, and have been such sheriff for nearly three years. I was elected in the year 1892. On the first day of July term, 1895, of Grant county court, I, as sheriff of said county, offered for sale the sixteenth section school land in township 5 S., R. 15 W., in Grant county. I offered said land for sale in 40-acre lots at the court house in Grant county somewhere about one o'clock on Monday, the first day of said term of said county court. One P. G. Gates, who represented Hayward Timber Company, bid for, and was the highest bidder for, lots 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, and 15; and the same were sold to said Hayward Timber Company, and the certificates of purchase were issued by me to the Hayward Timber Company. No petition of any kind was presented to me by the inhabitants of said township requesting the sale of said lands, and I never saw a petition from such inhabitants asking such sale. I examined the records of the county court, and found that Sheriff Reese, former sheriff of this county, made a sale of the part of the sixteenth section land in 1882, under the law as contained in the acts of the legislature of 1881.

"The only evidence of any kind that I had of such petition was an order of the county court which appears on page 194 of the record of said court for the year 1882, and is in words and figures as follows:

"Tuesday Morning, January 8, 1882. Court met pursuant to adjournment, present and presiding as on yesterday, before whom the following were had, to wit:

"In the matter of the sale of sixteenth section land, township 5 S., R. 15 W.: On

this day comes S. D. Reese, the sheriff of Grant county, Arkansas, and files herein the following report:

"To the Hon. County Court, Grant County, Arkansas, January Term, 1882; Hon. W. T. Poe, Presiding:

"In obedience to a petition of a majority of the legal electors of congressional township 5 south, range 15 west, and in accordance with an act of the last general assembly approved March 22, 1881, I advertised for sale, and on the first Monday (it being the second day) of January, 1882, proceeded to offer for sale, the 16th section in said township, after having the same appraised as the law directs; and W. H. Wilson bid off, and was declared to be the highest and best bidder for, the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, at \$1.50 per acre; the same being three-fourths of the appraised value. * * *

"All of which is respectfully submitted.

"S. D. Reese, Sheriff."

—And the court being well and sufficiently advised, it is considered, ordered, and adjudged that the sale of the said land, and the action of said S. D. Reese, be, and it is hereby, confirmed, except as to the recommendation herein."

Second. The deposition of S. D. Reese, as follows: "I was sheriff of Grant county in 1882, and sold two forties of the sixteenth section of township 5 S., R. 15 W., and made the report which has been offered in evidence in this case, which was approved by the county court at the January term, 1882. I do not know where the petition is upon which I acted at the time, but I am satisfied that it was signed by a majority of the voters in said township, or I would not have acted on it. I have very little recollection about the matter, and when the question was first mentioned to me, recently, I did not remember anything about it; but after seeing said order of the county court, and having my memory refreshed on the subject, I now remember that such a petition was presented to me. I do not know any name now that was signed to said petition, and cannot state the name of any person whose name was signed to it. I think none of the signers on the petition I acted on were boys. I would not have considered a petition with the names of minors on it. I don't know that said petition was signed by a majority of the male inhabitants of said township, but it was signed by a majority of the electors of said township. I went out of the sheriff's office about eight years ago."

Fourth. The evidence of W. D. Brouse, as follows: "I live at Sheridan, Grant county, and am a lawyer by profession. I was present when E. B. Toler sold the sixteenth section land in Grant county, on the 1st day of July, 1895. The sale was made at public outcry by E. B. Toler, as collector of Grant county, between twelve and three o'clock,

and lots 4, 12, and 16 were struck off to Joseph Brown, and he failed to make his bids good; and said lots or tracts were offered for sale again by said Toler the next day between twelve and three o'clock, and I bought lots 4 and 12 for the Hayward Timber Company. Mr. Toler adjourned the sale on the 1st day of July because there was not sufficient time on the 1st to finish the sale."

Fifth. The deposition of P. G. Gates, who testified that he was present at the sale of the sixteenth section made by Collector Toler in Grant county early in July, 1894, and bought some of the land as the agent of the Hayward Timber Company; that lots 4 and 12 were knocked down and sold to Mr. Joseph Brown; that he made a memorandum of the bids made by himself and Joseph Brown in pen and pencil on a plat of paper attached to his deposition as Exhibit A; that his bids were \$5 less than the figures for which lots 4 and 12 were knocked down to Brown. "Brown bid \$370 for lot 12, and \$305 for lot 4, and they were knocked down to him for those figures. At the second offering of lots 4 and 12 on the following day, W. D. Brouse bid for me for the Hayward Timber Company."

Sixth. A transcript from the record of the county court of Grant county, as follows:

"In the matter of sale of sixteenth section lands: On this day the report of E. B. Toler, collector of Grant county, Arkansas, of sale of sixteenth section lands, filed herein this day, is examined, and, it appearing that the collector aforesaid has in all things complied with existing laws in regard thereto:

"It is considered, ordered, and adjudged that sale of said lands by said collector, and all his acts therein, be, and they are, approved and confirmed; and it is ordered that said report be spread upon the records of this court, which is accordingly done, as follows, to wit:

"Report of sale of sixteenth section lands, situated in section sixteen, township five (5) south, of range fifteen west: The undersigned would report that, after advertising and having the following subdivision of said section appraised as the law directs, he did on the 1st day of July, 1895 (the same being the first day of the July county court), proceed to sell the same, and said lands were sold to the following named persons, to wit: Lots 4, 12, and 16 to Joseph Brown, for seven hundred and ninety-five (\$795) dollars. The said Joseph Brown failing to perfect his bid, by refusing to pay the amount of his bid, the sale was continued until July 2, 1895 (it being the second day of said court), whereupon I did, between the hours as prescribed by law, reoffer said lots 4, 12, and 16 of said section 16, and said lots 4 and 12 were sold to Hayward Timber Company for \$52.50 and \$50, respectively, making a total of one hundred and two and $\frac{50}{100}$ dollars.

"Said lot 1 was not sold, for want of a bidder.

"The expense of this sale was: Cost of confirmation, 75 cents; collector's commission on \$102.50, at 2 per cent., \$2.05. Leaving a net balance of \$99.70 in my hands, due the sixteenth section fund, on account of this county.

"E. B. Toler."

The court, over appellant's objections, and to which he at the time saved proper exceptions, made the following findings of facts:

"S. D. Reese was sheriff and collector of Grant county at the time the petition to sell the lands in controversy was presented to him in 1882, and he acted in offering and selling the lands embraced in the petition as collector, and not as sheriff.

"The petition presented to said Reese contained a majority of the adult male inhabitants of the township in which the land to be offered was situated.

"E. B. Toler, who made the sale of lands in controversy, was at the time sheriff and collector of Grant county, Arkansas, and acted in the matter of the sale as collector, and not as sheriff."

Appellant thereupon requested the court to make the following finding of facts, which the court refused, and defendant saved proper exceptions:

"The sale of a part of the sixteenth section made by Reese on the 3d day of January, 1882, was made by the said Reese, as sheriff of Grant county, on a petition presented to and passed on by him as sheriff.

"The petition upon which the sale was made by Reese in 1882 was signed by a majority of the legal electors of the township where the land was situated, but there is no evidence showing that said petition was signed by a majority of the male inhabitants, or of the adult male inhabitants, of said township.

"The sale of the land out of which this controversy arose was made by E. B. Toler, as sheriff of Grant county, in 1895."

Appellant also requested the court to make the following declarations of law, which were refused, and appellant saved proper exceptions:

"(1) E. B. Toler had no authority, as sheriff or collector of Grant county, in 1895, to sell the land in the sixteenth section under the petition presented to S. D. Reese, as sheriff, in 1881 or 1882.

"(2) The petition presented to S. D. Reese, as sheriff, in 1881 or 1882, conferred no authority on the said Reese to sell said land as sheriff."

"(4) The sale by S. D. Reese, as sheriff, in 1882, was without authority; and the sale by Toler, as sheriff or collector, on the petition passed on by said Reese as sheriff, was also without authority."

"(8) There being no evidence in this case that there was no collector in Grant county at the time of the sale of the land by Toler,

the said Toler had no authority to sell said land as sheriff."

The court on the 16th day of August gave judgment for appellee, and appellant on the same day filed his motion for a new trial, which was overruled, and he appealed.

Appellant assigns three errors, as follows:

"First. The circuit court erred in finding as a matter of fact, as requested by appellee, that S. D. Reese was collector of Grant county in 1882, and acted as such, and not as sheriff, in selling the land embraced in the petition then presented to him, and in refusing to find the converse of said proposition, as requested by appellant.

"Second. The circuit court erred in finding as matter of fact that the petition presented to S. D. Reese in 1882 was signed by a majority of the adult male inhabitants of the township in which the land to be sold was situated, as requested by said appellee, and in refusing to find the converse of said proposition, as requested by appellant.

"Third. The circuit court erred in refusing to declare, as law of the case, that the petition presented to S. D. Reese in 1882 conferred no authority on said Reese to sell in 1882 either as sheriff or collector, and said petition conferred no authority on Toler to sell in 1895."

We shall consider these alleged errors in the order stated.

1. The court did not err in finding and holding that Reese was collector of Grant county in 1882. He was sheriff and ex officio collector of that county. There is no evidence that he had forfeited the office of collector at that time. Being sheriff and collector, the sale of the land by him in 1882 was by authority, if he was authorized to make the same in either capacity. *Budd v. Bettison*, 21 Ark. 582; *Keith v. Freeman*, 43 Ark. 296.

2. Appellant insists that the evidence was not sufficient to show that the petition to Reese, the collector, for the sale of the sixteenth section in township 5 S., and in range 15 W., was signed by a majority of the adult male inhabitants of that township. Reese testified that he did not know that it was signed by a majority of the male inhabitants, but it was signed by a majority of the electors of the township. He could not remember whether it was signed by a majority of the male inhabitants. The petition being lost, the judgment of the county court of Grant county, in which the land in question lies, was read as evidence to show that the sale of the same was legal and approved. The judgment was read without objection, and as it tended to prove that the statutes prescribing upon what conditions, and the manner in which, the sale should be made, were complied with, the court, sitting as a jury, had the right to regard it as legitimate and proper for that purpose. *Frauenthal v. Bridgeman*, 50 Ark. 348, 7 S. W. 388.

Under the law, it was the duty of Reese,

the collector, to report the sale to the county court of Grant county for investigation, and it was the duty of that court to ascertain whether the sale had been made by authority and in conformity with the law. Reese, the collector, did so, and the county court approved the sale. This necessarily implied that the sale was made upon a petition of the majority of the adult male inhabitants of the township, and in the manner prescribed by law. The order of the county court was therefore sufficient to sustain the finding of facts by the court as to the sufficiency of the petition for the sale.

3. It is insisted that the petition presented to Reese did not confer upon him the authority to sell, because it was directed to him as sheriff. But we do not think that this defect affected the authority to sell. He was sheriff and collector. He was asked to sell the land. Upon a proper petition, he could do so in his capacity of collector. The petition asked for the exercise of that power. The address of it to him as sheriff was a mere mistake in the form of it, which did not affect its sufficiency.

The act entitled "An act to provide for the sale of the sixteenth section in this state," approved March 22, 1881 (Acts 1881, p. 154), under which Reese, the collector, sold, provides (page 155, § 1) that "whenever the inhabitants of any congressional township in this state shall desire the sale of the sixteenth section of such township * * * they may, by written petition, signed by a majority of the male inhabitants of such township, require the collector of taxes of the county, wherein such school land is situated to sell the same," and that (Id. § 2) "upon the reception of such petition the collector shall ascertain that it is signed by a majority of the male inhabitants of such township," and that it shall be his duty to sell when he ascertains that it was signed by such majority. Will a majority of the adult male inhabitants be sufficient?

The word "inhabitant" has many meanings. It has been construed to mean an occupier of lands; a resident; a permanent resident; one having a domicile; a citizen; a qualified voter. Its construction has generally been governed by the connection in which it has been used. In *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526, the construction of an act was involved which authorized towns and cities to subscribe for stock in railroad companies, with the consent of the inhabitants of such city or town, to be ascertained by an election held for that purpose. The court held that the word "inhabitants," in that act, meant legal voters. In that case the meaning of the word was determined to some extent by the nature of the act to be done. In this case it should be determined in the same manner.

Under the statutes of this state a male person under the age of 21 years is incapable

of managing his estate, or absolutely binding himself for the payment of money for anything except necessities. He cannot devise his lands, nor participate in the annual school meetings, nor vote in any election. As a general rule, he cannot do any act necessary to be done in the management and disposition of his lands, except subject to avoidance or ratification when he reaches the age of 21 years. In view of these laws, he was certainly not intended to be included in that class of inhabitants authorized to petition for the sale of a sixteenth section of land. The object of the act of 1881 in making a petition signed by a majority of the inhabitants of a township necessary to procure such sales was doubtless for the purpose of enabling them to protect the interest of their township in such land; and this precludes the idea that any person the law presumes and pronounces, and is generally known to be, incompetent to perform such acts, should form any part of the majority. The act does not provide for its own defeat, and it would tend to do so if it included infants in the word "inhabitants." For in that event it would make the child in arms and male persons of all ages competent petitioners, and in some cases place it within the power of children to control such sales, and thereby rob the townships of the safeguards it intended to throw around them. If such was its intention, why were females, and especially adults, excluded? No such construction can reasonably be placed upon the act.

Appellant contends that Toler, as collector, had no authority to sell the land in question in 1895 under the petition presented to Reese in 1882. This contention is based upon that section of the act of 1881 which provides that, if "any tract [school land] offered is not sold, it may be offered again, upon like notice, upon the first day of the next, or any succeeding term of the county court, and so on offered until sold without a new petition." Act 1881, p. 156, § 5. He insists that the words, "the next or any succeeding term of the county court, and so on offered," should be construed to mean that the land should be offered at each succeeding term of the county court until sold. We do not think so. It should have been construed in that way if the language had been, "if any tract was offered and not sold, it might be offered again, upon like notice, upon the first day of the next and every succeeding term of the county court, and so on offered until sold, without a new petition." But "or" does not mean "and," but "either," and "any" does not mean "every," but "one indifferently." We think that the act of 1881 authorizes the sale of any tract, if it was not sold at the time it was first offered, on the first day of any succeeding term of the county court.

Judgment affirmed.

HUGHES and WOOD, JJ., dissent.

FISCHER et ux. v. SIMON.

(Supreme Court of Texas. Feb. 10, 1902.)

TRUST DEED—FORECLOSURE—NOTICE OF SALE—ENACTMENT OF REVISED STATUTES—EFFECT.

Acts 1889, p. 143 (Rev. St. 1895, art. 2369), provided that notice of a sale of real estate under a trust deed should be given "as now required in judicial sales." The statute as to judicial sales in force at the time when the article was enacted did not require personal service of notice on defendant in execution. The act adopting the Revised Statutes in 1895 provided that "the provisions of the Revised Statutes, so far as they are substantially the same as the statute in force at the time when the Revised Statutes shall go into effect, * * * shall be construed as continuations thereof and not as new enactments of the same." *Held*, that article 2369 was not re-enacted by the adoption of the Revised Statutes, but continued in force, and the statute in force as to judicial sales in 1889, rather than a subsequent statute requiring service of notice on a defendant in execution is applicable to a sale under a trust deed, and no service on the maker is necessary.

Certified questions from court of civil appeals, First supreme judicial district.

Action by J. H. Simon against F. Fischer and wife. There was judgment in favor of plaintiff, and the court of civil appeals certified questions to the supreme court. For opinion in court of civil appeals, see 66 S. W. 883.

Beauregard Bryan, for appellants. Searcy & Garrett, for appellee.

GAINES, C. J. The court of civil appeals for the First supreme judicial district have certified to this court for decision the following questions:

"In this cause now pending before us on appeal, we rendered judgment on the 28th day of November, 1901, reversing the judgment of the trial court and remanding the cause. Since this action on the part of this court, our attention has been called to the fact that in reversing the judgment we announced a holding in direct conflict with an opinion rendered by Associate Justice Fly, of the court of civil appeals at San Antonio, in the case of *Swain v. Mitchell*, 66 S. W. 61, 3 Tex. Ct. Rep. 408. At the time we considered and decided the cause, the case cited had not been reported, and was not otherwise called to our attention. Inasmuch as no motion for rehearing has been filed in this cause, we have this day set aside the judgment on our own motion, and now certify the point of conflict for your decision. We set aside our judgment, not because we believe it erroneous, but because, in the absence of a motion for rehearing, we consider that course the correct practice. We adhere to our holding, and do not concur in the ruling announced by the court of civil appeals of the Third district in the case cited, *supra*. In so far as necessary to disclose the point of conflict, the nature of the suit and the facts as disclosed by the record are stated as follows:

"This was a suit in trespass to try title brought by appellee, J. H. Simon, to recover of F. Fischer and his wife, M. Fischer, about 6½ acres of land in the city of Brenham, Washington county, Texas. Appellants answered by plea of not guilty, general denial, and specially that appellee claimed title by purchase made at trustee's sale under a deed of trust with power of sale, and that the sale was void because no written notice of the proposed sale was served on them as required by the law governing such sales. Appellants prayed that the sale be declared void, and the cloud upon their title be removed. A trial before the court without a jury resulted in a judgment in favor of appellee for the land. There is no statement of facts in the record, but the trial court found the facts to be as follows: 'In January, 1898, defendant F. Fischer and one H. Knittel, now deceased, executed and delivered to V. A. Williams a deed of trust on the land described in plaintiff's petition, in which T. B. Botts was named as trustee, to secure certain indebtedness due by said Fischer to said Williams, evidenced by their promissory note. That thereafter, on August 12, 1898, said Botts, as trustee, upon the request of said V. A. Williams, duly advertised said land for sale for the time and in the manner required by law, as provided in article 2369, Rev. St. 1895, and sold same at public auction at the court-house door in Brenham, Washington county, Texas, on the first Tuesday in September, 1899, at which sale the plaintiff became the purchaser for a valuable consideration, of \$320, paid by him to said trustee, and received from him a deed to said land. That said Fischer had oral notice of said sale, but no written notice was served on him, and his attorney gave notice at the sale that it had not been served on him. Both parties claimed under a common source by agreement in open court.'

"The statutes in force governing judicial sales at the date of the original enactment of article 2369 did not require written notice to the execution debtor. The law in force at the time the sale in question was made required that in judicial sales the defendant should have written notice in addition to the published notice required by law.

"We reversed the judgment on the ground that the failure of the trustee to serve written notice of sale on Fischer as required by the law of judicial sales in force at the date of the deed of trust and date of sale rendered the sale void. In so concluding, we held that under the provisions of Rev. St., art. 2369, the law of judicial sales in force at the date of the trust deed and of the sale should have controlled the trustee. The court of civil appeals of the Fourth district has held, on a similar state of facts, that the law is otherwise.

"We also respectfully certify for your decision this question: 'Was the failure of the trustee to serve upon the debtor written

notice of the contemplated sale such a departure from his power, as conferred and restricted by the trust deed, or such an irregularity, as to render void the sale by the trustee?"

The decision of the question depends upon the proper construction of article 2309 of the Revised Statutes of 1895, which, in so far as it bears upon the point, reads as follows: "All sales of real estate made in this state under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated. Notice shall be given as now required in judicial sales, and such sales shall be made at public vendue between the hours of ten o'clock a. m. and four o'clock p. m. of the first Tuesday in any month," etc. This provision first became a law by an act of the 21st legislature approved March 21, 1889 (Laws 1889, p. 143), and is incorporated in the Revised Statutes in precisely the same language. The question is, does the word "now" refer to the time at which the Revised Statutes went into effect, or to the time at which the original act became a law? And this depends, in a measure, upon the further question whether it was the intention of the legislature which enacted the Revised Statutes to make them a mere compilation of the laws then existing, or to incorporate in the revision, by changes and amendments, new legislation. This is not an open question in this court. The point came before us for consideration in the case of *Insurance Co. v. Walker*, 2 Tex. Ct. Rep. 242, 61 S. W. 711, and it was there held that the Revised Statutes of 1895 were but the continuation of the former laws. In the opinion, Mr. Justice Brown, speaking for the court, says: "In the act of the legislature authorizing the revision of the laws of the state, which became a law in 1891, the codifiers were required, in revising the laws, to include all articles of the former Revised Statutes which had not been repealed, and to add in their order the amendments of the Revised Statutes, where they were expressed as amendments of certain articles, in the order in which they should come according to their subjects and the numbers of the articles given; and concerning other statutes this language is used: 'And all other of said statutes passed as aforesaid which are general and permanent in their nature shall be collated and arranged into their proper titles, chapters, and articles with marginal references and chapter head lines similar to those used in the present Revised Statutes: provided, that in revising the statutes referred to in this section, said commissioners shall, without making radical changes therein, so revise them as to render them concise, plain and intelligible.' The commissioners for revision were not authorized to make changes in the substance of the statute laws of the state, but simply to arrange them in convenient form. To make sure that the laws of the state were not materially changed by

such revision, the legislature which adopted the Code as revised enacted a chapter of general provisions to govern in the construction and application of the laws embraced in the Revised Statutes, of which general provisions section 19 is in these words: "That the provisions of the Revised Statutes, so far as they are substantially the same as the statutes of this state in force at the time when the Revised Statutes shall go into effect, or of the common law in force in this state at the said time, shall be construed as continuations thereof and not as new enactments of the same." In the article construed in that case, the Revised Statutes used the words "this chapter," instead of the words "this act," as used in the original statute; and the effect of the change, if literally construed, was very materially to enlarge the scope of the law, yet it was held that the construction of the original statute should govern. If, under the act which authorized the appointment of commissioners to revise our statutes, and the Revised Statutes themselves, as adopted by the legislature, it is proper to hold that a material change of phraseology in the latter was not intended to change the construction of a law, it follows, for a stronger reason, that it must be held that no change of construction was intended when the same language is employed. Therefore the question is to be determined just as if the Revised Statutes had never been adopted by the legislature. Since the rule is that a statute speaks as of the time at which it takes effect, it follows that by the words, "notice shall be given as now required in judicial sales," the legislature meant to provide that in all sales under trust deeds, and the like, made after the act became operative, notice should be given as required by the laws for judicial sales existing at that time; and the effect was to incorporate the law as to notice as to sales under execution in the act itself, and to make such laws a part thereof. The result is the same as if, instead of making the existing requirements of the law as to notice in judicial sales a part of the act by merely referring thereto, the legislature had inserted such requirements in specific terms, without such reference. If the purpose had been to make the law of notice as to sale under powers given in contract liens conform to such laws as to notice in judicial sales as might be in effect at the time the sale was made, it seems to us that they could and would have used apt words to express such intention. If the word "now" had been omitted, then a doubt might have arisen as to whether it was the purpose to make the then existing law as to judicial sales apply at all times, or to provide that the requirements as to judicial sales existing at the time of the sale under a power should be observed. But it seems to us that the word "now" removes the difficulty, and leaves no room for construction as to the legislative intent in that particular.

We conclude that personal notice to the mortgagor was not a prerequisite to a valid sale, and therefore answer the question in the negative.

MISSOURI, K. & T. RY. CO. OF TEXAS v.
WOOD et al.

(Supreme Court of Texas. Feb. 10, 1902.)

NEGLIGENCE—CONTAGIOUS DISEASE—CUSTODY OF PATIENT—PERMITTING PATIENT TO RUN AT LARGE—SPREADING INFECTION—LIABILITY OF CUSTODIAN.

1. Where a railroad company, in pursuance of a contract to care for its sick employes, took charge of an employe afflicted with smallpox, and hired a nurse and watchman to care for him, through whose negligence he escaped while delirious, and communicated the contagion to plaintiff, the railroad company owed to each individual member of the community the duty to prevent the spread of the disease, and hence plaintiff had a right of action for damages arising from the breach of such duty.

2. The railroad company was not relieved from liability by reason of the fact that the city in which the employe became ill would not have been liable for the acts of its officers in failing to maintain the quarantine, since the railroad company volunteered to perform the act without being required or authorized by law to do so.

3. While delirious and incapable of self-control, the patient was in the charge of the servant of the railway company, so that the latter was liable for failure to exercise due care in preventing him from going at large.

Certified questions from court of civil appeals of Fifth supreme judicial district.

Action by H. D. Wood and others against the Missouri, Kansas & Texas Railway Company of Texas. On certified questions from the court of civil appeals.

T. S. Miller, W. C. Jones, Craddock & Looney, and Head & Dillard, for appellant. Evans & Elder, for appellees.

BROWN, J. The court of civil appeals for the Fifth district has certified to this court the following statement and questions:

"The appellant, the Missouri, Kansas & Texas Railway Company of Texas, enters into agreements with its employes, whereby, in consideration of deducting a stipulated sum from their wages each month, that in case any one of them should become sick or injured while in its service it would furnish them surgical and medical attention. Appellant entered into a contract with Alonzo Dickson, an employe, whereby it was agreed that in consideration of deducting twenty-five cents from his wages each month, that, if he should become injured or sick, it would take charge of him, and treat him for such injury or sickness. On August 1, 1899, and for many years prior thereto, the appellant was operating and controlling a hospital department for the purpose of treating its sick and injured employes. The Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company constitute what is known as the Missouri,

Kansas & Texas Railway System. Said companies operate, in connection with and as a part of the claim and legal departments, their hospital department under one general management for the mutual benefit and interest of the companies and their respective employes. The Kansas Company owns a hospital at Sedalia, Mo., that is used by the two companies, where some of the employes of appellant are sent for treatment when sick or injured. During the latter part of July, 1899, Alonzo Dickson, who was then in the employment of appellant as a section hand, and had been in such employment for four years in Hunt county, received a slight injury in such service, and was sent to the Sedalia hospital, arriving there on August 1, 1899. At the time he was placed in the hospital he was placed in a ward with some colored patients who were broken out with smallpox, smallpox having existed in the hospital from the 10th day of July previous. He complained to the surgeon in charge, and told him that those negroes had smallpox, and that he desired to leave the hospital. He was told by the surgeon that it was only chickenpox, but to come around the next morning, and he would give him a pass back to Greenville. On the next morning—August 2, 1899—he was discharged from the hospital, sent back to Hunt county, and placed at work for appellant under James Ewing, section foreman. George McNeill was the house surgeon of said hospital. It was his duty to examine, admit, treat, and discharge patients sent to the hospital, and to keep a register showing the names and address and the dates of admission and discharge of all patients sent to the hospital for treatment. This surgeon was inexperienced in the treatment of smallpox, never having treated a case prior to this time, there never having been a case of smallpox in the hospital since he had been in charge, he being put in charge in 1890, the same year he graduated from college. It was not determined that there was smallpox in the hospital until August 2, 1899, the day that Dickson was discharged from and after he left the hospital. On that day the city of Sedalia quarantined the hospital on account of the prevalence of smallpox in the hospital, and it remained under quarantine until September 11, 1899. Prior to the 2d day of August appellant did not know that smallpox existed in the hospital, but learned it on that day, and that Dickson had been exposed thereto, and was liable to break out with the disease in about fifteen days. No precautions were taken to protect him, or the public against him, until the 19th day of August, when he broke out with the disease. On August 3, 1899, the division superintendent of appellant, A. D. Bethard, at Denison, Texas, sent to A. W. Baxley, at Greenville, Texas, the road master of the Mineola division of appellant's lines, the following telegram: 'During quarantine at Sedalia hos-

pital, local surgeons will look after sick or injured employes except those who desire to go to hospital, who may be sent to Dallas, Ft. Worth, or Houston infirmary.' When Dickson broke out with smallpox, and this fact was made known to the company's local surgeon, Dr. Garnett, he wired to Dr. Yancey, the chief surgeon, to know what to do with him, and the chief surgeon wired him: 'Isolate and quarantine him, secure a nurse at reasonable wages, and give him such attention there as he will need. Write me particulars and daily expenses. Attend to vaccination, and watch any one who may have been exposed by him.' When R. M. Chapman, who was then the mayor of Greenville, learned that Dickson had smallpox, and before he learned that he was an employe of appellant, and had been exposed to the disease at its hospital, he purchased a tent, and arranged with the owner of some lands, preparatory to taking charge of Dickson. This was Sunday afternoon, August 20, 1890. But before taking charge of Dickson, Dr. Garnett showed Chapman his instructions from Yancey, at which time Dr. Garnett, acting under the said instructions of Dr. Yancey, took charge of Dickson, and undertook to isolate and quarantine him. He placed him in the tent and on the land that had already been secured and designated by Chapman as a quarantine camp, and Chapman took no further steps until after Dickson had escaped, which was on Tuesday morning, August 22d. On that afternoon the mayor, acting on the understanding that the railway company would defray the expenses, hired one additional guard for the pest camp, and established a detention camp near the pest camp, and confined in it all who had been exposed to Dickson. Dr. Garnett, having taken charge of Dickson, undertook to isolate and quarantine him on behalf of the railway company, neglected to employ a sufficient number of attendants or guards to restrain him, but negligently employed an incompetent Mexican, and placed him in charge of Dickson to guard and nurse him for the first two days. At the time the Mexican was put in charge of Dickson, he (Dickson) was delirious with fever, and it was known that persons thus suffering would likely escape. While Dickson was in a delirious condition, the Mexican went to sleep, and negligently permitted him to escape from the camp, and to wander upon the premises of appellees, and communicate to them and their child the disease, inflicting the injuries complained of by appellees. Appellants exercised due care in the selection of their surgeons and physicians.

"Questions: (1) Under the foregoing facts, did the negligence of appellant's local surgeon in employing an incompetent nurse or attendant for Dickson, and the negligence of said attendant in permitting said Dickson to escape while delirious, render appellant liable for the damages sustained by appellee

by reason of the smallpox being communicated to him and his family by said Dickson? (2) Is the appellant liable for the damages sustained by appellee by reason of having exposed Dickson to the smallpox at the hospital at Sedalla, and afterwards assuming care of him, in failing to isolate and have him properly guarded to prevent his escape and communicating the disease to appellee and family?"

The contract between appellant and Dickson and the acts of the railroad company in sending him to the hospital at Sedalla, where he became infected with smallpox, were pertinent to the issues in this case only to the extent they tend to show that Dr. Garnett, in taking charge of the sick man and undertaking to care for him, acted as appellant's agent, and within the scope of his authority. The court of civil appeals having found that Dr. Garnett was authorized by the appellant to take charge of Dickson, it will be unnecessary for us to notice the relative rights and liabilities of the railroad company and Dickson.

Counsel for appellant claim that the quarantine of Dickson was a public duty, which the city of Greenville might have taken in hand without liability for the acts of its officers, from which the conclusion is drawn that for performing the same acts the railroad company is entitled to the same immunity. *White v. City of San Antonio* (Tex. Sup.) 60 S. W. 426, is cited to support the proposition. It is sufficient to say that the appellant occupied a very different position to that of the city of San Antonio, for the latter was engaged in the enforcement of a law of the state discharging a duty enjoined upon it by the statute, while the appellant voluntarily undertook to do what the city might have done, being neither authorized nor required by law to do so. It did not represent the state of Texas, and was not entitled to the immunity from liability which is accorded to the state.

Counsel urge the proposition that the railroad company owed no duty to the appellee; therefore there was no liability for Dickson's escape. *House v. Waterworks Co.*, 88 Tex. 238, 31 S. W. 179, 28 L. R. A. 532, is relied upon to sustain that position, but the cases are so dissimilar that the principles announced in that case are not applicable in this. In *House v. Waterworks Co.* the two classes of cases are distinguished upon authorities cited and discussed. Nonliability for a failure to perform a duty due to the public as such is there commented upon and contrasted with the class of duties which are intended to benefit the individuals composing the public. This case belongs to the latter class, because whatever affects the health of the community necessarily affects the individual members thereof; and, when the duty to prevent the spread of a contagious disease rests upon a private corporation or person, an obligation arises in favor of each

member of the community, and a right of action exists in favor of him who suffers from its breach.

But counsel for the railroad company earnestly insist that it is not liable for the act of Dickson in going away from the camp, although he was at the time delirious to the extent of being incapable of self-control. In *Board of Bishopp*, 2 C. P. Div. 192, Denman, J., stated and answered the question thus: "Can a man be said to 'expose' or to 'be in charge of' one who is of full age and a free agent? A man weakened by disease may fairly be said to be 'exposed' by the person who is attending upon him. The statute cannot be limited to legal control, or it will become a dead letter." That case proceeded before the court upon the ground that the defendant had exposed one infected with a contagious disease by going with him through the streets and in public places, but the defendant was acquitted because he had used proper care in doing so. The case answers the objection made that the escape of Dickson and his going upon the premises of the appellee could not be charged to the railroad company. Whenever the duty of restraining another arises, and the power of control over him exists, liability will follow upon a failure to perform the duty. In *District v. Hill*, 6 App. Cas. 204, Lord Blackburn said: "When the disease is infectious, there is a legal obligation on the sick person and on those who have the custody of him not to do anything that can be avoided which shall tend to spread the infection; and, if either do so,—as by bringing the infected person into a public thoroughfare,—it is an indictable offense, though it will be a defense to an indictment if it can be shown that there was a sufficient cause to excuse what is *prima facie* wrong." The same principle obtains in reference to animals of known vicious character which the owner is required to restrain to prevent them from inflicting injury upon others; and the owners of animals known to be infected with contagious diseases must control them in such manner as to prevent them from communicating the disease to the animals of other persons. *Agency Co. v. McClelland*, 89 Tex. 490, 34 S. W. 98, 35 S. W. 474, 81 L. R. A. 660, 59 Am. St. Rep. 70. If the railroad company had undertaken to keep a horse known to be affected with a contagious disease at the same place and by the same means, and the horse had been permitted, through the negligence of the attendant, to escape, and had communicated the disease to a horse, the property of the appellee, there would be no doubt of the liability of the railroad company for the damages. If there be a sound reason for denying to Wood as great security for his wife and children against the diseased man as would have been accorded to him in favor of his beasts against a diseased horse, it has not been suggested by counsel for the appellant, and we are unable

to discover any tenable basis for the distinction. The quantum of diligence which was required of the appellant depended upon the character of the disease and the danger of communicating it to others. "If the business be hazardous to the lives of others, the care to be used must be of a nature more exacting than required where no such hazard exists. The greater the hazard, the more complete must be the exercise of care." *Railroad Co. v. Hewitt*, 67 Tex. 478, 3 S. W. 705, 60 Am. Rep. 32. Smallpox is commonly known to be a highly contagious disease, and very dangerous to human life, and isolation of the infected person is generally recognized as necessary to afford protection to the community in which he may be found. The court of civil appeals found as a fact that it is a characteristic of smallpox, known to appellant's agent, that the patient is liable to become delirious to the degree of irresponsibility, and to wander from the place of confinement, being thereby liable to come into contact with persons in the neighborhood. The object of placing Dickson in the tent and supplying a nurse and guard for him was not alone to care for and to provide for him, but also to protect the public against infection by contact; and when the railroad company undertook to treat Dickson for the disease, and to care for him at the place designated by the mayor of Greenville, it assumed the duty of using ordinary care to prevent Dickson from exposing himself in delirium, or from being exposed otherwise, so as to communicate the disease to other persons; and, having failed, through the negligence of its employes, to use such care, and by reason of its negligence Dickson having escaped and communicated the disease to the appellee's family, the railroad company was liable for the damage caused thereby. *Rex v. Vantandillo*, 4 Maule & S. 75; *Rex v. Burnett*, Id. 273; *Haag v. Board*, 60 Ind. 511, 28 Am. Rep. 654; *Smith v. Baker* (C. C.) 20 Fed. 709; *District v. Hill*, 6 App. Cas. 204.

To both questions we answer that under the facts stated the railroad company was liable to the appellee Wood for the damages caused to him by reason of the smallpox being communicated to him and his family by Dickson through the negligence of the agent of the railroad company.

TERRY v. STATE:

(Court of Criminal Appeals of Texas. Dec. 18, 1901.)

CRIMINAL LAW—RECEIVING STOLEN PROPERTY—INSTRUCTIONS—OMISSION OF JUDGE TO SIGN.

1. An instruction on an issue not raised by the evidence is properly denied.

2. Where a thief took an animal, and rode it to the home of defendant, who was charged with receiving stolen goods, and placed it in

his possession and custody, it did not consist of driving stock from its accustomed range, within Pen. Code, art. 884, but was an ordinary theft of the animal.

3. Where the court read a special charge, requested by defendant, to the jury, and stated to them that it was given as the law applicable to the case, the omission of the judge to sign such charge is not reversible error.

Appeal from district court, Hamilton county; W. J. Oxford, Judge.

Jim Terry was convicted of receiving and concealing stolen property, and appeals. Affirmed.

Eldson & Eldson, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted under an indictment charging substantially that on or about June 18, 1901, "Jim Terry * * * did then and there unlawfully and fraudulently receive from George Terry, and did unlawfully and fraudulently conceal, certain corporeal personal property, to wit, one mule, the same being then and there the property of and belonging to John Nelson; and which said property had theretofore been acquired by the said George Terry in such manner as that the acquisition of the same comes within the meaning of the term theft; and the said Jim Terry then and there well knowing the same to have been so acquired at the time he received and concealed the same as aforesaid," etc. The jury assessed his punishment at five years' confinement in the penitentiary.

Complaint is made that the court erred in refusing the following special charge, requested by appellant, to wit: "If you believe from the evidence that George Terry did not take the animal alleged to be stolen by him from the possession of the alleged owner with the intent at the time of such taking to permanently deprive the owner of the value of the same and to appropriate it to his own use, but that he, the said George Terry, willfully took into his possession the alleged stolen animal, and drove, used, or removed it from its accustomed range, without the consent of the alleged owner, and with intent to defraud said owner, then you will acquit the defendant." We do not think the evidence raised the issue presented by the above-quoted charge, and the court was correct in refusing the same.

By his third bill of exceptions appellant complains of the court's refusal of the following special charge, to wit: "If George Terry willfully took into his possession the alleged stolen animal, and drove, used, or removed it from its accustomed range, without the consent of the alleged owner, and with intent to defraud the alleged owner, he would be guilty of the theft of said animal; and if they so believed, and further believed that defendant received or concealed said animal knowing that it had been so acquired by the said George Terry, they should find him guilty, and assess his punishment at

confinement in the penitentiary for not less than two nor more than five years, or by a fine of not exceeding one thousand dollars, or by both such imprisonment and fine, at their discretion." The court appends this explanation to the bill: "Counsel for defendant orally argued to the court that the acts set out in article 884, Pen. Code, though called by the legislature theft, do not in fact constitute theft, as defined in our statute, inasmuch as said article 884 contains acts not included in the general definition of theft; and orally asked the court not to submit said acts under said article as constituting theft, and further requested the court in writing to submit such acts as a defense to theft." Under the explanation of the court we do not think any reversible error shown, especially under the facts of this case, since the evidence does not raise the issue of driving stock from an accustomed range. We have heretofore held that under an ordinary charge of theft prosecution could not be maintained, as contended by appellant, under the terms and conditions of article 884; that is, a charge under indictment for ordinary theft could not be maintained for driving stock from the accustomed range. Long v. State, 39 Tex. Cr. R. 461, 48 S. W. 321, 73 Am. St. Rep. 954; Carr v. State, 9 Tex. App. 463; Sands v. State, 30 Tex. App. 578, 18 S. W. 86. It appears from the evidence here that the thief took the animal in charge, and rode it to the home of defendant, placed it in defendant's possession and custody. This would not constitute driving stock from its accustomed range, as contemplated by article 884, but would be an ordinary theft of said animal. If appellant's contention be correct, under every case where the animal in question was taken from the range defendant must be prosecuted under article 884, Pen. Code. We do not think this position is the law. If one take an animal from its range, and carry it off and sell it, in one sense this would be taking it from one range to another, but not within contemplation of article 884. Said article contemplates a driving of stock from its accustomed range, and not the bare theft of an animal running at large near the home of its owner, taken in custody by a thief, carried to another or adjoining neighborhood and sold.

In his second bill of exceptions, appellant complains because the court failed to sign the special charge requested by him and given to the jury by the court. The court explains this bill by stating that at the time said charge was read to the jury the court stated to the jury that he gave the same as the law applicable to the case. This complies with the spirit of the law, and appellant's contention is without merit. The jury had the charge in their possession. It was given them by the court, and the fact that the court did not sign the same would not constitute reversible error.

Appellant also insists that new trial should

be granted on account of newly-discovered evidence of Mrs. E. V. Terry, by whom he expected to prove that the mule in controversy had a brand on it prior to the time appellant took it. This testimony could have been secured by the use of even ordinary diligence, the witness being appellant's mother. Because the state proved said fact upon the trial, and appellant was surprised thereby, affords no legal basis for a new trial.

No reversible error appearing in the record, the judgment is affirmed.

CORLEY v. STATE.¹

(Court of Criminal Appeals of Texas. Dec. 18, 1901.)

CRIMINAL LAW—TRIAL—CONTINUANCE—DILIGENCE—CHARGE.

1. Where, in a criminal case, defendant has shown an utter lack of diligence to procure absent witnesses, it is not error to refuse his application for continuance because of their absence.

2. Where the charge given is correct, and covers defendant's defense, it is not error to refuse to give a special charge requested by him.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

James Corley was convicted of the theft of a mare, and appeals. Affirmed.

W. S. Thomas, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of a mare, and his punishment assessed at confinement in the penitentiary for a term of five years. There is but one bill of exceptions in the record, which is to the action of the court overruling appellant's motion for continuance. As explained by the court, and as is apparent from the application itself, there was an utter lack of diligence to procure the absent witnesses. If they had been present, and had testified as alleged, which was in the nature of alibi evidence, we do not believe it would have had any weight with the jury in the face of the overwhelming testimony in this case establishing appellant's guilt. His defense presents a most remarkable story, one that would tax the credulity of the most credulous. To our minds, instead of reasonably accounting for his possession of the stolen animal, it confirms our belief in his guilt. This was supplemented by his flight to Tennessee after he had been indicted and arrested for this offense. There was no error in the action of the court overruling his application for continuance, nor in overruling his motion for new trial predicated on that ground.

In motion for new trial he excepted to the

charge of the court, and the refusal of the court to give the special charge requested. The charge given was correct, and covered appellant's defense as presented in his testimony; hence, if the special charge had been properly drawn, it was not necessary to be given.

The judgment is affirmed.

CORTEZ v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1902.)

HOMICIDE—CONTINUANCE—CONFESSIONS—FORMER OFFENSE—EVIDENCE—DECLARATIONS—CONSPIRACY—ARREST WITHOUT WARRANT.

1. Continuance should have been granted defendant for absence of a witness, unable because of sickness to attend the trial, whose testimony was calculated to act in his favor; witness having been summoned by the state, and defendant having relied on its diligence.

2. A confession is not admissible where witness does not thoroughly understand the language in which it was given, and cannot repeat the words used.

3. Whether defendant's confession was freely and voluntarily made is a proper question for the jury, a number of sheriffs having assembled at the jail, they being armed, and having recently vigorously pursued him, he being brought out on their motion, and after warning been informed that they desired him to make a statement, and in this connection being given intoxicating liquors to drink, and he not being told that he could not be compelled to make a statement.

4. Though the attempted arrest of defendant, during the course of which the person for whose murder he was tried was killed, was illegal, the fact that he had previously killed an officer and fled from arrest is admissible as tending to show his purpose and intent in what he did.

5. Where a member of a posse, in attempting to make an arrest at a house, was killed, evidence of what was said and done by them in consultation and agreement with each other, as to the manner of their approach to the house, and what should be done on arrival there, is not competent against one accused of the killing.

6. One accused of killing a member of a posse while trying to make an arrest cannot show that shortly thereafter members of the posse expressed to each other the opinion that one of them accidentally did the killing, and that a bottle of liquor they had bought was the cause of it; though any one who made such statement, if called as a witness, could, on cross-examination, be asked if he did not make the statement, and though it could be shown that the posse were intoxicated at the time.

7. Testimony of witness that he had talked with defendant in jail, and that defendant could talk English, is admissible, this being no act or declaration of defendant with reference to the offense.

8. Where defendant did no act at the time in aid or encouragement of the person who killed a member of a posse attempting to arrest him, he is not responsible therefor, in the absence of a prior agreement or conspiracy between him and the person who did the killing.

9. In case of a killing of a member of a posse attempting to make an arrest without a warrant, an instruction should be given in regard to the right to so make an arrest and the right to resist.

¹ Rehearing denied February 5, 1902.

Appeal from district court, Gonzales county; M. Kennon, Judge.

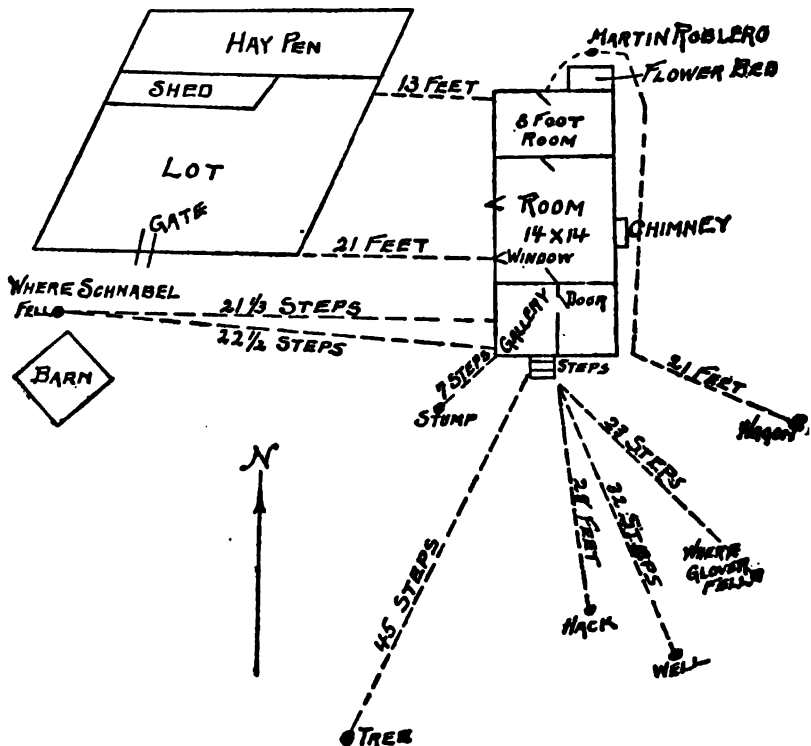
Gregorio Cortez was convicted of murder, and appeals. Reversed.

B. R. Abernathy, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 15 years.

It appears from the statement of facts that appellant, a few days before the alleged killing, in Gonzales county, had killed the sheriff of Karnes county, and had fled. Sheriff Glover, of Gonzales county, with a posse, was searching for appellant in the latter county. On their way to the place of one Henry Schnabel they met him, and he returned with them to the house of Martin Roblero, a Mexican, arriving about 8 o'clock at night. They approached the house from the north and rear. Sheriff Glover and Crispino Alcantar, a deputy sheriff, went around the house on the east side, and the other members of the posse, Swift, Howard, Schnabel, Karnstadt, and Harper, went around on the west side of the house. Almost immediately after they approached the house the firing commenced. The sheriff and

his deputies fired a number of shots, and some of the Mexicans at the house returned the fire. Several of the state's witnesses say that when the sheriff approached the house he accosted Martin Roblero, who was at the northeast corner. Davis testified that he said, "Hello, Martin; this is the sheriff of Gonzales county. Where is Bonifacio?" (Bonifacio being the son of Martin Roblero, and accused of theft.) Karnstadt testified that he said, "Hello, Martin; I am the sheriff of Gonzales county." Martin Roblero testified that he merely said, "Howdy, Martin," and immediately rode on around the house. The testimony indicates that as soon as Glover passed the southeast corner of the house a man on the steps at the front of the house began firing, and that he and the sheriff continued firing at each other until the sheriff fell from his horse mortally wounded. The testimony also indicates that, about the same time the firing began on the south and west of the house, some firing came from the house; that Schnabel, deceased, was killed during this firing, near the barn, which was west from the house about 20 yards. The plat herewith attached shows the situation of the house and the immediate environments, indicating where the sheriff was killed, and also where Schnabel, deceased, was killed:



The testimony indicates that when the posse approached the house Martin Roblero and appellant were at or near the northeast corner of the house, appellant having arrived at the house only a short time previously, and it is suggested that he must have gone from that point around the east side of the house toward the south; but whether it was he who had the duel with the sheriff, and finally shot him, is not made clear. From the record it appears there were two other men (Mexicans) at the house besides appellant, to wit, Bonifacio (the son of Roblero), and a low, heavy-set, dark Mexican. What part they took in the fight is not made manifest. As to who killed Schnabel is one of the important questions in the case. But, according to the uncontradicted testimony, whoever killed him must have been very close, as his head near the wound was powder burned, and the party who inflicted the wound must have stood within five or six feet of him.

S. T. Davis, a deputy sheriff, testified that the last time he saw Schnabel he was on horseback, about 15 steps from the house. Harper and Swift were there. Swift was at the back door; there had already been firing from the front of the house; that as he passed the house he saw a man run in the direction of the creek; that he told him to hold up; that the man never spoke, but fired at him, and they ran around a tree several times, firing at each other; that the man evidently had on shoes, as he saw shoe tracks around the tree the next morning. He does not suggest that this was defendant.

Swift says that he got off his horse, and ran in the back door; that the last he saw of Glover he was on the east side of the house, on horseback, and Alcantar, who had gotten off his horse, was behind him on foot. The first shots he heard were fired as he stepped in the back door. Martin Roblero went in the house in front of him, and when he got in the back door the shooting began at the front steps. While he was standing in the back door two men were running back and forward, and he did not like their maneuvers, and a man came running in the room where he was, and he shot at him and he fell. Another man ran in, and a woman came in between said party and witness, and he could not shoot again. He arrested these two men, and they are now in jail. He found in the house one single-barrel shotgun, one Winchester, and three pistols. The guns were loaded; the pistols were not. None of them had been used that night.

Harper, another witness for state, testified as did the others with reference to approaching the house and the direction the parties took. He further stated that when he got to the southwest corner of the pen he got off his horse, and walked up about halfway of the south line of the fence of the pen, between it and the barn where Schnabel was killed. The first firing he heard sounded

near the southeast corner of the house. There was a light in the house, and firing in the house, and witness fired in at the window. He saw Schnabel off his horse twice, from the light of the window. He passed in and out of the light, near the southwest corner of the house. Directly he saw Schnabel at the barn, heard a shot right at him, heard him groan, and saw him fall. He was within 10 or 12 steps from witness. On cross-examination, witness admitted that he may have said that night he saw the Mexican woman shoot Schnabel from the window, and that he (witness) shot her; that was his theory that night; that he did not think he could have shot Schnabel, as he shot into the window; that he had a Winchester, and shot twice at the window; that he did not think it possible that he might have shot Schnabel, as he shot in the window.

Howard testified substantially that the posse rushed up to the house in a run; that Glover accosted Martin Roblero, saying, "Hello, Martin; where is Bonifacio?" that Martin made some answer in Spanish; Glover did not speak, but rushed on around toward the southeast corner of the house, about 10 or 12 steps from the house; that he stopped on the north side of the house; that the first shooting came from the front of the house, and heavy firing from near the southeast corner; that he could not see the shots from where he was, but could tell from the flashes; that he saw Schnabel after he got around on the west side of the house; first saw him on horseback by the light from the window in the house; then saw him two or three times near the south window, on the west side. This witness also testified on cross-examination that shortly after the shooting he heard Harper, one of the posse, say that a woman who was wounded shot Schnabel from the window of the house; that he saw her when she shot Schnabel, and that he (Harper) shot the woman; that Harper told him he thought the body southwest of the house, near the barn, was Schnabel. He did not say that he knew it was Schnabel.

This is about all the testimony that bears on the identity of the party who may have shot Henry Schnabel, except the confession of appellant, which is, in effect, that defendant said he got to Martin Roblero's house between sundown and dark; that he went into the house, and asked for some water, and they gave him a cup of coffee; that after drinking the coffee he pulled off his shoes, as his feet hurt; he asked for Martin, and they told him he had gone hunting; that he walked to the back door, and saw Martin coming; that he told Martin he wanted to speak with him, and that Martin took him around on the east side of the house, between the corner and the chimney; that it was dark; that he and Martin talked a short while, when the posse came up in a gallop, and shot off their pistols; that defendant

then ran, shooting as he ran, at the head man, and ran by the barn, shooting back; that he did not know whether or not he had shot anybody; that he stayed all night in a field, and went back the next morning and got his shoes. Defendant said he fired two or three shots in retreating. On cross-examination, the witness said that instead of "posse," as stated by him in direct examination, defendant had used words meaning assaulting party, and not posse.

It may be stated here that the testimony showed that the posse were really in pursuit of appellant to arrest him for the killing of Sheriff Morris in Karnes county. They had no warrant, and there is testimony tending to show they had no opportunity to get a warrant. However, appellant controverts this. It may also be remarked that there is no testimony tending to show any preconcert or conspiracy on the part of the other Mexicans who were at the house to aid appellant in resisting an arrest. The testimony shows that he had only arrived at the house a very short time before the posse came up, and there is no evidence that appellant saw or had opportunity to see either Bonifacio or the heavy-set swarthy Mexican who was seen passing by one of the witnesses.

This is a sufficient presentation of the case in order to discuss the questions raised by appellant's assignments of error.

Appellant assigns as error the action of the court in overruling his motion for change of venue. That matter, however, cannot be considered, inasmuch as the bill of exceptions filed in term time does not embrace the statement of facts; the statement of facts being filed in connection with the statement of facts in the case, after the expiration of the term, under an order allowing 10 days in which to file such statement. *Wright v. State*, 40 Tex. Cr. R. 447, 50 S. W. 940; *White's Ann. Code Cr. Proc.* § 681.

Appellant's motion for continuance should have been granted. The application was based on the absence of Crispino Alcantar, who had been summoned by the state (defendant relying on the state's diligence), and at the time of the trial was confined to his bed with sickness, and not able to attend. This witness was one of Sheriff Glover's posse, and was the only one who accompanied the sheriff around the east end of the house; that is, he followed the sheriff around that way, the sheriff being on horseback and he on foot. This is a case, so far as the identity of the party who shot Henry Schnabel is concerned, depending on circumstantial evidence; and, if appellant did not shoot and kill Schnabel, his responsibility for the latter's death would turn on whether or not there was a prior conspiracy between him and the person who may have killed deceased, or co-operation and concert of action at the time between him and the party doing the killing. The testimony for the state does not tend to show any conspiracy between appellant and some other

person who may have killed deceased; and it further shows that appellant at the time of the approach of the posse was at the northeast corner of the house, talking with Martin Roblero. Now, if he ran off in a southerly direction from the house, and was the party who killed Glover, he could hardly have been the same person who shot Schnabel. The testimony further becomes material, in view of the fact that some of the witnesses testified that, when Glover came to where Martin Roblero was, he announced he was the sheriff, and inquired for Bonifacio; and the application shows it was expected to be proved by said witness that Glover did not announce on his approach to the house that he was the sheriff, and had come with a posse for the purpose of making an arrest. His affidavit taken at the inquest is referred to and made a part of the motion, and this shows that his testimony (the case being one of circumstantial evidence) was calculated to operate in favor of defendant in other respects than those mentioned above. The court committed an error in overruling appellant's motion.

By appellant's third bill of exceptions he seeks to involve the court in an alleged secret conference with the district attorney, pending the motion for continuance. As explained by the court, this bill should not have been allowed, as it was a reflection on the court. Under the qualification there was nothing improper in the action of the judge in communicating, as he did, with the district attorney in regard to the motion for continuance. Indeed, his action was intended to and did shield appellant from any injurious result connected with the matter; and it occurs to us that, on the explanation by the judge, counsel for appellant should have promptly withdrawn the bill, and not have insisted, as he does here, that it was a secret conference between the judge and the district attorney.

The state offered the confessions of appellant through the witness Rogers, who stated that he was not thoroughly acquainted with the Spanish language, and could not repeat the language used by defendant, but could understand what defendant said, and correctly interpret it into English. Appellant objected to this testimony on various grounds, among others that, not thoroughly understanding the Spanish language (the language in which defendant made his statement), he was not qualified as a witness to testify as to said confession. In this contention appellant was correct. *Underh. Ev.* § 147, states the rule as follows: "A witness called to prove an oral confession need not repeat the exact words of the accused, but it is absolutely essential that he should remember the substance of what was said in the conversation, and be able to state it accurately, and unless it should affirmatively appear that the witness thoroughly understood the language in which the prisoner spoke the confession should be rejected." And to the same

effect see *State v. Buster* (Nev.) 47 Pac. 194; *People v. Gelabert*, 39 Cal. 663. Now, this witness not only states that he could not repeat the language used by defendant, could not undertake to give his words, but could merely give a translation in English of what appellant had said in Spanish. Appellant further contends that the testimony is not a confession, but the statement of an exculpatory fact,—that is, appellant stated he had never been in Gonzales county, where the killing occurred,—and that this could not be used in evidence against appellant, unless he had become a witness, and a predicate had been laid for his contradiction, which was not the case here. While this was not a confession, strictly speaking, it was a criminative fact; that is, in connection with other evidence which showed that appellant was at the place of the killing, it was used by the state as an inculpatory fact. The authorities referred to by appellant would appear to support him. *Ferguson v. State*, 31 Tex. Cr. R. 93, 19 S. W. 901; *Quintana v. State*, 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730. However, the later authorities appear to authorize the introduction of such testimony under a proper warning. *Mixon v. State*, 38 Tex. Cr. R. 66, 35 S. W. 394; *Bailey v. State*, 40 Tex. Cr. R. 150, 49 S. W. 102; *Hernan v. State* (Tex. Cr. App.) 60 S. W. 766.

In connection with this bill of exceptions, we will also notice appellant's fourth bill, which relates to the testimony of the witness Tom, as to the confessions of appellant made in his presence. It appears that, after the witness Crowther had testified as to confessions made before him, he remarked to appellant, "That will do; I am through," and he turned to attend to other business; that at this juncture Capt. Sheeley came in, and remarked, "I would like to ask defendant some questions;" that Sheeley and defendant then entered into a conversation, which witness Crowther did not hear. Witness Tom then stated that he came into the room about this time, and heard the remark made by Capt. Sheeley; that he brought a flask of whisky, and gave defendant, and that he heard the conversation between Sheeley and defendant; that it was in the Spanish language, and Sheeley interpreted it into English; that he (witness) could not speak or understand the Spanish language thoroughly, but he could understand what defendant said; that what he would testify as to the confessions of defendant would be from the interpretation given by Capt. Sheeley. However, the court on this point informed witness that he could not testify what defendant said through an interpreter, but could only testify what he understood defendant to say, without the aid of an interpreter. Witness then proceeded to state that defendant said in retreating he went by the barn. On cross-examination, however, this witness stated that the word used by defendant which he interpreted as barn was "casa," which means

a "house," and witness did not know what word in the Spanish language means barn. The introduction of this testimony, as shown in the bill of exceptions, illustrates the danger of this character of testimony, and the wisdom of the rule that requires the witness who interprets to thoroughly understand the language in which the confession was made. The retreat by appellant becomes a very material matter in this case. If appellant retreated by the house, and went south, this would tend to show he was the party who killed Glover, and not Schnabel; whereas, if he retreated by the barn, he may have been the party who killed Schnabel. This testimony should not have been admitted. See authorities cited supra.

Bart Crowther was introduced by the state to prove the confession of appellant made at the jail in San Antonio. It is shown that shortly after appellant's arrest and incarceration in said jail, some time in June, 1901, Sheriff Vann, of Kerr county, Joe Sheeley, sheriff of Starr county, F. M. Fly, sheriff of Gonzales county, and one or two others came to witness, who was the jailer, and asked that defendant be brought out of his cell into their presence, that they desired him to act as interpreter, and ask defendant if he desired to make any statement in regard to the killing of Glover, sheriff of Gonzales county, Morris, sheriff of Karnes county, and Henry Schnabel. Defendant was brought into the presence of said parties, and witness, at their request, informed defendant that the parties present desired him to make a statement, and informed defendant that any statement made by him would be used against him on the final trial of the cause growing out of said killing; that defendant did not suggest or request that he be permitted to make such statement; that he gave defendant a glass of beer, and some one gave him a small flask of whisky, but defendant was not under the influence of liquor. Witness thereupon narrated the confession of defendant, set out in the statement of facts; that said officers were armed, and were active in the pursuit and capture of defendant. Defendant objected to the introduction of said confession, for the reasons that defendant was being plied with liquor to induce such confession; that the officers present were there for the purpose of inducing and forcing defendant; that the facts and circumstances surrounding the confession show that the same was not voluntarily made, but that defendant was induced to make the same, and that he was then in both physical and mental duress compelled to make the same. The court allowed the bill, with the statement that there was no evidence tending to show that defendant was in the least under the influence of liquor, as a small flask of whisky was given him upon his own request, and he had taken one drink only when he made the statement. As shown by the bill, we are of opinion that

said confession was admissible. But, as was said in *Thomas v. State*, 35 Tex. Cr. R. 179, 32 S. W. 771: "The circumstances under which the confession is made are of very great importance. They must be looked to in all cases, and when this is done, and there is nothing pointing to the motive prompting the confession, it will be received." This was a case involving a confession in connection with an alleged inducement or promise made to defendant, but the principle in both cases is the same. While here no inducement was held out to appellant, the facts that a number of sheriffs assembled at the jail, who were armed; that they had recently been vigorously pursuing the prisoner, and on their own motion had him brought out, and, after warning him, witness informed him that the gentlemen present desired him to make the statement above mentioned, and in this connection was given intoxicating liquors to drink,—might suggest that appellant's statement under such circumstances was not entirely free and voluntary, more especially as he was not told that he could not be compelled to make any statement. It occurs to us, under the state of facts as detailed in this bill, the court should have submitted the question to the jury as to whether or not this confession was freely and voluntarily made, after appellant had been duly warned.

The state was permitted, over appellant's objection, to prove by the witness Choate that on the 14th day of June, 1901, he went with Morris, sheriff of Karnes county, to where defendant and his brother were, in Karnes county, to arrest defendant on a charge of horse theft; that an altercation occurred, and defendant shot and killed Morris, after Morris had shot and badly wounded defendant's brother,—to all of which, and to the introduction of any testimony of the killing of Morris, defendant objected, for the reason that the same was irrelevant and immaterial to any issue, and because improper testimony. The court explains the bill as follows: "That the state merely showed the killing of Sheriff Morris by this witness, and it was admitted for what it was worth, for the jury to determine the motive of defendant in shooting Schnabel (if he did shoot him). Furthermore, this same fact was proved, without objection, by the witness Martin Roblero, who testified that defendant told him that he had killed Morris." Under the doctrine laid down in *Jacobs v. State*, 28 Tex. App. 79, 12 S. W. 408, said testimony was admissible. That was a case in some respects similar to the one at bar, and it was there said "that the former killing established a circumstance which tended to show defendant's motive in committing the homicide. It tended to show that he was a fugitive from justice; he had resolved to fight and resist arrest for a capital crime at any and all hazards, regardless of consequences, and regardless of whether his arrest should

be attempted legally or illegally. It furthermore tended to explain the conduct and motives of the officers and posse that were seeking to arrest defendant, and to throw light upon the whole transaction. It was in fact a part of the *res gestae* of the homicide." Of course, the fact that appellant may have killed the sheriff of Karnes county, and fled from arrest, did not authorize an illegal arrest. But, conceded that the arrest was illegal, the testimony would tend to indicate the purpose and intent of appellant in what he did. Nevertheless, in such case, it was the duty of the court to carefully guard appellant's rights as against an attempted illegal arrest. His action in resisting an illegal arrest might show such a wanton killing as to indicate murder, or it may be no more than manslaughter, or it might be self-defense.

The state was permitted to prove by Swift and Davis that before the posse reached the house where the killing of Glover and Schnabel occurred they had a consultation, and agreed with each other as to the manner of their approach to the house, and what should be done on arriving at said house. The facts as to what said parties said and what they did in pursuance thereof are not stated in the bill, and we cannot revise the action of the court in this regard. However, we would state that this character of testimony was not competent.

Appellant offered to prove by certain witnesses that shortly after the killing a number of the members of the posse discussed the killing of Schnabel among themselves, and expressed to each other the opinion that he had been accidentally killed by Harper, a member of the posse. This was excluded by the court, and appellant insists this was error. As presented, we do not agree with this contention. Of course, if any member of the posse who made such statement or declaration had been introduced as a witness by the state, appellant on cross-examination could have probed such witness as to this matter, and have asked him if he had not stated on a certain occasion that Schnabel was killed by Harper. But the bill does not present the matter in this shape.

The same observations made with reference to this bill are applicable to appellant's tenth bill, in which he proposed to prove that sometime after the homicide, and while certain of the posse were together conversing as to the killing, some one (who was not identified) stated that the black bottle they bought at Ottine was what did the work and caused the killing. It was competent on cross-examination to prove by the witness who may have made that remark that he made it, and it was competent, as was attempted, to show that the sheriff and his posse were intoxicated at the time of the homicide.

We do not think there was any error in permitting Sheriff Fly to testify that he had

talked with defendant in jail, and that he could speak English. This was no act or declaration of defendant with reference to the offense. The sheriff could testify as a fact that appellant could understand and speak English, and if it appeared, on probing his means of information, that this fact had been learned through his intercourse with appellant while in jail, it would not exclude the testimony.

We think it was permissible for the state to show that Bonifacio had not been arrested. At any rate, we fail to see how it could injure appellant.

Appellant complains of the action of the court charging on the doctrine of principals, insisting that there is no evidence in the record showing that if some one else besides appellant killed deceased, Schnabel, there is no testimony showing that appellant acted with such other party as a principal in that homicide. We have examined the record carefully, and there is no positive testimony showing that appellant had entered into any conspiracy prior to the homicide with any other person then present; yet, without any preconcert, appellant may have participated with some other person in the killing of Schnabel, and this might be shown by the circumstances occurring at the time of the killing as to what appellant did in that connection. However, the charge on this subject should have been carefully guarded; and, if appellant did no act in aid or encouragement of the party killing Schnabel at the time, he would not be responsible for the acts of such other party, in the absence of some prior agreement or conspiracy between him and such other party.

Appellant also complains of the court's charge on manslaughter, claiming that it was too restrictive, and limited appellant's rights to the firing which occurred when the parties approached the house, and did not authorize the jury to consider what occurred during the conflict. On another trial we would suggest that the court might by a fuller charge remove any objection on this account.

Appellant urgently insists that the court committed an error in refusing his special requested instructions Nos. 2 and 3, which are as follows:

"(2) Having in view the foregoing charge, the jury are further instructed that, under the facts, before they would be authorized to convict defendant of murder in either the first or second degrees, they must first find from the evidence that, at the death of Henry Schnabel, the sheriff, R. M. Glover, with whom and under whom Schnabel was acting, was in the act of making, or attempting to make, a legal arrest, and unless you should so find you should acquit defendant of murder, and then proceed to inquire whether or not, under the evidence, defendant is guilty of manslaughter.

"(3) In connection with the foregoing

charge No. 2, the jury are instructed that where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the person accused of such felony. In order to make the attempted arrest of defendant by Glover lawful (if you believe that, at the time of the killing of Henry Schnabel, Glover was making such attempt), you must find the existence of all the following facts, to wit: (1) That Glover, as sheriff, had satisfactory proof that defendant had committed a felonious killing of W. T. Morris, in Karnes county; (2) that such proof had been made upon the representation of a credible person; (3) that the defendant was about to escape; and (4) that Glover had no time to procure a warrant for defendant's arrest; or (5) that if he had time to procure such warrant he made no effort to do so. The absence of any one or more of these facts would make the attempted arrest unlawful, and you should in that event so find."

The court does not appear to have given any charge on the subject of arrest. It does occur to us that a charge on this subject should have been given, because if there was no purpose on the part of the sheriff, and those with him, to find and arrest appellant for the killing of Sheriff Morris, then the acts of himself and those accompanying him were without excuse. True, something is said in the testimony about arresting Bonifacio, but it occurs to us that this was a mere pretext. Even if this was the purpose, the rights of the parties in this connection should have been explained by the charge of the court. Undoubtedly the object of the posse in going to the house of Martin Roblero was to arrest appellant for the killing of Sheriff Morris. There is no claim that they had a warrant. Therefore the law authorizing an arrest without warrant should have been given, and the rights of the sheriff and his posse in executing the arrest should also have been stated to the jury. It does not follow from this that appellant would have been justified in resisting an illegal arrest without warrant. If he did not give the sheriff time to declare his purpose, but fired on him and his posse, then he could not claim self-defense. Or if he had determined beforehand not to be arrested, and to resist arrest at all hazards, and before the sheriff or his posse put him in jeopardy of life or serious bodily injury, real or apparent, he drew his weapon and began firing, in that event he would not be guiltless. If, on the other hand, the sheriff and his posse, without any warrant, having no time to procure one, charged upon defendant, and without any notification of their purpose to arrest him before firing upon him, he would have the right to resist such attempt. In our opinion,

the court should have given the law on this subject fully.

For the errors discussed, the judgment is reversed, and the cause remanded.

RENFRO v. HARRIS.

(Court of Civil Appeals of Texas. Jan. 29, 1902.)

SCHOOL LANDS—FORCIBLE ENTRY AND DETAINER—JUSTICE'S COURT—JURISDICTION—ISSUES—TITLE—POSSESSION—EVIDENCE—DIRECTING VERDICT.

1. Where there was no evidence that the sale of school land to plaintiff was forfeited, an assignment of error, in rejecting evidence of a sale to defendant after sale to plaintiff had been "legally forfeited and canceled," cannot be sustained.

2. Where plaintiff was an actual settler on school land, an assignment of error that the court, by overruling defendant's plea to jurisdiction, decided "that a naked trespasser, who has fenced in free school land, may invoke the remedy of forcible entry and detainer and dispossess a bona fide settler," is without merit.

3. An action of forcible entry and detainer in justice's court involves only the issue of prior possession, and hence a plea to the jurisdiction, on the assumption that the case involves the issue of title, should be overruled.

4. Where, in an action of forcible entry and detainer of school land, the commissioner's certificate shows a sale to plaintiff, a cancellation of such sale, and reinstatement because the cancellation was erroneous, a rejection of that part of the certificate showing the cancellation is not prejudicial to defendant.

5. In an action of forcible entry and detainer of school land, it is not proper to go outside the records of the land office to show a state of facts which would impeach such records and show a forfeiture not declared by the office.

6. Where, in an action of forcible entry and detainer of school land, it clearly appeared that plaintiff was in possession, that his possession was recognized by the land office, and that defendant entered unlawfully, it was not error to direct a verdict for plaintiff.

Appeal from district court, McCulloch county; John W. Goodwin, Judge.

Action by E. W. Harris against Thomas Renfro. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of forcible entry and detainer by appellee Harris against appellant Renfro, brought in justice's court of precinct No. 1, in McCulloch county, where there was verdict of not guilty, and judgment accordingly. Harris appealed to the district court, where verdict of not guilty was returned, and new trial granted, and at the April term, 1891, after hearing the evidence, the court instructed the jury to return a verdict for plaintiff Harris, which being done judgment was rendered for him, from which this appeal is taken by Renfro. The land for the possession of which the suit is brought is school land, section 84, No. 33/3241, Houston & Texas Central Railroad Company, appraised at \$1 per acre. The following testimony was introduced on the trial: Certificate of the commissioner of the general land office that the records of

his office show that the section of land in dispute was sold to Evans Harris September 18, 1897, as an actual settler, under the act of 1897, upon his application and obligation to purchase the same as such; that it was awarded to him January 18, 1898, by Andrew J. Baker, commissioner general land office of the state; certified copy of the application and obligation of Harris filed in the land office September 18, 1897, which application, affidavit, and obligation were in form as provided by law; the land was classed as dry grazing land, and appraised at \$1 per acre, and sold to E. W. Harris September 18, 1897; plaintiff Harris proved that he had paid all the taxes on the land, and made first payment on his purchase when he filed his application, and has made all annual payments due on his obligation since then, and April 15, 1901, he made final payment on the land, paying all principal and interest due thereon. Defendant introduced in evidence certified copy from the general land office of application, affidavit, and obligation to purchase the same land at \$1 per acre, classed as dry grazing land, and made by defendant Renfro May 23, 1900; the obligation for \$624 with 3 per cent. interest thereon; the application, affidavit, and obligation in legal form under acts of 1895 and amendments thereto, filed in the land office of the state May 26, 1900,—all properly certified by the commissioner of the general land office. Certificate of John W. Robbins, treasurer of the state, was read in evidence, showing that the records of his office show that J. E. Shropshire, March 25, 1901, tendered the office \$9.36 as interest to November 1, 1901, on account of Renfro's application to purchase the land, "which could not be accepted and applied, for the reason that Renfro's application to purchase the section of land was rejected by the commissioner of the general land office. It was proved that plaintiff Harris, on May 25, 1900, and prior thereto, was in possession of the land; had the same under fence, had two dwelling houses, a barn, a shepherd house and sheep pens, and two fields, two tanks, lots, pens, sheep sheds, and several small pastures; and about the same date Renfro made entry on the close; Harris demanded that Renfro leave the premises, which he refused to do. When he first moved on the premises, in the summer of 1897, his wife and the rest of the family remained in his old home in St. Louis, on which he borrowed money to pay for the land in Texas. After his contract to purchase the property in suit, it was always his intention to move onto the land when he finished educating his children. His wife followed him down to the property in October or November, 1897. He resided on the land, claiming it as his home, ever since August, 1897, and since then he has voted and performed jury service in McCulloch county.

Shropshire & Hughes and Walter Anderson, for appellant. A. W. Moursund, Jenkins & McCartney, and F. M. Newman, for appellee.

COLLARD, J. (after stating the facts). The fourteenth and last assignment of error complains of the exclusion by the trial court of appellant Renfro's application, affidavit, and obligation to purchase the land in dispute from the state, all of date January 21, 1901, filed in the general land office January 21, 1901, "after sale to E. W. Harris had been legally forfeited and canceled, and the land again placed on the market, as more clearly appears from defendant's bill of exceptions," etc. We do not find any evidence of the forfeiture of the Harris sale, as stated in the assignment. If this fact had been shown, and it was also shown in connection with the application to purchase by Renfro that the land had been sold to him by proper authority in form, then an issue would be raised by the proposed testimony; but without such additional facts the application excluded by the court would prove nothing, and would be immaterial. We find no error in the ruling.

2. Nor do we find error in the court's sustaining Renfro's plea to the jurisdiction of the court.¹ The assignment says that the lower court by its ruling thereby decided "that a naked trespasser, who has fenced in public free school land of the state, can invoke the summary remedy of 'forcible entry and detainer,' and dispossess a bona fide settler thereon and purchaser thereof." We do not find that Harris was a naked trespasser on the land, but an actual settler on the land. We find no merit in the assignment.

3. This action was that of forcible entry and detainer, and nothing else, and only involved the issue of prior possession by the plaintiff, and not that of title. We find no error in the court's refusing to sustain defendant's plea to the jurisdiction, based upon the assumption that the case involved the issue of title. The issue of title may exist as to the rights of the parties, which may be adjudged in the proper court, but such issues are not necessarily involved in the case of forcible entry and detainer.

4. It is insisted by appellant that the court erred in excluding that part of the certificate of the commissioner of the general land office showing that the purchase of Harris had been forfeited and canceled. The certificate of the commissioner shows that the sale to Harris was canceled by the land office January 17, 1901, because of abandonment by the purchaser, but that the purchase was reinstated March 6, 1901, because it had been erroneously canceled. The bill also shows, by certificate of the commissioner, that the same land was sold to Renfro January 21, 1897, which sale was canceled on the records of the office March 6, 1901, be-

cause the former sale to Harris had been erroneously canceled. The assigned error was harmless to defendant. The certificate of the commissioner would show that, while the sale to Harris had been canceled, it had been erroneously canceled, and because of that fact it had been reinstated, which would legalize his possession and claim. Rev. St. 1879, art. 2253. We do not believe that in this character of suit it would be proper to go outside the records of the land office to show a state of facts which would impeach such records and show cause of forfeiture not declared by the office.

5. We find no error in the charge directing a verdict for the plaintiff. Plaintiff's possession was in evidence; it was recognized by the land office, which had reinstated his sale,—still valid. Defendant entered unlawfully, and could be dispossessed by the suit brought.

We have examined all the questions presented by briefs of counsel, and find no error in the ruling of the court, or in the judgment. The judgment is affirmed.

Affirmed.

JOHNSON et al. v. BLUM et al.

(Court of Civil Appeals of Texas. Jan. 18, 1902.)

PUBLIC SCHOOL LAND — DEEDS—COVENANT — MARRIED WOMEN—CONTRACT—ILLEGALITY—CONSIDERATION.

1. Where, in an action for breach of a covenant of warranty in a deed, the defendants cause their grantors of the premises, with similar covenant, to be impleaded, and appeal from a judgment refusing them relief as against their grantors, and giving plaintiffs damages as against one defendant, plaintiffs on such appeal are not in a position to complain that they were not given judgment against such impleaded parties.

2. Where, in an action against a husband and wife for breach of covenant in their deed, both appeal from the judgment against the husband alone, plaintiffs, without appealing, may assign error in the refusal of the court to give them judgment against the wife.

3. Where a husband and wife, claiming that she is the owner of a tract of public school land, for full consideration paid, execute a deed, with covenant of warranty of title, purporting to convey such tract, the husband is liable on such covenant, notwithstanding the pretended conveyance of such land was void.

4. Where the grantee in a deed is sued by her grantee of the same premises for breach of her covenant of warranty,—the land being public school land,—and causes her grantors to be impleaded, she is entitled to judgment against them for the consideration paid by her, with interest, though no judgment is recovered against her.

5. Where a husband and wife join in a deed, with covenant of warranty, of a tract of land which they claimed she owned,—the land in fact being public school land,—in an action for breach of such covenant a judgment cannot be recovered against her, either on the covenant, or because the contract was void.

Appeal from district court, Mitchell county; W. R. Smith, Judge.

Action by Barbara J. Blum and husband

¹ For corrected opinion, see 66 S. W. 795.

against Lilly Johnson and others. From a judgment against defendant W. V. Johnson, and denying relief to defendant Lilly Johnson, the defendants Lilly and M. V. Johnson appeal. Modified.

Looney & Hamner, for appellants. Cowan & Burney and Martin Dies, for appellees.

STEPHENS, J. Barbara J. Blum, joined by her husband, Anthony Blum, sued W. V. Johnson and wife, Lilly Johnson, to recover the purchase money, with interest, paid the latter by Mrs. Blum out of her separate estate for a section of land in Borden county, Tex., No. 227, block 97, located for the Houston & Texas Central Railway Company within the Texas & Pacific reservation, which, it has been decided, rendered the location void. The land, after being so located and alienated by the Houston & Texas Central Railway Company, was conveyed to Mrs. Blum by Mrs. Johnson, joined by her husband, July 16, 1885, by deed with covenants of general warranty. H. L. Adams, I. Adams, and W. A. Holloway had made a like conveyance of it to Mrs. Johnson, in her separate right, April 22, 1885, and were consequently impleaded by the Johnsons, and recovery was sought against them in behalf of Mrs. Johnson for the amount of purchase money paid them for the land out of her separate estate. The Blums recovered judgment against W. V. Johnson, but were denied any recovery against Lilly Johnson on the ground that a married woman could not bind herself personally by a covenant of warranty, as was, in effect, held in *Wadkins v. Watson*, 86 Tex. 194, 24 S. W. 385, 22 L. R. A. 779. The recovery sought in behalf of Mrs. Johnson was denied because no recovery was allowed against her. The Johnsons alone have appealed, making all other parties payees in the appeal bond. The Blums, however, have assigned errors, complaining of the judgment in so far as the court refused to allow them a recovery against not only Mrs. Johnson, but also Adams, Adams, and Holloway. But as they neither sued the three parties last named, nor perfected any appeal from the judgment in their favor, no relief can be given them on that branch of the case. *Anderson v. Silliman* (Tex. Sup.) 50 S. W. 578; *Horter v. Herndon* (Tex. Civ. App.) 35 S. W. 80; *Stevens v. Insurance Co.* (Tex. Civ. App.) 62 S. W. 824. Whether they are entitled to assign errors to the judgment in favor of Mrs. Johnson is not so clear, but it would seem, from the opinion of Justice Williams in *Woeltz v. Woeltz* (Tex. Sup.) 57 S. W. 35, that they are, since the appeal of the Johnsons appears to have been taken from the whole judgment. The questions to be determined, then, are: First, whether or not the Blums were entitled to judgment against W. V. Johnson; second, whether or not they were entitled to judgment against his wife; third, whether or not

Mrs. Johnson was entitled to judgment in her separate right against Adams, Adams, and Holloway, for Mr. Johnson did not ask any judgment in his own behalf against them.

Neither in the pleadings of the Blums nor in the pleadings of the Johnsons was any recovery sought upon the ground of mutual mistake as to the fact and effect of the conflict between block 97 and the Texas & Pacific reservation, afterwards determined by courts of final jurisdiction to exist, and to leave the title in the state; but breach of warranty, and the bare fact that the subject-matter of the sales was a part of the public domain, were in each instance made the grounds of recovery of the purchase money, with interest. We need not, therefore, stop to inquire what the rights of the parties would have been if a case of equitable cognizance had been made. Doubtless both pleaders, in shaping the issues, had in mind the decision of our supreme court in the case of *Lamb v. James*, 87 Tex. 485, 29 S. W. 647, in which it was held that Lamb, who had purchased public school land from James, was entitled to recover the full purchase price paid James, who acted in good faith and warranted the title, merely because it afterwards turned out that James had never acquired any title from the state, although title was acquired by Lamb from the state after his purchase from James, and at a reduced price. The learned judge who wrote the opinion in that case (Justice Denman) evidently undertook, as it seems to us, to place the decision mainly, if not entirely, upon the ground that contracts for the sale of public school land, before the title has to any extent passed out of the state, are against public policy and void; for, in announcing that public school lands were not the "lawful subject-matter" of private contracts, the words just quoted were italicized, and the following clear statement of the grounds of the decision was made: "The making of such deeds by private parties would tend to embarrass the state in the disposition of its public lands; would incumber the homes of the purchasers with liens, not only to the state for real purchase money, but also in favor of a stranger to the title for such sum as he might charge the settler for his pretended right, thereby rendering the settler less able to perform his contracts with the state; and is therefore contrary to public policy. The public lands are not a lawful subject of a private contract, and an attempted conveyance thereof by one private person to another passes no interest whatever in the land, and does not create the relation of vendor and vendee, and therefore cannot be held to furnish a consideration for the payment, the promise of payment, or the recovery of the supposed consideration of such conveyance." No such view of the law, however, was entertained when that case was before this court; for it was then held

that Lamb's remedy—the charge of fraud not being sustained, and no other ground of equity being alleged—was an action on the warranty, and that the measure of recovery was what it had cost him to acquire title from the state. *Lamb v. James*, 21 S. W. 172, 27 S. W. 173. To sustain this ruling, *McClelland v. Moore*, 48 Tex. 355, involving a sale in part of a void location of public land, was cited, to which might now be added the case of *Dillahunt v. Railroad Co.*, 27 S. W. 1002, since decided, in which precisely the same ruling was made by the supreme court of Arkansas with reference to a sale with warranty of title of a part of the unappropriated public domain of the United States made by the Railway Company to Dillahunt, who afterwards acquired title from the government, the cost of which was held to be the measure of damages for breach of the warranty. When the case of *Cattle Co. v. Bedford*, 91 Tex. 643, 44 S. W. 410, 45 S. W. 554, came before us, while we could not approve as sound the view above expressed in the opinion of Justice Denman, we nevertheless felt constrained to accept it as an authoritative statement of the position of our supreme court on that question; as will be seen from the opinion of Justice Hunter in that case; but the decision refusing a writ of error was placed upon a different ground, as will be seen from the opinion of Chief Justice Gaines (45 S. W. 554), in which the learned court deemed it expedient to state that it seemed to them that the opinion of this court had proceeded upon a misapprehension of what was decided in *Lamb v. James*, 87 Tex. 485, 29 S. W. 647, in effect, because the judgment rendered by the supreme court in that case, which allowed the recovery of the purchase money, would have been erroneous, as subsequently held by them in *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805, if the contract between Lamb and James had been illegal. Then follows this statement: "The gist of the ruling in the Lamb Case was that the vacant, unappropriated public domain which was attempted to be sold by James to Lamb and Edwards furnished no consideration for the contract. There is no statement of facts found in the record in the case before us, but we are of opinion that it appears from the conclusions of fact found by the trial judge that all the land for which the notes in controversy were given was, at the time of the purported sale, public domain, and that the case falls strictly within the rule laid down in *Lamb v. James*, supra." We therefore understand our supreme court now to hold that it is not against public policy for one person to purchase of another land which turns out to be a part of the unappropriated public domain or public school land, and, as before indicated, this view meets with our approval; but we also understand that court to hold that the money paid in such a purchase may be recovered solely upon the

ground that such land furnishes no consideration for the contract, which seems, contrary to the holding in *McClelland v. Moore* and *Dillahunt v. Railroad Co.*, supra, to be treated as an exception to the general rule on that subject. That money voluntarily paid for a worthless title, with knowledge of all the facts, and without warranty of title, is not recoverable, is a proposition of very general, if not universal, application. 11 *Devl. Deeds*, § 957; 1 *Sugd. Vend.* p. 261, § 26, and notes; 2 *Sugd. Vend.* p. 549, § 6, and notes. In holding that a married woman could not recover money voluntarily paid in purchase of personal property, in *Pitts v. Elsler*, 87 Tex. 347, 28 S. W. 518, this language was used by Justice Brown: "Where money is voluntarily paid, with full knowledge of all the facts, it cannot be recovered, although it may have been paid upon a void demand, or upon a claim which had no foundation in fact. *Taylor v. Hall*, 71 Tex. 216, 9 S. W. 141; *Gould v. McFall*, 118 Pa. 455, 12 *Atl.* 336, 4 *Am. St. Rep.* 606. This proposition is too well settled to require further citations of authority." If, therefore, the construction placed upon the decision of the supreme court in *Lamb v. James* by this court, misled as we were by the learned judge who wrote the opinion, is shown to have been wrong because a recovery of the purchase money paid was allowed in that case, would not the construction now placed upon it by the supreme court be wrong for the same reason? That is to say, while the illegality of the contract is held to prevent the recovery of money paid under it, will not the fact that money is voluntarily paid, in the absence of grounds for equitable relief, have the same effect? But however this may be, while we think it would have been better if the supreme court's decision in *Lamb v. James* had been overruled entirely, instead of limited, we must accept the existing construction of that decision as announced in the opinion of the learned chief justice in *Cattle Co. v. Bedford*, and proceed to dispose of the questions at issue in accordance therewith. We therefore overrule the contention that W. V. Johnson was not liable on his warranty because of the alleged illegality of the contract. We could not hold that there was no consideration for the warranty, since Johnson received over \$2,000 on the faith of it. On the authority of *Lamb v. James*, as construed and limited by the supreme court in *Cattle Co. v. Bedford*, we feel constrained to hold that Mrs. Johnson was entitled to recover from Adams, Adams, and Holloway, although no recovery was had against her, and although no ground of equity was alleged, the money paid them for the land, with interest, as specified in her second assignment of error, without reference to whether or not she was entitled to recover on the warranty.

It only remains to determine whether the Blums were entitled to a judgment against

Mrs. Johnson as well as against her husband. That she was not liable on her warranty we must treat as settled by the decision of our supreme court in *Wadkins v. Watson*, supra. It is, however, insisted in the brief of the Blums that they were entitled to recover from Mrs. Johnson the money paid her husband for her, upon the ground that the land was a part of the public domain, and therefore no consideration for the contract of purchase, though we doubt whether their assignments of error (1 and 2) were ever intended to raise any question other than that of liability on the warranty. The contention presents this anomaly: They accepted the warranty of W. V. Johnson, and have recovered a judgment upon it, which, for aught we know, they may be able to collect; and yet it is insisted that they should also have a judgment against Mrs. Johnson upon the ground that there was no consideration for the contract. As already intimated, it is by no means clear that the money paid would have been recoverable, in the absence of a warranty or of well-known equitable grounds for relief, even as against one not under disability; and we know of no authority for holding a married woman liable in this state in such case,—the contract not being one for necessities or for the benefit of her separate estate,—and none has been cited.

Upon the findings of fact made by the district judge, which we adopt, and the conclusions of law above stated, we affirm the judgment between the Blums and the Johnsons, but reverse and here render the judgment between Mrs. Johnson and the other parties, so as to allow her to recover from them what was paid them for the land, with interest from the date of payment, as stated in their second assignment of error, with costs accruing on that branch of the case both in the court below and in this court; other costs of appeal to be taxed against the Johnsons.

VON CARLOWITZ v. BERNSTEIN.

(Court of Civil Appeals of Texas. Jan. 18, 1902.)

MASTER AND SERVANT—CONTRACT—EXPECTATION OF LEGACY—HUSBAND AND WIFE—SERVICES TO WIFE—COMPENSATION—APPEAL—ASSIGNMENT OF ERROR.

1. Deceased was an invalid for years, and plaintiff kept house for her and her husband, and nursed and cared for her five years, until her death. The husband died first, willing all his property to deceased. Plaintiff received no compensation, and deceased left no will. There was evidence that the husband and wife both repeatedly stated that plaintiff had to do everything for them, that they could not do without her, and that everything they had was to go to her on their death. Held, that a finding that the services were rendered in expectation of a legacy, induced by the declarations of deceased, and hence that plaintiff was entitled to compensation, was justified.

2. In an action against the estate of a wife for necessary personal services rendered to

her, it is not necessary to show that her husband was unable or refused to pay for such services.

3. Where plaintiff kept house and nursed and cared for an invalid wife under promise of a legacy which was not given, the fact that the invalid's husband lived with her, and hence necessarily received benefit from the service, did not affect plaintiff's right to compensation from the wife's estate.

4. An assignment complaining of a verdict on a ground not called to the attention of the trial court on the motion for new trial cannot be considered.

Appeal from district court, Tarrant county; Mike E. Smith, Judge.

Action by Rosa Bernstein against C. Von Carlowitz, administrator of the estate of Minnie Nolan, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

R. W. Flournoy and C. Von Carlowitz, for appellant. Carlock & Gillespie, for appellee.

STEPHENS, J. Appellant, the administrator of the estate of Minnie Nolan, deceased, was sued by appellee, Rosa Bernstein, a sister of Minnie Nolan, who claimed and recovered a judgment for \$1,500 as compensation for personal services rendered by her as housekeeper and nurse for Minnie Nolan, the wife of George Nolan, from 1894, or prior thereto, to the death of Minnie Nolan, in December, 1899. This recovery was sought and had upon the ground that the services were rendered in pursuance of an agreement with George and Minnie Nolan that appellee should be compensated for her services by will; the services being treated as necessities, for which a married woman may contract, furnished Minnie Nolan, who was an invalid during that period, and who finally lost her mind, and died without making a will, but to whom George Nolan, who died a few months before she died, had willed whatever property he possessed.

The most difficult question submitted for our determination is raised by the fifth assignment of error, reading, "The court erred in not setting aside the verdict of the jury for the reason that there is no evidence that Minnie Nolan ever offered to compensate the plaintiff for her services, and that the plaintiff accepted such offer." It will be observed that this assignment, as repeatedly held by our supreme court, raises only a question of law,—that is, whether or not there was any evidence of an agreement to compensate appellee for her services,—and not the question of fact, whether or not there was sufficient evidence of such agreement. With the scope of the inquiry thus limited, what evidence was there of an agreement that appellee should be compensated by will for her services? True, there was no direct evidence of such agreement; but owing to the deaths of the Nolans, and of the consequent disqualification of appellee as a witness to prove contracts between her and the deceased, such evidence was hardly to be

expected. There were, however, circumstances tending to prove the agreement. Both George and Minnie Nolan repeatedly stated, in substance, and sometimes in the presence of appellee, that she had to do everything for them, that Minnie Nolan could not do without her, and that everything they had was to go to her at their death. The service rendered was such as equitably entitled appellee to remuneration, but none was given. The inference is not an unreasonable one from the testimony that the services were rendered in the expectation, induced by the declarations of the deceased, of remuneration by legacy, which we understand to be the test. The rule on this subject is thus stated by Mr. Beach in his *Modern Law of Contracts* (section 650): "If services are rendered in expectation of remuneration by a legacy, and there is nothing in the conduct or language of the person benefited by the services to induce such an expectation, they are deemed voluntary and gratuitous. But where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover what the services were reasonably worth." For a further discussion of the rule, particularly in its bearing upon the question where services are rendered by members of a family living in one household to each other, see section 653, *Beach, Mod. Cont.* See, also, *Hart v. Hess*, 41 Mo. 441; *Robinson v. Raynor*, 28 N. Y. 494; *Graham v. Graham's Ex'rs*, 34 Pa. 475; *Guild v. Guild*, 15 Pick. 130; *Hudson v. Hudson* (Ga.) 13 S. E. 583, 27 Am. St. Rep. 270; and *Jones v. Jincey*, 9 Grat. 708,—all cited by counsel for appellee,—and particularly the *Missouri* and *New York* cases cited.

The proposition of the first assignment of error (the next submitted in the brief) is: To render the wife liable on her contracts for necessities, it must be shown that the husband was unable or that he refused to supply them. But it seems to have been otherwise ruled in this state, where we have a statute giving the wife power to make such contracts. *Hawkes v. Robertson* (Tex. Civ. App.) 40 S. W. 549, and cases there cited, and *Emerson v. Kneezell* (Tex. Civ. App.) 62 S. W. 551.

The verdict was objected to in the motion for a new trial as being excessive, because compensation was allowed for services rendered George as well as Minnie Nolan, and this contention is renewed in the fourth assignment of error; but it must be overruled, because, in the very nature of this case, it was impossible to render the required services to the latter without some benefit accruing to the former.

The remaining assignment submitted in the brief complains of the verdict upon a ground not brought to the attention of the trial court in the motion for new trial, and,

according to a well-settled rule of practice, could not, therefore, be entertained by this court.

Judgment affirmed.

LEAVITT v. BRAZELTON et al.

(Court of Civil Appeals of Texas. Jan. 18, 1902.)

ACTIONS—CITATION—FILING PETITION—JUDGMENT BY DEFAULT—WRIT OF ERROR—TIME.

1. Under 1 Sayles' Ann. Civ. St. art. 1214, requiring that the citation in an action give the true date of filing the petition, a judgment entered by default, where the citation stated the petition was filed on the 29th day of July, when it was in fact filed May 29th, should be vacated.

2. Under 1 Sayles' Ann. Civ. St. art. 1402, providing that a writ of error may be sued out within one year after a judgment sought to be reviewed is entered, when the petition and bond for the writ are filed within the year, it is in time, though the writ is not served until after the year has elapsed.

Error from Jones county court; J. C. Phillips, Judge.

Action by Brazelton & Johnson against W. H. Leavitt. From a judgment by default in favor of plaintiffs, defendant brings error. Reversed.

C. C. Ferrell, for plaintiff in error. Warren & Webb, for defendants in error.

HUNTER, J. This was a judgment final by default upon a verified account for \$212.92, rendered by the county court of Jones county on the 3d day of July, 1900, in favor of Brazelton & Johnson against the plaintiff in error, and on the 1st day of July, 1901, plaintiff in error filed his petition and bond for writ of error, caused citation to be issued thereon, and it was served on defendants in error on the 20th day of July, 1901. The original petition in the suit was filed May 29th (no year given). Citation was dated "29th day of July, 1900," and commanded the sheriff or any constable of Jones county to summon the defendant, W. H. Leavitt, "to be and appear before the honorable county court of Jones county, Texas, at the next regular term thereof to be holden at the court house in Anson on the first Monday in July, A. D. 1900, then and there to answer the plaintiffs' petition filed in a suit in said court on the 29th day of July, 1900, wherein Brazelton & Johnson are plaintiffs and W. H. Leavitt is defendant; file number of said suit being No. 193." If it was indorsed when issued, the indorsement was not copied in the record. The return of the sheriff indorsed thereon is as follows: "Came to hand the 1st day of June, A. D. 1900, at 4 o'clock p. m., and executed 1st day of June, 1900," etc. The July term of the county court began on July 2, 1900, and judgment by default final was

rendered July 3, 1900. The able counsel for plaintiff in error makes but one assignment of error, and that is, in effect, that the citation did not give the true date of filing the petition, as required by statute (1 Sayles' Ann. Civ. St. art. 1214), but another and different date. This assignment must be sustained. We held in *Dunn v. Hughes*, 36 S. W. 1084, that this provision of this article was mandatory, and must be substantially complied with; otherwise the defendant is not required to answer. See, also, *Spence v. Morris* (Tex. Civ. App.) 28 S. W. 405. The judgment in this case will therefore have to be reversed.

Defendants in error insist that, because service of citation in error was not obtained until more than one year after the judgment was rendered, we have no jurisdiction of this case. But we overrule this contention, as the writ, we think, must be considered as "sued out" when the petition for writ of error and bond, or affidavit in lieu thereof, are filed with the clerk of the court rendering the judgment. 1 Sayles' Ann. Civ. St. art. 1402.

Because of the defect in the citation above noticed, the judgment is reversed, and the cause remanded.

TEXAS CENT. R. CO. v. WALLER et ux.
(Court of Civil Appeals of Texas. Jan. 18, 1902.)

INJURY TO EMPLOYEE — NEGLIGENCE — BRAKE BEAMS — HEIGHT FROM GROUND.

It was not negligence for a railroad company to fail to equip its cars with brake beams hung high enough to pass over a brakeman lying on the ground between the rails.

Appeal from district court, Erath county; W. J. Oxford, Judge.

Action by J. M. Waller and wife against the Texas Central Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Martin & George and L. W. Campbell, for appellant. Capps & Contey, Daniel & Keith, and Theodore Mack, for appellees.

HUNTER, J. This suit was brought by the appellee and his wife to recover damages from the appellant occasioned by the alleged negligent killing of their son, aged 25 years, at Cisco, Tex., on April 11, 1899, and who was in the employment as brakeman. The negligence alleged was the bad condition of the track at the place he was killed, and the negligent and improper construction of the car which run over and killed him, and the negligence of the engineer, fireman, and other employes of the train. The evidence tended to prove that the train crew were switching cars by "kicking" them back on the side track; that

the side track was rough, caused by the sinking of the dirt between the ties, so as to leave the ties several inches above the ground between them. A car was "kicked" back, and was moving at the rate of about five or six miles an hour, when the deceased went on the track in front of it in order to place a coupling pin in the drawhead, which had fallen from another car, and stood in the middle of the track until the car came near enough to place the pin in the drawhead, running backwards to keep the car from knocking him down, and attempted to leave the track, when his foot, it seems, struck a tie, and he fell, and in his effort to rise the car struck him, and knocked him down, and passed over him, the brake beam thereof rolling him, and crushing him to death. The evidence tends also to show that this car was an old type of freight car, not much in use now, and that the brake beams thereof hung lower than they do as a rule on more modern cars; that they hung within about $3\frac{1}{4}$ inches of the top of the rail. But the only rule of the master car builders on the subject is, as the evidence tends to show, that the beam shall not hang lower than $2\frac{1}{4}$ inches above the top of the rail.

On the trial the court charged the jury as follows: "Or if you find and believe from the evidence that the said John Waller was knocked down by said car, and that he could not escape its passing over him after being so knocked down, and that he then lay flat, with his face to the ground, for the said car to pass over him; and if you further find and believe from the evidence that the brake beam upon said car came so low and close to the track that it caught and crushed said John Waller, and thereby killed him; and if you further find and believe from the evidence that the closeness to the ground to which said brake beam hung on said car constituted a defect in said car, and that said defect (if you find it was a defect) in said car was the direct and proximate cause of the injuries which resulted in John Waller's death; and you further find that it constituted negligence in defendant to permit the use of said car with such brake beam; and if you further find and believe from the evidence that said Waller was not informed and did not know of said defect in said car which caused his death (if you find that it did so and was a defect); and you further find and believe that in going in front of said car at the time and place and under the circumstances said Waller went in front of same was such as an ordinarily prudent brakeman would have done under the same or similar circumstances; and you further find that the plaintiffs were damaged by his death," etc.,—"you will find for the plaintiffs."

Appellant contends that this charge was error, "because the defendant company is not required to construct its brake beams in

such a way as that they will pass over persons lying upon the track, and the defendant company would not be guilty of negligence in failing to so construct its cars; and because it was not contemplated by the builders of railroad cars that any prudent person would ever place himself upon the track and lie down for the purpose of permitting such cars, and brake beams attached thereto, to pass over them; and because there is no law requiring any standard height to brake beams, and no law requiring them to be sufficiently high above the track or the ties to permit them to pass over persons lying upon the track."

We think this assignment will have to be sustained. Car builders are not required to fix their brake beams high enough to pass over persons who may fall upon the railroad track, any more than they should make them light enough not to cut off a man's leg if they should happen to run over it. They are built with the view of bearing burdens and carrying them safely, and the brakes are constructed and placed where they will be most efficient in stopping the car when necessary to apply them. Persons must not place themselves where they will be knocked down and run over by cars. If they do, in cases where they are not ordered there, or where their duty does not require them to go there, they assume the risk of being injured by the brake beams if they are knocked down or fall down and the car passes over them. Unless, therefore, the appellant was guilty of negligence in some other respect besides the placing of the brake beam where it was, it is not liable for the injury complained of, and the learned court below erred in submitting this issue to the jury, and in allowing a recovery on that ground.

The third assignment complains of the admission of the evidence of A. G. Hawkins, drawn out by appellees on cross-examination, to the effect as follows: "Q. Was not the engineer reckless, and did he not have the reputation of being a reckless engineer? A. I never considered him so. Q. Had he not killed three men before this? A. I don't remember how many have been killed by this train. There was one I remember in particular." This was objected to because it was "immaterial, and calculated to prejudice the rights of defendant with the jury." We think this objection was well taken. There was no allegation of recklessness of the engineer, and the examination in chief did not require or permit such questions to be asked. The evidence was plainly calculated to prejudice the minds of the jury against the defendant, and was not admissible under the allegations of the petition.

We find no other material error in the record, but, because the court erred in giving the charge and admitting the evidence aforesaid, the judgment is reversed, and the cause remanded for a new trial.

CUNNINGHAM et al. v. FT. WORTH & D. C. RY. CO.

(Court of Civil Appeals of Texas. Jan. 18, 1902.)

RAILROADS—NEGLIGENCE—ASSUMPTION OF RISK—TRESPASSER ON FREIGHT TRAIN.

As a freight train was running through a town at the rate of 12 or 15 miles an hour, a man was discovered by the conductor on the rear steps of the caboose, just in the act of getting off. Immediately after the discovery, and before anything could be done to prevent, the man jumped, or fell off, and was killed. While the engine was taking water at a watering station over two miles from the town, the pump tender saw this man in a badly intoxicated condition standing near the train, but did not see him get on, or know of his intention to do so. None of the train men saw him until he was so discovered by the conductor. The train was not permitted to carry passengers. *Held*, that deceased voluntarily assumed the risk of the circumstances, and no negligence on the part of the railway employees was shown.

Appeal from district court, Wise county; J. W. Patterson, Judge.

Action by Mary L. Cunningham and another against the Ft. Worth & Denver City Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Bullock & Basham, for appellants. Stanley, Spoons & Thompson, for appellee.

CONNER, C. J. This is a suit for damages by the widow and child of Louis B. Cunningham for his death, caused by the alleged negligence of appellee. Upon the trial, and at the conclusion of the evidence, the court gave peremptory instruction to the jury to return a verdict for appellee. This was done, and judgment entered accordingly, and the sole question presented on this appeal is whether there was any evidence of negligence on the part of the appellee which authorized the submission of the issue to the jury.

It appears that the deceased either fell or jumped off the rear platform of the caboose attached to the rear end of a through freight train while it was going at the rate of 12 or 15 miles an hour through the station of Alvord, Wise county, where the deceased lived at the time, and that he was thereby injured so that he afterwards died. We will not incur our conclusions by setting out the testimony in full, but deem it sufficient to say that it has been carefully considered, and that we find no such evidence as required the submission of the issue of negligence to the jury. It is undisputed that by the rules of the company passengers were not allowed upon the train in question; that the conductor and brakeman were stationed at their respective stations of duty, and they both testify positively that they were not aware that Cunningham was aboard. Nor is there material conflict in their testimony to the effect that Cunningham was not discovered or seen by the operatives until just about the time he jumped or fell off the

lower step of the rear end of the caboose, and until it was too late to have signaled the engineer and caused any material abatement in the speed of the train. The evidence tends to show that the deceased was drunk or drinking, and had boarded the train at a pump or watering station $2\frac{1}{2}$ miles from Alford, while the engine was taking water, and that before the train started the conductor walked around and upon the rear end of the caboose, and there remained until after the train had passed the pumping station. It is insisted, in effect, that therefore the conductor must have seen Cunningham and observed his condition, and become effected with the duty of caring for him, and of seeing that he got off without injury. The evidence referred to may raise a suspicion of this purport, but we regard it as altogether too inconclusive in its nature to raise the issue. The pumper is the only person who testifies that he saw Cunningham at the pumping station, but he further testifies that he did not see him get on the train. The last time the pumper saw him he was some four or five car lengths from the caboose, and nothing appears in the testimony evidencing Cunningham's purpose to then become a passenger. Just how or when Cunningham attained his position on the rear end of the caboose is mere conjecture. He may have done so after the conductor entered the caboose and shut the door, or may have boarded one of the forward cars and walked back after the train started; but, however this was, the positive testimony of the operatives of the train that they did not see him get on is uncontradicted, and no attempt to impeach the witnesses was made. Besides, there was no pleading authorizing a finding of negligence on the ground that Cunningham was so drunk that he could not care for himself and safely ride on the rear platform, and that therefore the conductor, in the exercise of ordinary care, should have taken him inside or safely put him off. Furthermore, if it be conceded that the operatives knew of his presence and position on the train, we fail to find any evidence that the conductor or brakeman knew, or could have known in time to have avoided the injury, of Cunningham's intention to get off at Alford. After such intention was manifest, the conductor and rear brakeman both testify, without contradiction, that it would have been impossible to have signaled the engineer and abated the speed of the train before the deceased jumped off. Cunningham was clearly a trespasser, in any view of the case, and the pleadings and the evidence developed no such case as required appellee's servants to exercise diligence to discover his presence on the train, or to care for his safety while thereon, and certainly failed to show a case of discovered peril with negligence thereafter to avoid the injury. The deceased seems to have voluntarily assumed the risk of injury arising from the cir-

cumstances, and we think it is clear that the action of the court in giving the peremptory instruction must be affirmed. Railroad Co. v. Shetter (Tex. Sup.) 59 S. W. 533, and Railroad Co. v. Haltom (Tex. Sup.) 65 S. W. 625; Rodriguez v. Railroad Co. (Tex. Civ. App.) 64 S. W. 1005.

Judgment affirmed.

MASS et al. v. BROMBERG.

(Court of Civil Appeals of Texas. Jan. 17, 1902.)

HUSBAND AND WIFE—COMMUNITY PROPERTY—HOMESTEAD—CONVEYANCE BY HUSBAND—VALIDITY—RATIFICATION BY WIFE—ADVERSE POSSESSION—PLEADING—BEST EVIDENCE.

1. A petition in trespass to try title alleged a purchase by plaintiff from decedent of 110 acres of land out of a 310-acre homestead, an agreement by decedent that the 110 acres should be taken off the south end of the 310 acres, and the death of decedent. *Held*, the parol agreement by decedent as to what portion of the 310-acre tract should be held by plaintiff under his deed for 110 acres was a valid agreement for partition, and it was unnecessary to allege a formal designation of the homestead prior to decedent's death.

2. A deed by a husband of an undivided 110 acres out of a 310-acre tract owned by him and his wife as community property, and occupied by them as a home, will pass the title thereto, though the wife does not join therein.

3. A parol agreement by a husband, who has conveyed an undivided 110 acres of land out of a 310-acre homestead owned by him and his wife as community property, that the purchaser shall take his 110 acres out of a certain part of the property, where not made in fraud of the homestead rights of the wife, is valid.

4. The wife, being the only person who can attack the agreement as affecting her homestead rights, is fully authorized after her husband's death to ratify it, and to accept her homestead out of the remaining land.

5. A deed conveying "110 acres of land, it being part of my homestead tract of land, which contains 310 acres," etc., and accurately describing the 310-acre tract, is not objectionable for insufficiency of description of the tract conveyed, but grants an undivided 110 acres in the land, reserving in the grantor the right to select 200 acres as his homestead.

6. Where decedent conveyed 110 acres out of his 310-acre homestead to plaintiff, and subsequently agreed that he should take his 110 acres from the south end of the tract, and such agreement was ratified by decedent's wife, any possession had by the wife and children subsequent thereto of any portion of the 110 acres so selected was not under and by virtue of the deed to decedent, since decedent's title had passed to plaintiff; and, where no other deed to the wife and children was shown, they could only claim title by adverse possession under the 10-year statute of limitations, if at all, and in no event to more than that portion of the 110 acres actually occupied by them.

7. In trespass to try title, though the apparent weight of evidence sustained defendants' contention that they had held a small portion of the land adversely to plaintiff for more than ten years, testimony that two of the defendants had stated within less than 10 years that all the land in their inclosure claimed by plaintiff belonged to him was sufficient to sustain a finding that defendants' holding of such land was not adverse.

8. Where the testimony of a witness convicted of felony is objected to, testimony of a

third person that he procured a pardon for such witness, and had read the same, and that it restored witness to all rights of citizenship, was inadmissible, because not the best evidence of the extent and character of the pardon.

Appeal from district court, Houston county; John Young Gooch, Judge.

Action by M. Bromberg against Rose Mass and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Madden, for appellants. Moore & Newman, for appellee.

PLEASANTS, J. This is an action of trespass to try title, brought by appellee against the appellants, to recover a tract of 110 acres of land, a part of the David Childers 310-acre survey, in Houston county. The trial in the court below resulted in judgment in favor of appellee for the land sued for, from which judgment this appeal is prosecuted.

Briefly stated, the material facts proven on the trial are as follows:

In 1883 Dick Mass, who is now dead, and the appellant Rose Mass owned, as community property, the David Childers 310-acre survey, in Houston county, on which they had established their home. On November 22, 1883, Dick Mass, for a consideration of \$100 cash paid to him by appellee, conveyed to appellee 110 acres out of said 310-acre survey, expressly reserving in said deed a homestead of 200 acres. The description of the land conveyed contained in the deed is as follows: "One hundred and ten acres of land; it being a part of my homestead tract of land, which contains 310 acres, and the said 110 acres being the balance over and above a 200-acre homestead. Said land is situated in Houston county, Texas, about 18 miles S. E. of the town of Crockett, and is known as the 'David Childers Headright Survey,' and the same on which I now reside; and for further particulars reference to the patent will show." It was agreed between said Dick Mass and appellee at the time the deed was executed, or just after its execution, that the 110 acres conveyed by the deed should be taken off the south end of the 310-acre tract. This deed was recorded on November 23, 1883, in the deed records of Houston county, and appellee has paid the taxes on said 110 acres regularly ever since his purchase of same. The 110 acres were not surveyed prior to the death of Dick Mass, which occurred in August, 1884. On September 14, 1885, appellant Rose Mass executed the following written agreement:

"The State of Texas, County of Houston.—Know all men by these presents, that I, Rose Mass, the surviving wife of Dick Mass, dec'd, have this day selected out of 310 acres of land my 200 acres as a homestead, and agree that Mr. M. Bromberg may survey the amount of land his deed calls for, so as to respect my improvements as much as

possible, respecting house and cleared land. I agree that the surveyor of Houston county, Texas, may at any time proceed to survey same. In making this selection it is expressly understood that I do not grant or transfer or convey any title that myself, or any one of my heirs, or any one else, may have in the matter of and concerning said land, but only select my homestead in order that same may be divided according to law, and same be settled. Witness my hand this, the 14th day of September, A. D. 1885.

"[Signed]

her
Rose X Mass.
mark

"Attest:

"R. L. Warren.

his
"Was X Wortham."
mark

In pursuance of this agreement and the prior agreement made with Dick Mass, appellee had his 110 acres surveyed off the south end of the 310-acre tract. As so surveyed, the 110 acres contains from 15 to 30 acres of land, which had been inclosed by Dick Mass, and a few acres of which had been cultivated by the appellants and the said Dick Mass prior to the execution of said deed. The 110 acres would have included more of the inclosed and cultivated land if taken out of any other part of the 310-acre tract. The north line of the 110-acre tract runs within 20 or 30 steps of the house in which appellants lived, and have lived ever since Dick Mass purchased the property; and when this line was run an old stable and crib were found to be south of the line, and on the 110-acre tract; but these improvements were moved by appellants after the survey was made, and placed on the 200-acre tract. The appellants Iss and Jack Mass are the children of Dick Mass, deceased; the said Jack Mass being not yet 21 years old. Appellants have paid taxes on the whole of the 310-acre tract, and have had possession of a portion of said 110-acre tract ever since the death of Dick Mass.

The trial court finds in his conclusions of fact that the possession of the part of the 110-acre tract which has been held by the appellants since said tract was surveyed has not been adverse to the title of appellee, and the evidence in the record is sufficient to sustain this finding.

The first, second, third, and fourth assignments of error assail the ruling of the trial court in not sustaining defendants' exceptions to plaintiff's petition. The petition excepted to contains all the necessary allegations of a petition in an action of trespass to try title, and, in addition thereto, alleges the purchase by plaintiff from Dick Mass of 110 acres of land out of the 310-acre survey; the agreement by said Dick Mass that said 110 acres should be taken off the south end of said 310-acre tract; the death of Dick Mass; the subsequent agreement of Rose Mass that said 110 acres should be sur-

veyed off the south end of said 310-acre tract, in accordance with the prior agreement of her said husband; and the ratification of said partition by all of the defendants, by removing their improvements off said 110-acre tract as so surveyed and designated. The exceptions urged to this petition were: First, that it fails to show that the 110 acres of land from which plaintiff claims to have been ejected is the same land conveyed to him by Dick Mass; second, it does not show what land was reserved in said deed as a homestead, nor does it show that the homestead of said Dick Mass and these appellants had been designated and set apart by him at the date of said deed for 110 acres, but same appears to have been done subsequent to the execution of said deed, and is not shown to have been done by legal authority; third, it is not shown whether the land was the separate property of Dick Mass, or the community property of said Dick and Rose Mass, nor is it shown whether said Rose Mass ever administered upon the estate of Dick Mass, or qualified as the survivor of the community, or was otherwise legally authorized to make the agreement set up in the petition; fourth, it is not shown how, where, when, or in what manner said alleged agreement was ratified by the defendants. We are of opinion that the trial court properly overruled all of these exceptions. The deed from Dick Mass to plaintiff, as set out in the petition, conveyed only an undivided interest of 110 acres in the 310-acre tract, and it clearly appears from the petition that the land from which plaintiff was ejected is the land obtained by him through the deed from Dick Mass, and the alleged partition agreements between plaintiff and the said Dick and Rose Mass. The parol agreement of Dick Mass as to what portion of the 310-acre tract should be held by plaintiff under his deed for 110 acres was a valid agreement for partition of the land, and it was unnecessary for the petition to allege a formal designation of the homestead prior to the death of Dick Mass. It was not required of plaintiff to show whether the land conveyed to him by Dick Mass was community property, or the separate property of said Dick Mass; for in either event the deed of Dick Mass passed the title to same, and his parol agreement for partition was binding upon his wife and his heirs at law. We think the facts alleged show authority in Rose Mass to make the agreement alleged in the petition to have been executed by her. It is well settled that a parol agreement for the partition of land, when acted upon by the parties, is valid and binding; and the agreement of Dick Mass that the 110 acres conveyed by him to plaintiff should be taken off the south end of 310-acre tract owned by him and the defendant Rose Mass at the time of said conveyance, unless made in fraud of the wife's homestead rights, was a valid agreement, and gave the

plaintiff the right to so locate his 110-acre tract. *Aycock v. Kimbrough*, 71 Tex. 333, 12 S. W. 71, 10 Am. St. Rep. 745. The wife, being the only person who could attack said agreement as affecting her homestead right, was fully authorized after the death of her husband to ratify his previous agreement, and to accept the homestead as designated by him. It was unnecessary for plaintiff to show any ratification of the partition by any of the defendants, other than that of Rose Mass, which is contained in the agreement alleged to have been executed by her; but the facts alleged show that the other defendants had ratified the partition by recognizing the agreed line, and removing their improvements north of same.

There is no merit in appellants' contention, presented in the fifth assignment, that the deed from Dick Mass to plaintiff is void for insufficiency in description of the land attempted to be conveyed. The location and description of the 310-acre tract, out of which the 110 acres were to be taken, is given with accuracy and fullness; and the deed, in express terms, conveys all of said 310-acre tract, except a homestead of 200 acres. It is unnecessary to cite authority to show that said deed conveys an undivided 110 acres of said 310-acre tract, reserving in the grantor the right to select and designate 200 acres of said 310-acre tract as his homestead.

Appellants' sixth assignment complains of the finding of the court below on the issue of limitation, as being without any support in the evidence. Under our conception of the law applicable to the facts of this case, as before stated, the conveyance by Dick Mass to plaintiff of an undivided 110 acres out of the 310-acre tract, with the agreement that said 110 acres should be taken off the south end of the 310-acre tract, and the subsequent ratification of said agreement by Rose Mass, put the title to the 110 acres surveyed and designated under said agreement in plaintiff; and any possession defendants may have had of any portion of said 110 acres since same was so surveyed has not been under the deed to Dick Mass, by which the 310 acres were conveyed to him, because the title of said Mass under said deed to said 110 acres had been conveyed to plaintiff. No other deed to defendants for said 110 acres being shown, it is clear that, if entitled to prescribe at all under the statutes of limitation, they can only claim under the 10-year statute, and in no event could hold more than that portion of the 110 acres actually inclosed by them. While the apparent weight of the evidence sustains appellants' contention that they have held a small portion of this land adversely to plaintiff for more than 10 years, there is evidence in the record to the effect that Rose Mass had stated within less than 10 years before the institution of this suit that all of the land in her inclosure south of

the line forming the north boundary of the 110-acre tract belonged to plaintiff. A similar statement is also shown to have been made by the defendant *les Mass*. This testimony is sufficient to sustain the finding of the trial court that defendants' possession of that portion of the 110 acres within their inclosure has not been adverse to plaintiff, and we would not be justified in disturbing such finding merely because it may seem to be against the preponderance of the evidence. The deed from Dick Mass did not convey any part of the homestead of Mass and his wife, but expressly reserved same, and it was therefore unnecessary for her to join in the execution of the deed in order to pass the title to the undivided 110 acres out of the larger tract on which their homestead was situated. The right of the husband to abandon one homestead and acquire another cannot be questioned, and, as the greater always includes the less, it is equally clear that he can alter and change the actual boundaries of the homestead as his judgment may dictate to be for the best interest of the family of which he is the head, so long as he does not by such change defraud the wife of any of her homestead rights. *Portwood v. Newberry*, 79 Tex. 340, 15 S. W. 270. The uncontradicted evidence in this case shows that the 110 acres of land could not have been surveyed in any other way than that in which Dick Mass agreed that it should with less injury to the homestead, and it is not shown that the 200 acres north of the south line of said 110-acre tract is not as valuable land and as suitable for homestead purposes as any portion of land in said 110-acre tract. In addition to all this, Rose Mass, who alone could complain of the act of her husband in making this change in the boundaries of their homestead, has ratified the same by an instrument in writing duly executed by her.

Appellants' twelfth assignment predicates error on the ruling of the trial court in not allowing appellants to show by the witness John Spence that he had procured a full pardon for one — Mass, who was offered by appellants as a witness by whom they could have contradicted the testimony of appellee's witness on the issue of the adverse possession of the land by the defendants. It was shown that the witness Mass had been convicted of a felony and sent to the penitentiary, and plaintiff objected to his testifying in the case until it was shown that his right to testify had been restored by pardon. Appellants then offered to prove by John Spence, Esq., that he had procured a pardon for said witness Mass, and had read the same, and that it restored said Mass to all of the rights of citizenship. The court did not err in sustaining appellee's objections to this testimony, because it was not the best evidence of the extent and character of the pardon, and no predicate was laid for the introduction of secondary evidence. All par-

sons are evidenced by written proclamation signed by the governor, and such written instruments are the best evidence of their contents.

The remaining assignments only present in a different way the same questions discussed under the various assignments above considered, and it would be a useless repetition for us to present and consider them in detail. It is sufficient to say that none of the assignments, in our opinion, present any error, and that the judgment of the court below should be in all things affirmed, which is accordingly ordered.

Affirmed.

CAPLEN v. HAWKINS et al.¹

(Court of Civil Appeals of Texas. Jan. 9, 1902.)

ERROR—BILL OF EXCEPTIONS—INSUFFICIENCY—DEPOSITIONS—MATERIALITY.

Where error was predicated on the suppressing of depositions of plaintiffs taken by defendant, but the bill of exceptions merely stated the fact of such exclusion and the reason therefor, and it appeared that plaintiffs testified by deposition, cross interrogatories being propounded by defendant, and there was nothing to show that plaintiffs refused to answer defendant's interrogatories or to what they related, the bill of exceptions was insufficient to show that the alleged error in suppressing the depositions was material.

Appeal from district court, Hardin county; L. B. Hightower, Judge.

Action by John Hawkins and others against John Caplen. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

J. S. Gregory and Terry, Ballinger, Smith & Lee, for appellant. W. W. Dies, Cruse & Nall, J. D. Martin, and J. N. Votaw, for appellees.

GARRETT, C. J. John Hawkins and others brought this suit against John A. Caplen to cancel a conveyance made by them to the defendant of the B. H. Hawkins survey, situated in Hardin county, which they alleged had been procured from them through the fraudulent representations of one J. F. Davis, who was acting as the agent of the defendant. The conveyance sought to be canceled was a deed dated March 12, 1900, executed by the plaintiffs to the defendant, conveying to him, in consideration of \$200, the above-mentioned survey, with general warranty of title. From the evidence introduced by the parties the jury was authorized to find that the plaintiffs were ignorant and illiterate persons, and in signing the deed relied upon statements of said Davis, who was a notary public and represented defendant in procuring the deed from them, that it was a conveyance to one Earl Adams, whom Davis represented, and was for the purpose of conveying to Adams a

¹ Rehearing denied, and writ of error denied by supreme court.

half interest in the land, which the plaintiffs had agreed to give him as their attorney. The plaintiffs believed Davis' statements to be true, and relied upon them, and would not have executed the instrument if they had known that it was a conveyance of the land to Caplen. From a judgment in favor of the plaintiffs Caplen has appealed, and the only error assigned is upon the ruling of the court in sustaining the motion of plaintiffs to suppress the depositions of the plaintiffs filed by the defendant. The defendant had filed interrogations to take the depositions of the plaintiffs, and had caused a commission to be issued for the purpose, and placed in the hands of a notary public for execution. Instead of addressing the commission to the several officers prescribed by the statute, the clerk addressed it to any notary public. The notary public to whom the commission had been delivered returned the same into court, whereupon the motion to suppress was made. A fuller statement of the action of the officer, or whether or not any deposition was made, cannot be given, because the bill of exception taken to the action of the court in suppressing the deposition is a mere skeleton, and does not show what was done. It is as follows: "Be it remembered that on the trial of the above-entitled cause the defendant offered to prove the following facts, viz.: The plaintiffs' depositions. The plaintiffs moved to strike out the deposition of the plaintiffs taken by the defendant, for the reason that the clerk of the court directed the commission to the notary public, and not as the statute requires, which motion the court sustains to that extent only; * * * to which the counsel for defendant objected for the following reasons, viz.: Said rulings are erroneous," etc. It further appears that the plaintiffs testified in the case by deposition upon interrogations propounded in their behalf and cross interrogations by the defendant. The interrogations propounded by the defendant to the plaintiffs not having been set out in the bill of exception, and there being nothing to show that the plaintiffs refused to answer them, and the plaintiffs having testified in the case, it does not appear that the error, if any, in suppressing the deposition, was material. The bill of exception is entirely too insufficient to invoke a review by this court of the action of the court below in suppressing the deposition, and the judgment will be affirmed.

Affirmed.

WILLIS et al. v. WEATHERFORD COMPRESS CO. et al.

(Court of Civil Appeals of Texas. Dec. 21, 1901.)

OFFICERS—FEES—ASSIGNMENT—PUBLIC POLICY—GARNISHMENT—ILLEGAL CONTRACT—PLEADING.

1. Where a candidate for a public office enters into a contract whereby, in consideration

of certain payments to be made, he agrees that the other parties may select his deputies and receive the fees of the office, such contract is against public policy, and void, and creates no indebtedness which can be reached by the officer's creditors in garnishment.

2. Where the fees of a public officer are collected by another under a void assignment thereof, such collection is ineffectual as to such officer, and they are still due, so far as he is concerned.

On Rehearing.

1. Where the plaintiff bases his right to recover on a contract by which an officer assigns the fees of his office, which is void as against public policy, the illegality of the contract need not be pleaded to make it available.

2. When, acting under a void assignment, an assignee has collected the fees of an officer, the moneys so collected cannot be recovered from such assignee by the officer, or reached by his creditors in garnishment proceedings.

Hunter, J., dissenting.

Appeal from Parker county court; D. M. Alexander, Judge.

Proceeding in garnishment by P. J. Willis & Bro., as creditors of one Smith, against the Weatherford Compress Company and others. From a judgment in favor of the garnishees, plaintiffs appeal. Affirmed.

R. L. Stennis, for appellants. Harry W. Kuteman, for appellees.

STEPHENS J. We are disposed to adopt the contention of appellants that the real nature and effect of the contract between Smith and the compress company was not one for current wages for personal services so much as it was one by which Smith assigned to the compress company his right to the fees of his office, and to some extent surrendered his right to control the appointment of his deputies, in consideration of what the compress company promised to pay him. The contract not only interfered with his right and duty in the appointment of his deputies, but it involved, also, not only an assignment of unearned fees of office, but to some extent fees of an office which he did not hold, the title to which depended upon an election thereafter to be held. This was clearly against public policy, and the contract was wholly void. *Bank v. Fink*, 86 Tex. 308, 24 S. W. 256, 40 Am. St. Rep. 833. Therefore Smith could not have enforced it, but was entitled to his fees of office the same as if no such contract had ever been made. From this it follows that the creditors of Smith would not be entitled to a judgment against the compress company as garnishee of Smith, for the rule is elementary that the plaintiff does not acquire any greater rights against the garnishee than the defendant himself possesses. The only exception to this rule is where the garnishee is in possession of effects of the defendants under, or holds a debt arising out of, a fraudulent transfer from the latter. *Drake, Attachm.* § 458. In such case the parties to the fraudulent transaction are estopped from asserting its invalidity, and such a transfer is or may be detrimental to the attaching

creditor, whereas, in the case of a contract void on grounds of public policy, either party to it may avail himself of its invalidity so long as it remains executory, and in the case before us the creditor is not by the contract placed in any worse position, as he would or might be in the case of a fraudulent conveyance. The fees of office, since, as held by our supreme court, they cannot be assigned on grounds of public policy, cannot for the same reason be reached by garnishment, and, if no contract had been made between Smith and the compress company, P. J. Willis & Bro. would have been in no position to collect their debt, and we fail to see how a contract that is absolutely void, even as between the parties to it, can place them in any better position.

As to the contention that the fees had been collected, it is sufficient to say that they had not been collected by Smith, and, if held by the compress company under a void contract, Smith would perhaps be as much entitled to collect them as he was in the first instance, for they were still uncollected fees of office, so far as he was concerned.

As to the contention of appellee that, under the decision in *Whitfield v. Compress Co.* (Tex. Civ. App.) 62 S. W. 117, the Weatherford Compress Company had the right to have cotton delivered at the compress weighed by private weigher, we have only to say that in this instance Smith, through his deputy, was called upon to weigh the cotton, and under the statute was therefore under obligation to do so, and was entitled to the fees; but we fail to see how this decision strengthens the position of the appellees in the case; for if Smith had no right to the fees, and under a mistake of law the compress company had made the contract to pay the sums of money specified to surrender what was supposed to be his right, it would seem that the only thing that could possibly save the compress company from a judgment on the garnishment would be the contention that Smith was in the employ of the compress company, working for wages, which the evidence hardly establishes.

On Motion for Rehearing.

(Feb. 1, 1902.)

It has been decided in this state that the illegality of a contract need not be pleaded to make it available. *Lawson v. Coal Co.* (Tex. Sup.) 82 S. W. 871, 34 S. W. 921. It was sufficient that Smith intervened, and, together with the garnishee, resisted the recovery pleading the facts. This was not a case, or anything like it, in which, after the completion of an illegal undertaking, a settlement of the profits and losses was made, and a new contract executed in pursuance thereof, and declared on, as was that of *De Leon v. Trevino*, 49 Tex. 88, 30 Am. Rep. 101, so much relied on in the motion for re-

hearing. It has also been held in this state that the earned, as well as the unearned, compensation of a public officer is not subject to garnishment, and this notwithstanding his conceded right to make an assignment of his earned fees or salary. *Sanger v. City of Waco* (Tex. Civ. App.) 40 S. W. 549. It has also been decided by our supreme court that money paid under an illegal contract cannot be recovered upon the ground of such illegality. *Beer v. Landman*, 38 Tex. 450, 31 S. W. 805; *Cattle Co. v. Bedford*, 91 Tex. 643, 44 S. W. 410, 45 S. W. 554. It is elementary that there must be privity of contract between the defendant in execution and the garnishee, and that a garnishee is not liable for goods taken in trespass, even though the owner might have a recovery from him. *Drake, Attachm.* § 485; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203. It follows, from an application of these principles to the questions raised by the motion, that the original conclusions must be adhered to.

The compress company never undertook to act as the agent of Smith in the collection for him of his fees of office, but whatever collections were made were made by it for its own benefit exclusively. It takes a contract, express or implied, to create the relation of principal and agent. *Mechem, Ag.* § 48. Clearly, there was no such contract in this instance. Neither Smith nor garnishing creditors of his could recover from the compress company any money paid to it by the consent of Smith, merely because it was paid in pursuance of an illegal contract. Such recovery, if admissible, would have to rest upon the ground that the fees of office had been collected without authority by one not entitled to them, and such fees, being thus recoverable, if at all, only as fees of office, could not be reached by garnishment; for the illegal contract would have to be entirely ignored to warrant such recovery. The same public policy which stays the hand of the creditor while the compensation remains in the coffers of the state or in the hands of the persons paying the fees would prevent him from taking advantage of an officer who is the victim of an illegal contract, the public more than the officer being interested in the matter.

HUNTER, J. (dissenting). Upon argument of counsel and further consideration of the question, I have reached the conclusion that we erred in holding that the \$288.15, which the garnishee answers is due from it to Smith "under said contract" for his fees of office as public weigher, was not subject to the writ of garnishment. I am of opinion that the contract made by Eddleman with Smith, assigning his fees of office, was null and void, as we held it to be, in the sense that the title to the fees did not pass from Smith to the compress company; yet it authorized the latter to collect them, and

use them, so that when the compress company collected them it held them as trustee or agent for Smith, and not as a trespasser, under an implied contract to account for them when called on. Thus, it became liable to Smith for all the fees it collected. Now, if the identical fees thus collected were held by it, as in the nature of a special deposit, they would not be subject to garnishment. But if the compress company did not keep the fees collected as a special deposit, but used them by Smith's consent, express or implied, and became thereby indebted to Smith, this indebtedness was not fees of office, but was an indebtedness for money had and received, and was subject to the writ.

The answer of the garnishee fails to show that the \$288.15 was the identical fees collected, but, on the other hand, shows that there "is still due him the sum of \$288.15 under said contract," which was the void contract of assignment of the fees.

The fees of office for having their cotton or other produce weighed could not be garnished in the hands of the persons who owe them. They cannot be garnished until after they are paid to the officer entitled to charge them for official services. A payment, however, to a designated agent or trustee, is a payment to the officer, and after the fees for weighing are paid they are no longer fees of office. If loaned out by the officer or deposited in bank by him, or allowed to be collected and used by an agent or trustee, whereby such trustee or agent becomes indebted to him, the indebtedness is not fees of office.

I am therefore compelled to recede from the conclusion reached by us in our original opinion, to the effect that the sum due in this case was not subject to garnishment because it was fees of office. I think the rehearing ought to be allowed, and the judgment reversed, and rendered for appellant.

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SAN ANTONIO & A. P. RY. CO. v.
BARNETT.

(Court of Civil Appeals of Texas, Dec. 2, 1901.)

CARRIERS — DAMAGES TO CATTLE — PAROL AGREEMENT — WRITTEN CONTRACT — MERGER — CONNECTING LINES — THROUGH SHIPMENT — AGENCY — WAYBILLS — SHIPPING REPORT — VALUES AT DESTINATION — WITNESSES — COMPETENCY — TRAIN SCHEDULE — ENGINEER'S DECLARATION — INSTRUCTIONS — JURISDICTIONAL AMOUNT — AMENDMENT OF PETITION.

1. Where the amount, with interest thereon from a certain date, claimed as damages in an original petition, did not exceed the court's jurisdiction at the time such petition was filed, an amended petition, claiming the same amount, with interest from the same date, filed at a time when the accrued interest had raised the damages above the jurisdictional amount, was improper, but did not necessarily defeat the court's jurisdiction over the proper amount.

2. Upon another trial the amended petition might be amended so as to bring the amount within the court's jurisdiction.

3. In an action against a railroad company for damages to cattle received during their carriage over its own and a connecting line, defendant introduced written contracts for the shipment of the cattle to a point on defendant's line, and which limited its liability to damage occurring on its own line. Plaintiff claimed that the cattle had been loaded under a verbal agreement for through carriage, and that he had been forced to execute the written contracts in order to get the cattle moved, and that, although the written contracts called for delivery at a point on defendant's line, the real contract was for through shipment. The only evidence as to the written contracts showed that they were executed by plaintiff's direction in order to secure free transportation for his helpers. Held that, in the absence of any evidence of fraud, compulsion, or want of time to read the written contracts, they must be taken as merging all previous understandings between the parties.

4. Plaintiff having pleaded the written contracts as well as the verbal, the court properly refused to instruct the jury to find a verdict for defendant, since plaintiff was entitled to recover for any damages occurring on defendant's own line.

5. The waybill issued by defendant for the guidance of its employes, which denominated plaintiff's shipment as a through live stock waybill to a point on the connecting line, via the point on defendant's line specified in the written contracts, did not change or affect the terms of such written contracts.

6. The waybill afforded no proof of partnership or agency between defendant and the connecting line.

7. The shipping report signed by plaintiff and the agent of the connecting line at the connecting point could not change or affect the written contracts between plaintiff and defendant.

8. In an action against a railroad company for damages to cattle received during carriage, it would not be necessary for a witness acquainted with values at the point of destination and with stock generally, and who saw the cattle at their destination point, to have seen or known the cattle when shipped or en route, in order to testify as to their value in the condition in which they arrived at their destination, and as to the condition they would have been in if they had been properly carried, provided such testimony was elicited by proper hypothetical questions.

9. Such witness would be competent to testify from the appearances of the cattle as to what caused their condition, provided he gave the data upon which he based his opinion.

10. In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, the declaration of defendant's conductor would be admissible to prove the time the train carrying the cattle was due at the connecting point provided, if such time was material for any purpose.

Appeal from Karnes county court; A. J. Parker, Judge.

Action by R. L. Barnett against the San Antonio & Aransas Pass Railway Company and the Gulf, Colorado & Santa Fé Railway Company. Judgment was rendered in favor of defendant the Gulf, Colorado & Santa Fé Railway Company on its plea to the jurisdiction, and from a judgment in favor of plaintiff against defendant the San Antonio & Aransas Pass Railway Company it appeals. Affirmed as to the Gulf, Colorado & Santa Fé Railway Company, and reversed as to the San Antonio & Aransas Pass Railway Company.

Proctors, for appellant. Atkinson & Abernethy and A. J. Bell, for appellee.

JAMES, C. J. Appellee sued in the county court for damages by reason of the failure of appellant and the Gulf, Colorado & Santa Fé Railway Company to properly and safely transport a shipment of eight car loads of cattle from Karnes City, Tex., to San Angelo, Tex. Plaintiff's first amended original petition, upon which the case went to trial, alleged substantially as follows: That on August 26, 1898, plaintiff delivered 408 head of cattle to defendant the San Antonio & Aransas Pass Railway Company at Karnes City for transportation to San Angelo, and that its agent there contracted with plaintiff to receive and ship and transport same over its line to Cameron, and over the Gulf, Colorado & Santa Fé Railway Company lines from Cameron to San Angelo, with reasonable care, speed, and diligence, at a certain rate, to plaintiff as consignee; that defendants did not so carry and deliver the cattle, but that they negligently delayed the cars upon which the cattle were loaded at various places for many hours, which caused them great injury by reason of their being so confined in the cars, and in muddy and insufficient pens, and being so long without food and water; that defendants' servants handled them so roughly in loading and unloading, and in feeding and watering them, and in causing the cars to be jerked and thrown around against each other and other cars, that many of the cattle were thrown down and against each other and the cars, and bruised and injured, and lost in flesh and value. The petition charges that 7 of them were killed in the cars by this treatment, of the aggregate value of \$175, and 16 head, of the aggregate value of \$400, were so injured that they died after being unloaded at San Angelo, and that the balance were so injured that they thereby lost in flesh and value \$1 per head, or \$385. The prayer was for judgment against both defendants for the sum of \$960, with 6 per cent. interest per annum from August 28, 1898, or, in case one of the defendants should be found not in fault, then against the other. Judgment was against appellant alone for \$960, with interest as prayed for.

Appellant, the San Antonio & Aransas Pass Railway Company denied making any verbal contract with appellee, and alleged the execution of written contracts; that it was not the agent of the Gulf, Colorado & Santa Fé Railway Company, and that its sole undertaking was to deliver the cattle to the Gulf, Colorado & Santa Fé Railway Company at Cameron, and that the latter received same as a connecting or succeeding carrier, and not as the agent of this defendant; that it was only liable for damages to said cattle on its own line by the terms of said contract; that this defendant safely and expeditiously transported the cattle to

Cameron, Tex., the end of its line, and immediately upon their arrival there delivered same in good order and condition; that no damage occurred to the cattle between Karnes City and Cameron; and prayed for judgment as against the Gulf, Colorado & Santa Fé Railway Company, if any damages were adjudged against it.

The verdict and judgment were against appellant for damages as prayed for, and in favor of the Gulf, Colorado & Santa Fé Railway Company on its plea to the jurisdiction. There are no assignments of error which relate to the Gulf, Colorado & Santa Fé Railway Company, and in so far the judgment will be affirmed.

Plaintiff filed a supplemental petition, admitting the signing of the written contracts attached to the answer, but alleged the following facts as to their signing: After the cattle were loaded and delivered to defendant at Karnes City, defendant's agent presented the contracts, demanded that they be signed, and refused to move them unless they were signed, and because of these circumstances he signed them; that at Cameron the Gulf, Colorado & Santa Fé Railway Company required him and it became necessary for him to sign contracts over its road from there to San Angelo; that there was no consideration whatever for the signing of the contracts, and they were signed under duress and compulsion; that if it should be held that the cattle were shipped under the written contracts, and not under verbal contracts, then the shipment was in fact a through shipment, as originally contracted between plaintiff and defendant's agent at Karnes City; that although the written contracts call for the delivery to him of his cattle at Cameron, and although at Cameron new contracts were required to be signed, yet, in truth and in fact, said shipment was intended by plaintiff, and was received and acted upon by both defendants, as a through shipment over their respective lines, at a stipulated rate of two cents per hundred pounds. By supplemental answer, appellant denied the making of any verbal contracts; that plaintiff knew that defendant's agent at Karnes City had no authority to make any but written contracts, etc.

First assignment of error: The trial court erred in rendering any judgment whatever in this case, for the reason that said court had no jurisdiction over the subject-matter, in this: That plaintiff in his petition seeks to and did in fact recover in this suit the sum of \$960, with legal interest thereon from August 28, 1898, and therefore said suit and judgment rendered therein are for an amount which exceeds that over which the county court has jurisdiction. The first amended original petition was filed November 27, 1899. The original petition is not in the record, and all we know of it is that it was filed January 26, 1899. The damages, if any, were sustained about August 28,

1898. At the time of filing the suit the amount sued for, say \$960, with 6 per cent. interest, could not have exceeded \$1,000. The cases of *Schulz v. Tessman*, 92 Tex. 488, 49 S. W. 1031, and *Baker v. Smelser*, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163, have decided that in cases like this the interest, if allowed, is regarded as damages. *Watkins v. Junker*, 90 Tex. 584, 40 S. W. 11, does not, as we understand it, announce any different rule. It has been held, also, that interest as damages may be allowed, although not asked in the petition. *Railway Co. v. Great-house*, 82 Tex. 105, 17 S. W. 834. In testing the jurisdiction of a court, the distinction between interest as interest and interest allowed as damages may become material. The suit was filed at a time when 6 per cent. interest on \$960 would not have amounted to \$1,000. Consequently the court had jurisdiction. We cannot know from this record what was originally sued for, but presumably it was not for more than is asked in the amendment. The county court, having once acquired jurisdiction, would continue to have it to the maximum extent of its jurisdiction. Any amended petition which increased the amount so as to claim more than \$1,000 in damages (including interest as damages) thereon, which this does, would be improper and inadmissible (*Ross v. Anderson*, 1 White & W. Civ. Cas. Ct. App. § 1032), but would not necessarily have the effect of defeating the court's jurisdiction over the proper amount. Upon another trial plaintiff may amend his petition in this respect.

The twenty-third assignment is that the court should have given the following requested charge: "The plaintiff has failed to prove the contract alleged by him, and you are instructed to return a verdict for defendant." There may have been sufficient evidence to show an oral contract with defendant's agent to receive and transport the cattle to San Angelo. But written contracts were signed in reference to the cattle which were inconsistent with such oral contract. As to the circumstances under which these written agreements were entered into, we have the testimony of only one witness, that of G. W. Barnett, a brother of plaintiff. He testified: "I executed the contract for the shipment of two car loads of these cattle because I had business at San Angelo, and wanted a pass to go there. I was authorized and directed by plaintiff to sign said contract. The cattle belonged to R. L. Barnett, who knew of my desire to go to San Angelo, and had two cars of the cattle billed in my name. We had this done because the railroad would pass only so many men under one contract. There were four of us who wanted to go, and we thought some of us might want to return before the others, and I did return before the others. John Elder, Sam Maddox, John McCaughn, Emery Hall, R. L. Barnett, and myself and others

were present when the stock were loaded at Karnes City." There were four of these written contracts, signed, respectively, by G. W. Barnett, R. L. Barnett, R. C. Ruckman, and J. W. McCaughn. The above is all the testimony we can find as to the signing of the four written contracts. It does not appear, as is usual in this class of cases, that the agent insisted on the papers being signed before allowing the cattle to be moved out; that the shipper did not know the terms of the writings, and did not have time to read them. On the contrary, it appears that plaintiff himself procured them to be executed, and had their execution in contemplation in shipping the cattle. According to his testimony respecting the oral negotiations with the agent, how are we to understand that four contracts were prepared by the agent, three of them with other parties than himself, unless the agent had been requested by plaintiff to do so? The only person who testifies on this subject says that plaintiff authorized and directed him to sign one of the contracts.

The only reasonable conclusion from the evidence is that plaintiff never understood nor contemplated that the oral negotiations constituted the contract under which the cattle were to be shipped, but that, on the contrary, he contemplated and expected written contracts to be entered into before the cattle left. We find no evidence even as to when the contracts were signed,—whether before or after loading. No circumstances of fraud, compulsion, want of time to read the contracts, etc., appear from any testimony in the case to entitle plaintiff to repudiate these written contracts. They appear to have been deliberately entered into, and, under the foregoing circumstances, must be taken as merging all previous understandings of the parties. By their terms defendant was not liable for injuries occurring beyond its line. The assignment under consideration, however, is not sustained because plaintiff pleaded the written contracts also, under which he may recover for what may have occurred on appellant's own line.

The fact that the waybill issued by defendant for the guidance of its employés denominated this as a "through line stock waybill from Karnes City to San Angelo, via Cameron & G. C.," could have no effect upon the terms of the contracts with defendant. Neither could the shipping report signed by plaintiff and the Gulf, Colorado & Santa Fé Railway agent at Cameron.

We would not be justified in assuming, though it may be possible, that the testimony as to the contracts will be materially different on another trial. If the case be narrowed down to the obligations of defendant under the written contract, as it ought to have been at the last trial under the testimony, it would be a useless task for us to consider and discuss the many exceptions of appellant to the charges.

There are a number of assignments which relate to testimony admitted. Witnesses should not be allowed, over objections, to testify to the questions concerning values at the place of destination unless they are shown to have knowledge of such subject. *Railway Co. v. Staton* (Tex. Civ. App.) 49 S. W. 278. We do not think it would be necessary for witness acquainted with such values and stock generally, and who saw the cattle at point of destination, to have seen or known the cattle when shipped or en route, in order to testify to the value of such cattle at destination in the condition they arrived there and the condition they would have been in if properly carried, provided proper hypothetical questions were propounded. *Railway Co. v. Greathouse*, 82 Tex. 109, 17 S. W. 834. But it has been held that the witness should state facts, and not simply give his bare opinion as to the difference in values. *Railway Co. v. Wright*, 1 Tex. Civ. App. 404, 21 S. W. 80; *Railway Co. v. Ward*, 2 Tex. Civ. App. 599, 21 S. W. 607; *Railroad Co. v. Hughes* (Tex. Civ. App.) 31 S. W. 412. Such a witness would be competent to testify, from the appearances of the cattle, as to what caused their condition, provided he gave the data upon which he based his opinion.

We are further of opinion that, if it became material for any purpose to prove the time the train was due at Cameron, the declaration of the conductor was admissible. *Railroad Co. v. Barnett* (Tex. Civ. App.) 34 S. W. 139. The waybills which defendant issued for the guidance of conductors afforded no proof of partnership or agency in this case.

It is unnecessary to lengthen this opinion. Reversed and remanded as to appellant the San Antonio & Aransas Pass Railway Company.

SOUTHERN PAC. CO. v. WINTON et al.¹
(Court of Civil Appeals of Texas. Dec. 11, 1901.)

APPEAL—RECORD—JURISDICTION—NONSUIT—APPEARANCE—ASSIGNMENT OF CLAIM—INTERVENTION—RAILROADS—NEGLIGENCE—MISMATCHED COUPLERS—BRAKEMAN—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—RULES—DAMAGES.

1. Where it appears by the dates stated in the record that the case was transferred to the court in which it was tried after a nonsuit had been entered in the court in which the action was commenced, and before such nonsuit was set aside, the appellate court cannot receive and consider affidavits and certificate of the clerk of the trial court that such record is erroneous in that the transfer was in fact ordered after the nonsuit was set aside.

2. Where a cause is transferred from one district court to another, in which it is tried, the order of transfer and proceedings in the court in which such order is entered, certified by the clerk, become ipso facto a part of the record of the cause.

3. Where a nonsuit is entered, an order setting aside such nonsuit reinstates the cause, and leaves it pending in the court making such orders, notwithstanding an intermediate void order transferring the cause to another court has been entered.

4. Where plaintiffs, acting on a void order of transfer of an action, file a petition for the same cause of action in the court to which they supposed the action was transferred, though called an amended original petition, they thereby commence a new action, and defendants, by appearing generally therein without citation give the court jurisdiction.

5. Under Rev. St. art. 3025, providing that in an action for injuries resulting in death, if the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate, and article 4647, authorizing the assignment of any claim after suit brought, a surviving wife's cause of action for negligence resulting in the death of her husband is not assignable before a suit is brought thereon.

6. Where an attorney performs services for a widow in the prosecution of an action against a railroad company for negligence resulting in the killing of her husband, the claim of such attorney for compensation is not an interest in the cause of action which entitles him to intervene in such suit.

7. Where a railroad company starts over its road a train of cars having coupling appliances so mismatched that on coupling the cars the appliances on one car may slip past that on the other, and let the cars together, so as to endanger the life of the brakeman who is attending to the coupling, and the brakeman is so killed, the company is chargeable with negligence which is the proximate cause of the injury.

8. The railroad company could not shift its duty of inspection and starting out only such cars as were properly equipped onto its brakemen by a rule forbidding them to put cars into a train which are not properly equipped.

9. A train of "tourists' sleepers" loaded with colored soldiers was received by a railroad company for carriage over its tracks. Some of the cars had the Miller coupler and some the Janney coupler. These styles of couplers do not match, and when coming together may slip past each other, letting the car platforms come so near together as to endanger the life of a brakeman attending to the coupling. The defect was discernible on inspection. *Held*, that the company owed the duty to its employees of proper inspection of the cars and appliances, and, if they were not reasonably safe and proper, it must remedy the defect, or refuse to take the cars.

10. A rule of a railroad company forbid its employees to place a car with defective couplings in a train. It received from another road and carried a train of tourist sleepers having mismatched couplers. While stopping at a station the train was separated to leave a highway open. While coupling up preparatory to going on, such couplers slipped past each other, letting the cars together, crushing the brakeman who was attending to the coupling. *Held*, that making such coupling was not placing such cars in the train, and not contributory negligence, or a violation of such rule.

11. A railroad company received from another road a train of tourists' sleepers having cars with couplers so mismatched that they were liable to slip past each other and let the platforms come together when they were being coupled. A freight brakeman, where such couplers were not ordinarily used, and who did not appear to have ever made or seen made a coupling with such appliances, was required to brake on such train. The train was temporarily separated, and such brakeman was ordered to make the coupling, but was not warned of the hazard of working with such couplers

¹ Rehearing denied January 29, 1902, and writ of error denied by supreme court.

The couplers slipped past each other, and he was crushed between the cars. *Held* that, as he had the right to presume that the company had furnished appliances which were reasonably safe when used in accordance with its rules, and that he would be warned if there was extra or unusual hazard, he did not assume the risk of the use of such unsafe couplers.

12. Where, in an action against a railroad company for injury resulting from negligence, it is not clearly established that a fact essential to plaintiff's recovery has not been proven, or that one which is a complete defense is shown, the court should not direct a verdict for defendant.

13. Where, in an action against a railroad company by a mother for the negligent killing of her married son, it appears that she is 73 years old, living with her married daughter, and the son, earning \$100 a month, had contributed \$50 per year for her support, a verdict of more than \$1,000 is excessive.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

Action by Minnie Winton and another against the Southern Pacific Company. From a judgment for plaintiffs, defendant appeals. Affirmed on conditions.

Beall & Kemp, for appellant. W. B. Brack, Edwards & Edwards, W. M. Petcolas, and Patterson & Buckler, for appellees.

NEILL, J. This suit was brought by Minnie Winton, as surviving wife, and Annie H. Winton, as the mother, of Benjamin S. Winton, against appellant and the Galveston, Harrisburg & San Antonio Railway Company to recover damages occasioned by the death of Benjamin, who was alleged to have been killed by the defendants' negligence, when in the employ of appellant as a brakeman, while attempting to couple two passenger cars equipped with mismatched couplers,—one a Miller hook, and the other a Janney coupler. The defendants answered by general demurrer, a plea of not guilty, and pleaded specially assumed risks, contributory negligence, disobedience by decedent to rules of the company, that the cars between which he was killed came beyond the state of Texas and appellant was obliged by the laws of the state to receive and transport them without delay, and that it was a part of the duty of decedent's employment to inspect such cars and report any imperfections or defects therein. Messrs. Patterson & Wallace, attorneys at law, claiming an interest in plaintiffs' cause of action through contract with Minnie Winton, authorizing them to sue for plaintiffs on this cause of action, and agreeing to give them one-half of the recovery, intervened in this suit. The court having sustained exceptions made by plaintiffs to the petition of intervention, the defendants, by a trial amendment in the nature of an interpleader, prayed to be protected against the claim of interveners, and asked that they be retained as parties. However, the petition of intervention was dismissed. The case was tried before a jury, whom the court peremptorily instructed to

return a verdict in favor of the Galveston, Harrisburg & San Antonio Railway Company, and submitted the case on the law and facts against the appellant only, against whom a verdict was returned in favor of Minnie Winton for \$10,500, and in favor of Annie H. Winton for \$2,500. From the judgment entered on this verdict the Southern Pacific Company has appealed. Messrs. Patterson & Wallace have also appealed from the judgment dismissing their petition in intervention.

Before considering the questions of fact or law arising from the trial, we will first determine a preliminary question of jurisdiction, and then dispose of interveners' appeal. There are two district courts for El Paso county,—the Thirty-Fourth and Forty-First judicial districts. This suit was originally instituted in the Thirty-Fourth district, and on April 20th it was transferred to the Forty-First. On June 30, 1900, it was retransferred to the Thirty-Fourth. On November 15, 1900, it was again transferred to the Forty-First, where, on the 10th day of January, 1901, the case was tried, and, on the court's announcing, after argument, that it would instruct a verdict for defendants, the plaintiffs took a nonsuit, and judgment of nonsuit was entered. On February 15, 1901, the Forty-First district court, on motion of plaintiffs, transferred the case to the Thirty-Fourth district, and on February 18, 1901, the Forty-First district court set aside its judgment of nonsuit. The case was afterwards, on the 27th of May, 1901, tried in the Thirty-Fourth district, when the judgment appealed from was rendered. The appellant, upon these matters, shown from the record, by its first assignment of error complains that "the court erred in hearing the cause and in rendering judgment therein, as said court was without jurisdiction, and its proceedings and judgment are void." In passing upon the question raised by this assignment we can only consider such matters as are disclosed by the record. This requires us to exclude from our consideration, as being no part of the record, the affidavit of appellees' counsel and certificate of the clerk, made after the appeal was perfected and filed for the first time in this court, to the effect that the record does not speak the truth, and that in fact the order transferring the cause to the Thirty-Fourth district was made after the one setting aside the judgment of nonsuit. If there were a mistake in the record of the court as to the respective dates of these orders, it should have been corrected, on motion, in that court. Its records, as disclosed by the transcript, import to us absolute verity. It is for the district court—not an appellate tribunal—to correct a mistake in its minutes. We have no authority of law to consider papers filed in this court for the purpose of contradicting the minutes of the court from which an appeal is prosecuted, or of the court from

which the cause was transferred to the one which rendered the judgment. Nor can we agree with appellees' counsel in the assertion that the orders of transfer made by the Forty-First district are no part of the record, and cannot be considered on this appeal. If this were so, there would be no means of showing, after a case had once been transferred from the court wherein it was originally instituted to the other district court, how it ever got back on the docket of the court which made the first transfer. When a case is transferred, all the orders and proceedings of the court making the transfer are certified by the clerk, and are transmitted, together with the original papers in the case, to the court to which the transfer is made, and become ipso facto a part of the record in the cause. Looking alone to the record for the purpose of determining this question of jurisdiction, we find that on the 15th day of May, 1901, after the date of the last order of transfer to the Thirty-Fourth judicial district and of the order setting aside the judgment of nonsuit, the plaintiffs filed in the court of the Thirty-Fourth judicial district their "second amended original petition" in this cause, and that on the 23d day of the same month the interveners likewise filed in said court their "second amended plea in intervention." No citation on either of these petitions was issued to the defendants after the nonsuit was entered, nor did either of them, up to the date of the trial, appear or file any pleading or any other paper in the cause. The judgment of nonsuit did not destroy nor bar plaintiffs' cause of action. After it was entered, they had the right to renew their suit in any court having jurisdiction of the subject-matter and person of the parties. It cannot be contended that the court of the Thirty-Fourth judicial district did not have this jurisdiction. If, then, it should be conceded that the order of February 15, 1901, was inoperative because of the existence of the judgment of nonsuit, and that, therefore, this cause was not transferred from the Forty-First district, it would follow that, as the so-called "second amended original petition" stated a cause of action of which the Thirty-Fourth district court had jurisdiction, it was the institution in that court of a suit against the defendants upon the same subject-matter involved in the old suit pending in the court of the Forty-First judicial district. In that event there would be a suit between the same parties plaintiffs and defendants, as well as interveners, involving the same subject-matter pending in each of the district courts; for, if the order of February 15th did not operate to transfer the case from the Forty-First district, that court had jurisdiction to set aside, as it did on the 18th of February, 1901, the judgment of nonsuit theretofore entered, which would leave the suit pending in that court. The styling the petition filed on the 15th of May, 1901,

in the court of the Thirty-Fourth district court, "second amended original petition," would not prevent it from operating as the institution of a suit in that court. Then, there being pending in two different courts of competent jurisdiction the same cause of action between the same parties, there being no plea of abatement filed in either, the plaintiffs could elect which they would try, and the trial of one to final judgment would necessarily abate the other. But it may be said by the defendants that neither of them was cited or answered in the case. They each, however, did appear, as is shown by the record before us, in court upon the trial, introduced evidence, asked special instructions, their counsel argued their cause to the court and jury, and the appellant filed a motion for a new trial, in which no complaint was made of the court's jurisdiction. The court having jurisdiction of the subject-matter, this appearance and participation in the trial gave the court jurisdiction of their persons. Logically, it would be so much the worse for appellant that it had filed no answer to the petition of plaintiffs filed on the 15th of May, 1901, upon which the case was tried; for, if appellant is right in its contention that the cause had never been transferred from the Forty-First district court, its answer was there, and, having none in the court where the case was tried, it was not entitled upon the trial to be heard upon any question except the quantum of damages, and could not assign error on, nor have this court review, any other matter. But this cold logical sequence is not advanced nor insisted upon by appellees; nor are we inclined to apply it to appellant on this appeal. Having appeared upon the trial, and (without objection of appellees) availed itself of all the defensive matters set up in its answer in the suit which it claims was never transferred from the court of the Forty-First to the Thirty-Fourth judicial district, we hold that it waived all questions of jurisdiction which might otherwise arise from the ineffectual order of transfer made by the court of the Forty-First district on the 15th of February, 1901, and cannot for the first time be heard in this court to say that the case was not properly transferred from the Forty-First to the Thirty-Fourth judicial district. *Marx v. Heldenheimer*, 63 Tex. 304; *Andrews v. Beck*, 23 Tex. 455.

The interveners, Messrs. Patterson & Wallace, assign as error the action of the court in striking out, on motion of appellees, their petition in intervention. It will be seen from our statement of the case that interveners alleged in their petition that appellee Minnie Winton entered into a written contract with them, as attorneys at law, whereby she, in consideration of legal services to be rendered in instituting and prosecuting suit against defendants for damages occasioned by the death of B. S. Winton, assigned them one-half of her cause of action for the death of

her said husband; and that in making said contract all the formalities of law required were complied with, save that it was entered into before suit was filed. They set up a partial performance of their part of the contract, their ability and willingness to fully perform it, the value of the services performed, that they were without cause discharged from their employment by Minnie Winton, and that she is insolvent. They prayed, in the event they were not entitled to recover on the contract, for judgment for the value of their services rendered. To entitle one to intervene in an action, the interest claimed by him must be in the subject-matter in the suit, and not in some incidental or collateral matter. The subject-matter, when interveners came into this suit, was the damages plaintiffs were entitled to recover against the appellant for injuries by it inflicted resulting in the death of B. S. Winton. Their cause of action, if any they had, against Mrs. Winton, was for a breach of contract; and, if it bore any relation at all to the subject-matter involved in appellees' action against appellant, it was only incidental or collateral. If they had any cause of action against appellant, it must necessarily have arisen from the alleged assignment by Mrs. Winton to them of one-half of her cause of action against it for the death of her husband, for it cannot be successfully contended that the Southern Pacific Company would be liable to interveners on a quantum meruit for services rendered by them in instituting and prosecuting a suit against it upon a contract between interveners and Mrs. Winton. However meritorious, so far as plaintiffs are concerned, such services may have been, we apprehend that appellant could see as little merit in as it received value from them. Things in action which do not pass to the personal representatives of a decedent as assets of his estate, in the absence of a statute authorizing their assignment, are not assignable. Pom. Eq. § 1275. Until the act of 1895 (Rev. St. art. 3353a), "in all cases of injuries to the person, whether by assault, battery, false imprisonment, slander or otherwise, if either the party who received or committed the injury died, no action could be supported either by or against the executors or other personal representatives." *Taney v. Edwards*, 27 Tex. 225. The act referred to provides that causes of action brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health or to the reputation or person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such action shall have accrued. It is thus seen at the time of this enactment that it was recognized by the legislature that actions for personal injuries resulting in death did not survive, and that the statute expressly excepts such causes

of action from its operation. An action of this character is for the sole benefit of the parties to whom the right is given, and it is expressly provided that "the amount recovered therein shall not be liable for the debts of the deceased" (Rev. St. art. 3021), and that, "if the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate" (Id. art. 3025). But it would seem that Rev. St. art. 4047, which provides for the "sale of a judgment or any part thereof of any court of record within this state, or the sale of any cause of action or interest therein after suit has been filed thereon," when evidenced, acknowledged, filed, and a minute of such transfer made, as required by the article, is applicable "to any judgments, suits, claims or causes of action whether assignable in law or equity or not." It, however, does not apply to the sale of a cause of action before suit is brought. *Railway Co. v. Wooten* (Tex. Civ. App.) 30 S. W. 684. We conclude, therefore, that it appears from the face of interveners' petition that they have no interest in the subject-matter of this suit, and that the court did not err in striking their pleading from the record and dismissing their alleged cause of action.

This brings us to the consideration of the case upon its merits. Under appellant's second assignment of error it is contended that the court erred in submitting the case to the jury under the facts, and in charging that under any phase of the evidence plaintiffs were entitled to a recovery. This requires a consideration of the facts and the law applicable to them. We will therefore state the facts. Such as are undisputed may be considered as our conclusions. But when the evidence raises an issue as to the existence or nonexistence of a material fact, we will, after considering the testimony, determine the issue in accordance with the verdict, if we find the evidence reasonably sufficient to support it.

On the 25th day of September, 1899, a train loaded with negro soldiers, destined for the Pacific coast, came from some point beyond the state of Texas over the line of the Texas & Pacific Railway Company, and was received from that company by the Southern Pacific Company at its depot in the city of El Paso, Tex., to be carried over its road west to its destination. The cars composing the train were tourist sleepers. While waiting at El Paso, the train was cut in two at a certain street crossing. When the time came for the train to depart on its journey west, the conductor directed Benjamin S. Winton, who had on that day been taken by appellant from his employment as a brakeman on its freight trains and assigned to duty as a brakeman on this passenger train, to couple the cars at the crossing where it had been cut in two. In obedience to the order of the conductor, he made the coupling, when, by reason of the coupling appli-

ances being mismatched,—one being a Miller hook and the other a Janney coupler,—they slipped by each other before he could get out from between the cars, and by their coming together he was crushed so that he died soon thereafter. Each of the couplers was automatic when worked with its own kind. When they were used together they would not couple automatically, but could be coupled by the use of a link and pin. When coupled by these means,—as they were in this instance,—their tendency, on account of the lateral motion in the Miller hook, was to slip by each other, and allow the ends of the cars or their platforms to come so close together as to endanger the life of any one between them. It is generally recognized among railroad men that the use of these kinds of coupling appliances together is dangerous. The accident happened in the daytime, when the kind and character of the coupling appliances could be plainly seen. The deceased was an experienced brakeman, 35 years old, and had worked for the Southern Pacific Company as a brakeman on its freight trains about a year and a half before his death. Prior to his employment by appellant he had worked for the Santa Fé System in Southern California for about two years on passenger trains the greater part of the time. Rules 59 and 60 of appellant company are as follows: "Great care must be exercised by all persons when coupling cars. Inasmuch as the couplings of cars and engines cannot be uniform in style or strength, and are apt to be broken from various causes, so as to render it dangerous to expose the hands, arms, or person of those engaged in making couplings, all employees are enjoined before coupling cars or engines to examine and to know the kind and condition of drawhead, drawbar, link, and coupling apparatus, and are forbidden to place in trains any car with a defective coupling, until they shall have reported the defect to the conductor or yard master. Sufficient time may be taken by employees in all cases to make the examination required." "In coupling Miller hooks with other styles of drawbars, the link should first be inserted to the hook, using the pin chained to the Miller platform. In coupling a Miller hook with link and pin to an automatic coupler, the link should first be inserted in the hook; then the coupling be made to the closed knuckle of the automatic coupler. The person making the coupling as a rule should stand on the guardarm side of the automatic coupler." We conclude and find as a fact that appellant was negligent in having in said train the two coaches one of which was equipped with what is known as a "Miller hook" and the other with a "Janney coupler," and that such negligence was the proximate cause of the death of Benjamin S. Winton.

The issues of fact (1) as to whether de-

cedent knew, or by ordinary observation could have known, when he went between the coaches to make the coupling, that the lateral motion in the Miller hook was sufficient to allow it to slip past the Janney coupler, and subject him to an unusual danger; and (2) whether, in making the coupling, he observed the rule of the company prescribing the manner in which it should be done,—are controverted, and upon them the evidence was conflicting. There was, however, evidence upon each of said issues sufficient to warrant the jury in finding that decedent did not know, and by ordinary observation could not have known, of the liability of the Miller hook to pass the Janney coupler. As to the second issue stated, we think it is demonstrable from the evidence that the decedent obeyed to the letter the rule of the company in making the coupling. In view of the verdict, we find on each of the issues of fact in accordance therewith. Having found (1) that appellant was negligent in having the two cars in its train with mismatched coupling appliances; (2) that such negligence was the proximate cause of Winton's death; (3) that the risk attending one in coupling such cars was unusual; (4) that the decedent was unacquainted with, and could not by ordinary observation have known of, unusual danger caused by the liability of the mismatched coupling appliances to pass each other; and (5) that in making the coupling Winton complied with the rule of the company in making it,—we are brought to the question raised by this assignment: Did the court err in submitting the case to the jury on these facts? This question requires us to consider the law upon (1) negligence of appellant; (2) on assumed risk; and (3) upon contributory negligence.

1. It is the duty of the master to use ordinary care, diligence, and skill for the purpose of protecting his servants from encountering unnecessary risks in his service. He personally owes to his servants the duty of using ordinary care and diligence to provide for their use reasonably safe instrumentalities of service. These instrumentalities must be adapted to the work in hand. It is not enough that they should be good under ordinary conditions, but they must be suitable for the work to which they are applied by the master, and properly adjusted to each other. If, therefore, the master knows, or would have known if he had used ordinary care to ascertain the facts, that the machinery or appliances which he provides for the use of his servants are unsafe, and a servant, without contributory fault, suffers injury thereby, the master is liable therefor. The master is not entitled to time to discover defects in things which are defective when put to use, but he should examine them before putting them to use. He cannot evade his responsibility in these respects by simply giving general orders that

servants shall examine for themselves, before using the appliances furnished by him. *Shear. & R. Neg.* (5th Ed.) § 194, and authorities cited in notes. Railroad companies owe to their employes the duty of proper inspection of cars and their appliances for the purpose of discovering defects. If the appliances are not reasonably safe or proper on any of the cars, they should not be put in the train and started out. And it makes no difference whether the cars belong to the company or were received by it from some other railroad. They must first be inspected, and, if found unsafe, must not be put in the train. As is said in *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 341: "It [the railroad company] owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must remedy such defects, or refuse to take such cars. So much, at least, is due from it to the employes. The employes can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. As to such defects the duty of the company is the same as to all cars drawn over its road." As the evidence shows without contradiction that the appellant knew, when it received the train carrying the two cars with mismatched coupling apparatus, that it was extrahazardous to its employes to couple them together, it was guilty of a breach of duty to its servants. As is seen, it could not, under the law, shift the consequence of its negligence from itself to its servants,—as it claims in this case it had done,—by a rule imposing upon its servants a duty it personally owed to secure their safety while in the discharge of the duties of their employment. Even if the master were permitted in this way to shirk his duty and avoid the consequence of his negligence, the rule of the company forbidding its employes to place in trains any cars with defective couplings cannot be held in this case to have that effect. It was not the decedent's duty to place cars in trains. This duty was appellant's, or such of its servants to whom it had been delegated by the company; and whose failure to discharge it would, as to all employes except themselves, be the negligence of the master. The cars had been placed in the train before Winton was assigned to it in the capacity of a brakeman. The train might have been hauled over appellant's entire line without it becoming necessary for a brakeman either to couple or uncouple any of the cars, had it not been cut in two at the street crossing in El Paso. Because of its being parted there, the brakeman who had to make the coupling so it could proceed on its journey cannot be held to the liability of a servant whom appellant had "forbidden to place in trains any car with defective coup-

plings." These principles of law, when applied to the facts, show to a moral certainty the negligence of appellant.

2. As to the doctrine of assumed risks: "A servant is held to assume the ordinary risks of the business upon which he enters, so far as those risks, at the time of entering upon the business, are known to him, or should be readily discernible by a person of his age and capacity, in the exercise of ordinary care, and whether the business is dangerous or not. The ordinary risks of a particular business are those which are a part of the ordinary method of conducting that business, even though they might be fairly called extraordinary with reference to different business, or a different department of the same business. If the business is essentially attended with extraordinary dangers, these are among the risks assumed." *Joyce v. Worcester*, 140 Mass. 245, 4 N. E. 565. "But a servant does not assume risks which are not thus known or discernible, nor any which do not exist at the time when he enters into his master's service, and of which he has not notice in time to protect himself against them; nor does he assume extraordinary risks, unusual in his business, of which he has not timely notice." *Shear. & R. Neg.* §§ 185, 185a. "He does not assume the risks arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or in the ordinary discharge of his duty must necessarily have acquired that knowledge." *Railway Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508. A servant has the right to presume, and to act upon the presumption, that his master or his vice principal has and will continue to perform every duty incumbent upon him; that there are no risks attending the business other than such as usually attend business of that general nature, and existed when he entered into the service, or such as have been explained to him, or are known by or perfectly obvious to him; that it is safe to obey orders; that the place of work is safe, and the appliances reasonably good and adequate. *Shear. & R. Neg.* § 185b. When the master has been guilty of negligence, knowledge on the part of the servant of such negligence and of the danger arising therefrom is the foundation of assumed risk. *Railway Co. v. Engelhorn* (Tex. Civ. App.) 62 S. W. 561. If it be admitted the decedent saw, at the instant he attempted to make the coupling, the dissimilarity between the couplings, that would not give rise to the doctrine of assumed risk; for, if he acquired that knowledge at the time he attempted to make the coupling, the doctrine of assumed risk does not apply. *Railway Co. v. Millam* (Tex. Civ. App.) 50 S. W. 417. The rule prescribing how the coupling should be made when "coupling Miller hooks with other styles of drawbars" would imply that, if the coupling were made in compliance with the rule, no extraordinary risk would be encountered. A servant upon

whom the duty devolved of performing the service would have the right to presume that his master knew it was safe if done in the manner prescribed. If making the coupling according to the rule of his instruction would expose him to unusual danger, it was the company's duty to inform him of the extra hazard. The decedent was not bound to know what was unusual, and not to be expected in the usual course of his employment. *Kerns v. Railway Co. (Iowa)* 62 N. W. 682. The decedent's employment was that of a brakeman on freight trains, upon which such coupling appliances as a "Miller hook" and "Janney coupler" were not ordinarily used. It does not appear that he ever made or ever saw a coupling made with such mismatched appliances. The fact that it was generally known among railroad men that making a coupling with such devices was dangerous would not, as a matter of law, impute to him knowledge of such danger. The rules furnished him provide for making such a coupling and he was ordered by his conductor (the company's vice principal) to make it. He had, in addition to the presumptions arising from the rule forbidding cars with defective couplings being placed in trains, and prescribing how couplings should be made with a Miller hook, and that he was not exposing himself to unusual danger, the right to assume that the conductor would not order him to make the coupling if the appliances were unsafe. It not appearing that Winton knew, or by the exercise of ordinary observation ought to have known, that the lateral motion of the Miller hook was sufficient to permit it to slip by the Janney coupler, it cannot be said he assumed the risk of losing his life in undertaking to couple the cars. *Russell v. Railway Co. (Minn.)* 20 N. W. 147; *Martin v. Railway Co. (Cal.)* 20 Pac. 645; *Railway Co. v. Smith (Tex. Civ. App.)* 57 S. W. 990. As the risk to Winton in making the coupling was one that arose from the negligence of appellant, and not such as was ordinarily incident to his employment, nor of which he had knowledge, nor readily discernible, and of which he had knowledge in time to protect himself, therefore we conclude, under the law and facts, that it cannot be held to be such a risk as was assumed by him.

3. Little need be said as to contributory negligence. If one is injured in the discharge of his duty by an occurrence of which he assumed the risk of the danger, it can make little difference whether he was negligent in the performance of the duty or not. In either event he is not entitled to a recovery. If the injury results from a risk which was not assumed, but from his contributory negligence, he cannot recover, though his employer may have also been guilty of negligence. The only ground upon which it is possible to say that decedent was guilty of contributory negligence is that he did not obey the rule of the company as to the manner of making the coupling. Upon this point

we have found that it is demonstrable from the testimony that in this he observed the rule to the letter. We must therefore hold that he was not guilty of any negligence proximately contributing to his death.

It follows from what we have said that the court did not err in submitting the case to the jury on the facts. It is only when it is so clearly established from the undisputed testimony as to admit of no other reasonable hypothesis or conclusion that either a fact essential to plaintiff's action is not proven, or one which is a complete defense has been shown, that it becomes the duty of the court to instruct a verdict for the defendant. *Sanchez v. Railway Co.*, 68 Tex. 117, 30 S. W. 481; *Railway Co. v. Ryan*, 80 Tex. 50, 15 S. W. 538; *McDonald v. Railway Co.*, 86 Tex. 1, 22 S. W. 989, 40 Am. St. Rep. 803; *Choate v. Railway Co.*, 90 Tex. 88, 36 S. W. 247, 37 S. W. 319; *Haass v. Railway Co. (Tex. Civ. App.)* 57 S. W. 855.

All of the questions raised in the assignments which complain of the charge, except one, are involved in what we have already stated to be the law applicable to the facts in this case. The charge is in perfect accord with our view of the law as before expressed, and we deem it unnecessary to say more than that, in our opinion, none of such assignments, as well as none of those which complain of the court's refusal to give certain special instructions requested by appellant, is well taken. As the charge shows that the only issues of negligence submitted to the jury were: (1) Whether appellant was guilty of negligence in using a Miller hook in connection with a Janney coupler; (2) whether or not it was negligent in failing to inform deceased of the unusual danger in making the coupling; and (3) whether Winton was guilty of contributory negligence,—the appellant could not have been prejudiced by the court's telling the jury in its charge that, before they could find for plaintiffs they must find that decedent's "injury was caused through the negligence of the defendant in some one of the respects above named," i. e., some one of the grounds of negligence alleged in plaintiffs' petition. When the charge is considered as a whole, the jury were only permitted to consider or find against appellant upon one or both of the grounds of negligence submitted to them.

The evidence shows that Annie H. Winton, the mother of the deceased, was 73 years old when her depositions were taken in the case; that her life expectancy was 7 years; that he gave her about an average of \$50 a year; that she resided with her daughter, Cora Caswell, in California, at the time of his death; that Mrs. Caswell and another married daughter contributed to her support by giving her a home. Deceased was earning \$100 per month when he was killed. In May, 1899, he spoke of his intention to care for his mother the remainder of his life, saying that he wanted her to live with him, and take life

easy; that theretofore he did not have money to do for her as he liked, "but now [May, 1899] he was out of debt, making money, and able to support her." Had deceased contributed one-third of his earnings during her life expectancy, it would have amounted to little more than the judgment. She already had a home with her daughter, and it is not shown that she ever intended to change it for a home with her son. There is nothing to show that she had any reasonable expectation of receiving pecuniary aid of more than \$1,000 in value from her son had he lived. That sum we believe will amply compensate her for the pecuniary loss she has sustained. We do not believe the damages awarded Minnie Winton, the wife of deceased, is excessive. If within 15 days from this date a remittitur is entered by Mrs. Annie H. Winton of \$1,500, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded.

ADAMS v. KING.¹

(Court of Civil Appeals of Texas. Jan. 11, 1902.)

INFANTS—CONTRACTS—SALES—PUBLIC LANDS.

Under Act July 8, 1879, amended by Act April 6, 1881, § 6 et seq., authorizing the sale of school lands, and declaring that any person may become a purchaser, a sale to an infant was nevertheless void, so that a retention of the land by the infant for 10 years, and a subsequent sale by him, could not amount to a ratification.

Appeal from district court, Shackelford county; N. R. Lindsey, Judge.

Action by J. Q. Adams against C. H. King. From a judgment for defendant, plaintiff appeals. Reversed.

A. A. Clarke, Thos. L. Blanton, and Theodore Mack, for appellant. Warren & Webb, J. A. King, and A. H. Kirby, for appellee.

HUNTER, J. This was an action of trespass to try title brought by Adams to recover from King three sections of state school land lying in Shackelford county; being sections 8 and 18 in block 13, and section 6 in block 14, located by virtue of certificates issued to the Texas & Pacific Railroad Company. The defendant pleaded, "Not guilty," and reconvened in a cross action to recover possession. The case was tried by the court without a jury, and judgment was rendered against Adams, in favor of King, for the recovery of the land with writ of possession; and from that judgment Adams has appealed, and brings the case here on the findings of fact and conclusions of law as found by the district court, accompanied by a statement of facts.

We adopt the conclusions of fact as found by the district judge, some of which are that on December 18, 1882, the three sections in controversy were formally sold by the commissioner to James M. Rockwell, who was

on that day over 19 years old, but under the age of 21, and that Rockwell on July 28, 1892, conveyed it to T. H. King by quitclaim deed; that said sale to Rockwell has never been legally forfeited, though the commissioner has put the land on the market twice since and sold it twice, both of which sales, however, were void because of collusion with King (the lands being in King's pasture); that Rockwell, by failing to repudiate the sale within a reasonable time after majority, and by his sale to King in 1892, must be held to have elected to affirm the sale made to him by the commissioner while a minor, if such sales can be affirmed.

It will be seen from the above that the vital question in this case is whether the sale in this instance was void, or only voidable. It is the first time this question has come before us under the statute of 1879 as amended by the act of 1881, and were it not for the decision of our supreme court in Walker v. Rogan, 93 Tex. 248, 54 S. W. 1018, construing that statute, we would not hesitate to hold that the sale to a minor under the statute named would be voidable only, and that, as the ratification in this instance by the minor was complete after coming of age, King's title under his deed from Rockwell is good. The reasons why we should so hold are sufficiently set forth in the opinion of this court delivered by Justice Stephens in Watson v. White, 64 S. W. 826, 3 Tex. Ct. Rep. 70, and in O'Keefe v. McPherson, 2 Tex. Ct. Rep. 97, 61 S. W. 534, and authorities cited in these cases. In view, however, of the decision in Walker v. Rogan, supra, construing the very statute under consideration, and being unable to distinguish this case, in principle, from that, we feel constrained to reverse the judgment herein, and render it in favor of the appellant; and it is so ordered.

BRIDGES et al. v. WILLIAMS.

(Court of Civil Appeals of Texas. Feb. 12, 1902.)

NEW TRIAL—CUMULATIVE EVIDENCE.

New trial will not be granted to introduce the books of the store kept by T., where they would only show that they were kept in the name of other persons, and would thus be merely cumulative evidence, assisting the letters of T. read on the trial.

On rehearing. Denied.

For former opinion, see 66 S. W. 120

John G. Winter, for appellants. J. E. Yantis and Lud Williams, for appellee.

COLLARD, J. The motion for rehearing must be overruled. Our former decision that the administrator was entitled to the possession of the goods for the purposes of administration must stand. Appellants made an effort to show that Thomas was not the owner of the goods; but we decided that appellants were wrongdoers, and could not

¹ Rehearing denied February 8, 1902, and writ of error denied by supreme court.

take the goods from one rightfully in possession, as was Thomas during his life, and hence the administrator's duty was to take the goods to be administered in due course of law.

The motion in the court below for a new trial on the ground that the books of the store kept by Thomas would show that they were kept in the name of N. E. Lewis and J. L. Goree was properly overruled. The books would only tend to show the fact stated, and would be cumulative evidence assisting the letters of Thomas read in evidence on the trial,—strictly cumulative evidence, in the nature of admissions that the goods belonged to other parties; that is, additional testimony of the same kind and to the same point. It has often been decided that newly-discovered evidence, when merely cumulative, will not authorize the granting of a new trial. *State v. Moore*, 7 Tex. 258; *Oil Co. v. Thompson*, 76 Tex. 238, 13 S. W. 60; *Railway Co. v. Wood*, 69 Tex. 682, 7 S. W. 372; *Conwill v. Railway Co.*, 85 Tex. 102, 19 S. W. 1017; *Walker v. Brown*, 66 Tex. 558, 1 S. W. 797. As to what is cumulative evidence, see *Railway Co. v. Forsyth*, 49 Tex. 180.

The motion for rehearing is overruled.

WESTERN UNION TEL. CO. v. REDINGER.
(Court of Civil Appeals of Texas. Feb. 12, 1902.)

DELIVERING TELEGRAMS—AGENT TO RECEIVE—NEGLIGENCE.

Any negligence in not having telegram for plaintiff delivered to the proprietor of the hotel at which he boarded, who was his agent for receiving messages, is that of the agent, and not of the telegraph company; he, on inquiry of him for plaintiff, by one he knew was a messenger of the company, not having asked if there was a message for plaintiff, and the fact that the plaintiff boarded at the hotel being no notice that the proprietor was his agent to receive messages, and imposing no duty to inquire if he was such agent.

Appeal from district court, Fannin county; E. S. Chambers, Judge.

On motion to modify statement. Granted.

For former reports, see 63 S. W. 156; 65 S. W. 78.

Wilkins, Vinson & Batsell and Geo. H. Fearons, for appellant. Wheeler & Cunningham and Agnew & Duncan, for appellee.

KEY, J. Appellee has submitted a motion asking this court to modify and correct a statement embodied in the supplemental findings of fact heretofore filed to the effect that the proprietor of the hotel where the plaintiff boarded in Bonham was informed of the fact that the messenger boy had a message for him. The motion will be granted. On that issue there was a conflict in the testimony, and, the jury having decided in favor of the plaintiff, we find, in support of the verdict, that the hotel proprietor was not in-

formed of the fact that the messenger had a telegram for Redinger; but the undisputed testimony shows that the boy who acted as messenger for the telegraph company went to the hotel, and inquired of the proprietor for Redinger, and was told that he was out of town. And by the same character of testimony it was shown that the hotel proprietor knew at the time that the boy referred to was a messenger of the telegraph company, whose duty it was to deliver telegrams, but he did not ask the messenger boy if he had a telegram for Redinger, nor offer to receive the same. In examining the record on the motion under consideration, the writer has reached the conclusion that this case is distinguishable from the *Linn Case*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58, and that there was testimony which authorized the jury to find that the proprietor of the hotel was the plaintiff's agent, and had authority to receive the message, and the only hiatus in plaintiff's case is the entire absence of any testimony tending to show that the messenger boy or the telegraph company had any knowledge of the fact, or reason to suppose that the hotel proprietor was authorized to receive the telegram. The mere fact that the plaintiff boarded at the hotel was not notice of the fact that the proprietor of the hotel was the plaintiff's agent for the purpose of receiving telegrams, or for any other purpose; nor was it the duty of the telegraph company, under the circumstances stated, to prosecute an inquiry to ascertain whether the plaintiff had an agent authorized to receive the telegram. If the agency referred to existed, the only negligence disclosed by the testimony in reference thereto was the negligence of the hotel proprietor in not informing the messenger of the fact that he was the plaintiff's agent, and would receive the telegram. When he saw the messenger inquiring for the plaintiff, he had reasonable ground to suppose that an attempt was being made to deliver a telegram to him, and, if he was the plaintiff's agent for the purpose of receiving the telegram, he was guilty of negligence in not apprising the messenger of that fact, and permitting him to carry the telegram away.

SCOTT et al. v. FARMERS' & MERCHANTS' NAT. BANK et al.

(Court of Civil Appeals of Texas. Jan. 22, 1902.)

CORPORATIONS—PURCHASE OF PROPERTY—CONSIDERATION MOVING FROM DIRECTOR—AGREEMENT BETWEEN DIRECTOR AND CORPORATION—POWERS TO HOLD PROPERTY—AGREEMENT FOR BENEFIT OF DIRECTORS—DAMAGES FOR BREACH—INSOLVENCY OF CORPORATION—CREDITORS—LIMITATIONS—TRIAL—HARMLESS ERROR—CONSOLIDATION OF ACTIONS—ASSIGNMENTS OF ERROR—SPECIAL VERDICT.

1. A party seeking to vacate an order consolidating actions after acquiescing therein for seven months must show that the consolidation

¹ Writ of error denied by supreme court.

was made over his objection, or give a reasonable excuse for not then objecting.

2. An assignment of error that the court erred in overruling the motions for a new trial and for judgment notwithstanding the verdict, for the reasons set forth in the motions, not followed by any proposition, but submitted as a proposition in itself, will not be considered, it being too general.

3. An assignment of error which complains of the court's action upon two motions seeking different relief and involving several questions will not be considered.

4. A party's assignment of error covering several pages of his brief, and specifying several different propositions, though irregular, is not void, and hence will not be disregarded.

5. Where the unchallenged verdict of a jury, alone or in connection with facts deduced from the evidence, will, upon any sound principle of law, support the judgment, the court, on appeal, must affirm it, though theories advanced to support it are untenable.

6. Where a party on appeal does not assign as error the action of the court in refusing to set aside a special verdict, he cannot complain of the judgment against him on the ground that certain findings are unsupported by the evidence.

7. Under Laws June 18, 1897, relating to the requisites of special verdicts, providing that upon appeal an issue not submitted shall be deemed as found by the court, so as to support the verdict, if there be evidence to sustain such finding, the trial court cannot disregard a finding in a special verdict, though unsupported by the evidence.

8. Laws June 18, 1897, relating to the requisites of special verdicts, providing that upon appeal an issue not submitted shall be deemed as found by the court, so as to support the verdict, if there be evidence to sustain such finding, does not affect Rev. St. art. 1332, declaring that as between the parties a special verdict shall be conclusive as to the facts found, and article 1333, requiring the court to render a judgment on the special verdict unless it be set aside.

9. Where a special verdict entitled a party to a judgment, the court must either set aside the verdict or render judgment thereon, but cannot enter judgment contrary thereto.

10. A party aggrieved by a special verdict cannot move the court for judgment notwithstanding such verdict, for the motion concedes the facts to be as found by the jury.

11. Where a party aggrieved by a special verdict does not move the court to set aside the verdict and grant a new trial, and does not on appeal, assign as error the overruling of such motion, error, if any, is waived.

12. Where the consideration of a deed conveying a street railway was furnished by a third person, who afterwards purchased the same at a trustee's sale, such third person is the absolute owner thereof, though he may have intended that it should inure to the benefit of the grantee in such deed, and hence the third person and his grantees are entitled to hold the same, at least until they are offered reimbursement for the consideration paid therefor.

13. An agreement between a director of a corporation and the corporation that property secured by the former should be his individual property is valid in law, there being nothing to prevent a director from dealing with the corporation; and hence land secured by the director in consideration of the corporation extending its street car lines is his individual property.

14. Under Batts' Ann. Civ. St. art. 651, authorizing private corporations to purchase real estate as the purposes of the corporation shall require, and also to take and hold other real property in order to secure a debt due it, a street railway corporation cannot acquire blocks of land in consideration of its extend-

ing its street car lines, such land not coming within the classes specified in the statute.

15. Though the state only can object to a corporation acquiring title to real estate in excess of its powers, yet when the corporation seeks the aid of a court to enable it to acquire lands outside of its power to take and hold, a private person may defend on that ground, and hence, where a director of a corporation received deed to lands intended for the corporation, the latter cannot compel a conveyance thereof.

16. An assignment of error by a party claiming to be the owner of the property involved, complaining of a decree in favor of another party to the record, will not be considered where the court adjudges that the party complaining is not such owner.

17. Where the purchasers of a street railway agreed to operate the railway for a certain period, and to extend its line a certain distance, the performance of which would benefit the directors of the selling corporation individually without benefiting the corporation, such directors as individuals are entitled to damages resulting from a breach of the agreement, and such damages constitute an equitable lien analogous to a debt for the purchase price.

18. Where a deed of a street railway contains a covenant against incumbrances, an assignee of the vendee, on being sued for failure to operate the railway as required in the deed, cannot defend on the ground that the covenant against incumbrances has been broken, where no damage is shown to have resulted from the breach, and especially where no offset or counterclaim is pleaded.

19. Where, in an action by a grantor of a street railway for failure of the grantee to operate the railway as required by the deed, there is no assignment calling in question the amount of the damages awarded, the court on appeal will not disturb the damages assessed by the jury.

20. While one director may contract with the corporation, the entire board of directors cannot do so, there being then no one to represent the corporation, and hence the directors cannot claim a lien on the corporate property under a pledge by them to themselves of bonds secured by a mortgage on the corporate property.

21. In an action by a grantor of a street railway against the assignee of the grantee for damages for failure to operate the railway as required by the deed, the grantee is not a necessary party, he having no interest in the property in litigation, and no personal judgment is rendered against him.

22. A purchaser of property under a trustee's sale is not subrogated to the rights of a prior mortgagee, thus cutting of the vendor's lien of his grantor under a contract for the sale of the property where the jury finds that contract for such sale constituted the consideration of the trustee's sale.

23. Admission of evidence of the claim of the directors of a corporation as individuals to the ownership of corporate property by virtue of their purchase at a trustee's sale under a void deed of trust is harmless error where the court decided against such claim.

24. Admission of evidence of an assignment by a street railway corporation to all its directors of the right to damages for a breach of an agreement of a grantee of the corporation is harmless error where the jury found that the corporation sustained no damages by reason of such breach.

25. A party having an equitable lien on certain property has also an equitable lien on the sum recovered by its legal owner from one wrongfully appropriating such property to his own use.

26. A party charging that the officers of a corporation have misapplied certain corporate funds which should have been in part applied to his claim against the corporation must, in

order to recover against such officers as individuals, show what part of such funds should have been applied to his claim.

27. A person's claim for injuries inflicted by an insolvent corporation, though not reduced to judgment, is an equitable lien on its property, constituting its officers trustees thereof for his benefit.

28. The statute of limitations does not run against a person claiming damages for injuries inflicted by an insolvent corporation until its officers indicate to the claimant an intention to repudiate the trust created by law, whereby such officers are made trustees for the benefit of the creditors of the corporation.

29. A sale by an insolvent street railway corporation of its property to one agreeing to operate the same for five years under a secret agreement that such operation was for the benefit of the directors individually of the selling corporation is not a notice to a corporation creditor of a repudiation of the trust imposed upon the corporate officers until the creditor had knowledge of the secret agreement so as to put in operation the statute of limitations.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Actions by the Farmers' & Merchants' National Bank and others against H. O. Scott and others and by J. E. Parker and others against the Citizens' Railway Company and others. The cases were consolidated. From a judgment in favor of the plaintiffs, all the parties appeal. Affirmed.

Clark & Bolinger, for Scott and Citizens' Ry. Co. John W. Davis, Eugene Williams, and L. W. Campbell, for Farmers' & Merchants' Nat. Bank and others.

KEY, J. On April 13, 1896, the Farmers' & Merchants' National Bank of Waco commenced an action in the district court of McLennan county in the form of trespass to try title against Henry O. Scott and the Citizens' Railway Company for the recovery of what had formerly been known as the "Waco Dummy Street Railway." April 13, 1900, it filed an amended original petition, in which it set forth in detail the nature of its title and its claim for rent and damages. It also alleged that it was the owner of a judgment for \$2,000 in favor of one J. H. Graves and against the Waco Dummy Street Railway Company, which constituted a charge against the property superior to the claims of the adverse parties. Thereafter the bank filed two supplemental petitions responding to matters pleaded by the defendants, and in some respects enlarging upon the matters already pleaded by it. The answer of Scott and the Citizens' Railway Company contained a general demurrer, general denial, plea of not guilty, and a special plea setting up in detail the character of title asserted by them. They also filed a supplemental answer in response to the bank's first supplemental petition. June 20, 1896, J. E. Parker, J. A. Clifton, J. W. Johnson, A. A. Robinson, John Sleeper, and L. B. Daughtrey brought an action in the same court against the Citizens' Railway Company and the Farmers' & Merchants' National Bank in form of trespass to try title for the

recovery of the same property. On March 19, 1900, on motion of the plaintiffs Parker and his associates, the two suits were consolidated. Parker and his associates pleaded their rights fully and in detail, claiming—First, ownership of the property; and, second, a lien thereon superior to the claims asserted by the other litigants. The bank and Scott and the Citizens' Railway Company filed answers contesting all the rights asserted by Parker and associates, the particulars of which need not be stated. October 25, 1900,—the day on which the case went to trial,—the bank and Scott and the Citizens' Railway Company filed a motion to set aside the order consolidating the two cases, which motion was overruled. At the request of the respective parties, the trial court submitted the case to the jury upon special issues. After the verdict was returned, a decree was rendered awarding the Waco Dummy Street Railway, together with its right of way, franchises, etc., to the bank, and requiring Scott and the Citizens' Railway Company to pay the bank certain sums of money for rent, etc. The decree also fixed a lien on the property in favor of Parker and his associates for \$15,601.25, superior to the rights of the other litigants, except as to \$1,742.65, a balance due on a judgment obtained by J. H. Graves against the Waco Dummy Street Railway Company, and owned by the bank, which was given priority over the lien established in favor of Parker and his associates. Scott and the Citizens' Railway Company filed a motion asking the court to set aside the verdict and grant a new trial, and another moving the court to render judgment for them upon and notwithstanding the verdict, both of which motions were overruled. All the parties have appealed.

The chief subject-matter of this litigation, the Waco Dummy Street Railway, was a suburban street railroad, constructed by a domestic corporation known as the Waco Dummy Street Railway Company. The enterprise was inaugurated in 1890, but the road was not in operation until February, 1891. The company operated it for about three months, and thereafter J. E. Parker, the president, and A. A. Robinson, a director of the company, operated it for a while, making in all five or six months that it was a going concern. It was not a financial success, and, after running five or six months, ceased to be operated, and became an insolvent nongoining concern. April 15, 1891, the Waco Dummy Street Railway Company executed a mortgage or deed of trust to the Citizens' National Bank of Waco, as trustee, conveying the property in controversy to secure an issue of bonds aggregating \$50,000, which mortgage was filed for record in McLennan county on July 11, 1891. On June 2, 1896, W. M. Sleeper, acting as substitute trustee under the mortgage referred to, sold the property in controversy to J. E. Parker and his coplaintiffs, and they asserted title

under this sale. November 5, 1891, the Waco Dummy Street Railway Company made a deed of trust conveying the property in controversy to Robert H. Rogers, as trustee, to secure the Citizens' National Bank of Waco, Tex., in the sum of \$8,813.37, which trust deed was duly recorded November 9, 1891. On June 7, 1892, Robert H. Rogers, acting as trustee, sold the property to W. J. Hobson. At that time W. J. Hobson was the president of the Waco Electric Railway & Light Company, and had been such president and a director of said company from the time of its organization. The company was a corporation chartered under the general laws of this state on February 26, 1891. June 19, 1894, the district court of McLennan county rendered a judgment in favor of the Farmers' & Merchants' National Bank against the Waco Electric Railway & Light Company and W. J. Hobson for \$4,590.30, an abstract of which judgment was properly filed and indexed in the office of the county clerk of that county June 29, 1894. On May 7, 1895, the sheriff of the county, acting under an execution issued upon the judgment, sold W. J. Hobson's interest in the property in controversy to the Farmers' & Merchants' National Bank for \$1,000, all of which sum, except \$38.75 costs, was credited on the bank's judgment, and the bank claims title under that sale. In May, 1891, the Waco Dummy Street Railway Company inflicted certain personal injuries upon J. H. Graves, and on March 17, 1893, Graves obtained a judgment in the district court of McLennan county against the company for damages on account of such injuries for the sum of \$2,000. On November 5, 1895, the property herein involved was sold by the sheriff under an execution issued upon that judgment. The Farmers' & Merchants' National Bank became the purchaser at that sale upon a bid of \$270, which was credited by the bank upon the Graves judgment, which had previously been acquired by the bank, and the bank also claims title under that sale. April 4, 1892, the Waco Dummy Street Railway Company, acting by J. E. Parker, its president, and John Sleeper, its secretary, conveyed the property in controversy to the Waco Electric Railway & Light Company. On February 26, 1894, at the suit of an attaching creditor, the district court of McLennan county appointed a receiver for the Waco Electric Railway & Light Company. The record shows that W. J. Hobson was a party defendant in that suit, but was dismissed by the final decree. It also appears that the Farmers' & Merchants' National Bank was at one time seeking to litigate its rights in that suit, but it is agreed by the parties that it withdrew its plea of intervention. The property now in controversy and considerable other property was taken possession of by the receiver as the property of the Waco Electric Railway & Light Company; and in due course of proceedings, and

by order and approval of the court, it was, on May 7, 1895, sold by a special commissioner, at which sale Henry C. Scott became the purchaser for the sum of \$80,100; and Scott and the Citizens' Railway Company claim title under that sale. This sale included about 5 miles of street railway constructed by the Waco Electric Railway & Light Company, as well as the road conveyed to it by the Waco Dummy Street Railway Company, which was about $4\frac{1}{2}$ miles long, and extended from a central point in the city of Waco to a suburb called "Alta Vista." It was shown that all the title acquired by Scott had been vested in the Citizens' Railway Company; and that is the title asserted by it. The evidence presents no question as to the right of any of the parties to protection as innocent purchasers. The deed from the Dummy Street Railway Company to the Electric Railway & Light Company recites a cash consideration of \$7,500, and the obligation of the latter company and W. J. Hobson to operate the dummy road for five years from the date of the deed, making four round trips each day. That deed contains a general covenant of warranty, and a stipulation, not however in the warranty clause, to the effect that the property conveyed is to be free from all incumbrances. It was shown that the cash consideration recited in the deed was not in fact paid, and the deed was made by the officers of the Dummy Street Railway Company for the purpose of complying with the following contract:

"Waco, Tex., March 8, 1892. To Mr. W. J. Hobson: We, the undersigned stockholders of the Waco Dummy Street Railway Company, make you the following proposition to sell you the track, roadbed, and right of way of the above-mentioned Waco Dummy Street Railway Company, as it is now built from Washington street, in the city of Waco, Texas, to the town site of Alta Vista, about $4\frac{1}{2}$ miles of track, free from any incumbrance whatever, this including all franchises and rights of way along the said $4\frac{1}{2}$ miles; and we hereby agree to make legal title to same to you within the period of sixty days from this date, reserving the rolling stock now owned by said Waco Dummy Street Railway Company, consisting of one engine and two passenger cars,—all upon the following conditions, to wit: That you will equip with electric cars and appliances suitable for the operation of same by electricity, equip the same for the whole length of the above line, and operate said cars over all of said lines for the period of five years from the time of its equipment, as above stated, which shall be within ninety days from the time of full delivery of said property to you. You shall also operate same not less than four trips each day each way throughout the whole length of said line, and the fare from Alta Vista shall not exceed five cents each way. You are also to

agree to build or cause to be built an extension of said railroad track with its electric equipment to the town of Robinson, a distance of three miles, within four months from the time that we shall give you good and sufficient guaranties that you will be paid the sum of six thousand dollars in cash, to be paid when said three miles of line shall be built and operated, in consideration of which, and in full payment of same, you shall give us a good title, clear of all incumbrance, to the following mentioned real estate, to wit, blocks Nos. 1, 39, 57, and 47 in the University Heights addition to the city of Waco, Texas, said deed to be made soon as may be, and not later than twelve months from the time of the conveyance to you of the above property, or in default of said conveyance of said four blocks of ground within the said time you shall pay to us in cash, in its stead, the sum of \$7,500, with interest from the 1st day of May, 1892. The following further conditions are made and agreed upon, namely, that the right of way, fifty feet wide, shall be donated, free of cost, for three miles of track to be built to Robinson, and that said line shall be built as now located, or changes made as may hereafter be agreed on, and said line shall be operated for the period of five years from its completion. The fare from Robinson to Waco shall not exceed twenty-five cents for the round trip. All the property not mentioned to be conveyed to said Hobson is hereby expressly reserved for the use of the stockholders of the undersigned stockholders of said Dummy Street Railway Company. If the four blocks of ground above mentioned shall not be conveyed within sixty days, then the interest at eight per cent on their value, as stated at \$7,500, shall be paid until such conveyance shall be made. The Waco Dummy Street Railway Co., by J. E. Parker, President.

"We, the stockholders of the Waco Dummy Street Railway Company, agree to the above. J. W. Johnson. A. A. Robinson. J. A. Clifton. L. B. Daughtrey. H. N. Atkinson. Jno. Sleeper. T. F. Jones. J. E. Parker. W. M. Sleeper. Bart Moore, individually."

Acceptance of Above Proposition. "I accept the above proposition, and that the stockholders of said Waco Dummy Street Railway Company are thereby bound by this proposition. Waco, Tex., March 8, 1892. W. J. Hobson."

The deed from Rogers, as trustee, to Hobson, recites a consideration of \$7,500, but the parol evidence bearing on that question shows that Hobson paid nothing at the time he bought the property at that sale. However, on August 4, 1892, he conveyed to J. E. Parker, as president of the Waco Dummy Street Railway Company, the four blocks of land referred to in the above contract for a recited consideration of \$7,500. Parol evidence was submitted, showing that this con-

sideration was not paid in money, and some of the testimony tends to show that the lots were conveyed to Parker as part of the consideration for the deed conveying the dummy railway to the electric railway and light company, while testimony given by Hobson himself tends to show that they were conveyed to Parker in satisfaction of Hobson's bid when he purchased the dummy road at the trustee's sale. In reference to the four blocks of land the transcript shows that on April 6, 1891, the following contract was made: "State of Texas, County of Dallas. This contract, made by and between the Waco Electric Railway & Light Company, of Waco, Texas, acting through its president, W. J. Hobson, party of the first part, and A. W. Childress, trustee, for himself and beneficiaries, party of the second part, of Dallas county, Texas, witnessing: That in consideration of the party of the first part constructing, equipping, and operating an electric street railway, as proposed by an ordinance granting the franchise therefor, recently passed by the city council of the city of Waco, which said railway is to begin at the public square of said city, and running from thence on Austin street to Ninth street, and thence on Ninth street by some practicable route to Fifteenth street, and thence from Fifteenth street to Grace street (said Grace street being known as Maple street, in the University Heights addition to Waco), and thence in a southwesterly direction on Maple street to Pierce street, and thence on Pierce street, with said street, northwesterly through said University Heights addition to the Waco Female College. The operation of said railway, as proposed by the terms of said ordinance, and the running of a car thereon at least every thirty minutes from 6:30 a. m. until 10 p. m., and every sixty minutes from 10 p. m. to 12 o'clock midnight. Said road to be first class in construction and operation in all particulars. And the said road is to be operated as above set forth for the term of five years from the time of its completion. And as security for the continued operation for the term of five years, in accordance with the agreement above set forth, said company is to furnish a bond to said A. W. Childress, trustee, for the faithful keeping up and operation of said road for said term of five years, in an amount to be agreed upon, which said bond is to be considered and made a part of this contract or agreement. In consideration of the foregoing, the said A. W. Childress, trustee, for himself and beneficiaries, agrees and binds himself to convey to said Waco Electric Railway & Light Company (or such person as it may designate), upon the completion of said railway and the operation of its cars thereon from Ninth and Austin streets to said Waco Female College, two blocks of the Waco University Heights addition to Waco, Texas, the same being numbered as follows, to wit, block 1 con-

sisting of fourteen lots; block 39, consisting of fourteen lots. And upon the completion and operation of said railway from Ninth and Austin streets to the public square of said city, and the operation thereon of its cars from the public square through the property of said A. W. Childress, trustee, to the Waco Female College, then said Childress, trustee, is to convey to said Waco Electric Railway & Light Company, or such person as it may designate, two additional blocks of the Waco University Heights addition to Waco, Texas, as follows, to wit, block 47, consisting of fourteen lots, and block 57, consisting of fourteen lots, each of said blocks being designated upon the plat of said Waco University Heights addition to Waco, Tex., and the deed for the same to be made as soon as said road is completed and in operation in accordance with the foregoing agreement. It is mutually agreed and understood that said railway is to be completed and in operation to said proposed Waco Female College on or before six months from date hereof, unavoidable delays excepted; and in the event of a failure to complete the same, and have the same in operation, as aforesaid, within six months, then this contract is to become null and void. It is further understood that the blocks of land hereinbefore stipulated to be conveyed by said A. W. Childress, trustee, are to be conveyed free from all incumbrances and by good title. Witness our hands and this instrument signed in duplicate, the said Waco Electric Railway & Light Company by the hand of its president, and attested by the hand of its secretary and its seal, at its office in Waco, Texas, this April 6th, 1891. The Waco Electric Railway & Light Co., by W. J. Hobson, Presdt. [Company Seal.] Attest: S. A. Hobson, Secy. A. W. Childress, Trustee."

At the same time, and as part of the same transaction, the Waco Electric Railway & Light Company, by W. J. Hobson, president, and S. A. Hobson, secretary, executed to A. W. Childress, as trustee, a bond in the sum of \$15,000, obligating itself to comply with the above contract. On June 4, 1892, Childress and others obtained a charter, incorporating the University Land & Investment Company, and on June 13, 1892, Childress conveyed to that company certain property held by him, including the four blocks specified in the above contract; and on August 1, 1892, the University Land & Investment Company conveyed the four blocks to W. J. Hobson, the deed reciting that it was made in accordance with the contract of April 6, 1891, between A. W. Childress, trustee, and the Waco Electric Railway & Light Company. It was shown that at the time the dummy street railway company executed the deed of trust to secure its bonds for \$50,000 Parker and his associates were indorsers for the company to the extent of about \$11,000, and they submitted testimony tending to

show that they, acting as the board of directors of said company, had placed the bonds in the possession of the Citizens' National Bank, to be held for their security and protection, on account of their liability as indorsers for the dummy street railway company. They also proved that they had discharged the indebtedness for which they were sureties, and had not been reimbursed for a considerable portion thereof. Other facts and testimony may be referred to hereafter, as they appear to be pertinent.

The verdict of the jury contains the following findings of fact, though not in the order here given: (1) That W. J. Hobson was the president and a director of the Waco Electric Railway & Light Company in 1892. (2) That the contract with A. W. Childress, as trustee, for the construction of a line of street railway, was not made with the electric street railway company, but with Hobson as an individual. (3) That the consideration for the deed conveying the four blocks of land referred to in said contract to Hobson was money and services which moved from Hobson to the makers of the deed, said money and services being paid to A. W. Childress. (4) That in executing said deed the makers and Hobson intended to vest the title in him for his own benefit. (5) That when Hobson conveyed the four blocks of land to J. E. Parker they belonged to him, and not to the electric railway and light company. (6) That by the agreement between Hobson and Parker and his associates, as directors of the dummy street railway company, the four blocks of land were accepted in satisfaction of the \$7,500 bid by him at the sale made by Rogers as trustee, and said bid was thereby discharged; and in response to another question, asking if Hobson paid out any money as a bid at said sale, and if he gave any consideration for the deed made to him by Rogers, as trustee, the jury answered, "He did." (7) That the agreement to run the cars to Alta Vista four times a day each way for five years was not made for the benefit of the dummy street railway company itself, but for the benefit of the directors individually. (8) That running the cars, as stated in the contract, would have been no benefit to the dummy street railway company, but would have benefited Parker and his associates to the extent of 25 per cent. on the value of 265 acres of land owned by them near Alta Vista, and worth \$200 per acre at the time the contract was made. (9) That the electric railway and light company partially complied with the contract requiring the road to be operated to Alta Vista, but ceased to operate it in the summer of 1893. (10) That the Citizens' Railway Company took possession of the road on October 31, 1895, and did not operate it according to the contract embodied in the deed to the electric railway and light company. That it ceased to operate to Twelfth street terminus in the summer of

1896, and did not operate it to Ninth street after April 4, 1897. (11) That in executing the deed of April 4, 1892, from the dummy street railway company to the electric railway and light company, the former company transferred all of its property, and deprived itself of its ability to operate its road and perform its duties to the public; and that by the execution of said deed it was intended that the electric railway and light company should be substituted for the dummy street railway company as to the operation of the road and the performance of such duties. (12) That J. E. Parker, Jno. Sleeper, J. A. Clifton, L. B. Daughtrey, and J. W. Johnson were stockholders or directors of the dummy street railway company during the years 1890, 1891, 1892, and 1893. (13) That in 1891 and 1892 the dummy street railway company owed \$10,813.37, including the \$2,000 subsequently reduced to judgment in favor of J. H. Graves; and on April 4, 1892, its assets were worth \$12,000. That during said two years it was not able to pay its debts, and in 1891 its officers and directors ceased to operate the road because it did not pay. (14) That the sale made by Robert H. Rogers, trustee, at which W. J. Hobson became the purchaser, was made for the purpose of clearing the title to the property from the incumbrance created by the trust deed under which the sale was made. (15) That the bonds secured by the mortgage dated April 15, 1891, were pledged to Parker and his coplaintiffs as security, by a resolution of the board of directors of the dummy railway, to secure them against indorsements that had been made by them for the dummy road, or for amounts they were bound to pay for or had advanced to the dummy street railway company. (16) That the pledge referred to was not concurred in by all the stockholders of the dummy street railway company. (17) That at the time the pledge was made the dummy street railway company owed debts for which said plaintiffs had become responsible, and which debts had been subsequently paid by them. (18) That J. H. Graves sustained the injuries which formed the basis of his claim against the dummy street railway company in May, 1891, subsequent to the time the bonds were pledged to secure Parker and his associates. (19) That at the time the bonds were pledged the dummy street railway company was indebted to Parker and his coplaintiffs in the sum of \$7,902.95, and that said indebtedness was still owing at the time the dummy road was sold by the substitute trustee, Wm. H. Sleeper, and purchased by the plaintiffs, J. E. Parker and his associates. (20) That the 265 acres of land owned by Parker and his associates near Alta Vista had depreciated 50 per cent. in value, which depreciation was caused by the failure to operate the dummy railway, and the general depreciation of land values. (21) That the dummy street railway was a parallel and competing line

with the roads owned by the Waco Electric Railway & Light Company and the Citizens' Railway Company, respectively. The jury also made findings that tend to support the personal judgments rendered against Scott and the Citizens' Railway Company for rent and conversion; but, as no point is made in this court as to the amount of these liabilities, and as the findings referred to have no bearing on the question of title, we deem it unnecessary to set them out. Of course, if the bank was not entitled to its judgment on the issue of title, it was not entitled to any recovery for rent and conversion, and, if we should decide against it on the question of title, the judgment for rent and conversion would be set aside. The verdict also embraces some other findings, which are deemed unimportant, and therefore omitted from this statement.

Continuing the order in which the case has been presented in this court, we consider the appeal presented by Scott and the Citizens' Railway Company first. Their first complaint is addressed to the action of the trial court in overruling the motion to set aside a previous order consolidating the two cases. The order referred to was made on March 19, 1900, and the motion to set it aside was overruled October 25, 1900, the day the case was called for trial. It is not shown that the complainants objected to the consolidation at the time it was made, which the record shows, and we judicially know, was at a former term of the court. Consolidation of suits is a matter of practice, resting, to some extent, in the discretion of the trial judge (*Young v. Gray*, 65 Tex. 100); and the party who complains in that respect ought to show that he has exercised reasonable diligence to prevent that of which he complains (*Bank v. Fry* [Tex. Civ. App.] 37 S. W. 675). One seeking to set aside an order of consolidation made seven months before, and at a former term of court, ought to show that it was made over his protest, or present a reasonable excuse for not then objecting. Such showing is not made in this case, and for this reason, if no other, we overrule the assignment of error on this subject.

The second assignment charges the trial court with error in rendering judgment for the bank for title and possession of the property, and for rents, etc.; and the third assignment, which is not followed in the brief by any proposition, but is submitted as a proposition in itself, is as follows: "The court erred in overruling the defendants' motion for a new trial, and also motion to render judgment for the defendants notwithstanding the verdict, for all the reasons set forth in said motion." The adverse litigants object to a consideration of this assignment on the ground that it is too general. In *Land Co. v. McClelland*, 86 Tex. 180, 23 S. W. 576, 1100, 22 L. R. A. 103, our supreme court considered at some length the question

of particularity required in assignments of error, and announced this doctrine: "Where an assignment of error is sufficiently specific to enable the court to see that a particular ruling is complained of, it should be held good, although it should fail to state the reason why such ruling is claimed to be erroneous. An assignment may be brief, and yet specific, and brevity in such a case is commendable, and accords with good practice. The reasons by which allegations of error are sought to be sustained find their proper place in the propositions, statements, and authorities required to be set forth in the brief under and in support of the respective assignments." Under the rule quoted it would seem that an assignment charging in general terms that error had been committed in overruling a motion for a new trial, or any other motion, when followed by appropriate propositions and statements showing why it is contended the motion should have been granted, should be held sufficient; and it has been so held by the supreme court in reference to such an assignment complaining of the action of the trial court in overruling a motion for a continuance. *Railway Co. v. Howell*, 87 Tex. 429, 30 S. W. 102. However, there is a long line of decisions holding that such assignments as "the court erred in overruling the defendant's motion for a new trial," and "the court erred in not granting the defendant's motion for a new trial for the reasons therein stated," are too general, when the motion assigns more than one ground for a new trial. *Pearson v. Flanagan*, 52 Tex. 266; *Flanagan v. Womack*, 54 Tex. 45; *John v. Battle*, 58 Tex. 598; *Railway Co. v. McNamara*, 59 Tex. 256; *Railway Co. v. Kirk*, 62 Tex. 233; *Hodde v. Susan*, 63 Tex. 310; *O'Neil v. Bank*, 67 Tex. 36, 2 S. W. 754; *Bumpass v. Morrison*, 70 Tex. 758, 8 S. W. 596; *Land Co. v. Chisholm*, 71 Tex. 523, 9 S. W. 479; *Mayer v. Duke*, 72 Tex. 449, 10 S. W. 565. Though other cases to the same effect might be referred to, those cited are sufficient to show that the rule was well established before *Land Co. v. McClelland*, supra, came up for decision; and, notwithstanding what was said in the quotation from the opinion in that case, the court in another part of the opinion referred to and approved the rule established by the cases cited. But the assignment of error under consideration is more objectionable than those referred to in the cases cited. This assignment undertakes to complain of the action of the court in overruling two motions seeking to accomplish different results. One asks the court to render judgment for the Citizens' Railway Company and Scott "upon the special findings of the jury herein rendered notwithstanding such verdict, for the following reasons," and it then proceeds to assign 16 different reasons. The other motion asks the court to set aside the verdict and grant a new trial, and assigns seven different reasons as a basis for that motion,

and the assignment is not followed by propositions giving reasons for charging that the court had erred, and the attempt is made to submit the assignment as a proposition within itself. After *Land Co. v. McClelland* was decided, our supreme court held, in the case of *Insurance Co. v. Chowning*, 86 Tex. 660, 26 S. W. 982, 24 L. R. A. 504, that an assignment of error which attempts to complain of more than one ruling involving more than one question is too general for consideration. For these reasons we deem it our duty to sustain the objections urged against the assignment of error under consideration.

Parker and associates urge objections to all the other assignments of errors,—those presented by the bank as well as those presented by Scott and the Citizens' Railway Company; and, while it cannot be disputed that some of them are subject to some of the criticisms urged, still we do not believe that they should be entirely disregarded. For instance, the second assignment of Scott and the railway company, complaining of the decree against them and in favor of the bank, covers four pages of their printed brief, and specifies seven different reasons for charging that the court erred in so rendering the decree; and the fourth assignment of the bank, complaining of the decree against it and in favor of Parker and associates, covers five pages of its printed brief, and specifies eight separate grounds of complaint. But while this method of preparing assignments of errors has been characterized by our supreme court as irregular, it has also been held that such assignments are not void, and should not be disregarded on account of such irregularity. *Insurance Co. v. Chowning*, 86 Tex. 660, 26 S. W. 982, 24 L. R. A. 504. Under their second assignment, charging that the court erred in rendering judgment for the bank on the issue of title, which is the only other assignment made by them against the bank, Scott and the Citizens' Railway Company assert the following propositions as grounds for reversal: (1) That the evidence indubitably and without contradiction showed that when Hobson bought the property at the trustee's sale he was president of and acting for the Waco Electric Railway & Light Company; that the sale was made solely for the purpose of freeing the property from the trust deed; that Hobson paid no consideration for the property; that the consideration for the deed from the dummy street railway company to the electric railway and light company was paid with property of the latter company; and therefore the property in suit did not belong to Hobson when the bank bought it as his property at sheriff's sale, and belongs to the Citizens' Railway Company under its title derived from the receivership sale. (2) That, the corporate authorities of the Waco Electric Railway & Light Company not having fixed and agreed upon compensation to be paid to Hobson, he was not entitled to

compensation for services rendered, and could not claim any property belonging to that company as his individual property on account of such services; and therefore the jury were not warranted in finding that Hobson paid for the four blocks of land with money and services, and that the finding referred to is too indefinite to be made the basis of the judgment rendered. (3) That issues Nos. 2 and 2½ submitted to the jury at the instance of the bank, and resulting in the findings stated as Nos. 4 and 5 in this opinion, were not susceptible of being answered without further instructions; that there was no evidence authorizing the submission of those issues; that the findings of the jury thereon are contrary to the evidence, and therefore said findings could not be made the basis of the judgment. (4) That the provisions of the constitution prohibiting railroad corporations from acquiring parallel or competing lines do not apply to street railways, and therefore issues Nos. 22 and 23 submitted to the jury at the instance of the bank, and resulting in the finding stated as No. 21 in this opinion, were wholly irrelevant and immaterial. (5) That the bank, having been a party to the receivership, and having credited its bid on its judgment, was not an innocent purchaser.

The court below filed no conclusions of fact or law, and we are not apprised by the record upon what theory it based its judgment. Therefore, if the verdict of the jury is to be treated as unchallenged, and if the facts found therein, either alone or in connection with other conclusions of fact which may be deduced from the evidence, will support the judgment upon any sound principle of law, then it is correct, and must be affirmed, although other theories advanced in support of it may not be maintainable. But under the assignment of error under consideration Scott and the Citizens' Railway Company, as shown by some of the propositions above, do challenge the verdict of the jury, and charge that certain findings are unsupported by evidence; and this brings under consideration this question: When a case has been submitted to a jury on special issues, and the findings of the jury entitle the plaintiff to a judgment, and the trial court overrules a motion to set aside the verdict, but the defendant does not, on appeal, assign as error the action of the court in overruling the motion for a new trial, can he complain of the judgment against him on the ground that certain findings of the jury are not supported by testimony? We are of the opinion that this question must be answered in the negative. The doctrine is well established in this state that in jury trials the verdict must form the basis of the judgment. *Clasborne v. Tanner's Heirs*, 18 Tex. 79; *May v. Taylor*, 22 Tex. 349; *Bledsoe v. Willis*, Id. 651; *McConkey v. Henderson*, 24 Tex. 214; *Handel v. Elliott*, 60 Tex. 147. In *May v. Taylor*, *supra*, which was a

suit on a note secured by a mortgage, and in which the evidence seems to have been so clear and indubitable as to justify the trial court in directing a verdict for the plaintiff, still a judgment foreclosing the mortgage was reversed, because the verdict failed to find the existence of the mortgage. In *Oakes v. West*, 64 S. W. 1033, 3 Tex. Ct. Rep. 214, the writer of this opinion expressed a view not in harmony with this doctrine, but it was not necessary to a decision of that case, and he was laboring under a misapprehension as to the scope of the amendment of June 18, 1897, to article 1331 of the Revised Statutes, relating to special verdicts. That amendment does modify the rule established by the decisions cited in this language: "Upon appeal or writ of error, an issue not submitted and not requested by a party to the case shall be deemed as found by the court in such manner as to support the judgment, provided there be evidence to sustain such finding." But this amendment does not authorize the trial court, in rendering judgment, to disregard a finding of the jury on a material issue, even though such finding has no support whatever in the testimony. The amendment does not in any way affect articles 1332 and 1333 of the Revised Statutes, and these declare that, as between the parties, a special verdict shall be conclusive as to the facts found, and that, unless the verdict be set aside, the court shall render judgment thereon. So it seems quite clear that when a special verdict has been returned, which entitles one of the litigants to a judgment, there are but two alternatives for the trial court. One is to set aside the verdict, and grant a new trial, and the other is to render judgment upon and in conformity with the verdict; and the court cannot properly decline to pursue either course, and render judgment contrary to the verdict. This being the case, if the verdict is not supported by testimony, what is the remedy of the party who is dissatisfied with it? Can he move the court to render judgment for him notwithstanding the verdict? No, because (1) such a motion concedes the facts to be as found by the verdict (1 Black, Judgm. § 16; 1 Freem. Judgm. § 7; 12 Am. & Eng. Enc. Law, 61; *Brown v. Rentfro*, 57 Tex. 332; *Templeman v. Gibbs* [Tex. Civ. App.] 25 S. W. 737); and (2) under the statute and decisions heretofore cited the judgment must accord with, and not depart from, the verdict. Can such dissatisfied party remain inactive, and on appeal complain of the verdict, or of the failure of the court to set it aside of its own motion? Clearly not, because it is not the duty of any court to set aside the verdict, unless requested so to do. Then there is but one other remedy left, and that is to fight the verdict,—to move the court to set it aside and grant a new trial. The law charges the party against whom the jury find the facts with knowledge of the fact that the verdict is a barrier to his suc-

cess, and that, unless he secures its removal, it will necessarily be followed by a judgment against him, regardless of what the evidence may be. This being the case, he must not only ask the trial court to set the verdict aside, but if, on appeal, he seeks to complain on account of the verdict, he must do so under an assignment of error addressed to the action of the court in refusing to set it aside and grant a new trial. *Armstrong v. Elliott* (Tex. Civ. App.) 49 S. W. 636. Suppose a petition, though not fundamentally defective, should be obnoxious to a special exception, which exception, though made, should be overruled, would the defendant on appeal, though assigning no error upon the action of the court in overruling the exception, be heard to complain of the judgment because of the defect in the petition? Or, take a case where improper testimony has been admitted over objection, but no error assigned upon the action of the court in admitting it, could the losing party complain of the judgment because of the admission of the testimony? In the cases stated it is quite clear that the appellate court would hold that the questions raised in the trial court concerning the sufficiency of the petition and the admissibility of the testimony had been waived because of the failure to assign error upon the rulings of the court in those particulars. And so in this case, while Scott and the Citizens' Railway Company attacked the verdict in the court below on grounds that may have been tenable, yet they have not pursued the attack in this court, and assigned error upon the action of that court in overruling their motion to set aside the verdict; and for that reason, in our opinion, it must be held that they have waived their objections to it.

If we are correct in these views, it follows that on the question of title the judgment is correct, in so far as the Citizens' Railway Company and Scott are concerned; because the facts found by the jury, and especially those embodied in the third and sixth subdivisions of the findings, as set out in this opinion, show that Hobson not only held the legal title, but was in fact the equitable and beneficial owner of the four blocks of land conceded by Scott and the Citizens' Railway Company to have been the consideration for the deed from the dummy street railway company to the electric railway and light company. And if he paid for the dummy street railway with a consideration belonging exclusively to him, then when he took the deed to himself at the trustee's sale he became the absolute owner of the property, although he may have intended to make it a part of the railway plant then owned and operated by the electric railway and light company, of which he was the president. While the jury found otherwise, if it be conceded that in making the purchase referred to Hobson was acting for his company, still if, as a consideration for that sale, he parted

with title to property that belonged to him, he and his vendee are entitled to hold the property thus purchased as against the company and its vendees; at any rate, until they offer reimbursement for the consideration paid for the property, which offer was not made in this suit. But while we do not feel called upon to determine the question, it cannot be said that all the findings referred to are without testimony to support them. Hobson's testimony is to the effect that it was understood between himself and the board of directors of the electric railway and light company that donations secured by him were to be his individual property. He was the chief promoter of the enterprise, and at the time the donations referred to were secured he was not receiving any salary from the company; and if, in view of that fact, the other members of the board of directors agreed that he might have the blocks of land referred to as his own property, no sound reason is perceived why the agreement should not be upheld. At that time, according to Hobson's testimony, no stock had been issued or paid for, and it is not made to appear that any one was subsequently induced to become a stockholder or creditor upon the faith of the contract between Childress and the company and the belief that the donation therein referred to was to become the property of the company. The rule on this subject is stated by a standard text writer in these words: "There is no sound principle of law or equity which prohibits one or more of the directors of a corporation from entering into contracts and dealings with the corporation, provided they act in good faith, and provided there be a quorum of other directors on the other side of the contract, so that the vote of the interested director is not necessary to the adoption of the measure; and even in the latter case the contract is good at law. In other words, a director is not debarred, by reason of his office, from entering into a contract with the corporation, but the contract is subject to the principle that, where he appears on both sides of it, it will be closely scrutinized in equity, and set aside, unless made in that entire good faith which the law demands of this species of fiduciary. Even where the majority of the stockholders are personally interested in a contract which they have authorized on behalf of the corporation, this does not render the contract void per se. It is still good at law, though voidable in equity in case of any fraud or unfairness at the suit of the corporation or of stockholders suing in its behalf." *Thomp. Corp.* § 4059.

But, laying the verdict aside, and conceding that Hobson paid nothing for the four blocks of land, and was acting for the electric railway and light company when he contracted for them, still, in the opinion of the writer, speaking for himself only, that company never acquired any title to them, either legal or equitable. This results from the

fact that it was a private corporation, and had no power or authority to acquire real estate, except in payment of debts, or such as was necessary to enable it to transact the business for which it was created. As to the acquisition of real estate, the statute then in force conferred upon private corporations power to "hold, purchase, sell, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation shall require; and also to take, hold and convey such other property, real, personal or mixed, as shall be requisite for such corporation to acquire in order to obtain or secure any indebtedness or liability, due or belonging to the corporation." Batts' Ann. Civ. St. art. 651. It was not shown that the four blocks of land here involved belonged to either class named in the statute, but, on the contrary, the testimony will warrant a finding that they did not. In *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 149, 24 S. W. 16, 22 L. R. A. 802, it was held that private corporations chartered under the general laws of this state,—as was the electric railway and light company,—"have no powers other than such as are given by the laws of the state"; and that doctrine is abundantly sustained by other authorities, and, when applied here, necessarily leads to the conclusion that the corporation referred to was not authorized by law to acquire the four blocks of land. And in reaching this conclusion the familiar rule that when a corporation has acquired title to real estate in excess of its powers no one but the state can object has not been overlooked. *Russell v. Railway Co.*, 68 Tex. 652, 5 S. W. 650. But, while that is true, a mere contract to convey real estate does not vest in the proposed purchaser the legal title to the property. It is an unexecuted contract, and, if the intended purchaser be a corporation, not having the power to purchase, the contract confers no right enforceable in either law or equity. It seems to me that the true test ought to be whether or not the electric railway and light company ever had such right to the blocks of land as could have been enforced by it against Childress and his associates, or against Hobson, after they were deeded to him; and on that question authorities are not lacking. In discussing the doctrine that the state alone can question the title of the corporation Mr. Thompson states this exception: "This principle has no application where the corporation is seeking the aid of a court of justice to enable it to acquire lands which it has no power to acquire and hold. Here the principle is that a court of justice will not aid a corporation to do that which is impliedly forbidden by its charter or by the law. It has, for instance, no application to a case where a suit in equity is brought to compel the specific performance of a contract to convey land to a railroad company, which the latter has attempted to acquire, not for any purpose connected with

the building and operating of its road, but merely for speculative purposes. In such a case the specific performance was refused on the ground, among others, that the company had no power under its charter to take and hold land for such purposes." *Thomp. Corp.* § 5800. See, also, *Railroad Co. v. Seeley*, 45 Mo. 212, 100 Am. Dec. 369. In *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513, suit was brought to recover certain real estate, and the bill alleged that the defendants Kelly, Ketchum, and Hiles, who were officers of the railroad company, of which company Case, the plaintiff, was receiver, had procured numerous donations of land from citizens who were interested in the construction of the railroad along its line, intended to be for the use and benefit of the railroad company, and to assist it in such construction. It was charged that the defendants, representing to the persons who made the donations that they were officers of the road, and soliciting these grants for the benefit of the road, took the conveyances to themselves individually; that they did this in a fraudulent manner, by making the grantors in the conveyances believe that they, as the officers of the company, could receive the conveyances for the benefit of the road; and that either the grantors did not know to whom the conveyances were made, or were induced to believe that, when made, the grantees held the lands as a trust for the benefit of the road. And as the defendants did not recognize the trust, and refused to convey to the company, or to admit its rights to the lands, the suit was brought to have a declaration of the trust made by the court, and a decree ordering conveyances by the defendants of the land to the corporation. The circuit court on the hearing was of the opinion that the conveyances made by various persons to Kelly, Ketchum, and Hiles of the lands described in the bill were made by the grantors and received by the defendants as contributions to the railroad to aid in the construction of its road; and that, if the railroad company had authority by law to receive such grants and to hold such real estate, it would be entitled to the relief sought in the bill. But, being also of opinion that by the laws of Wisconsin, and under its charter, it could only receive and hold lands for the defined purposes of the road, it held that only such lands as were necessary and proper for the immediate use of the road could be recovered in that suit. Case, the receiver and representative of the railroad, appealed, and the supreme court, speaking through Mr. Justice Miller, among other things, said: "The principal question suggested by this appeal is whether the complainant, as representing the railroad company, can maintain a suit for these lands; that is to say, whether the company was endowed by the legislature of Wisconsin with a capacity to receive an indefinite quantity of lands, with no limitation upon their use

or upon their sale, or whether they were limited to the lands necessary to such uses as were appropriate to the operations of a railroad. It is not pretended that there is any general statute of the state of Wisconsin which authorizes either this company or any other corporation to purchase and hold lands indefinitely, as an individual could do, without regard to the uses to be made of such real estate. The charter of the company approved, April 12, 1866 (Priv. & Loc. Laws Wis. 1866, c. 540, p. 1331), authorizes it to acquire real estate, namely, the fee simple in lands, tenements, and easements, for their legitimate use for railroad purposes. It is thus authorized to take lands 100 feet in width for right of way, and also such as is needed for depot buildings, stopping stages, station houses, freight houses, warehouses, engine houses, machine shops, factories, and for purposes connected with the use and management of the railroad. This enumeration of the purposes for which the corporation could acquire title to real estate must necessarily be held exclusive of all other purposes, and, as the court said at the time of making its interlocutory decree, 'It was not authorized, by its charter, to take lands for speculative or farming purposes.' It must be held, therefore, that there was no authority under the laws of Wisconsin for this corporation to receive an indefinite quantity of lands, whether by purchase or gift, to be converted into money, or held for any other purposes than those mentioned in its act of incorporation. To this view of the subject counsel urges several objections. The first of these which we will notice is that the charter of the corporation is a private act, of which the court cannot take judicial notice; and that, as it was not pleaded, nor offered in evidence, nor otherwise brought to the attention of the court, it could not be the foundation of its judgment. To this there are two sufficient answers, the first of which is that, if the statute creating this corporation gave it no power to receive and hold lands in the manner we have mentioned, then it had no such power by virtue of any law of the state of Wisconsin; for a corporation, in order to be entitled to buy and sell, to receive and hold the title to, real estate, must have some statutory authority of the state in which such lands lie to enable it to do so, and the absence of such provision in the law of its incorporation does not create any general statute which authorizes any such right. * * *

It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the state alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a quo warranto on behalf of the state. The case of *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, is strenuously relied on to support this view. We need not stop here to in-

quire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that, while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids." In that case the decree of the circuit court was affirmed, and there was no dissenting opinion, though a footnote shows that Chief Justice Fuller did not sit in the case. From these authorities, it seems quite clear to me that the electric railway and light company never at any time had any title or right to the blocks of land in question, and that the fact that they were transferred and used as a consideration for either or both transfers of the dummy railway cannot inure to the benefit of the electric railway and light company or its vendees.

These views render it unnecessary to decide the points made by Scott and the Citizens' Railway Company in their third, fourth, and fifth propositions under their second assignment. Nor is it necessary to consider their assignments complaining of the decree in favor of Parker and his coplaintiffs. Not being the owners of the property, it is immaterial to them in whose behalf and to what extent liens may be established against it.

Next in order is the appeal prosecuted by the Farmers' & Merchants' National Bank. In its brief numerous objections are urged to so much of the decree as fixes a lien on the dummy railway in favor of Parker and his coplaintiffs. It would extend this opinion beyond proper limits to set out and elaborately discuss these objections in detail. In assigning our reasons for sustaining this part of the decree we may refer to some of them. It is proper, however, to note that some of these objections are based on a state of facts inconsistent with the verdict, and for that reason are untenable. As to the verdict, the bank is, if possible, in a worse condition than Scott and the Citizens' Railway Company. Not only has it failed to assign error upon the action of the trial court in refusing to set the verdict aside, but it did not

ask to have it set aside. So the bank must abide by the findings of the jury, and, if these alone or in connection with other conclusions of fact deducible from testimony will support the decree in favor of Parker and his associates, it must be upheld. And the facts found disclose a theory upon which Parker and his coplaintiffs can and do predicate their lien. The findings of the jury show that the agreement to operate the road to Alta Vista for five years was made for the benefit of Parker and his associates individually, and that its performance would not have benefited the dummy street railway company, but would have inured to the pecuniary benefit of Parker and his associates. The contract with Hobson for the sale of the road to him required it to be operated for the period of five years; and the deed from the dummy street railway company to the electric railway and light company recites the obligation of Hobson and the latter company to thus operate the road as part of the consideration for that deed. In fact, it is admitted by the bank, on page 89 of its brief, that the obligation to operate the road to Alta Vista for five years was part of the consideration for the sale to Hobson. And so it is that any one claiming under either Hobson or the electric railway and light company, and not an innocent purchaser, is bound by the stipulation referred to, and charged with knowledge of the fact that performance of that agreement was part of the consideration for the sale of the property. Now, this being true, and the agreement referred to not having been made for the benefit of the dummy street railway company, but for the benefit of Parker and his associates, such damages as resulted to the latter from the failure to perform that agreement are analogous to a debt owing for the purchase money, and are secured by an equitable lien. That doctrine was announced in *Howe v. Harding*, 78 Tex. 17, 13 S. W. 41, 13 Am. St. Rep. 17. In that case a railway company constructed its road across a tract of land, the legal title to which was in Nancy S. James, but the land was in possession of Harding; and in a contract made with Nancy S. James it was stipulated: "As a further consideration for said right of way the company agrees to erect a tank on said premises, provided there be sufficient water, and contract with the above party or her authorized agent to keep the same supplied." Harding offered testimony tending to show that, while the contract was made in the name of Nancy S. James, it was, by her consent, made for his benefit; and the court said: "If title to the land was in Miss James in fact or only apparently, then under the facts it cannot be denied that by her act the right of way vested in the company; but, as the promise to pay the consideration therefor was made to appellee with her consent, he has the same right to enforce any existing lien she would have had had

the promise been made to her;" and the court held that Harding had a lien on the land to secure the damages resulting to him from a breach of the contract. See, also, *Flanagan v. Cushman*, 48 Tex. 241; *Knight v. McReynolds*, 37 Tex. 204; *Thomas v. Morrison* (Tex. Civ. App.) 46 S. W. 46. It is true that the contract with Hobson and the deed to the electric railway and light company stipulate that the property is to be conveyed free from incumbrance; and it is urged that, as the property was then incumbered by the Rogers trust deed, Parker and his associates cannot recover, because they had breached the contract. This contention seems to overlook the fact that the bank is asserting title to and has obtained judgment for the property under and through the contract referred to. Though Parker and his associates may have breached the contract in the particular stated, still it is not shown that any damage resulted therefrom, and it would be inequitable to permit Hobson and his vendee to refuse to pay for the property because of such breach. If it had been alleged and proved that injury resulted from that breach, possibly the amount of damage sustained might have been offset against the damages resulting to Parker and his associates from the failure to operate the road according to contract; but no such offset or counterclaim was pleaded or proved. Besides, the testimony and the findings of the jury indicate no breach of the contract in reference to the trust deed to Rogers. The property was sold under that instrument for the purpose of carrying out the agreement to free it from incumbrances; and, while the jury did not expressly so find, the evidence indicates that the sale was made upon an understanding that Hobson or the electric railway and light company was to become the purchaser; and the jury found that the four blocks of land thereafter conveyed by him to Parker were, by agreement with the board of directors of the dummy street railway company, accepted as the consideration for the deed made by Rogers, the trustee, to Hobson. If, as contended by the bank, Hobson contracted for and intended to buy the property for himself individually, the mode adopted—the sale by the trustee—was, perhaps, the best and shortest method that could have been adopted by the dummy street railway people to accomplish what they had agreed to do. By the one transaction the property was freed from the trust deed, and the title passed to Hobson. And it is in this way that we harmonize the findings of the jury that the sale was for the purpose of removing the incumbrance, and that Hobson also paid a consideration for the property. He paid nothing at that time, and acquired no lien under the mortgage; but thereafter he paid for the property according to contract by conveying to Parker the four blocks of land, which, when conveyed, belonged to him.

The precise question as to the amount of

damages sustained by Parker and his associates on account of the breach of the contract to operate the road for five years was not submitted to the jury, and was not found by them. Certain questions were submitted, however, and findings of fact made by the jury which bear upon that question, and tend to show that Parker and his associates sustained damages to the extent of several thousand dollars; but there is no assignment calling in question the amount awarded to Parker and his associates, and secured by a prior lien upon the property, and therefore we do not feel called upon to determine whether the findings made by the jury, supplemented by those that might have been made by the court, will justify the amount awarded by the decree to Parker and his associates. We do not hold that Parker and associates have a lien on the property under the mortgage of April 15, 1891, and the attempted pledge by them to themselves of the bonds secured by that mortgage. While one director may deal with the corporation, the entire board of directors cannot, because, in the latter case, there would be no one to represent the corporation.

There is no merit in the contention that Hobson and the electric railway and light company should have been made parties to this suit. They have no interest in the property which is the principal subject of the litigation, and no personal judgment was rendered against them.

As against the claim of Parker and associates, the bank does not assert that the transfer of the dummy railway was in fraud of Graves' right as a creditor, and therefore it acquired title to the property through its purchase at sheriff's sale under an execution issued on the Graves judgment, and not through the conveyance by the dummy street railway company to the electric railway and light company, and from Rogers, as trustee, to Hobson. Of course, if the bank were asserting no other title but the former, and it was sustained by the findings of the jury or clear and uncontroverted testimony, the judgment in its favor on the issue of title might be sustained on that ground, and the right of Parker and associates to fix a lien upon the property for a breach of the contract to operate the road would be cut off. But such is not the case. That issue was not submitted to the jury, and the testimony is not in such condition as to lead necessarily to the conclusion that the transaction was fraudulent. At any rate, the testimony will support a finding that there was no fraud or notice of fraud on the part of the vendees; and the bank is asserting title under both sales,—the trustee's sale to Hobson, because it vested perfect title in him, and the sale to the electric railway and light company, because it was upon a consideration furnished by Hobson,—and therefore he became the equitable owner of the property conveyed.

We overrule the contention that Hobson's

purchase at the trustee's sale subrogated him to the rights of a prior mortgagee, and cut off the right of Parker and associates to a vendor's lien under their contract with him. We think the findings of the jury connect the two transactions, and show, in effect, that the prior contract for the sale of the property supplied the only consideration to support the trustee's sale.

As to the points made against the title asserted by Parker and associates under their purchase at the sale made by Sleeper, as substitute trustee, under the mortgage of April 15, 1891, it is sufficient to say, if error was committed in permitting proof of that sale, it is now harmless, because the court decided against Parker and associates and in favor of the bank on the question of title. And the same may be said in reference to the objections to the assignment by the dummy street railway company to Parker and associates of any claim that it might have for damages for a breach of the contract to operate the road for five years. The jury, in effect, found that the breach referred to had resulted in no damage to the dummy street railway company, and, as the judgment in favor of Parker and associates finds support upon other ground, it is not to be presumed that the court disregarded the verdict, and based the judgment upon the ground that damage had resulted to the dummy street railway company.

It is also urged in behalf of the bank that error was committed in that part of the decree which directs that, if the property shall not sell for enough to discharge the Graves judgment and the judgment in favor of Parker and associates, the latter recover the balance of the amount awarded to them from the Citizens' Railway Company, not to exceed \$6,535.86, which, when paid by the latter company, shall be a pro tanto satisfaction of the judgment rendered for said amount against said company and in favor of the bank. We overrule this assignment, because the recovery referred to by the bank from the Citizens' Railway Company was, as shown by the decree, the value of the irons, rails, ties, etc., removed by said company from the dummy street railway company, and appropriated to its own use. In other words, the Citizens' Railway Company had, to that extent, appropriated to its use property upon which Parker and associates held a lien; and, having held a lien on the property thus appropriated, they have an equitable lien on the amount recovered from the Citizens' Railway Company as compensation for the property so appropriated.

The bank set up a counterclaim against Parker and associates, charging them with misapplication of certain funds belonging to the dummy street railway company, and which should have been applied, in part, at least, to the payment of the Graves judgment. In reply to this demand Parker and associates pleaded the four-years statute of

limitation. In reference to this counterclaim the evidence is meager and unsatisfactory. It was shown that Parker and associates, as directors of the dummy street railway company, had used the four blocks of land received as a consideration for the sale of the road and certain other assets for the purpose of paying certain debts against the dummy street railway company; and also that certain property, the value of which is not given, was transferred to two of the stockholders of the company. The latter transaction occurred more than four years before the cross action was filed, as, perhaps, did some of the others. But, in order to obtain a recovery in this regard, it devolved upon the bank to adduce such evidence as would show how much of the funds referred to should have been applied to the Graves judgment, and this was not done; and counsel for the bank has not undertaken in his brief and argument to point out and show that on account of the use made of other assets of the company the bank was entitled to recover any particular sum. In fact, the testimony is so indefinite and uncertain that we are not prepared to hold that the court erred in holding, as we presume it did, that the bank had failed to show that it was entitled to recover on its cross action. This is all we deem it necessary to say in reference to the appeal prosecuted by the bank.

Parker and his coplaintiffs assign as error so much of the decree as gives priority of lien on the property to the Graves judgment, now owned by the bank. We sustain that portion of the decree on this theory: At the time of the sale of the dummy railroad and its purchase by Hobson, it was a nongoin insolvent corporation, not intending to resume business. Parker and his associates, constituting its board of directors, held its assets in trust for the benefit of its creditors and stockholders. In other words, before and at the time of the sale of the road to Hobson, Graves had an equitable lien on the property, or, at any rate, such right thereto as could not be displaced by any right the directors might thereafter attempt to secure to themselves. *Hardware Co. v. Manufacturing Co.*, 86 Tex. 143, 24 S. W. 18. It is true that his claim had not at that time been reduced to judgment, but he was such a creditor as the law will protect against fraudulent assignments. *Cox v. Shropshire*, 25 Tex. 113; *Holden v. McLaury*, 60 Tex. 220; *Cole v. Terrell*, 71 Tex. 555, 9 S. W. 668. And for that reason we believe that his claim, though not then reduced to judgment, was protected by an equitable lien upon the property as against the right asserted by Parker and associates upon their claim for damages resulting from a breach of the obligation to operate the road to Alta Vista for five years. As against this lien Parker and associates pleaded the four-years statute of limitation, and the evidence sustains the plea; but, while we do not deny the

proposition that ordinarily a junior lienholder can plead limitation against a prior lien, it is not believed that doctrine is applicable to this case. As directors of an insolvent nongoin corporation, Parker and his associates were trustees for Graves, who was a creditor of the corporation; and on account of the trust relation limitation did not run, unless it was a constructive trust, and we are of opinion that it was not of that character. While it was not an express trust created by written contract, it was a trust resulting from the fact that the trustees were rightfully in possession of the property, holding it as agents for the corporation when the latter became insolvent and quit business with no intention to resume; and as soon as that event happened, by force of law they became trustees for Graves. According to legal terminology it would, perhaps, be classified as a resulting trust; but, regardless of the name that may be applied to it, we are of opinion that it belongs to that class of trusts against which limitation does not run until there has been such adverse claim or hostile act on the part of the trustee, as would indicate to the beneficiary an intention to repudiate the trust. *Cole v. Noble*, 68 Tex. 432; *Wilson v. Simpson*, 80 Tex. 279, 16 S. W. 40. In *Cole v. Noble*, supra, Chief Justice Willie said: "It is common learning that in cases of resulting trusts, so long as the trust relation is admitted, and there is no adverse holding by the trustee or any one claiming under him, no lapse of time will bar the *cestui que trust*." In the case at bar, no such adverse holding or hostile act was shown, at least not of such a nature as to indicate an intention on the part of Parker and his associates to repudiate the trust relation. Their sale of the property to the electric railway and light company was ostensibly made for the purpose of paying the debts of that company, and there was nothing on the face of the transaction inconsistent with faithful performance of the fiduciary relation. In fact, in making the sale they acted as directors of the corporation. The stipulation requiring the road to be operated for a period of five years does not indicate on its face anything more than a laudable desire to carry out the purpose for which the dummy street railway company was created, and thereby subserve the public interest. There may have been a private understanding, express or implied, between the trustees and the purchaser, that the stipulation referred to was intended for the benefit of the trustees; but, if such was the case, until the creditor acquired knowledge of that fact there was no such repudiation as would put in operation the statute of limitation.

The *Stanton Case*, 86 Tex. 620, 26 S. W. 615, relied on by counsel for Parker and associates, in support of the proposition that Graves had no prior lien on the property, is not in point, though expressions in the opin-

ion may tend that way. That was not a contest between a creditor and the directors and managers of a defunct corporation. In that case the adverse claimant was a prior mortgagee.

To the suggestion that Parker and associates were prior creditors of equal dignity with Graves on account of transactions prior to the sale of the dummy road, and to the extent of these debts entitled to share equally, at least, with the Graves judgment in the proceeds of the sale of the property, it is sufficient answer to say that throughout their brief Parker and associates claim that the entire amount adjudged to them was awarded as damages for the breach of the contract to operate the road for five years. This is not disputed by the record, and, if it be true, the Graves debt was entitled to precedence over it. Furthermore, while the testimony shows the existence of some indebtedness to Parker and associates prior to the sale of the road, the amount thereof is left uncertain; and it also indicates that a pro rata of some of the funds used by them for the payment of other debts should have been applied on the Graves debt, the amount so misapplied being uncertain. Therefore we cannot say that the decree as rendered, giving priority to the Graves debt, does not come as near reaching the ends of justice as, under the circumstances, could be done; and Parker and associates state in their brief that they do not want the cause remanded for another trial.

We have given the case careful and patient consideration. This opinion embodies conclusions of both law and fact. It is intended to express the views of the writer in reference to the case, and, while the court has agreed as to the result, the other members may not concur in all that is said in the opinion.

The judgment will be affirmed.

BLACKWOOD et al. v. TANNER et al.¹

(Court of Appeals of Kentucky. Feb. 7, 1902.)

INFRINGEMENT OF FERRY FRANCHISE—JOINT RIGHT OF ACTION—MEASURE OF DAMAGES—EVIDENCE—RECOVERY OF STATUTORY PENALTY—JURISDICTION.

1. As the license of plaintiffs to operate a ferry was a joint one, and they executed a joint obligation to discharge their duties, they may sue jointly to recover for the loss of tolls resulting from the illegal infringement of their ferry franchise by defendants, though one of them ran the ferry one week and the other the next, as this was simply a plan agreed upon by them for conducting the business.

2. The act of defendants in operating an unlicensed ferry within the prohibited distance of plaintiffs' ferry was an actionable wrong for which plaintiffs were entitled to recover damages.

3. The measure of damages for the infringement of a ferry franchise is the amount of tolls lost to the owners by diminution in the number of customers using the ferry.

4. The income derived in former years from tolls and the income received from the same source during the continuance of the infringement may be proved to show the value of the franchise and the extent of the losses.

5. Under Ky. St. § 1820, providing that no ferry shall take or land any passenger or thing within the prohibited distance of another ferry "under a penalty of fifteen dollars for each offense, to be recovered before a justice," the circuit court cannot, by allowing the joinder of a number of separate causes of action, acquire jurisdiction of an action to recover the prescribed penalty, as the statutory mode must be pursued.

Appeal from circuit court, McLean county.
"To be officially reported."

Action by S. C. Tanner and another against J. H. Blackwood and others to recover tolls lost by plaintiffs by reason of the operation of a rival ferry by defendants. Judgment for plaintiffs, and defendants appeal, and plaintiffs prosecute a cross appeal. Affirmed on original and cross appeal.

Lockett & Lockett and Sweeney, Ellis & Sweeney, for appellants. Lawrence P. Tanner and Little & Taylor, for appellees.

BURNAM, J. This case is the sequel of the decision of this court in *Warren v. Tanner*, 56 S. W. 167, 49 L. R. A. 248. In that case this court affirmed a judgment of the circuit court enjoining appellants from operating an unlicensed ferry within less than a mile of appellees' licensed ferry across Green river between the counties of McLean and Webster. After the decision in that case, appellees instituted this suit against appellants, seeking to recover toll lost by them in consequence of the operation of their ferry by appellants; second, damages to the salable value of their plant; and, third, they seek to recover the penalties prescribed by subsection 2 of section 1820 of the Kentucky Statutes. These various causes of action were set out in three separate paragraphs, and a general demurrer was sustained to the second and third paragraphs, and appellants filed an answer, denying liability for the cause of action stated in the first paragraph. A jury trial resulted in a verdict in favor of appellees for \$600 for loss of tolls, and the defendants appealed. Plaintiffs also prosecute a cross appeal from the judgment sustaining a demurrer to the second and third paragraphs of their petition.

Several distinct grounds are relied on for reversal. First, it is insisted that there was no joint cause of action in favor of appellees, and the motion to elect should have been sustained. It is next insisted that the damages sought to be recovered are so remote and uncertain as to afford no basis for an action. Appellees' license to operate the ferry was a joint one, and they executed a joint obligation to discharge their duties. The fact that Tanner ran the ferry one week and Mulligan the next, is not important. This was simply a plan agreed upon by them for conducting the business, and in no wise affects their rights or liabilities. The suit

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

was properly instituted in the name of both parties. And the claim that appellees could not recover for loss of toll resulting from the illegal infringement of their ferry franchise by appellants is equally untenable. Appellees enjoyed the exclusive franchise to maintain and operate a ferry at the point on Green river fixed in the order of the county court, and were required, under heavy penalties, to maintain it in good condition for the convenience of the traveling public; and they were expressly protected in this right by the statute, which prohibited the establishment of any other ferry within a mile of their place of business, and the running of an unlicensed ferry within the prescribed distance was an actionable wrong, for which they were entitled to recover damages. See *Owens v. Roberts*, 69 Ky. 609, and *City of Newport v. Taylor's Ex'rs*, 55 Ky. 699. And the measure of damages for the infringement of a ferry franchise is the amount of tolls lost to the owner of the franchise by diminution in the number of customers who would have used the ferry. See 12 Am. & Eng. Enc. Law, p. 1104. And the income derived in former years from tolls and those received during the continuance of the infringement are competent evidence to show the value of the franchise and the extent of the losses. See 6 Lawson, Rights, Rem. & Prac. § 2958, and *Bridge Co. v. Gelsse*, 38 N. J. Law, 39. There is therefore no error in the instruction.

It is very earnestly insisted for appellees that the circuit judge erred in sustaining a demurrer to the third paragraph of their petition, in which they sought to recover the penalty prescribed by the statute in addition to their loss of tolls. The section of the statute under which this claim is asserted is as follows: "No ferry shall take or land any passenger or thing within such prohibited distance of another ferry, under a penalty of fifteen dollars for each offense, to be recovered before a justice against the owner or keeper, and by the owner of such other ferry." Ky. St. § 1820, subsec. 2; 7 Lawson, Rights, Rem. & Prac. § 3777, says that: "When a statute has created a new right, and has prescribed a remedy for the enjoyment of the right, he who claims the right must pursue the statute remedy. So, when a summary remedy is given by the statute, those who wish to avail themselves of it must confine themselves strictly to its provisions, and can take nothing by intentment. When a statute to obtain a particular object prescribes the mode of proceeding to enforce, that mode must be pursued." This view of the learned author was approved by this court in the cases of *Com. v. Louisville & N. R. Co.*, 37 S. W. 589, and *Louisville & N. R. Co. v. Com.*, 43 S. W. 458. In the last case the question is carefully and fully considered, and the court held that it was not the policy of the law or the intention of the legislature to oust magistrate

courts of cases of which the statute gave them exclusive jurisdiction by allowing the joinder of a number of separate causes of action into one; that public interest required that violators of penal statutes should be proceeded against as soon as the violations were committed in the courts having jurisdiction thereof. We are of the opinion that the circuit judge properly sustained a demurrer to the third paragraph.

For the reasons indicated, the judgment is affirmed on the original and cross appeal.

FLOYD v. KENTUCKY LUMBER CO.¹

(Court of Appeals of Kentucky. Feb. 6, 1902.)

INJURY TO SERVANT—WORK OUTSIDE OF DUTY.

Where plaintiff, a boy about 16 years old, employed as off-bearer from a planing machine, volunteered, without suggestion or leave from any one, to oil the machine after he had been warned that it was dangerous to do so, the master is not liable to him for an injury received while thus engaged.

Appeal from circuit court, Pulaski county. "Not to be officially reported."

Action by Charles P. Floyd, by next friend, against the Kentucky Lumber Company to recover damages for personal injuries. Judgment for defendant, and plaintiff appeals. Affirmed.

W. A. Morrow, Sam C. Hardin, and Edwin P. Morrow, for appellant. Barker & Woods and O. H. Waddle, for appellee.

DU RELLE, J. This was an action instituted by appellant, by next friend, for damages for an injury to his hand, received while employed in appellee's mill. According to his statement, the appellant, who was about 16 years old, had been employed only about three weeks as off-bearer from one of the planing machines. It was also his duty to clean up the shavings from the machine. For a few days toward the last of his employment he seems to have been on duty at two machines. He states that he was told that it was dangerous to oil the machine, and was told to stay away from the machine, but seeing the box of one of the machines which was running, but not in use, begin to smoke, he thought he would oil it, and in removing a pin dropped the pin, and in reaching for it his hand slipped on top of the table, and onto one of the knives, and was cut. It seems conceded that the duty for which appellant was employed was perfectly safe. It was no part of his duty to oil the machines, or in any way to meddle with them. He had been warned that it was dangerous. He volunteered to perform this service without suggestion or leave from any one. Under the circumstances, we consider it unnecessary to cite authority to sustain the action of the trial judge in directing a peremptory instruction. The nu-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

merous authorities cited by appellant may be conceded to be correct statements of law, but are not applicable to the facts which appellant himself detailed.

The judgment is affirmed.

SHANKLIN v. MOODY et al.¹

(Court of Appeals of Kentucky. Feb. 6, 1902.)
HUSBAND AND WIFE—VALIDITY OF JUDGMENT AGAINST MARRIED WOMAN—FIDELITY TO PLEAD COVERTURE.

Where a married woman permitted a judgment by default to be rendered against her on a promissory note, she cannot resist the enforcement of the judgment on the ground that she was a married woman, and merely the surety of her husband in the note sued on, as that defense could be made only in the action on the note.

Appeal from circuit court, Todd county.

"Not to be officially reported."

Action by S. A. Shanklin against Jennie A. Moody and others to enforce a lien on land. Judgment for defendants, and plaintiff appeals. Reversed.

Perkins & Trimble, for appellant.

DU RELLE, J. Appellee and her husband, since the passage of the act of March 15, 1894, known as the "Weissinger Act," executed their joint promissory note to appellant. At the July term, 1897, of the Todd circuit court, appellant recovered a judgment by default against appellee and her husband, and caused execution to be issued and levied on the land of appellee, Jennie A. Moody, which was incumbered with a mortgage lien in favor of one Petrie. The land was sold under the execution, and appellant became the purchaser for the amount of his debt, interest, and costs. Claiming a lien under section 1709, Ky. St., for the amount of his purchase price, with interest, subject to the prior incumbrance, appellant instituted this proceeding in equity for a sale of the land for the payment, first, of Petrie's claim, and then for the payment of his own claim. Mrs. Moody filed her separate answer, alleging that she was the surety of her husband in the note, and was a married woman at the time of its execution, and did not at that time, or at any time, set apart any portion of her estate by deed, mortgage, or other conveyance, for the purpose of securing the payment of the note; wherefore she claimed that the sale of her land under the execution was void, and appellant thereby acquired no lien. Appellant denied the allegations of the answer, and further alleged that Mrs. Moody, having been duly summoned in the suit in which personal judgment was rendered by default against her, was estopped to claim that she was a surety in the note, and her coverture was no defense to the petition in this proceeding. The trial court adjudged that she could rely upon the disability of coverture

in the present proceeding, and dismissed the petition. In *Wren v. Ficklin* (Ky.) 59 S. W. 746, substantially the same question was presented, and this court, in an opinion by Chief Justice Paynter, held that, although the note was signed by a married woman as surety for her husband, that defense could only be made in the action instituted upon the note, and she was concluded by the judgment in that case until reversed or vacated. See, also, *Howard v. Gibson* (Ky.) 60 S. W. 401.

For the reasons given, the judgment is reversed, and cause remanded, with directions to set aside the judgment, and enter a judgment in accordance with this opinion.

EVENING POST CO. v. CAUFIELD.¹

(Court of Appeals of Kentucky. Feb. 5, 1902.)
APPEAL AND ERROR—ERRORS NOT ASSIGNED AS GROUND FOR NEW TRIAL—LIBEL—HARMLESS ERROR IN ADMITTING EVIDENCE—CLERK OF PENITENTIARY—POWER TO REMOVE.

1. An error in refusing instructions cannot be reviewed on appeal unless it was made a ground for a new trial.

2. In an action for libel, based upon a newspaper publication referring to plaintiff as ex-clerk of the penitentiary, and stating that an expert accountant had found him to be short in his accounts, the error in admitting as evidence a judgment to the effect that plaintiff was clerk of the penitentiary when the publication complained of was made was harmless, as the court, under the other proof in the case, could have told the jury as a matter of law that plaintiff was clerk of the penitentiary at the time of the publication complained of.

3. The term of office of clerk of the penitentiary is four years, and the incumbent can be removed only for cause, after notice of the charges against him and an opportunity to be heard.

O'Rear, J., dissenting.

Appeal from circuit court, Lyon county.

"Not to be officially reported."

Action by C. I. Caufield against the Evening Post Company to recover damages for libel. Judgment for plaintiff and defendant appeals. Affirmed.

Helm, Bruce & Helm, for appellant. Malloy & Utley, Jas. H. Hazelrigg, and Wm. Cromwell, for appellee.

PAYNTER, J. This is an action for libel, based upon an article which appeared July 3, 1897, in the *Evening Post*, a daily newspaper published by the appellant. It reads as follows: "Accountant Charges Clerk Caufield with a Deficiency. Eddyville, Ky., July 3. (Special.) The expert accountant who has been investigating the books and accounts of ex-Clerk Caufield, of the prison, has concluded his work, and now says he finds that Caufield is short to the prisoners \$239.94, to the state \$96.92, and an unclaimed balance of \$14.57. The accountant also says that he learns that Caufield made personal gifts to the prisoners and charged them to

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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the state." The defense is: (1) The publication was made as a matter of news; that it was made in good faith by the appellant, believing that the statements were true; that it had reasonable grounds for so believing. (2) That the statements contained in the publication were true. The trial resulted in a verdict against appellant for \$1,000. Testimony was offered by both the appellant and the appellee as to whether the statements in the publication were true. At the close of the testimony the court instructed the jury. In the grounds for a new trial the appellant did not complain of the action of the court in giving or refusing instructions, except instruction "A." This instruction did not relate to any issue involved on trial of the case. It was not a proper instruction to give the jury. The appellant is not entitled to have this court review the action of the court below in giving the instructions or refusing to give instructions, except instruction "A." This court has often held that an appellant is not entitled to have an alleged error of the court below reviewed unless it is made a ground for a new trial. This is such a well-settled rule of practice that we deem it unnecessary to make a citation of authorities in its support.

Over the objection of appellant the court admitted as evidence a judgment of the Lyon circuit court in the action of the appellee against Tinsley, in which the court determined that appellee could not be removed except for cause, and that Tinsley did not have the right to take his place as clerk of the penitentiary at Eddyville; so he was clerk of that institution when the publication complained of was made. The board of sinking fund commissioners sought to supplant him with a man by the name of Tinsley. The office of the clerk of the penitentiary is for a term of four years, and the incumbent can only be removed for cause. Before he could be removed, he was entitled to have notice of the charges which were made against him, and an opportunity to be heard. So far as this record shows, no proceeding had been instituted as required by law for his removal. In law he was the legal clerk of the penitentiary, although he was prevented from performing the duty as such by the warden of the prison barring the doors against his entrance to the office where he performed his duties. The defendant did not attempt to show that he was not the clerk of the penitentiary at the time of the publication. As there was no dispute about the facts, the court could have told the jury as a matter of law that the appellee was clerk of the penitentiary at the time the appellant published the article in question. This being true, the admission of the judgment was not prejudicial of the rights of the appellant. It simply showed that the court had determined the law as to the rights of Camfield to hold the office as we understand it to be.

The question of "qualified privilege" so

ably and earnestly argued by counsel for appellant, for the first time was raised in this court in this case. The question does not arise on this appeal for the reason we have given above with reference to the right to complain of the action of the court as to giving or refusing of instructions. If an instruction embodying the view of counsel for the appellant as to "qualified privilege" had been offered, and refused by the court, the appellant could not complain on this appeal, for the reason that it did not in the grounds for a new trial. In our opinion, considering the character of the publication, the wide circulation which it was given, the amount of the verdict is not excessive.

The judgment is affirmed.

O'REAR, J., dissents.

PRITCHETT v. FRISBY.¹

(Court of Appeals of Kentucky. Feb. 5, 1902.)
GRAND JURY—COMPETENCY OF GRAND JUROR
AS WITNESS.

Under Cr. Code Prac. § 118, providing that a member of the grand jury may be required by a court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining its consistency with the testimony given by the witness on the trial, or for the purpose of instituting or supporting a proceeding against the witness for perjury or false swearing, a grand juror is not a competent witness for any other purpose as to what occurred before the grand jury, and is therefore not competent to testify for the plaintiff in an action for libel as to the publication of the libel before the grand jury.

Guffy, O. J., dissenting.

Appeal from circuit court, Henderson county.

"To be officially reported."

Action by A. L. Frisby against Green W. Pritchett to recover damages for libel. Judgment for plaintiff, and defendant appeals. Reversed.

Hazelrigg & Chenault, Montgomery Merritt, and Yeaman & Yeaman, for appellant. Edward W. Hines, Stanley & Ruggles, and John E. Lockett, for appellee.

PAYNTER, J. By this action the appellee sought to recover damages from the appellant, because: (1) The appellant falsely and maliciously exhibited to the members of the Henderson county grand jury a certain letter, which purported to have been written by the plaintiff, but which was forged, containing false and scandalous charges against him. (2) That before the members of the aforesaid grand jury he charged that the appellee was trying to have appellant indicted by perjured testimony, and that he had sworn falsely in a certain suit pending between the parties. It is averred in the petition that the appellant had done these

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

things voluntarily, and against the protest of the members of the grand jury; that the libelous publication and the false charges were not made with reference to anything under investigation before the grand jury. On trial of the case the appellee introduced as witnesses members of the grand jury, including himself, who was also a member of the grand jury, and was present when the alleged false charges were made. Some of the members of the grand jury testified that they did not remember whether or not the grand jury was in session at the time the statements were made, or whether the appellant was sworn to give testimony before the grand jury before they were made. Other members of the grand jury testified that the statements were made while the grand jury was in session; that the appellant was sworn before making them. Under this testimony it may be assumed that the evidence is uncontradicted that the grand jury was in session, and as such heard the false charges which the appellant made against the appellee. It may be observed at this point that the appellant was not summoned before the grand jury, and his appearance before it was voluntary, with the purpose of trying to prevent the returning of an indictment against him which he claimed the appellee desired to procure. The question which invites our consideration is, were the members of the grand jury competent witnesses to prove what transpired before it? Independent of statutory regulation, courts in different states hold widely divergent views upon the question as to whether it is competent for members of a grand jury to testify as to what occurred in the grand-jury room. In some jurisdictions it is held that the oath of secrecy which grand jurors take does not prevent the public or an individual from proving by them in a court of justice what passed before the grand jury, where, after the purpose of secrecy has been effected, it becomes necessary to the attainment of justice that the conduct and testimony of prosecutors and witnesses shall be inquired into. In some jurisdictions it is held to be in the discretion of the court whether or not a grand juror shall be examined as a witness touching transactions before the grand jury. In other jurisdictions it is held that witnesses before a grand jury cannot invoke the rule of secrecy after the investigation of the grand jury has ceased. Again, other courts hold that, where statutes have been enacted prescribing the instances in which the grand jurors may testify as to what occurred before them, such statutes are exclusive, and that grand jurors may testify in no other than in the cases prescribed. The latter is the view which has been taken by this court. Section 118, Cr. Code Prac., reads as follows: "A member of the grand jury may, how-

ever, be required by a court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining its consistency with the testimony given by the witness on the trial, or for the purpose of proceeding against the witness for perjury (or false swearing) in his testimony, or upon the trial of a prosecution of the witness for perjury (or false swearing); and it shall be the duty of the foreman of the grand jury to communicate to the attorney for the commonwealth, when requested, the substance of the testimony before them." In *Com. v. Scowden*, 92 Ky. 120, 17 S. W. 205, the question arose as to whether upon the trial of one for false swearing before a grand jury the grand juror can testify to what the accused swore before the grand jury. The court held that it was incompetent, because the Criminal Code of Practice did not provide that a member of a grand jury could give evidence as to what a witness may have testified to before the grand jury on the trial of an indictment in which the witness was charged with having sworn falsely in giving testimony before the grand jury. The court said: "The offense of false swearing is a statutory one, and distinct from that of perjury, which existed at common law. The two have no connection. The former is not mentioned by common-law writers, and the elements of the two are different. The charge of perjury does not embrace that of false swearing. The Code has declared that what the accused testified before the grand jury may be proven against him upon a trial for perjury, but it has not said that this may be done upon his trial for false swearing. The latter offense existed under our law when this provision of the Code was adopted; but the legislature, for some reason, did not see fit to embrace it. '*Expressio unius est exclusio alterius*.'" Subsequently the legislature amended the Criminal Code of Practice (Acts 1891-93, p. 11), making grand jurors competent to testify, on the trial of a person indicted for false swearing, as to what he may have said as a witness before the grand jury. To follow the reasoning of the court in that case necessarily brings us to the conclusion that grand jurors are incompetent to testify as to what occurred before that body. The section of the Code does not say that they shall not be competent as witnesses in a case like this, or in a civil action growing out of the occurrences before the grand jury; yet the fact that the legislature specified the instances in which grand jurors could testify excludes the idea that it intended that they should be competent as to instances other than those specified.

The judgment is reversed for proceedings consistent with this opinion.

GUFFY, C. J., dissents.

LOUISVILLE & N. R. CO. v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 5, 1902.)

PENAL ACTION—REPEAL OF STATUTE—NECESSITY OF INDICTMENT—SUFFERING GAMING ON RAILROAD TRAIN—EVIDENCE—MISCONDUCT OF PROSECUTING ATTORNEY—INSTRUCTION ON REASONABLE DOUBT—REQUIRING DEFENDANT TO CRIMINATE HIMSELF—NECESSITY OF FILING ANSWER.

1. Cr. Code Prac. § 11, providing that a public offense of which the only punishment is a fine may be prosecuted by a penal action, was not repealed by Ky. St. § 1141, providing that "in misdemeanor cases where the highest penalty that may be imposed is a fine of one hundred dollars and imprisonment for fifty days, the offender may be prosecuted by warrant as provided in the Criminal Code, or by information filed by the commonwealth's attorney or county attorney."

2. Const. § 12, providing that, with certain exceptions, "no person for an indictable offense shall be proceeded against criminally by information," does not apply to misdemeanors punishable by fine, and therefore the legislature had power to provide for the prosecution of such offenses by penal action.

3. Ky. St. § 1978, providing for the punishment of any person who shall suffer gaming "in a house, boat or float or on premises in his occupation or under his control," a railroad company may be punished for suffering gaming on a moving train under its control.

4. Admissions of evidence in such a prosecution that the gaming was continuous from the time the train started until it stopped was not prejudicial to defendant, as the evidence was brought out by the witnesses in explaining how they knew that gaming was done in the county in which the offense was charged to have been committed, and the instructions confined the jury to what was done in that county.

5. The statement of the commonwealth's attorney to the jury, in opening the case, to the effect that defendant denied everything, as in other cases, was improper, but was not substantially prejudicial.

6. Cr. Code Prac. § 238, providing that "if there be a reasonable doubt of the defendant being proved to be guilty he is entitled to an acquittal," applies to a prosecution by penal action as well as by indictment; and it was, therefore, error, in such an action, to require the jury to believe only "from the preponderance of the evidence" the facts necessary to constitute guilt.

7. The defendant in a penal action should not be required to file an answer to the petition, but should be admitted to plead merely "Not guilty" to the charge, as the defendant, under the constitution, cannot be required to give evidence against himself.

Appeal from circuit court, Todd county.
"To be officially reported."

Action by the commonwealth of Kentucky against the Louisville & Nashville Railroad Company to recover a fine for the offense of suffering gaming. Judgment for plaintiff, and defendant appeals. Reversed.

Perkins & Trimble and Edward W. Hines, for appellant. Morrison Breckinridge and R. J. Breckinridge, for the Commonwealth.

HOBSON, J. This was a penal action by the commonwealth against the Louisville &

Nashville Railroad for suffering gaming contrary to section 1978, Ky. St. A judgment was rendered in the circuit court for the sum of \$200. The proceeding was instituted under section 11 of the Criminal Code of Practice. The first question made on the appeal is that this provision of the Code is repealed by section 1141, Ky. St. Sections 10 and 11 of the Criminal Code of Practice are as follows: "Offenses within the jurisdiction of a justice of the peace or of a city or police court, the punishment of which is a fine limited to one hundred dollars, may be prosecuted by a summons or warrant of arrest, in which shall be stated in general terms the offense charged to have been committed." Section 10. "A public offense of which the only punishment is a fine may be prosecuted by a penal action in the name of the commonwealth of Kentucky or in the name of an individual or corporation, if the whole fine be given to such individual or corporation. The proceedings in the penal actions are regulated by the Code of Practice in civil actions." Section 11. It will be seen that section 10 relates to proceedings by a summons or warrant of arrest, which are regulated by the Criminal Code. Section 11 relates to penal actions in which the proceedings are regulated by the Civil Code. The commonwealth has an election of remedies in cases falling within both of the sections, and in *Wilson v. Com.*, 7 Bush, 536, it was held that, where the matter in controversy in penal actions does not exceed \$50, pleadings may be oral. Section 1141, Ky. St., is as follows: "In misdemeanor cases where the highest penalty that may be imposed is a fine of one hundred dollars and imprisonment for fifty days, the offender may be prosecuted by warrant as provided in the Criminal Code, or by information filed by the commonwealth's attorney or county attorney in the circuit court, or before the county judge, or a justice of the peace or police or city judge. The information shall be signed by the officer filing it, and shall state the nature of the offense charged; and when filed the court or judge or justice, shall at once issue a summons or warrant against the offender commanding him to appear within three days at the time and before the court or justice or judge mentioned therein; and the amount of bail that he may give for his appearance shall be specified in the warrant. The warrant or summons may be directed to any peace officer, and shall be returned by him before the court or judge or justice mentioned in the warrant or summons. The proceedings upon the warrant or summons shall be the same as in other like cases prosecuted by warrant or summons." The words, "the offender may be prosecuted by warrant as provided in the Criminal Code," manifestly refer to the provisions of section 10, above quoted, which regulate the subject of prosecutions by warrant; and this part of the section was intended to increase the cases

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

in which that mode of prosecution might be followed, so as to include those matters in which imprisonment for 50 days might be imposed, as well as a fine of \$100. The remainder of the section gives an alternative proceeding in this class of cases by information filed by the commonwealth's attorney or county attorney. On the information a summons or warrant is issued against the defendant, commanding him to appear within three days. The amount of bail he is to give must be specified in the warrant. The proceedings in the case are the same as in other like cases prosecuted by warrant or summons. The purpose of this part of the section is to empower the attorneys representing the commonwealth to institute the proceeding without proof to the magistrate that there are reasonable grounds to believe the defendant guilty according to title 3 of the Criminal Code. The proceeding upon the information is covered by the Criminal Code, as in other like cases prosecuted by warrant or summons. It may be tried in three days, and may be taken out during the term of the circuit court or in vacation before the other officers named. It is entirely different from a penal action, which is governed by the Civil Code. In it the defendant cannot be held to bail. He must be summoned as in other civil cases, and the case must be tried at the next regular term commencing at the proper time thereafter. A petition must be filed which is sufficient under the rules of the Civil Code governing pleadings. There is nothing in section 1141 that in any way relates to penal actions. It relates only to prosecutions by warrant, and was designed to extend section 10 of the Criminal Code, both as to the cases embraced by it, and the mode of obtaining the warrant or summons. We therefore conclude that section 11 of the Code is not repealed by the section quoted from the Kentucky Statutes. Though this question has not been expressly determined by this court, section 11 has in several cases been recognized as in force. *Com. v. Louisville & N. R. Co.* (Ky.) 37 S. W. 589; *Harp v. Com.* (Ky.) 61 S. W. 467; *Com. v. Louisville & N. R. Co.*, 80 Ky. 291, 44 Am. Rep. 475; *Com. v. Sherman*, 85 Ky. 686, 4 S. W. 790. See, also, section 63, Civ. Code Prac.

It is also insisted that section 11 of the Criminal Code is in conflict with section 12 of the constitution of Kentucky: "No person for an indictable offense shall be proceeded against criminally by information, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, or by leave of court for oppression or misdemeanor in office." This provision was contained in the first constitution of the state, and has been continued unchanged to the present time. In 1843, in *Williamson v. Com.*, 43 Ky. 146, this court said: "It is suggested that, as a breach of the peace is an indictable offense, the proceeding by warrant, as in this case, is in vio-

lation of the eleventh section of the tenth article of the constitution of Kentucky, which provides that 'no person shall, for any indictable offense, be proceeded against criminally, by information,' etc. We are not aware of any decision of this court giving construction to that provision of the constitution. But this court has regarded proceedings for offenses punishable by fine only as of a quasi civil nature, as said in the case referred to, of *Montee v. Com.*, 26 Ky. 132. The legislature have so regarded them, by leaving to this court appellate jurisdiction in such cases. They have been considered as rather penal proceedings, than criminal, and the proceeding in this case may be regarded as a penal action. The warrant is a mere summons. Indictment is a general remedy for the redress of public injuries, and may be filed in all cases where an offense is created and punishment imposed; but in many such cases penal actions are authorized, and proceeding by warrant. A proceeding in that way has never been held, and should not be, we think, as a proceeding "criminally by information," and in violation of the clause of the constitution in question." Again, in 1879, in *Com. v. Avery*, 77 Ky. 625, 29 Am. Rep. 420,—a penal action to recover the amount of a bet,—the court said: "This is not a 'criminal prosecution,' nor 'an indictable offense,' within the meaning of the constitution. Betting on an election was never a crime or an indictable offense at common law, nor is the offense, as prescribed by the statute, to be visited with any infamous punishment; and it does not, therefore, come within the meaning of the twelfth and thirteenth sections of the constitution, above quoted, either as a 'criminal prosecution' or as 'an indictable offense.' Is it a proceeding according to the law of the land? It is competent, as we have seen, for the legislature to prescribe what shall be the mode of trial for a misdemeanor created by statute, which was not indictable at common law, and for which no infamous punishment is provided. *Proff. Jury*, § 97. The legislature having denounced the penalty, and prescribed a method for its recovery, in which a hearing is granted the accused, the trial by jury is preserved inviolate, and a judgment before dispossession prescribed. This, we think, is all that the constitutional 'law of the land' requires in such cases." The constitutional convention which framed the present constitution brought over into it, without change, the old provision which had thus been construed, and must therefore be held to have adopted it with the construction it had then received. It has been the policy of the state, from its foundation, to punish many minor offenses without indictment. These summary proceedings are essential to the welfare of society, and have by common consent been adopted to a greater or less extent in all states. At common law, misdemeanors might be prosecuted either by indictment or information. 1 *Bish. Cr. Proc.* §

141; 4 Bl. Comm. 301-310. Prosecutions for misdemeanors without indictment have been sustained in other states. See *McGinnis v. State*, 49 Am. Dec. 697; *State v. Barnett*, 87 Am. Dec. 471; *State v. Bennett* (Mo.) 14 S. W. 865, 10 L. R. A. 717.

The defendant was charged in the petition with willfully and knowingly suffering and permitting "divers persons to engage in games of chance, and bet, wager, hazard, win, and lose money as the result of same, on the premises of said railroad company, to wit, in a car of a special passenger train" run on September 10, 1899, from Clarksville, Tenn., to Evansville, Ind., and return. The prosecution was under section 1978, Ky. St.: "Whoever shall suffer any game whatever at which money or property is won or lost, to be played in a house, boat or float or on premises in his occupation or under his control, shall be fined from \$200 to \$500 for each offense." It is earnestly urged for appellant that a railroad car does not come within this statute. The right of way of a railroad, and the grounds belonging to it, are its premises. For these premises, it is responsible as any other owner, for gaming suffered thereon. The fact that the gaming was in a car standing on these premises would not be material; nor is the fact that the car was not stationary, but in motion. If a farmer suffered gaming to go on in a wagon on his farm driven by him from the crib to the cornfield, he would be as clearly guilty as if the wagon was standing at the crib, or the gaming was done in the crib. The purpose of the statute is the suppression of gaming, and to this end it imposes a penalty on all persons suffering it on premises in their occupation or under their control. The admission of evidence that the gaming was continuous from the time the train started until it stopped came about by witnesses stating facts incidentally. The mode of interrogation by the commonwealth's attorney was proper, and the statements objected to were brought out by the witnesses in explaining how they knew that gaming was done in Todd county. The court, by its instructions, properly confined the jury to what was done in that county, and we do not see that there was any error to the substantial prejudice of the appellant in this matter.

The statement of the commonwealth's attorney to the jury in opening the case, to the effect that the defendant denied everything, as in other cases, was improper, but we cannot see that it could have been substantially prejudicial. We must give the juries some presumption that they understand that they are to try the case before them on the law and the evidence.

The court instructed the jury that if they believed, from the preponderance of the evi-

dence, the defendant to be guilty of the offense charged, they should so find, and refused to instruct them that they should find for the defendant unless they believed from the evidence, beyond a reasonable doubt, that it was guilty. Section 238 of the Criminal Code is as follows: "If there be a reasonable doubt of the defendant being proven to be guilty he is entitled to an acquittal." In 1 Bish. Cr. Proc. § 1092, it is said: "In a case of reasonable doubt, therefore, even the interests which prompted the prosecution require an acquittal. Blackstone deems it 'better that ten guilty persons escape than that one innocent suffer,' and he says that thus the law holds. Such numerical comparison, however, is obviously impossible, but the general doctrine indicated thereby is beyond dispute." Thus it will be seen that the doctrine that the defendant is to be acquitted, unless proven guilty beyond a reasonable doubt, was a rule of the common law. If the defendant in this case had been indicted for the offense charged, it would have been entitled to the benefit of section 238 of the Code, above quoted. We do not think that the change in the mode of prosecution at the option of the commonwealth's attorney can have the effect of denying the defendant so important a right. The section quoted is of general application. This, although a penal action, is a prosecution; and the defendant comes within the letter of the section, as well as its humane purpose.

The court also refused to allow the defendant to plead "Not guilty" to the charge, and required it to file an answer to the petition. The defendant, under the constitution, cannot be required to give evidence against himself. He cannot, therefore, be examined by the state, against his will, as to the truth of the charges against him. To require him to answer the petition, and specifically admit or deny its allegations, is indirectly to make him give evidence against himself; for his admission of an allegation in the petition would dispense with proof of it by the state. Whether, therefore, the prosecution is by penal action or indictment, a plea of not guilty, under the constitution, is the only answer that the defendant may be required to file, and puts in issue all the allegations of the petition. A *capias pro fine* may issue on judgments in a penal action. Cr. Code Prac. § 301; *Long v. Wood*, 78 Ky. 392; *Harp v. Com.* (Ky.) 61 S. W. 467.

On the return of the case the court will allow the defendant to withdraw its answer, and enter a plea of not guilty, if it desires to do so. We see no other error in the record; but for the reasons indicated the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. CARTER.¹

(Court of Appeals of Kentucky. Feb. 4, 1902.)

EVIDENCE—UNSIGNED DEPOSITION TAKEN IN ANOTHER ACTION—COMPROMISE—RATIFICATION—VERDICT AGAINST EVIDENCE.

1. A carbon copy of a deposition of plaintiff taken in another action and verified by the stenographer who took the deposition, and filed as part of his testimony, was not admissible against plaintiff, as the deposition was taken in shorthand, and never read or signed by plaintiff after it was typewritten, the waiver of signature by the parties to that action not being binding on him.

2. Where a passenger whose leg was injured in a railroad wreck accepted from the railroad company a substantial sum by way of compromise while he was in a hospital being treated by a physician employed by the railroad company, and thereafter expended the money received by him in purchasing land and erecting a home thereon, a verdict in his favor against the railroad company in an action brought by him to recover damages for his injuries, in which he repudiated the compromise, and tendered back the money received, must be set aside as against the evidence both as to compromise and ratification, as it appears that plaintiff's mind at most was only slightly impaired, and that he understood the contract, which was free from fraud; and this is true though the representation of the attending physician, made to plaintiff prior to the compromise, to the effect that his leg would not have to be amputated, turned out to be false, as it was made in good faith, and without intention to influence the compromise.

3. The fact that there was a plea of fraud in obtaining the compromise did not entitle defendant to have the action transferred to the equity docket, the issues being properly triable by a jury.

4. Plaintiff was a competent witness as to his mental condition at the time of the compromise.

Appeal from circuit court, Simpson county.
"Not to be officially reported."

Action by Isalah Carter against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

Edward W. Hines, James A. Mitchell, Walker D. Hines, and H. W. Bruce, for appellant. Bennett H. Young, Goodnight & Roark, Gerald T. Finn, and Hazelrigg & Chennault, for appellee.

WHITE, J. The appellee brought this action for damages for personal injuries received while traveling as a passenger on a freight train in charge of a shipment of live stock. The injury was caused by a rear-end collision,—a freight train following run into one on which appellee was riding. The charge of negligence was in the operation of the trains. Appellant answered, denying negligence or liability by reason thereof, and pleaded contributory negligence of appellee. In addition to these pleas, the appellant pleaded accord and satisfaction by reason of a compromise agreement entered into with the appellee, by which appellee was paid \$2,000 in money and all his expenses in-

curred in his illness. Appellee replied, denying contributory negligence; denied accord and satisfaction (that is, admitted that he had been paid \$2,000, but said that he was overreached and defrauded in the settlement; that it was made when he was not in his right mind,—when, by reason of his illness and suffering, he did not know or have capacity to understand the agreement he was making; in fact was for the time non compos). Appellee then tendered back the money so received in the compromise settlement, and sought judgment. For rejoinder appellant denied that appellee was overreached or defrauded, or that he was of unsound mind or non compos when the agreement was reached or the money paid, and pleaded further that, if it were true that appellee did not know what he was doing, or did not have mental capacity to contract when the compromise was made, yet, that after he got well, and was of sound mind, and had a clear and full understanding of what had been done, and of the payment of the money to him, he ratified the compromise agreement, and kept the money with full knowledge of all the facts as to how it was paid him. The ratification was denied. Upon the issues thus presented the case went to trial before a jury, and resulted in a verdict and judgment for appellee for \$5,000, less \$2,000 already received. After appellant's reasons and motion for a new trial had been overruled, this appeal is prosecuted.

The reasons for new trial cover many rulings of the court in admitting and excluding testimony of witnesses, especially of Edwin M. Williams; also rulings of the court in giving and refusing instructions; because the verdict is against the law and evidence. In the view we have taken of the case we deem it unnecessary to discuss many of the questions of testimony presented, but there is one presented that is novel, and goes to nearly the whole of the evidence of the witness Williams, which it is proper to discuss. It seems that at the time appellee, Carter, was injured, there was another person on the same train that was killed by the collision. While appellee was in the hospital, he gave a deposition in the other case, in which he undertook to detail the incidents and facts as to the accident. This deposition was given before Edwin M. Williams, a notary, who took the questions and answers in shorthand. Williams then read his shorthand notes to a phonograph, and from the phonograph they were heard and written out on typewriter by an employé of Williams. Appellee did not hear the deposition read after it was typewritten, nor was it signed by him, the signature being waived by the parties to the action in which taken. In making the typewritten copy, a carbon copy was made at the same time. This carbon copy was produced by the witness Williams as a part of his deposition, but the

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court refused to permit the exhibit to be read. Of this action complaint is made. We are of opinion that in this ruling there was no error. While the deposition could be used in the case in which taken without the signature of the appellee witness because of the agreement to waive the signature, it could not be used in this case against appellee as his statement without his signature or approval after it had been put in readable form. The parties to the suit were at liberty, if they so desired, to waive the signature, and risk the accuracy of the stenographer and his clerk to correctly report the statements of appellee as a witness, but their waiver did not bind appellee. The witness Williams did not undertake, from memory, to say what appellee had testified to, but filed the carbon copy of the deposition as an exhibit, and then verified the carbon copy. In our opinion, this did not bring the carbon copy within the rule of admissible evidence, and the exception to that part of the deposition was properly sustained.

The testimony as to the compromise agreement and as to the subsequent ratification, as well as the mental capacity of appellee, as it appears from the record, is about this: The appellee was injured on January 14, 1897, and was carried to a hospital in Louisville. On February 5, 1897, Mr. Warfield, attorney for the appellant, made the compromise agreement, which was in writing, and witnessed by Dr. G. W. Griffiths, the attending surgeon on appellee, and also by Edwin Carter, a grandson of appellee, who was about 20 years of age. The check for \$2,000 was properly indorsed by Carter, and deposited in a bank at New Albany, Ind., to the credit of appellee, and from time to time was paid out by the bank on the checks of Carter. This money was expended in paying for a small farm, and in building a barn thereon, and in a loan to appellee's son. The purchase of the land and direction of the building was by other members of appellee's family, but he in person signed the checks on the bank. The compromise in February was before appellee's injuries had healed, and while their extent was uncertain. It appears from the proof that the limb got worse, and amputation became necessary in April, which had not, in February, been thought of as probable. Appellee left the hospital in May, 1897, and went home. The record shows that while at home, in the state of Indiana, appellee was visited by the secretary of the American Railway Employees' Protective Association, and, as they testify, "advised of his rights"; that is, this gentleman informed appellee and members of his family that he had been defrauded in the compromise settlement, and had been induced to accept in the compromise less than he was entitled to and could recover. This gentleman furnished appellee the necessary funds to tender back to appellant the money paid on the compromise, with interest, which

was done in August, 1897. Upon this tender being refused, this action was brought. It may be well to remark that appellee was not a member of, or in any way connected with, the American Railway Employees' Protective Association, and was not, nor never had been, a railway employe. The proof shows that after the injury, up till August, 1897, appellee's health was poor, but there is no positive evidence of any facts showing that his mind was wrong, except as necessarily caused by ill health. There is no evidence that when the compromise was effected appellee was induced to believe his injuries were slight. His attending physician and surgeon gave his opinion that he could save the limb, and it turns out that in that he was mistaken. But there is no pretense that this was other than the honest opinion of Dr. Griffiths. There is no proof that he made such statements to induce the settlement, or that he acted in the interest of appellant to bring about the compromise. It is a fact, however, that Griffiths was employed by appellant to treat appellee's injuries. The grandson who witnessed the contract of compromise says that appellee understood that he was settling for his injury. After the compromise agreement had been made, and appellee had been carried home, he was visited by various friends. The testimony of none of these witnesses shows that appellee was of unsound mind. The most that they would say is that they did not think him capable of attending to important business matters. On the other hand, there are several witnesses, including all the physicians and nurses at the hospital, who say that his mind was clear, and as good as ever, though his health was poor. It is shown without contradiction that appellee, in speaking of the compromise, said that he thought that the easiest way was the best, and he compromised. This was in the summer after appellee had gone to his home in Indiana. When it is remembered that while at the hospital appellee gave a deposition in an important case, and paid out the money obtained by the compromise to various persons for land and work and material, and loaned some of it out, and, on the other hand, the conflict in the testimony of the witnesses as to whether appellee's mind was as good as usual, yet no one saying it was more than impaired, we conclude that the verdict was contrary to the evidence on this point. The weight of the evidence as to the fairness of the compromise agreement as well as to ratification is so strongly in favor of appellant that the court should have set aside the verdict and awarded a new trial.

There was a motion by appellant to transfer this case to the equity docket on account of the plea of fraud in obtaining the compromise settlement. This motion was overruled. In this, we are of opinion, there was no error. The case was properly brought at law, and the issues presented were prop-

erly triable by a jury, even on the question of compromise. Appellee was entitled to a jury to try the issues, and therefore the case was properly retained on the law docket.

Objection is also made as to the testimony of the appellee, Carter, as to his mental condition at the time he made the compromise. In thus permitting appellee to testify we perceive no error. He was a competent witness for himself, and could, therefore, testify as to any matter in issue. If he desired to say that at a particular time he had no recollection of what happened, or that he participated in a particular transaction, or that he indistinctly remembered the transaction, this would be permissible. Likewise if he desired to say that at a given time he was non compos, there is no rule of law that will deny his right to so testify. The weight of such statements are for the jury.

We have not stated or discussed the question of negligence of appellant in inflicting the injury, because, in our opinion, it is unnecessary, if not improper, in view of another trial. Suffice it to say that on that issue the case was properly submitted to the jury.

There is complaint as to the instructions given, but a majority of the court are of opinion that there is no error in the instructions, but that they fairly present the law of the case. But because the verdict is against evidence on the issues of compromise and ratification, the judgment appealed from is reversed, and cause remanded for a new trial, and for further proceedings consistent herewith.

VINTON v. NATIONAL BUILDING & LOAN ASS'N et al.¹

(Court of Appeals of Kentucky. Feb. 4, 1902.)

BUILDING AND LOAN ASSOCIATIONS—CREDIT ON LOAN OF PAYMENTS MADE ON STOCK—APPLICATION FOR WITHDRAWAL PRIOR TO INSOLVENCY OF ASSOCIATION.

Payments made by a borrowing member as dues on stock cannot, by operation of law, be applied to the extinguishment of the debt and interest after the association has become insolvent, though application by the member for withdrawal was made prior to the insolvency of the association.

Appeal from circuit court, Rowan county. "To be officially reported."

Action by the National Building & Loan Association and others against A. W. Vinton to enforce a mortgage lien. Judgment for plaintiffs, and defendant appeals. Affirmed.

James G. Whitt and James E. Clarke, for appellant. Henry Watson, for appellees.

DU RELLE, J. The National Home Building & Loan Association on March 4, 1898, filed its petition to enforce its mortgage lien upon a lot of land in Morehead for \$263.78, as the balance due on a loan of \$1,000 made in 1893

to appellant Vinton upon 10 shares of the stock of the company. In this petition credit is given not only for the amounts paid as interest and premium, but for the monthly payments made as dues on the 10 shares of stock on which the loan was made. On June 8, 1898, Vinton filed his answer, denying that he owed anything to the association, and alleging that at the time of the loan he held 20 shares of stock, upon which he made 48 monthly payments; that in February, 1897, he filed for withdrawal 10 shares of the stock, and the association received and retained his certificate therefor, but has refused to give him credit on the mortgage sued on for the dues paid upon those ten shares; and that the note and mortgage have been overpaid in the sum of \$36.23, for which sum he prayed a judgment over. On October 27, 1898, C. C. Chenault, as special receiver of the association, filed his petition to be made a party, alleging that on June 8, 1898, the appellee association had been, by a judgment of the circuit court of Montgomery county, adjudged to be insolvent, and the petitioner had been duly appointed receiver, and duly qualified as such; that by the order of appointment he had been directed to proceed to the liquidation of the association, to institute suits, and cause himself to be made a party to the suits already instituted, and prosecute same as receiver. This petition, which is referred to as an amended petition, gives credit only for the interest and premiums paid upon the loan, and claims the amount due from Vinton to be \$750. A reply was filed by the receiver, denying the payments pleaded, alleging the insolvency of the corporation, and that by reason thereof credit should not be given for amounts paid as dues, either on the 10 shares of stock pledged as collateral security, or upon the other 10 shares. An order of reference was accordingly made, directing the master to give appellant credit for all interest and premiums paid. The master reported the amount due from Vinton to be \$869.73, and the court accordingly rendered judgment for that amount.

The correctness of the calculation by the master does not seem to be disputed, but it is claimed that the basis of computation was incorrect, in this: that, by the application for withdrawal of the unpledged 10 shares held by appellant, his right to the withdrawing value of his shares at the date of the notice became fixed, under section 860, Ky. St., and under the terms of the bond executed for the loan, and appellant thereby became entitled to a credit for the withdrawing value of his unpledged shares. The bond provides that, in case of default and forfeiture of the pledged shares, the value thereof, at the option of the association, may be applied in the payment of the obligation; that, in case of payment before maturity, the obligor may surrender his pledged shares at their cash value. Sections 860 and 866 provide substantially the same thing. By sec-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

tion 860 it is enacted that a member may withdraw his unpledged shares at any time, by giving the notice provided, "and shall thereupon receive the withdrawing value of his shares at the date of the notice, and this withdrawing value shall be the amount of the dues paid thereon, together with such proportion of the profits as the by-laws may determine, less all fines, expenses and proportionate part of any unadjusted loss." Section 866 provides that a borrower may repay a loan at any time, in even shares, whereupon he "shall be given credit for the withdrawing value of his shares pledged and transferred as security." There is no basis in this record for any claim of payment of the loan, except the contention that the amount of interest and premiums paid, together with the amounts paid as dues on stock, both pledged and unpledged, was sufficient to discharge the entire debt and interest before the bringing of the suit, and when the corporation was, or may be assumed to have been, solvent, and that these payments of interest, premiums, and dues should, by operation of law, be applied to the discharge of the debt. This exact question was fully considered in *United States Building & Loan Ass'n's Assignee v. Reed* (Ky.) 62 S. W. 1020; and it was held that payments made as dues on stock could not, by operation of law, be applied to the extinguishment of the debt and interest in such a case, having been by action of the parties applied to a different purpose.

The question remains to be considered whether the notice of withdrawal of the unpledged shares so fixed the stockholder's rights to their withdrawing value as to entitle him to a credit therefor upon his debt, upon the subsequent insolvency of the association. There is nothing in this record to show why his application for withdrawal was not complied with, and why he did not obtain the withdrawing value. The only fact that appears is that these sums were paid as dues on stock, were presumably carried to the stock account, and presumably remained in that account, subject, in the language of section 860, to his "proportionate part of any unadjusted loss." They were subject to such part of such loss at the time he made the application, by the very terms of the statute. They are none the less subject to it now because, for some unexplained reason, the association failed to take action upon his application for withdrawal at the time he made it. So long as these payments made to the stock account for the purpose of paying the stock subscription have not been actually withdrawn from the assets of the association, they remain assets for the purpose of extinguishing the debts and paying the expenses of the concern; and, the concern being now in process of liquidation, they cannot be diverted to any other purpose than the one to which they were appropriated by both parties at the time the payments were made,

except in so far as they may be judicially determined to be unnecessary for that purpose. *United States Building & Loan Ass'n's Assignee v. Reed*, supra. The duty of the chancellor, when the assets of such an association are in the hands of a receiver or an assignee for distribution, to protect the interest of all parties alike, and to allow no stockholder to escape his just proportion of the losses or expenses which in good conscience he should be required in part to bear, is distinctly recognized in the opinion by Judge Hazelrigg in *Simpson v. Loan Ass'n* (Ky.) 41 S. W. 570, 42 S. W. 884. And see *End. Bldg. Ass'ns* (2d Ed.) § 523; *Rogers v. Rains*, 100 Ky. 299, 38 S. W. 483; *Strohen v. Loan Ass'n* (Pa.) 8 Atl. 843. And in *Reddick v. United States Building & Loan Ass'n's Assignee* (Ky.) 49 S. W. 1075, Chief Justice Hazelrigg, delivering the opinion of the court, said: "The right of withdrawal is not an absolute one, any more than is the right of the borrowing member to pay his loan by monthly payments until the maturity of his stock cancels his loan. * * * But in the latter event, no more than in the former, can he rely on the exact terms of his contract. And these terms all come to nothing when the scheme falls through. The chancellor cannot carry on the enterprise when the parties themselves have failed, and the only thing possible is to wind it up on equitable principles. As in the one case the borrowing member cannot complain of the violation of his contract coming from a precipitation of the maturity of his loan, so in the other the withdrawing member cannot say he has an absolute right to a specific performance of the letter of his contract. Judge Endlich, in his work on *Building Associations* (2d Ed., § 108), affirms the doctrine that 'the fact of insolvency of an association negatives the right of any one to obtain a priority over his fellows by giving notice of withdrawal'; citing *Christian's Appeal*, 102 Pa. 181, and other cases." The stock of each stockholder, whether it be pledged stock of a borrowing member or investment stock, is at all times subject to the burden of its share of the losses and expenses. In going concerns, as said by Judge Hazelrigg in the *Reddick Case*, supra, it is estimated that the member's stock is at least worth what he paid on it, and whatever more it may be worth is forfeited for expenses. In insolvent concerns it is to be assumed that there has been an impairment of the capital stock, growing out of losses in the conduct of the business, and the value of the stock can be determined only when the losses are ascertained and the funds ready for distribution. And we are of opinion that the mere date of an application for withdrawal of stock presents no bar to the right of other stockholders to insist, through the assignee or the receiver, upon the subjection of payments to stock account to the payment of proportionate amounts of the losses and expenses of the concern. To

hold otherwise would be to lend the aid of the courts to the placing of a disproportionate part of this burden upon the borrowing members,—the class for whose benefit the law is supposed to have been designed, and who, as their stock is in pledge to the association, cannot apply for its withdrawal. So long as the stock payments remain in the hands of the association, no matter what the date of the application for withdrawal, they remain subject to this burden.

For the reasons indicated, the judgment is affirmed.

DRAKE et al. v. HOLBROOK.¹

(Court of Appeals of Kentucky. Feb. 4, 1902.)

DECEIT—SALE OF SHARES IN CORPORATION—PLEADING—ESTOPPEL TO DENY KNOWLEDGE OF CONDITION OF CORPORATION—MEASURE OF DAMAGES.

1. In an action to recover damages for deceit in the sale of shares in a corporation, it is not necessary to expressly allege that plaintiffs would not have purchased the shares but for the false representations; it being sufficient to allege that the statements were false, were made for the purpose of defrauding plaintiffs, and with intention that they should rely thereon, and that, relying on such false statements, plaintiffs made the contract of purchase.

2. Defendant, being secretary and treasurer of the corporation at the time he sold his shares to plaintiff, cannot claim that his representations as to the financial condition of the corporation were made by him in ignorance of the fact that they were false, as it was his duty, by reason of his position, to know the condition of the corporation, and it was therefore error to submit to the jury the question of his knowledge of the truth or falsity of his representations.

3. The measure of damages in such an action is the difference between the actual value of the stock and the value it would have had if the corporation had been in the condition represented by defendant.

Du Relle, Burnam, and O'Rear, JJ., dissenting.

Appeal from circuit court, Ohio county.

"Not to be officially reported."

Action by W. P. Drake and others against Rowan Holbrook to recover damages for deceit. Judgment for defendant, and plaintiffs appeal. Reversed.

Little & Little, for appellants. Glenn & Ringo, for appellee.

WHITE, J. This is an action for damages for deceit brought by appellants against appellee. The allegations of the petition are that the defendant sold to plaintiffs 20 shares, being one-half the stock in a certain coal mining company, at the price of \$4,500, and at the time, and in order to induce appellants to purchase such shares of stock at that price, the appellee made certain representations as to the condition of the corporation as to its assets and liabilities,—the representations being that the liabilities were about \$1,500, including debts due the other shareholder and superintendent, these being

represented to be \$300 or \$400 to one and \$200 to \$300 to the other, and that the book assets that were collectible would pay the sum, less the two debts named; that appellee was the secretary and treasurer of the company. It is then alleged that the statements made by appellee were false and untrue, the fact being that the liabilities of the company being largely in excess of the sum stated, setting out the list of the creditors and amounts due each, and that these false representations were made with the intention that appellants would rely thereon, and that they did rely thereon, being ignorant of the truth, and made the purchase at the price of \$4,500. They pleaded that, by reason of the false and fraudulent representations, they were induced to purchase, and by reason of the fact that the indebtedness exceeded largely the sum represented as the correct sum they were damaged, and asked judgment for \$4,500. Appellee, for answer, admitted the sale at the price stated, but denied making the false or any false statements as to the condition of the company, or as to its indebtedness or assets. Then is pleaded by defendant what the contract was, and that the same was in every essential and material fact true. It is then alleged that the 20 shares of stock are, and were at the time of sale, worth the full sum appellants paid for same. Damage is denied. A reply traversed the material affirmative allegations of the answer. Trial was had on the issues thus presented, which resulted in a verdict and judgment for appellee. After appellants' reasons and motion for new trial had been overruled, this appeal is prosecuted.

Appellee contends that the petition stated no cause of action, and that the demurrer thereto should have been sustained. The specific objection pointed out is that there is no averment that appellants would not have purchased the stock but for the false representations. The averments are that the statements were false, were made for the purpose of defrauding appellants, and with intention that they should rely thereon, and that, relying on such false statements so made, the appellants made the contract of purchase. We are of opinion that the petition is sufficient, and the demurrer was properly overruled.

The instructions given on the trial are as follows: "The court instructs the jury that if they believe from the evidence that, before or at the time of the sale of his stock in the Field Coal Company to the plaintiffs, the defendant, as an inducement to plaintiffs to purchase his said stock, falsely and fraudulently represented to them that the debts due the company, owing by good and solvent parties, were sufficient to pay all debts owing by said company at the time, except \$300 to Foster, and \$300 or \$400 to Field, when in fact said company owed debts to a much greater amount, and this

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

fact was then known to the defendant, and his said representations concerning said indebtedness were untrue, and then known by him to be untrue, and were made with the intention that plaintiffs should rely on said representations as true, and plaintiffs did rely on them, and on the faith of them purchased said stock, and by reason of the indebtedness, not disclosed, said stock was diminished in value below the purchase price, \$4,500, the jury should find in damages for the plaintiffs the difference between the actual value of the stock at the date of the sale and purchase of said stock and the price, \$4,500, if any proven, not exceeding \$4,500. But if the jury believe from the evidence that the stock sold by defendant to plaintiffs was at the time of the actual value of \$4,500, notwithstanding the indebtedness, or if they believe from the evidence that defendant made no false or fraudulent representations, inducing plaintiffs to buy, and made no representations which were known by him to be untrue, or if they believe from the evidence the plaintiffs bought the stock on their own judgment and investigation, they should find for the defendant," etc. The court then told the jury they might, in their discretion, give interest, and that nine could find a verdict.

Appellants complain of the instruction on account of the measure of damages, and in submitting to the jury the question of appellee's knowledge of the truth or falsity of any representations made. It was pleaded, and not denied, that the appellee, Holbrook, was the owner of one-half the stock, and was secretary and treasurer of the company. This being true, he cannot be heard to say he did not know the resources and liabilities of the company. It was his business, as secretary and treasurer, to know the financial condition of the corporation, and any statements made by him as to the financial condition of the corporation to the appellants would authorize them to rely thereon as the truth. Appellee, being in condition to know, and it being his duty to know, will not be permitted to say he in fact did not know the truth as against his own statements to appellants. *Ward v. Trimble* (Ky.) 44 S. W. 450. There is conflict in the testimony, both as to the representations made by appellee and as to the true condition of the company at the time of the sale. This conflict presents a proper case for the jury to determine the facts, and, in view of another trial, we refrain from a discussion of the evidence.

We are of opinion that, in addition to the error in the instruction as above indicated, there was also error in the measure of damages. If, under the facts found by the jury, the plaintiffs were entitled to recover at all, they were entitled to recover for the difference between the value of the stock with the company in its actual financial condition at the time and its value if the company had

been in the condition represented by defendant. In 3 *Suth. Dam.* § 1171, that author thus states the rule as to the measure of damages: "The party guilty of the fraud is to be charged with such damages as have naturally and proximately resulted therefrom. He is to make good his representations as though he had given a warranty to that effect. He is to make compensation for the difference between the real state of the case and what it was represented to be." An illustration of Mr. Sutherland is as follows: "Where one, with intent to cheat and defraud another, induces him, by fraudulent means and representations, to purchase, for value, stock which he knows to be worthless, he is liable for the damages sustained, whether the purchase is made from him or from another. The measure is the difference between the value of the stock as the condition of the company issuing it really was and what it would be if its condition had been as the purchaser was fraudulently induced to believe it to be." In *Am. & Eng. Enc. Law* (2d Ed.) p. 184, the rule is thus stated: "The measure of damages for false representations on the sale of bonds, mortgages, and other securities is obviously, under ordinary circumstances, the difference between the actual value of the security and what its value would have been if it were as represented." The doctrine of these texts is supported by a long line of cases from many of the states of the Union, including Massachusetts, New York, New Jersey, Illinois, Ohio, and others. In this court this is stated to be the general rule of the measure of damages in cases of *Campbell v. Hillman*, 15 B. Mon. 508, 61 *Am. Dec.* 195; *Trimble v. Ward*, 97 Ky. 748, 31 S. W. 864; *Bank v. Gaitskill* (Ky.) 37 S. W. 160; and the later case of *Ward v. Trimble* (Ky.) 44 S. W. 450. These cases hold that the measure of damages is the difference between the value of the bank stock and its value if it had been as represented. There the stock was so represented as to show a value of 120 per share; on the trial the actual value was shown to be 60 per share. The criterion of recovery was this difference.

In the case at bar, if the represented value was \$4,500, and appellants' contention as to the facts be true, the actual value would be the difference in value caused by the difference in the represented and actual state of facts. On the other hand, if \$4,500 be taken as the actual value of the stock, notwithstanding the false representations, as contended by appellants, were made, if such be the fact, then the stock would necessarily be of greater value if the representations by appellee, if such he made, had been true. This difference in value is the measure of damage, and the jury should have been so instructed. Appellants are entitled to what they were induced to believe they were getting by their purchase. If they actually received less than they were induced to be-

lieve they were purchasing, they were damaged. If they were induced to believe they were getting a bargain, it is no answer to say they got the value of their money. They are entitled to the bargain,—the profit actually represented to exist.

The objections to the admission of testimony are slight, and on another trial may not occur, and are not passed on.

For the errors indicated, the judgment is reversed, and cause remanded for new trial and for proceedings consistent herewith. Whole court sat in this case, DU RELLE, BURNAM, and O'REAR, JJ., dissenting; O'REAR, J., delivering the dissenting opinion.

O'REAR, J. (dissenting). In my opinion, the facts in this case and the allegations of the complaint are sufficient to have rested the decision upon the rule applicable to a breach of warranty. The court, however, has not deemed it proper to do so, and have gone beyond that rule.

It will be observed that the effect of the circuit court's instructions to the jury was to indemnify the plaintiff against such loss as he may have sustained by reason of the deceit practiced on him by the defendant. The instructions precluded the finding of anticipated profits as an element of plaintiff's damages. I think the circuit court ruled correctly in this respect. Generally, the measure of damages in cases of deceit is the difference between the contract price and the reasonable market value if the property had been as represented to be. The reason that this general rule exists, in my opinion, is that generally the contract price is the equivalent if not exactly the reasonable market value if the property had been as represented, and in suits for the recovery of damages because of actionable defects the real condition of the thing represented is generally below that value at which it was sold. In *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279, followed in *Glaspell v. Railroad Co.* (C. C.) 43 Fed. 900, *Atwater v. Whiteman* (C. C.) 41 Fed. 427, and *Buschman v. Codd*, 52 Md. 202, the rule has been more accurately stated than I have elsewhere found. *Smith v. Bolles* was an action for tort for fraud in the sale of the stock, and it was held that the measure of damages was not the same as upon breach of warranty, but was compensation for the injury done by the fraud; that is, the purchase money less the actual value of the stock. Chief Justice Fuller, in the course of the opinion of the court, said: "The measure of damages was not the difference between the contract price and the reasonable market value, if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What

the plaintiff might have gotten is not the question, but what he had lost by being deceived into the purchase. * * * He [defendant] was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct, but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery." The same rule prevailed in England. In *Peek v. Derry*, 37 Ch. Div. 541-594, which was an action for false representations in the sale of shares, Cotton, L. J., delivering the opinion of the court on the question of damages, said: "The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares. Before he was induced to buy the shares, he had the £4,000 in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over that £4,000, and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendants was having the shares, instead of having in his pocket the £4,000. The loss, therefore, must be the difference between the £4,000 and the then value of the shares." In the same case Sir James Hannan added: "The question is, how much worse off is the plaintiff than if he had not bought the shares? If he had not bought the shares, he would have had the £4,000 in his pocket. To ascertain his loss, we must deduct from that amount the real value of the thing he got." It is just to add that Sedgwick, in his work on Damages (section 780), finds fault with this doctrine. The rule announced by the majority opinion in this case is that held in *New York (Whitney v. Allaire, 1 N. Y. 305)*, in which it is said: "The measure of damages in an action upon a warranty and for fraud in the sale of personal property are the same." So far as the cases cited from this court are concerned, it will be noted that in every instance the contract price was what the value of the property would have been had the statements as represented been true, while the actual value of the property was shown in each instance to have been below that price. It is rare that contemplated profits are allowed as part of damages recoverable, even upon a breach of contract. There are many reasons why this is so, among them their extreme uncertainty, their problematical existence, their speculative nature. They are not proximate, and are therefore not, in contemplation of law, within the minds of the parties as a measure of damages in case of the breach of the contract. There is even less reason for considering them as an element of damages in actions for tort. The doctrine of damages rests on the idea of compensation to the one injured

by the wrong of the other. It is not the making of the contract, nor is it the enforced execution of one. It is merely making up to the injured party that of which he has been devastated by his overreaching adversary. Sedg. Dam. § 29; Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507. The rule is that the plaintiff shall recover so much as will repair the injury sustained by the misconduct of the defendant. Walker v. Smith, 1 Wash. C. C. 152, Fed. Cas. No. 17,086. I think the rule should, in many cases, be different between recoveries for breach of warranty and damages for deceit. In cases where the deceit amounts also to a warranty, generally the rule would be the same; but, where this is not so, then the rule should be different, because, among other reasons, for a breach of warranty the party has his contract enforced; that which is lacking is made up to him. He bought a certain thing. Its defect is cured by the recovery. He would not be entitled, however, to a rescission upon a mere breach of warranty. But in case where fraud intervenes, and the action is one for deceit by the seller, the contract may be rescinded, the thing and the price paid recovered, or the party defrauded may stand to the bargain, and recover damages for the fraud; that is, I should think he would be entitled to recover the difference between the value of the thing retained and the sum that he paid for it. This would be the equivalent of a rescission. Campbell v. Hillman, 15 B. Mon. 508, 61 Am. Dec. 195, opinion by Judge Simpson, was an action to recover for the false and fraudulent representation of the nature of the title to a slave sold the plaintiff, the title to which was represented as being absolute and clear, when the vendor knew that it was but an estate for life. One of the questions was the criterion of recovery. Said the court: "In an action for a fraud, if the plaintiff succeed he is entitled, as a general rule, to recover damages adequate to the injury he has sustained." The court said that the difference between the value of the estate which was purchased and the one that plaintiff actually acquired in the slave would ordinarily constitute the standard for which the injury he sustained was to be measured. "But it is evident," said the court, "that cases might arise in which this mode of ascertaining the difference in the value of the two estates, and thereby determining the extent of the injury sustained, might work manifest injustice." The owner of the life estate whose life was considered so precarious at the time of the sale, on account of his bad health, that its probable duration was estimated at about two years, or a little upward, was still living when the suit was tried, although more than seven years had then elapsed from the time the purchase was made, and his health had so improved as to justify the belief that he might still live for several years longer. Besides, one of the slaves had died in the mean-

time. The court readily found that it would be unwise, because unjust, to adhere always to the general rule stated above. "It is perfectly evident that the damages to which the purchaser would be entitled, under the operation of such rule, would greatly exceed in the present case the actual injury he has sustained. His right of recovery must be restricted to legal compensation for the loss actually resulting, and not for that which might have resulted, from the wrong inflicted on him." I regard this valuable opinion as clearly sustaining the views herein discussed, and as being in entire accord with the English doctrine and that held by the supreme court of the United States, and consequently by all inferior federal jurisdictions. In the case at bar there was proof tending to show, and the verdict of the jury seemed to accept it as true, that although defendant may have misrepresented the facts concerning the indebtedness of this corporation as affecting the value of its shares, yet the shares were worth at the time of their purchase the price actually paid for them. Consequently there could have been no damage.

DU RELLE and BURNAM, JJ., concur in this dissent.

EDWARDS v. GRIMES et al.¹

(Court of Appeals of Kentucky. Feb. 6, 1902.)

EQUITABLE ACTION—TIME OF TRIAL—TRIAL NOT DELAYED BY FILING OF CROSS PETITION.

Under Civ. Code Prac. § 97, subsec. 3, providing that proceedings upon cross petitions shall not delay the trial upon any issue in the original action concerning which a judgment can be rendered without prejudice to the rights of defendants on the cross petition, in an action by vendors against the purchaser to recover the balance of purchase money, and to enforce the purchase-money lien, the trial was not premature, by reason of the fact that persons against whom defendant set up a cross petition to quiet his title had not been served with process, as whatever judgment might have been rendered by the court as between the original parties could not affect the defendants on cross petition.

Appeal from circuit court, Edmonson county.

"Not to be officially reported."

Action by Grimes Bros. against P. F. Edwards to enforce a lien on land. Judgment for plaintiffs, and defendant appeals. Affirmed.

P. F. Edwards in pro. per. Wm. Cromwell and Wilkins & Lay, for appellees.

O'REAR, J. An issue was joined by the pleadings in this case in equity in June, 1900. Appellant's answer was made a cross petition against others not formerly parties, and process was sued out and served upon one of the cross defendants in June, 1900. As to the other the summons was returned,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

"Not found." The case was continued for defendant at the June term, with a rule to try at the next term, and defendant was ordered to complete his proof by September 15, 1900. No proof was taken in the case. Under the pleadings, the burden was on the defendant. At the following December term the cause was submitted without objection, and a judgment rendered against appellant.

This appeal presents but one question: Was the submission of the cause premature? By section 364 of the Civil Code of Practice, equitable actions shall stand for trial at any term, if the pleadings have been, or, by the provisions of sections 102, 104, 105, and 106, should have been, completed 60 days before the commencement of such terms. In this action, as stated, the issues were completed in June, and the trial had in the following December. It is argued, however, by appellant, that the trial of the action was premature, because the defendants on his cross petition were not before the court. Subsection 3 of section 97 of the Civil Code of Practice provides that proceedings upon cross petitions and upon set-offs and counterclaims against new parties shall be the same as those upon petitions; but they shall not delay the trial upon any issue in the original action concerning which a judgment can be rendered without prejudice to the rights of defendants of the cross petition. This action was by appellees, as vendors, against appellant, as vendee, to recover the balance of purchase money for a tract of land in Edmonson county, and to enforce the purchase-money lien. The cross petition sought to quiet defendant's title as against others alleged to be claiming same parts of the land. Whatever judgment might have been rendered by the court as between appellant and appellees could not affect the new defendants to appellant's cross petition. Therefore the action stood for trial.

Judgment affirmed.

BURTON v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 6, 1902.)

CRIMINAL LAW—TESTIMONY IN CHIEF—HARMLESS ERROR IN ADMITTING OUT OF TIME—SELF-DEFENSE—INSTRUCTIONS TO JURY—EVIDENCE AS TO PRESENCE OF PEACE OFFICER.

1. Though evidence on a trial for murder to the effect that on the evening after the killing defendant said of deceased that he had been unruly, and hard to get along with in the mill in which they were employed, and that he did not want to be bossed by deceased, may have been in chief, its admission after defendant had closed his testimony was harmless error, under all the circumstances of the case.

2. It was error to instruct the jury that, in order to acquit on the ground of self-defense, they must believe "that the deceased was then and there about to inflict upon defendant death or great bodily harm, and to cut, stab, or wound deceased was necessary, or seemed to defendant to be necessary, in the exercise of reasonable judgment, in order to avert said

danger, real or to the defendant apparent," as the jury may have supposed from the language used that they must, in order to acquit, believe that defendant was actually in danger.

3. If deceased was about to commit a felony, defendant had the right to disarm him, and, if need be, restrain him, in order to prevent the commission of the felony, but had no right to use more force than reasonably appeared necessary for that purpose.

Appeal from circuit court, Clay county.

"Not to be officially reported."

Granville Burton was convicted of the offense of manslaughter, and he appeals. Reversed.

D. B. Golden, S. H. Kash, A. B. Hampton, and A. D. Hall, for appellant. Morrison Breckinridge and R. J. Breckinridge, for the Commonwealth.

GUFFY, C. J. The appellant was indicted in the Clay circuit court for the alleged crime of murder committed by stabbing and cutting Reuben Davidson with a knife, from the effects of which the said Davidson soon thereafter died. A trial resulted in a verdict and judgment sentencing the appellant to the penitentiary for the term of 10 years. and, appellant's motion for a new trial having been overruled, he prosecutes this appeal. The grounds relied upon for a new trial are, in substance, as follows: Error of the court in instructing the jury, and in refusing to properly instruct the jury; error of the court as to the admission and rejection of evidence; and because the verdict is contrary to law and against the evidence.

We deem it unnecessary to recite even the substance of the testimony. It is, however, proper to say that the evidence conduces to show that the deceased, some hours before the killing, appeared to be in a very bad humor, and also somewhat intoxicated, and manifesting by words and acts a disposition to shoot and kill divers persons; that he also said in the presence of some parties that he was a murderer, and that he had murder in his heart, or words to that effect. The proof also tends to show that the appellant and his wife had been invited to the residence of Henry Martin to supper, and, after several had eaten supper, William Bowling and several others were singing some songs from a hymn book, and about half an hour after supper Davidson came in and asked for whisky. William Bowling had brought some whisky with him, and Bowling told his wife to give Davidson a dram. Afterwards Davidson took offense at the statement of Bowling to his wife to the effect that she ought not to have given Davidson the whisky. Davidson got mad, got out his knife, and seemed as though he was going to cut Bowling. Bowling also got out his knife, and they were making at each other, when the witnesses separated them. Shortly after this, the evidence tends to show, Davidson was discovered by Mrs. Martin either attempting or threatening to shoot into the room, and there-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

by so alarmed Mrs. Martin that she fainted, and caused quite an excitement, many seeming to suppose that she was dead; and, before Mrs. Martin got so she could speak, Carlow Martin and the appellant brought Davidson into the house. The appellant said, as they brought deceased in, that he had cut him seven times. It further appears from the testimony that after the attempt or threat to shoot into the house, before referred to, deceased left, and went some little distance from the house; and the appellant, together with John Martin and Wilson Burton, went to look for Davidson, as they said, "to get that gun away from him before he killed somebody." They started in the direction of appellant's home, and in a short distance they heard some one, towards the stable back of the house, and back of them, call for Carlow. The evidence also tends to show that the parties found the deceased "hunkered" down, and he pointed his gun at the appellant, or those with him, and said, "Stop! stop!" Appellant jumped at Davidson, and they both got hold of the gun. Wilson Burton finally got the gun. The evidence also conduces to show that appellant struck Davidson from three to five times while he was sitting there after he had taken the gun, and he never moved while the defendant was striking him. The appellant testified that at Henry Martin's Mrs. Martin opened the door, and hallooed: "Lord have mercy, Rube [addressing the deceased]! Don't shoot in here. You will kill my little children." But the deceased replied: "You needn't talk to me. I'll be damned if I don't shoot in there. There is no use to talk to me about it." The gun was pointed in at the lower pane of the window where the pane of glass was out. Mrs. Martin screamed, "For the Lord's sake, get that gun away from him before he kills us every one!" Thereupon, as before stated, Mrs. Martin fainted, and appellant rushed out, as he said, to see if he could see anything of Rube, and settle the excitement. It was then dark, and witness could not see anything of him, and called him several times, but he would not answer. Appellant, Wilson Burton, and John Martin went to find deceased and get the gun from him. They started to appellant's house, but when they got in front of Martin's house heard the deceased calling Carlow Martin. The women and children in the house were still crying and screaming, like they were scared to death. He told the boys, "We must go to him, and take the gun away." They went out toward the garden palling, but had not gotten but a few steps until Davidson began to halloo, "Stop! stop!" "He was crouched down by the side of the post, with gun pointed in our direction. I switched around out of the light, and went in to the left of him, and my boy got around somehow,—I don't know how,—but I got to Davidson first, and grabbed the muzzle of the gun, and told him that he must give

the gun up, and he said to me 'G— d—n you, you will get what is in it, but you won't get the gun' and he commenced trying to draw the gun on me, and said, 'Now you are in it.' We began to wrestle and pull over the gun, and I saw that he was about to get it loose from me, and I commenced to cut him with my right hand, and to hold the best I could to the gun with my left hand. I struck him six or seven times, and finally I hallooed to the boys to come to me, or he would kill me; my son rushed in, and grabbed the gun, and jerked it loose from both of us. As soon as he did this, I stepped back, and did not strike another lick." The evidence also shows that the deceased and appellant both lived together in the same house, deceased being unmarried, and that they had been entirely friendly always up to that time. It is also in evidence that deceased was anxious to be taken back to appellant's house, where he was finally taken, and remained there for some time, and until his death. It is also shown that he expressed himself, in substance, that the appellant was not to blame, and that he did not want any "lawing" about it, whether he lived or whether he died.

The appellant complains of the admission of testimony, which he claims to be in chief, after appellant's testimony had been introduced to the effect that on the evening after the cutting of deceased the appellant said of Davidson that he had been unruly, and hard to get along with about the mill, and he did not want to be bossed by him. It may be true that this testimony was in chief, but, under all the circumstances in this case, we are not inclined to hold that its admission would be a reversible error.

It is very earnestly insisted for appellant that the court erred in giving instructions, especially instructions Nos. 4 and 5. No. 4 reads as follows: "If you shall believe from the evidence that at the time defendant cut, stabbed, and wounded deceased,—if you shall believe beyond a reasonable doubt defendant did cut, stab, or wound deceased, and that from such cutting, stabbing, or wounding deceased languished and died,—that the deceased was then and there about to inflict upon defendant death, or great bodily harm, and to cut, stab, or wound deceased was necessary, or seemed to defendant to be necessary, in the exercise of reasonable judgment, in order to avert said danger, real or to the defendant apparent, you will find the defendant not guilty, on the grounds of self-defense or apparent necessity." Counsel for appellant insists with some plausibility that the instruction complained of required the jury to believe as a matter of fact that the deceased was then and there about to inflict upon defendant death or great bodily harm, and that, unless they did so believe that, he was not excusable, although there might have been reasonable grounds for him to believe, and that

he did in fact so believe; it being the contention of appellant that the words "danger, real or to the defendant apparent," do not cure the defect. We are inclined to the opinion that the court intended to say to the jury that, if the defendant had reasonable grounds to believe, and did believe, that he was in danger of losing his life or suffering great bodily harm, and that it was, to avert such danger, necessary, or reasonably so appeared to defendant, to stab or wound said deceased, the jury should acquit; but the instruction under consideration does not express that idea as clearly as the law authorizes. Much complaint is also made of the fifth instruction, which is voluminous, and, to some extent, involved, and might not be easily understood by the jury. The evidence in this case abundantly shows that there were reasonable grounds to believe that the deceased was about to commit or would commit a felony prior to the difficulty between himself and the appellant, and if he was about to do so it was the privilege of appellant to disarm him, and, if need be, restrain him, in order to prevent the commission of the felony; but he would not be excusable if he used more force than reasonably appeared necessary to so restrain the deceased.

All reference as to whether or not there was a peace officer on the grounds at the time should have been omitted from the instructions. It is true that, if a peace officer had been present, the commonwealth would have been entitled to prove that fact as a circumstance connected with the attempt to arrest or disarm the deceased; and upon another trial the court will, if the facts authorize it, instruct the jury as indicated herein.

No exceptions seem to have been taken to the testimony by either party as to the statement of the deceased after he was wounded; hence the competency of such evidence is not before us for decision.

After a careful consideration of the evidence complained of and of the instructions given, we are of the opinion that a new trial should be awarded. The judgment is therefore reversed, and cause remanded for a new trial upon principles consistent with this opinion.

FLOYD et ux. v. MACKEY.¹

(Court of Appeals of Kentucky. Feb. 5, 1902.)

PRINCIPAL AND AGENT — DELEGATION OF AGENT'S AUTHORITY TO SELL LAND — ESTOPPEL OF MARRIED WOMAN TO DENY AGENT'S AUTHORITY — PURCHASER'S RIGHT TO COMPENSATION FOR IMPROVEMENTS.

1. An agent to sell land had no power to delegate his authority to his son, and the principal is not bound by a sale made by the son.

2. While the active participation of a married woman in the perpetration of a fraud may operate, by way of estoppel, to devert her of her interest in real estate, yet a married woman is

not estopped to deny the authority of one who sold her land, where she never received any part of the purchase money, or the notes executed therefor, or in any other way ratified or approved the sale.

3. As the purchaser acted in good faith, he is entitled to compensation for his improvements, to the extent they have enhanced the vendible value of the property; and the chancellor should require him either to surrender the land upon receiving payment for improvements, or to pay the purchase money, with interest from day of sale, — the rents being equivalent to the interest.

Appeal from circuit court, McLean county. "To be officially reported."

Action by Robert Floyd and wife against J. H. Mackey to recover land. Judgment for defendant, and plaintiffs appeal. Reversed.

W. S. Pryor and T. R. Cartmell, for appellants. R. G. Higdon and Sweeney, Ellis & Sweeney, for appellee.

BURNAM, J. This action was instituted by appellants against appellee to recover a tract of 129.3 acres of land situated in McLean county, and rents thereon from 1885, which they alleged that the defendant wrongfully detained from them. The defendant denied the alleged wrongful possession, and said that he had purchased the land sued for from the plaintiff, through her duly-authorized agent, L. W. Gates, on the 25th day of April, 1885, for the sum of \$1,200, and was put in possession by him; that, whilst the negotiations for the purchase were made with L. W. Gates as agent of plaintiff, he authorized his son G. W. Gates to conclude the transaction, and that G. W. Gates wrote the notes and executed the bond, binding plaintiff to convey the land, and that the cash was paid to G. W. Gates for his father, L. W. Gates, and that the notes were delivered to G. W. Gates, who paid the money collected by him, and delivered the notes to L. W. Gates, plaintiff's agent, who, in turn, paid the \$200 and delivered the notes to plaintiffs, which they accepted; that subsequently plaintiffs redelivered the notes for collection to L. W. Gates, who placed them in the hands of G. W. Gates, with authority to collect them, and that G. W. Gates did in fact collect the whole of said notes, except \$163 and interest on the last note; that in 1898 he wrote to the plaintiffs, offering to pay this balance, and requesting them to make him a deed to the land; that his letter was answered by Lucy B. Floyd, who requested him to send her a copy of his bond, and promised to make him a deed to the land; and that subsequently, on the 3d of September, 1898, she again agreed to make him a deed, — and pleaded that by these acts and transactions of plaintiff she was estopped from maintaining this suit. He also pleaded that, after he took possession of the land under his purchase, he expended \$2,025 in permanent and lasting improvements, and prayed either for a specific enforcement of

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

his contract with L. W. Gates as agent, or that he be given a judgment for the purchase money paid by him, with interest, and for various sums of money alleged to have been expended in improvements,—the whole amounting to \$3,100. Plaintiffs demurred generally to the answer, which was overruled. They thereupon filed a reply, in which they denied all the statements of the defendant as to moneys expended by him for improvements placed upon the land. They also denied that L. W. Gates had either written or verbal authority from either of them to sell the land to the defendant, or that he had in fact sold it to him, or that the defendant had paid to him \$200 in cash, or delivered to him the four promissory notes set out in the answer. They also deny that L. W. Gates had, as their agent, or at all, authorized his son G. W. Gates to sell the land to the defendant, or to execute the bond set up in the answer, binding them to convey the land, or that he had power or authority to do so. They also deny that L. W. Gates had paid to them \$200 upon the purchase price, or had delivered to them the notes executed by defendant therefor. They say that they were in entire ignorance of this transaction until the receipt by them in 1898 of the note from defendant requesting that a deed be made to him for the land; that, upon the receipt of the defendant's letter, in order to obtain further information as to his claim, they requested that he should send in the bond, so that they could examine it, with a view of determining its authenticity, and also to identify what part of the tract of land it referred to; that they never at any time agreed to execute a deed to him therefor. The pleadings were made up by rejoinder and surrejoinder.

It appears from the record that plaintiff Lucy B. Floyd inherited from her father a large tract of unimproved land in McLean county about the year 1859, which she never saw, and which she managed through agents residing in McLean county. The greater part of this land had been sold or disposed of prior to 1885. For several years preceding the transaction with the defendant, Lloyd W. Gates, who resided in McLean county, acted as her agent in looking after her unsold lands, and as such paid the taxes thereon, rented them out, and sold a part of the land to a man named Ray, executing therefor a bond for a title, signed by him as agent. In 1883 or 1884 L. W. Gates moved from McLean county to Jefferson county, about 12 miles from Louisville, where he resided until his death, in 1890. After his removal to Jefferson county it appears that he made several trips back to McLean county, looking after unfinished business. In April, 1884, the appellee, J. H. Mackey, wrote to the appellant Mrs. L. W. Gates, proposing to buy about 29 acres of land in the tract of land in controversy. Mrs. Floyd inclosed this letter

to L. W. Gates, and addressed to him the following communication: "Louisville, Ky., April 9. Mr. Gates: Inclosed find letter from Mr. Mackey, which we cannot answer only through your judgment. Please do what you consider best, or write your advice in the matter, and oblige, yours very respectfully, Lucy B. Floyd." Plaintiff testifies that she never received any communication from L. W. Gates in response to this note. On the 23d of April, more than 12 months afterwards, G. W. Gates, a son of L. W. Gates, who resided in Owensboro, Ky., wrote and signed the following bond for a title: "For and in consideration of the sum of \$1,200.00,—\$200.00 cash in hand paid, the receipt of which is hereby acknowledged, and the further sum of \$1,000.00, to be paid as follows: \$250.00 first of May, 1886; \$250.00 first of May, 1887; \$250.00 first of May, 1888; \$250.00 first of May, 1889,—for which J. H. Mackey has executed to me his four promissory notes, bearing date of the 23rd of April, 1888, bearing six per cent. interest from date, I have this day sold to him a tract of land in McLean county, known as Lucy B. Floyd land, bounded as follows: * * * I bind myself, as agent for Mrs. Lucy B. Floyd, to execute to the said J. H. Mackey, or his heirs and assigns, a good and valid deed to the said land before the last-named note is paid by him; a lien being retained on the land for the payment of said note. This April 23rd, 1885. G. W. Gates, Agent for Mrs. Lucy B. Floyd." G. W. Gates, the son of L. W. Gates, testifies that he prepared and executed this bond and took the notes of the defendant for the unpaid purchase money as the agent of L. W. Gates, who, he thinks, was present at the time; that he had no authority to represent Mrs. Floyd; that he had a general impression that the cash payment was made to his father, and that the notes were left by his father with him for collection; that when they became due he sent them to Frank Wright, a constable who resided in McLean county, for collection; that Wright collected the greater part of the notes from Mackey, and transmitted the money to him, and that he thinks he paid the money over to his father before his death, in 1890, at his residence, in Jefferson county; that the payments were usually in cash, or by check upon a bank. He says, however, that he has no receipts or other evidence of these various payments to his father, and that he kept no books or memoranda of the transaction which would enable him to speak definitely as to the date or amount of such alleged payments; and no checks to his father are filed with, or made a part of, his deposition. The defendant, Mackey, also testified as to transactions with L. W. Gates as agent of plaintiff Mrs. Floyd in connection with the sale of the land; but, as this testimony is clearly incompetent, we deem it unnecessary to consider it. But it is not denied that from the

date of his purchase, in 1885, until the institution of this suit, in 1898, the defendant was in the undisturbed possession of the land in controversy, listing it for taxation, and claiming it as his property. The claim that L. W. Gates was in fact the agent of Mrs. Floyd, with authority to sell the land to the defendant, rests, in the main, upon the letter dated Louisville, Ky., April 9th, addressed to him by Mrs. Floyd. And the deposition of G. W. Gates is the main prop to support the contention that L. W. Gates actually exercised the authority which it is alleged was conferred by the letter of April 9th, whilst, on the other hand, Mrs. Floyd testifies that she never authorized L. W. Gates to sell the land, and denies that she ever received any part of the purchase money, or ever heard of the transaction until he was written to by the defendant relative to the deed in 1898. She also testifies that she had no personal acquaintance with L. W. Gates, and that about 1884 or 1885 he wrote to her that he had determined to leave McLean county and take up his residence in Owensboro with his son, and that she never heard of him after that date in any way, and was not aware of the existence of G. W. Gates. L. W. Gates, Jr., the youngest son of L. W. Gates, testifies most positively that his father did not leave his home, in Jefferson county, in the spring of 1885, and consequently could not have been present at the time G. W. Gates sold the land to the defendant. He also files an itemized statement of the account of his father with the appellant, as taken from his books, which were kept by his father in a very methodical and exact manner, which show that he began to act as the agent of appellant in June, 1877, and continued to act until July, 1882. He also testifies that he had made a careful examination of his father's bank account, and had in his possession all of the checks drawn by him between 1885 and 1890, and that no payments were made by him to appellant during this interval. This witness also testifies: That he found upon the book kept by his father, in his own handwriting, an account with his son G. W. Gates, beginning in 1883, at the time he left western Kentucky, and ending in 1890, the year of his death, which contains entries of every note and claim turned over to G. W. Gates for collection, giving the date of the notes or accounts, when payable, rate of interest, name of maker, amount of credits, and date of turning over same. This account contains a list of several hundred notes and accounts against various parties in McLean and adjoining counties, and was signed by G. W. Gates in his own handwriting. That the record shows that when these notes were collected by G. W. Gates, and the proceeds forwarded to his father, they were so entered upon the book. That this list contained no reference or mention of any notes or claims in which appellants had any interest, and that

this was the only account between his father and G. W. Gates. The testimony of L. W. Gates, Jr., is fully corroborated by that of his mother, Mrs. Alice Gates.

The first question to be determined is, did Mrs. Floyd ever in fact authorize L. W. Gates to sell the land, as her agent, to the defendant? And, second, did he in fact do so? The appellee, Mackey, in his letter to Mrs. Floyd in 1885, only proposed to purchase 29 acres of her tract of land. This letter she referred to L. W. Gates, with instructions to do what he considered best, or to write his advice in the matter. The only question was the advisability of selling 29 acres of the remainder of appellant's land. There is no contention that L. W. Gates sold the 29 acres, but it is claimed that he sold the entire tract, of 129 acres, through his son, G. W. Gates. Agency is a personal trust for ministerial purposes, and cannot be delegated; for the principal employs the agent upon the opinion he has of his personal skill and integrity, and the latter has no right to turn his principal over to another without his knowledge or consent. See 1 Am. & Eng. Enc. Law (2d Ed.) p. 368; Jones v. Brand (Ky.) 50 S. W. 679. It is clear that even if L. W. Gates had authority, either general or special, to sell the land to the defendant, he did not do so in person; and he had no right to delegate such authority, if in fact he did delegate it, to his son. The decided weight of the testimony is that L. W. Gates was not present at the transaction between his son G. W. Gates and the defendant, and that he never received any of the purchase money, which was undoubtedly paid by the appellee to G. W. Gates. It is unreasonable to believe that the account books of L. W. Gates should have contained an exact record of every transaction between himself and his son from the time he left western Kentucky and moved to Jefferson county, except that growing out of the sale of appellant's land. The testimony is undisputed that he was an honest, methodical, and exact business man; and the fact that he resided within 12 miles of appellant, and was frequently in the city where she resided from 1884 until his death, in 1890, certainly raises a strong presumption that he had no money in his possession belonging to her. As G. W. Gates was not the agent of appellant, she was not bound in any way by his acts.

But it is contended for appellee that as Mrs. Floyd authorized and permitted L. W. Gates, in numerous transactions which preceded the one in question, to represent her in the sale of parts of her tract of land in McLean county under precisely similar circumstances to those under which appellee bought the land claimed by him, and subsequently ratified his acts by making conveyances, and referred appellee's letter, seeking to buy the 29 acres of land, to him, she is estopped to deny his authority in the premises, or to assert title to the land in controversy. Even if

L. W. Gates had, as a matter of fact, sold the land to appellee (which the record fails to show), the facts relied on would not be sufficient to estop Mrs. Floyd from claiming the land in controversy. Undoubtedly the active participation of a married woman in the perpetration of a fraud may operate, by way of estoppel, to divest her of interest in real estate. See *Connolly v. Branstler*, 66 Ky. 702, 96 Am. Dec. 278; *Heck v. Fisher*, 78 Ky. 644; *Newman v. Moore*, 94 Ky. 147, 21 S. W. 759, 42 Am. St. Rep. 343. And if appellant had in fact received the purchase money of this tract of land, or had knowingly ratified and approved its sale, by accepting the notes and sending them to G. W. Gates for collection, the doctrine of equitable estoppel in pais might be invoked, unless she refunded the money. But there is no evidence that she actively participated in the fraud practiced upon appellee in the sale of the land to him, or that she ever subsequently, by any act of hers, ratified or approved the sale; but, on the contrary, we think the evidence clearly demonstrates that she had no connection with G. W. Gates at any time with reference to the land, or ever received the cash or notes executed for the purchase money. We do not deem it important to review the transactions between appellant and appellee after his letter of 1898 requesting a deed for the land. Appellant and appellee differ as to what occurred in the interview between them with reference to this matter, and the statements of appellant are fully corroborated by the testimony of her attorney, who was present. But in view of the fact that appellee has acted in good faith throughout this transaction, and has expended considerable sums of money in improvements upon the land, which will probably add to its vendible value, we are of the opinion that he is equitably entitled to have refunded to him such an amount as these improvements have permanently increased the salable value of the property. See *Pom. Eq. Jur.* (2d Ed.) § 1241. And as suggested by counsel for appellant, the chancellor, upon the return of the case, should require appellee either to surrender the land upon the condition mentioned, or pay the purchase money, with interest from the day of the sale; the rents being equivalent to the interest.

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

GREER MACHINERY CO. v. SEARS et al.¹
(Court of Appeals of Kentucky. Feb. 5, 1902.)
GUARANTY—NECESSITY OF NOTICE OF ACCEPTANCE—SUFFICIENCY OF NOTICE.

1. Where a written contract by a company appointing an agent to sell goods stipulated that it was not to be binding until signed by the president of the company, one who, prior

to the signing of the contract by the president, executed a written guaranty of the performance of the contract on the part of the agent, was entitled to notice of its acceptance; the guaranty being a conditional one.

2. Express notice of acceptance was not necessary, but information received by the guarantor from any source that goods were being delivered to the agent upon the faith of the guaranty was sufficient to bind the guarantor.

Appeal from circuit court, Pulaski county.
"Not to be officially reported."

Action by the Greer Machinery Company against J. L. Sears and another on a contract of guaranty. Judgment for defendant Sears, and plaintiff appeals. Reversed.

W. A. Morrow and J. R. Cook, for appellant. Paul & Porch and Waddle & Son, for appellee.

BURNAM, J. In September, 1898, the Greer Machinery Company, of Knoxville, Tenn., proposed, in writing, through its agent, to C. J. Chandler, of Somerset, Ky., to appoint him its agent to sell agricultural implements and machinery, and a fertilizer known as the "Greer Compound," at certain fixed and designated prices. The proposition was made upon a printed form used by the company, and one of the clauses used these words: "It is understood and hereby agreed that fertilizers and all other goods ordered by or shipped to you are to be consigned and remain our property until sold; and the proceeds of all sales, including notes, cash, and accounts, are to be held in trust for us as our property, and subject to our order. All sales of these fertilizers and other goods are to be closed by your customers' notes, taken on forms furnished by us; and on the first day of November, 1898, you agree to forward these notes to us as collateral security for your note. To avoid any misunderstanding, this contract is signed in duplicate, and one copy retained by each contracting party, but is not binding until signed by the president of the Greer Machinery Company; and it may be terminated by him at any time." This proposition was accepted in writing by C. J. Chandler on the 9th of September, 1898; and on the same day J. L. Sears signed the following guaranty, which was appended to the written proposition made by Chandler: "In consideration of one dollar to me paid by Greer Machinery Co., the receipt of which is hereby acknowledged, and in further consideration of the constitution of the within-named agency by the Greer Machinery Company, I hereby guaranty to it the fulfillment of the within contract, and the payment of all obligations arising under the same on the part of C. J. Chandler. [Signed] J. L. Sears." The paper was then sent to Knoxville, Tenn., for the signature of the Greer Machinery Company. Upon this contract and guaranty the company instituted this suit in the Pulaski circuit court on the 3d day of January, 1900; it being alleged that during the years

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

1898 and 1899 plaintiff had consigned to the defendant Chandler goods of the value of \$681.20, on which he had turned over to the plaintiff notes amounting to \$268.20; that the defendant received the goods under the contract, and had failed and refused to turn over the proceeds of the sale thereof, and asked judgment against both Chandler and Sears for \$413. No defense was made by Chandler, and Sears answered in two paragraphs, denying liability. In the first paragraph he denied that the contract with Chandler had ever been signed by the president of the company, as provided in the agreement; and in the second paragraph he alleged that he had never received, and appellant had not given him, any notice of the acceptance of the contract, or consignment or delivery of the goods to Chandler for which suit was brought. A demurrer was filed to the second paragraph and overruled, and appellant replied, admitting that it had given no notice to the defendant Sears of the acceptance of the contract of the defendant Chandler, but denied that he had not received such notice, or that he had not received notice of plaintiff's having consigned to Chandler the goods set up and referred to in the petition, and avers that its acceptance of the guaranty on the part of the defendant Sears, and the consignment of the goods, were both well known and understood by him. Upon these pleadings and the following instruction of the court the case was tried: "Instruction. Gentlemen of the jury, you will find for the defendant in this case, unless you believe from the evidence that, before the fertilizer was delivered to the defendant Chandler, the president of the Greer Machinery Company had signed the contract on file with the petition, and that notice of such signing by the said president had actually been given to the defendant Sears. Should you believe the latter state of case, you will find for the plaintiff the value of any fertilizer that may have been delivered to Chandler after the signing by the president, and the notification to Sears of the acceptance." The trial resulted in a verdict and judgment in favor of appellee, which we are asked to reverse upon this appeal.

It is claimed for the appellant that the guaranty executed by the appellee, Sears, is an unconditional promise of payment or performance on default of Chandler for a stipulated consideration, and that no notice to him of acceptance of the guaranty by the company was necessary to fix his liability, and that the instruction given to the jury, requiring specific notice, was erroneous. It is also insisted that the instruction was misleading in requiring express notice from the company to appellee. A guaranty may be either a conditional promise of payment on the default of the principal, or it may be conditioned upon some extraneous event in addition to the default. "Ordinarily, when the

contract of guaranty is executed contemporaneously with, or is a part of, the consideration for the contract or transaction guarantied, notice of acceptance is not necessary.

* * * But where the undertaking is simply a proposition, the acceptance of which by the guarantee constituted the mutual consent necessary to a contract, notice of acceptance is required." See 14 Am. & Eng. Enc. Law, p. 1146. The rule in this state is well stated in *Steadman v. Guthrie*, 61 Ky. 156, in these words: "It is a general rule that, if a person offers to pay money upon the performance of an act by another, the performance of the act by the latter, without any notice of his acceptance of the offer, or of his intention to act upon it, gives him the right to demand the money. This rule applies to the offer of a reward for the return of lost property, and to many other cases. But where the offer is to guaranty a debt for which another is primarily liable, in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix liability of the guarantor, but the creditor must notify the guarantor of his acceptance of the offer, or his intention to act upon it." The reason for the rule is that the guarantor may have an opportunity to arrange his relation with the party for whose benefit the guaranty is given. "Where the whole transaction is of such a nature as to give the guarantor full information as to his liability, and the agreement to accept is contemporaneous with the guaranty, and was the consideration therefor, all the parties being privy to the whole transaction, no specific notice is necessary." See *Thompson v. Glover*, 78 Ky. 195, 39 Am. Rep. 220. In this case the contract was not completed at the time of the execution and delivery to the Greer Machinery Company of the writing signed by appellee. It expressly stipulated that it was not to be binding until signed by their president, and it was understood by all the parties that the contract was to be sent to appellant's president for his approval or rejection; and until it was signed by him it was not a contract at all. We think this stipulation makes the guaranty of appellee a conditional one, and that he was entitled to notice of his acceptance before liability attached. "But it is not essential that the notice should be in writing, or in any particular form, or should come from the guarantee. According to the weight of authority, knowledge is equivalent to notice, from whatever source derived, and will operate as a sufficient notice if seasonably acquired." If it be shown that the guarantor in this case received information that Chandler had been appointed agent for the appellant, and goods consigned to him upon the faith of his guaranty, this would be equivalent to actual notice, and he would be liable upon his undertaking. The instruction in this case was erroneous and misleading, in requiring the jury to believe that

appellant's president had actually given formal notice of the acceptance of his guaranty. It was sufficient that information was derived of its acceptance, whether in the form of an express notice from the president of the company, or from Chandler, or from any other source, which made him aware of the fact that the goods were being delivered upon the faith of his obligation. See 14 Am. & Eng. Enc. Law, 1148, and *Ford v. Harris* (Ky.) 43 S. W. 190. We are therefore of the opinion that the instruction complained of was misleading, in requiring that the notice of acceptance should have been given appellee by the president of the appellant company.

For the reasons indicated, the judgment is reversed, and the cause remanded for a new trial consistent with this opinion.

BENNETT v. LEWIS et al.¹

(Court of Appeals of Kentucky. Feb. 5, 1902.)

FALSE IMPRISONMENT—ORDER OF ARREST FROM STATE COURT AFTER DISCHARGE IN BANKRUPTCY—DEBT NOT RELEASED BY DISCHARGE—RELEASE ON HABEAS CORPUS AS EVIDENCE OF UNLAWFUL ARREST.

1. In an action for false imprisonment, defendants are not liable unless the arrest was unlawful, however malicious their motives may have been.

2. The fact that plaintiff, after his discharge in bankruptcy, was arrested and imprisoned under an order of arrest procured by defendants upon a judgment of a state court rendered against him prior to his discharge, is not sufficient to show that his arrest was unlawful, as a discharge in bankruptcy does not release the bankrupt from all debts, and to show that the arrest was unlawful facts as to the nature of the debt must be alleged showing that it was one from which he was released, the statement of the legal conclusion to that effect not being sufficient.

3. The discharge of plaintiff from arrest by the United States district court on a writ of habeas corpus against the jailer does not conclude defendants, in the absence of anything to show what was in issue there, as that decision did not terminate the proceedings in the state court, which had the right to proceed with its process until the bankruptcy proceeding was properly pleaded.

Guffy, C. J., and O'Rear, J., dissenting.

Appeal from circuit court, Meade county.
"Not to be officially reported."

Action by William E. Bennett against J. W. Lewis and J. H. Trent, Jr., to recover damages for false imprisonment. Judgment for defendants, and plaintiff appeals. Affirmed.

Hargis & Duncan, for appellant. Fairleigh, Straus & Eagles, for appellees.

HOBSON, J. This is an appeal from a judgment in the Meade circuit court sustaining a demurrer to and dismissing the following petition: "The plaintiff, W. E. Bennett, says that he is a resident of Meade county, Kentucky, and that he is and has always borne the reputation of an honest,

peaceable, and law abiding citizen in the community in which he lived. He says that on the 16th day of February, 1900, he filed his petition in bankruptcy in the United States district court for the district of Kentucky, in Louisville, Kentucky; that in said bankruptcy proceedings he sought discharge from all his debts, among which was a debt by judgment of the Meade circuit court in case of Charlotte Bennett and others against this plaintiff; that the defendants, J. W. Lewis and J. H. Trent, Jr., were the attorneys for plaintiff in said action, and that after filing the petition in bankruptcy, on the 16th day of February, 1900, the plaintiff was duly adjudged a bankrupt; that thereafter the defendants conspired and confederated with each other to injure, damage, annoy, and humiliate the plaintiff, and to extort money from him, and with those ends in view, on the 26th day of February, 1900, illegally and maliciously, and without probable cause, sued out and caused to be sued on said judgment an order of arrest upon the said judgment of the Meade circuit court, directed to the sheriff of Meade county, directing him to arrest and imprison this plaintiff, who was defendant therein; and the said defendants, in furtherance of said conspiracy, and illegally, maliciously, and without probable cause, directed, counseled, and advised the said sheriff to execute said order of arrest, and arrest and imprison the plaintiff; that the plaintiff, in order to prevent his arrest and imprisonment by said sheriff on said order of arrest, thereafter was compelled to and did secure from the referee in bankruptcy, in his said bankruptcy proceedings, and did secure on March —, 1900, an order of immunity from arrest or imprisonment upon all his debts, including said judgment of the Meade circuit court, until the said district court of the United States could decide whether or not plaintiff should be finally discharged from all his said debts; that thereafter, on the 16th day of April, 1900, the plaintiff was, by judgment of the said United States district court, finally, fully, and completely discharged from all his debts, including the debt by judgment of this court, and was thereby granted a full and complete discharge from and immunity from arrest or prosecution of any kind by reason of his said debts, but notwithstanding these facts, and that same were of public record, and notwithstanding the defendants and each of them knew these facts, and that plaintiff had been granted full discharge from his said debts, and full and complete immunity from prosecution or arrest on account thereof, in furtherance and in contemplation of said conspiracy, to humiliate, annoy, and distress, injure, and damage this plaintiff, and extort money from him as aforesaid, defendants, and each of them, unlawfully, maliciously, and without probable cause, on April 24, 1900, induced, procured, counseled, ordered, directed, and caused the said sheriff of Meade

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

county to arrest the plaintiff on said order of arrest and confine him in the jail of Meade county, and place him in the custody of the jailer of Meade county; that plaintiff was thereupon, by the procurement of defendants as aforesaid, confined and imprisoned as a common criminal in the jail of Meade county for three days, and was held in the custody of said jailer of Meade county one day outside of the jail of Meade county, whereby plaintiff was greatly humiliated, annoyed, and distressed, injured, and damaged; that plaintiff was compelled, at great trouble and expense, to-wit, \$——, to sue out a writ of habeas corpus before the Hon. Walter Evans, judge of the United States district court, which he did on the 26th day of April, 1900, directed to the jailer of Meade county, Kentucky; that thereafter, on the 28th day of April, 1900, in obedience to said writ, plaintiff was delivered by said jailer to the court, and upon hearing of the said writ of habeas corpus said court decided that said arrest by said sheriff at the instance and under the orders of the said defendants as aforesaid was illegal, and without any authority whatever, and contrary to the constitutional and legal rights of the plaintiff, and discharged the plaintiff from the custody of said jailer of Meade county, and the said proceedings touching the said arrest and imprisonment were finally determined and ended. The plaintiff further says that the said defendants, in continuation and furtherance of their said conspiracy to damage, injure, annoy, humiliate, and oppress the plaintiff, and with the object and purpose to extort money from him, opposed the discharge of the plaintiff from custody in said United States court upon said writ of habeas corpus, and employed counsel to aid therein, and all and each of said acts of defendants, and each of them, were done by defendants in conspiracy as aforesaid, illegally, maliciously, and without probable cause, and to the damage of plaintiff in the sum of five thousand dollars. The plaintiff files herewith, and makes a part hereof, a certified copy of the bankrupt proceedings of plaintiff, and the proceedings on the plaintiff's writ of habeas corpus, and marks them, respectively, Exhibits 'A' and 'B'. Wherefore plaintiff prays judgment against the defendants and each of them for the sum of five thousand dollars, his costs herein, and all proper relief."

No facts are averred in the petition showing that the judgment of the Meade circuit court or the attachment issuing on it was void. It must, therefore, be presumed that the court had jurisdiction of the person and the subject-matter, and that the attachment was regularly issued.

The action is for false imprisonment. The gist of the action is the unlawful arrest. However malicious the motives of the defendants may have been, they are not liable if the arrest was not unlawful. 12 Am. & Eng. Enc. Law (2d Ed.) 739.

The only ground on which it is attempted to show that the arrest was unlawful is the discharge of appellant from custody by the United States district court on the habeas corpus proceeding against the jailer after his proceeding in bankruptcy. The seventeenth section of the present bankruptcy act provides as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by the fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

It will be observed that a discharge in bankruptcy does not release the bankrupt from all debts. The exhibit filed with the petition shows that appellant was discharged from all his debts which existed on February 16, 1900, "excepting such debts as are by law excepted from the operation of discharge in bankruptcy." It is not averred in the petition that the debt on which appellant was arrested was such as he might be discharged from by the bankrupt court, nor is the nature of this debt stated in the petition, and there is an entire failure to state the proceedings in the Meade circuit court in which the judgment was obtained and upon which the warrant was issued. The allegation that appellant was discharged from all his debts, including the judgment in controversy, is a conclusion of the pleader. The facts should have been stated so that the court might see that this was the legal effect of the discharge, for the discharge is general in its terms, and to determine its effect upon any particular debt the facts as to that debt must appear. This not being shown in the petition, it does not appear from it that the discharge in bankruptcy had any effect upon the judgment of the Meade circuit court or the power of that court to enforce its writ. A writing must be pleaded according to its tenor or substance. The petition does not set up the discharge in either mode. If it had been averred that by the discharge in bankruptcy appellant was discharged from all his debts in existence on February 16, 1900, except such as are by law excepted from the operation of a discharge in bankruptcy, and that thereby he was discharged from the judgment in contest, it could not be doubted that the averment would have been insufficient; for whether the discharge would have this effect would be dependent on other facts not shown in the pleading.

The averment that by the discharge appellant was discharged from all his debts, including the judgment, is no better; for it amounts to no more than a statement that, as a matter of law, appellant was discharged from the judgment by the discharge in bankruptcy. The proceeding on the writ of habeas corpus against the jailer does not conclude appellees; for that was a special proceeding, and it does not appear from the petition what was in issue there, or what was decided, further than that appellant was discharged from custody. The decision on the writ of habeas corpus discharged appellant from custody, but it did not terminate the proceedings in the Meade circuit court. Its only effect, so far as appears, was to release him from the arrest. In *Bump, Bankr.* pp. 641, 642, this is said: "If the debt was created by fraud, the bankrupt will not be released from arrest." "The bankrupt should apply in the first instance to the state court, for that will avoid a conflict of jurisdiction." We know judicially that April 24, 1900, was the second day of the April term of the Meade circuit court, and appellant might have applied immediately to that court to discharge him from the custody of the sheriff by pleading his discharge in bankruptcy, and showing that the debt was one which was covered by his discharge. The court might lawfully proceed with its process until the bankruptcy proceeding was properly pleaded.

Judgment affirmed.

(Feb. 6, 1902.)

GUFFY, C. J. I cannot concur in the majority opinion of the court in this case, and, deeming the questions involved to be of the utmost importance, I have determined to file this dissenting opinion. The petition in this case clearly shows that the appellant had been discharged from the debt mentioned therein by the United States district court for the district of Kentucky, and that said fact was known to the appellees, and that, after having such knowledge, they maliciously, and without probable cause, procured the arrest and commitment to jail of the appellant. The statements of the petition clearly show, not only wrong, but intentional and malicious prosecution, and an attempt, contrary to law, to extort money from the plaintiff by illegal proceedings therein stated. Such a prosecution, even of a civil suit, without probable cause, to injure and worry the plaintiff, would have been a cause of action itself. In this case it is much more so, because the prosecution is in defiance of the judgment of a court having jurisdiction to discharge the appellant from any and all liability upon the debt referred to in the petition.

The constitution of the United States provides for the enactment of a bankrupt law. It also provides that the laws of the United States made in pursuance thereof shall be

the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. The petition in this case shows clearly that the debt referred to in the petition was embraced in the list of debts in the schedule filed by the appellant in the federal court, and the petition shows that he was discharged therefrom, and it was wholly unnecessary for him to aver that the debt in question was a debt or demand which was provable in bankruptcy, or from which he could be legally discharged.

There is no force in the suggestion that the discharge in bankruptcy does not enumerate the debts from which plaintiff had been discharged. Such a paper would often be unreasonably long and voluminous, if it specified all the debts that some bankrupts owe, and from which they are discharged. I presume that the judgment of the federal court in its order book provides that he should be discharged from all debts mentioned in the schedule of which he was entitled to be discharged. Moreover, I take the law to be that, inasmuch as the district court had jurisdiction to determine as to the discharge of the debtor, a discharge from a debt, even if erroneous in point of law, is still a valid and binding judgment upon the creditors, debtors, and all officials until the same has been annulled or set aside, as provided by law. The case is not at all similar to a suit against a bankrupt seeking to recover a judgment, because in such a case he could plead his discharge in bankruptcy, and it must be presumed that the court would sustain his plea; but it may well be questioned whether a creditor, who knew the bankrupt had been discharged from the debt, would not be liable to a suit for an attempt to coerce said debt by legal proceedings.

In this case it appears that some time before the appellant was discharged from the debt in question the plaintiffs in the judgment had obtained an order for some kind of an attachment or warrant of arrest, and that the federal court interfered, and prevented the imprisonment of defendant until the determination of the bankruptcy proceedings, and afterwards, as before stated, discharged the defendant from all liability on account of such judgment debt, and, after all of this had taken place, the party went to the clerk of the court, and obtained a writ, and caused the sheriff to arrest and imprison the appellant, and, aside from the mortification and humiliation, he had to go to the trouble and expense of obtaining a writ of habeas corpus from said district court in order to be released from the jail, and that judgment showed conclusively that he had been discharged from all liability. So we are face to face with the question as to whether or not parties, officials, creditors, or attorneys are at liberty to disregard judgments of the district courts of the United States in respect to matters of which said

court has undoubted jurisdiction. It would seem from the majority opinion of the court that the circuit court of Meade county would have a right to disregard the solemn judgment of the United States district court in respect to the matter in question, and to imprison indefinitely the appellant, if he did not pay the judgment in question. Surely this cannot be the law. I take it, however, that, if such be the law, the Meade circuit court can at any time order the arrest of appellant, and, if the district court again discharge him upon writ of habeas corpus, as soon as he is out of the actual custody of the district appellees may again arrest him and commit him to the Meade county jail. Such an absurd state of affairs surely cannot be legal, under our form of government. I conclude, therefore, that the petition stated a cause of action; that, if the statements are not true, the only way to test that is by answer. The jurisdiction of the federal court cannot, as I think, be disregarded in the manner shown to have been done in this case, nor do I think that the court of Meade county can reverse the judgment of the district court, nor lawfully disregard the same.

For the reasons indicated, I respectfully dissent from the majority opinion of the court.

O'REAR, J. (dissenting). The record discloses that the debt upon which appellant was arrested was provable against the bankrupt, and from which he could have been and was discharged. I rather incline to the opinion that the United States district court has the jurisdiction, by writ of habeas corpus or other appropriate process, to enforce its judgment. Such seems to me the inherent power of all superior courts. It further appears that the parties to this suit litigated before the federal court in the bankrupt proceedings the question of appellant's right to be discharged from this debt. The federal court decided the controversy in favor of appellant. I do not believe appellees were thereafter at liberty to disregard that judgment, and, for the purpose of maliciously annoying appellant, to treat it as void.

CAMPBELL COUNTY et al. v. NEWPORT & C. BRIDGE CO. (two cases). SAME v. LOUISVILLE & N. R. CO. SAME v. MAYSVILLE & B. S. R. CO.¹

(Court of Appeals of Kentucky. Feb. 6, 1902.)

TAXATION OF RAILROAD BRIDGES—ACTION TO RECOVER COUNTY TAXES—PERSON AUTHORIZED TO SUE—STATUTE PROVIDING FOR UNEQUAL TAXATION—REPEAL BY CONSTITUTION.

1. A statute authorizing an action to recover taxes due "from any railroad company" applies to taxes due from a railroad bridge company.

2. Under Ky. St. § 4104, providing that taxes due from any railroad company to "any coun-

ty, city, incorporated town or taxing district may be recovered by the officer authorized to receive the same by action in the name of the commonwealth," a collector of delinquent taxes, appointed by the fiscal court, with power to receive and receipt for such taxes in the name of the county, was authorized to sue in the name of the commonwealth, for the use of the county, to recover delinquent taxes due from a railroad company or railroad bridge company, especially as the sheriff in office when the taxes became due had gone out of office, and had been acquitted by his settlement with the county.

3. Act April 17, 1882, creating a court-house district in Campbell county, and exempting property in that district from taxation for certain county purposes, and the amendment of 1886 thereto, are inconsistent with the provisions of the present constitution forbidding exemptions from taxation, and requiring uniformity of taxation, and were, therefore, repealed, either by that instrument at once upon its adoption, or by the general revenue law of November 11, 1892, providing for equality of taxation, except to the extent that such acts authorize the commissioners to levy a tax to pay off the outstanding court-house bonds.

Appeals from circuit court, Campbell county.

"To be officially reported."

Actions by Campbell county and others against the Newport & Cincinnati Bridge Company and others to recover taxes. Judgments for defendants, and plaintiffs appeal. Reversed.

C. L. Raison, Jr., for appellants. C. J. & W. W. Helm, for appellee Newport & C. Bridge Co. L. J. Crawford, for appellee Maysville & B. S. R. Co. Wright & Anderson and Edward W. Hines, for appellee Louisville & N. R. Co.

WHITE, J. These actions, being all for taxes, and involving the same questions of law, are, by consent, heard together. The case first above, against the Newport & Cincinnati Bridge Company, is for taxes on property assessed by the county assessor—being its bridge and certain lots in the city of Newport—for the years 1892, 1893, 1894, and 1895. The second-styled case, against the Louisville & Nashville Railroad Company, is for tax on its property as assessed by the railroad commission for the years 1892, 1893, 1894, and 1895. The same as to the case against the Maysville & Big Sandy Railroad Company. The case last set out is against the Newport & Cincinnati Bridge Company, for taxes on its franchise as assessed by the state board of valuation and assessment for the years 1893, 1894, 1895, and 1896. The last-named action is brought in the name of Campbell county and the commonwealth of Kentucky for the use of Campbell county; and, a special demurrer as to the right and power of the named plaintiffs to sue being sustained, an amendment was filed, adding as plaintiffs the fiscal court of Campbell county and C. L. Raison, Jr., official collector of the fiscal court, for the use of Campbell county. In the other three cases the plaintiffs are Campbell coun-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ty, C. L. Ralson, Jr., official collector of taxes, and the commonwealth of Kentucky, for the use of Campbell county. The petitions state the fact of the levy and the tax rate, the regular assessment of the property by the proper authority for each of the different years, and that the taxes due had not been paid. In the several amendments filed to the petitions the pleader anticipated the probable defense of appellees, and pleaded that their contention was and is that their property was and is exempt from taxation in Campbell county, or, rather, by Campbell county, by reason of the provisions of an act of April 17, 1882, as amended by the acts of March 13, 1886, and March 15, 1898, concerning the court-house district in Campbell county. Appellants then pleaded that said acts, in so far as an exemption from taxation is given or attempted to be given, are unconstitutional and void, and pleaded that appellees are not exempted from taxation by Campbell county. To these several petitions as amended the court sustained a special demurrer to the right to maintain the action, as well as a general demurrer to the right to recover, and dismissed the actions. From that judgment these appeals are prosecuted.

The questions that are presented for our consideration are (1) the right of the county, either by itself, by its fiscal court, by the commonwealth, or by the back-tax collector appointed by the fiscal court, for the use and benefit of the county, to maintain an action for taxes due it; and (2) the constitutionality of the several acts of the legislature exempting property from taxation by the county of Campbell where it is situated within the taxing district created by the act of 1882. These questions we will discuss in their order.

It is insisted by appellant that by section 4021, Ky. St., authority and power are given to the county to sue for taxes due. The section reads: "The commonwealth, and each county, incorporated city, town and taxing district, shall have a lien on the property assessed for the taxes due them respectively, which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and costs incident to the sale," etc. It is also contended that by section 4104, Ky. St., authority to sue for taxes is expressly conferred. That section reads: "Taxes, penalties and interest due the commonwealth from any railroad company may be recovered by the auditor of public accounts, by action in the name of the commonwealth, in the Franklin circuit court; and those due any county, city, incorporated town or taxing district may be recovered by the officer authorized to receive same, by action in the

name of the commonwealth in any court of competent jurisdiction." It will be noticed that this section 4104 applies to railroads alone, by its term. However, in the case of Henderson Bridge Co. v. City of Henderson, 90 Ky. 498, 14 S. W. 493, it was held that this section applied also to railroad bridges. This ruling was recently followed in Louisville Bridge Co. v. City of Louisville (Ky.; decided Dec. 19, 1901) 65 S. W. 815.

It is insisted by appellee railroad companies that, while actions can be maintained against them for unpaid taxes in the name of the commonwealth for the use of the county, authority to institute such actions lies only in the sheriff, and that as it affirmatively appears here that the action is instituted by C. L. Ralson, Jr., who is not the sheriff of Campbell county, the action could not be maintained. In the language of the section, the officer authorized to receive the taxes may, by action in the name of the commonwealth, recover the taxes. The petition herein shows that Ralson was an officer of the fiscal court of Campbell county authorized to receive these taxes, and to receipt therefor in the name of the county; and it further appears that the sheriff in office when the taxes were due had gone out of office, and had been acquitted by his settlement with the county, and therefore he had no right, power, or authority to receive these taxes. As they were taxes due the county prior to the term of office of the incumbent sheriff, the fiscal court might or not, in their discretion, have certified these taxes to the then sheriff or collector of current taxes. If the fiscal court desired, it had a right to appoint a collector of past-due and delinquent taxes; and such appointee was the officer authorized to receive such taxes, and might, under section 4104, recover same by action in the name of the commonwealth for the use of the county. However, in the case of Louisville Bridge Co. v. City of Louisville, supra, this court held that under section 4021 there was authority given to sue for taxes, so far as the city of Louisville was concerned. Under the provisions of the section, the county and taxing district are placed on the same footing as the city. We conclude, therefore, that appellant had authority to maintain the actions for these taxes by reason of the sections of the statute quoted. This court expressly so held in the Louisville Bridge Case, after a careful review of the authorities; recognizing the general rule that no action for taxes could be maintained without legislative authority, and then deciding that these acts conferred the necessary authority. It would follow, therefore, that the special demurrer should have been overruled.

The question as to the validity of the exemption granted by the court-house district acts might have been left to a demurrer to an answer pleading such exemption or immunity; but as the validity of the several

acts was questioned in the several petitions, and a demurrer thereto sustained, the question is fairly presented. Section 6 of the act of April 17, 1882, provides: "The citizens living within the district above described shall hereafter be exempt from the payment of a poll tax, and the property within said district shall be exempt from all taxation except for state revenue, for county roads, for taking care of the poor, court and jail expenses, and the Highland district, and the cities of Newport and Dayton and the town of Bellevue, for the purposes now authorized by law." 2 Acts 1881-82, p. 571. By the amendment of 1886 the court-house district, through its commissioners, was authorized to levy taxes to pay a portion of the salaries of the county officers, and for maintaining the court house built in Newport. By an act of 1898, section 6, supra, of the act of 1882, was expressly repealed, as also so much of the act of 1886 as authorized a levy of taxes to pay for court-house maintenance and to pay portion of the salary of the county officers. There is no question as to the constitutionality of the act of 1882, and the amendment of 1886, under the constitution prior to that adopted September 28, 1891. But it is insisted that by the present constitution the act of 1882 and the amendment of 1886 were repealed, because in direct conflict therewith. Section 171 of the constitution reads: "Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws." Section 170, after naming property exempt from taxation, provides, "and all laws exempting or commuting property from taxation other than the property above mentioned shall be void." Section 175 reads: "The power to tax property shall not be surrendered or suspended by any contract or grant to which the commonwealth shall be a party." The schedule to the constitution provides: "The provisions of all laws which are inconsistent with this constitution, shall cease upon its adoption, except that all laws which are inconsistent with such provisions as require legislation to enforce them shall remain in force until such legislation is had, but not longer than six years after the adoption of this constitution, unless sooner amended or repealed by the general assembly." It is perfectly clear that if the act of 1882, even as amended by the act of 1886, is in force, taxation throughout Campbell county will not be equal and uniform under the authority of the levy made by the fiscal court. The fiscal court could only levy taxes on property within the court-house district for certain named purposes,—viz., for county roads, for the poor, and for the court and jail expenses,—under that act, while in the other part of the county, outside that district, the taxes could be levied for all coun-

ty purposes. This was unequal taxation. Again, the exemption accorded to persons and property within the court-house district is within the express prohibition of the constitution. By the schedule of the constitution quoted, it is clear that the inconsistent law was repealed by the constitution itself; and, by the clear meaning of the constitution, there could be no law in force longer than six years if the law was inconsistent with the provisions of the constitution, and such as could be altered, amended, or repealed. As the original act was passed in 1882, it was subject to repeal, alteration, or amendment, unless such change or repeal would change the obligation of a contract lawfully made thereunder. The question then presented is whether the repeal took place on the adoption of the constitution itself, on September 28, 1891, or whether it was within the six-year period, and was repealed in 1897. The language of the schedule is that all inconsistent laws shall cease upon the adoption, except that laws that are inconsistent with some provision of the constitution that requires legislation to enforce, or, in other words, inconsistent with some provision of the constitution that is not self-executing, may remain till the necessary legislation giving force to the constitution is provided. In the case here the provision of the constitution prohibiting exemption from taxation is self-executing. That requiring uniform taxation may not have been self-executing (a question unnecessary to be determined); but, if not self-executing, the necessary legislation was passed by the general revenue act of November 11, 1892, under which the taxes here claimed were assessed and levied. So that if legislation was necessary to give force to section 171, providing for equal taxation throughout the territorial limits levying the tax, that legislation was had in November, 1892. In our opinion, therefore, the whole of the act of 1882 and the amendatory act of 1886, except that part relating to levying the tax necessary to pay off the outstanding court-house bonds of that district, and the powers and duties of the commissioners to that end alone, was repealed, if not by the constitution itself, by the passage of the general revenue act of November 11, 1892. If there were outstanding bonds executed by the court-house district to pay for the building, the power would remain in the commissioners, under the act, to provide for their payment, and for that purpose alone the act remained in force. If no such bonds or obligations existed, or when such obligations have been satisfied, the foundation upon which the act stands to prevent repeal by the constitution and the act of 1892—that of contract—will be taken away, and the act will stand repealed in toto.

We therefore hold that there remains in force of the three acts of 1882, 1886, and 1892 only so much thereof as authorizes the

commissioners to levy a tax, within the limits therein provided, for the purpose of paying off the bonds executed and outstanding, and given for the purpose of erecting the court house in Newport, and when that purpose shall have been fully met, and the obligation arising thereby shall have been discharged, the act will cease to have force and vitality. It therefore follows that the petition is sufficient, and the general demurrer thereto should have been overruled.

For the reasons indicated, the judgments are each reversed, and causes remanded for further proceedings in each consistent herewith.

PRICE'S ADM'X et al. v. PRICE'S ADM'X.¹
(Court of Appeals of Kentucky. Feb. 5, 1902.)

CONSTRUCTION OF CONTRACT—SATISFACTION OF DEBT—AGREEMENT TO ACCEPT ANNUITY—USURY—SUFFICIENCY OF CONSIDERATION—INADEQUACY OF CONSIDERATION—EVIDENCE OF FRAUD—STATUTE OF LIMITATIONS—PART PAYMENT.

1. Where S. executed to D., his brother, a writing promising to pay to D. \$62.50 "every three months during his natural life," which was recited as "being the interest on \$4,000 which I owe him," and D. at the same time executed to S. a receipt for "all demands to this date, except \$62.50 to be paid every three months during my life, it being the interest on \$4,000 which he owes me, and which he is to have at my death," the two writings, which are to be construed together, import that S. at that date owed D. \$4,000, and that D. released him from this debt in consideration of the quarterly payments which he agreed to make.

2. The contract, being, in substance, an undertaking to pay an annuity of \$250 a year in quarterly installments in consideration of the release of a debt of \$4,000, was not usurious, the payment not being made for the use of, or the forbearance to collect, money, but in consideration of the satisfaction of the debt.

3. Under Ky. St. § 472, authorizing the real consideration of a writing to be shown, the fact that the agreement was made in compromise of matters of difference and dispute between the parties may be shown by extrinsic evidence.

4. As the annuity amounted to more than legal interest, and was to be paid quarterly, the contract was supported by a sufficient consideration; a valuable consideration, however small, being sufficient to support a contract.

5. Whether the consideration is so inadequate as to suggest fraud cannot be considered upon demurrer, but only upon a plea of fraud.

6. If the contract was invalid, the payee was never bound thereby, and might have sued for his debt at once; and therefore an action to recover the debt, brought more than 16 years thereafter, is barred by the statute of limitations.

7. The payments of the annuity do not take the case out of the statute, as they were not made in part payment of the original debt, and cannot, therefore, be regarded as an acknowledgment that it was due.

Paynter, J., dissenting.

"To be officially reported."

Petition for rehearing. Denied.

For former report, see 64 S. W. 746.

Morton & Darnall, for appellants. John B. James, Geo. S. Shanklin, and W. S. Pryor, for appellee.

HOBSON, J. A bare promise, without consideration, by a creditor, to give his debt to his debtor at his death, is unenforceable. Knott's Adm'r v. Hogan, 4 Metc. 99. But if a creditor holding a debt of \$4,000 should agree with the debtor to release the debt for an annuity of \$500 a year as long as he lived, the agreement would be valid; for a different obligation would be created, which would take the place of the original one. The question to be determined in this case is, to which of these classes does it belong? The writings, executed at the same time, and to be read together, are as follows: "One day after date I promise to pay to D. L. Price, or order, sixty-two and ⁵⁰/₁₀₀ dollars every three months during his natural life, it being the interest on four thousand dollars which I owe him. S. Price." "Received of S. Price all demands to this date, except sixty-two dollars and fifty cents to be paid every three months during my life, it being the interest on four thousand dollars which he owes me, and which he is to have at my death. D. L. Price." These writings are inartificially drawn, and in construing them the court must give proper effect to each clause, so that the real intention of the parties will be regarded. The substance of them taken together is this: S. Price agrees to pay D. L. Price \$62.50 every three months during his life, and in consideration of this D. L. Price acquits him of all demands. It will be observed that the writing signed by S. Price does not obligate him to pay anything except the quarterly sums of \$62.50, and that he was not intended to be bound for anything further is shown by the fact that no note was taken from him for the \$4,000, although the parties lived for something like 20 years after the transaction. It is true that in the writing signed by S. Price these words are used at its conclusion: "It being the interest on \$4,000 which I owe him," and the writing signed by D. L. Price concludes with these words: "It being the interest on \$4,000 which he owes me, and which he is to have at my death." But the latter writing begins with the words, "Received of S. Price all demands to this date." There is no necessary inconsistency between these clauses, and that construction of the instrument is to be preferred which does not make them conflict. Taking all the clauses together, the fair meaning of the whole of the two papers is that S. Price at that date owed D. L. Price \$4,000, and that D. L. Price released him from this debt in consideration of the quarterly payments which he agreed to make. The concluding words of the last writing, "which he is to have at my death," were intended by the parties to express the idea that the quarterly payments were to be made, as long as D. L. Price lived, on account

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

of the debt, but that at his death all obligation should cease. Unless we adopt this construction, we must reject altogether the words in the second writing, "Received of S. Price all demands to this date," which necessarily import an acquittance in present; and also give no force to the fact that S. Price obligated himself for the payment of nothing except the quarterly installments.

Such being the construction of the contract, is it valid? It is, in substance, an undertaking of S. Price to pay D. L. Price an annuity of \$250 a year in quarterly installments in consideration of the release of the debt of \$4,000 due by him. The contract to pay the annuity was not one for the use or forbearance of money. The annuity was not paid for the use of the money, or for forbearance of D. L. Price to collect it. The consideration of the payment of the annuity was the satisfaction of the debt. No question of usury, therefore, arises. If the agreement was made in compromise of matters of difference and dispute between the two brothers, this was a sufficient consideration; and by section 472, Ky. St., the real consideration of a writing may be shown. But, independently of the question of compromise of disputed matters alleged in the answer, the papers on their face show a sufficient consideration. The legal interest on \$4,000 was \$240 a year. By the contract D. L. Price secured \$250, payable quarterly. This was more than the interest on the money, and, as the payments were to be made as long as he lived, constituted a sufficient consideration to uphold the contract. The rule is clear that a valuable consideration, however small, is sufficient to sustain a contract. Thus, in *Bishop on Contracts*, after referring to this rule, the learned author says, in section 41: "Hence in reason, and, it is believed, substantially on the authorities, the consideration should be something to which a jury can attach pecuniary value; though, like the value of a thing stolen in larceny, it may be less than the smallest coin or denomination known to the law." Further on, in section 45, he says: "Yet inadequacy of value may be strong evidence of fraud, should that question be raised; or it may suggest fraud, and in a gross case it may be the controlling circumstance in establishing the fraud." Whether the consideration for this contract between two brothers, situated as they were, is so inadequate as to suggest fraud, cannot be considered upon demurrer. To raise this question, fraud must be pleaded, and then all the facts attending the execution of the contract may be shown. But on the face of the papers the payee got something of substantial value, which was more than the interest on his money, and the consideration thus appearing is sufficient to uphold the contract on its face. If the contract was based on a sufficient consideration, then the payee was bound by it, and he cannot recover the

\$4,000 contrary to its terms. If the contract was invalid, and without consideration, the payee was never bound by it, and might have sued for his debt of \$4,000 the day it was made; and, more than 15 years having elapsed after this before the bringing of the suit, it is barred by limitation, unless the payments of the annuity take the case out of the statute. The authorities are uniform that a payment which is made by the debtor under the impression that he is paying something else has never the effect of reviving the debt. Thus, in *U. S. v. Wilder*, 13 Wall. 254, 20 L. Ed. 681, the court said: "The principle on which part payments take a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, the statute, having begun to run, will not be stopped by reason of such payment." A part payment only arrests the running of the statute where from it a promise to pay the debt may be inferred, for the reason that the waiver of the statute rests with the debtor, and it is a question of intention whether he waived it or not. Thus, in *Hodge v. Manley*, 60 Am. Dec. 257, the court said: "By the later English authorities, in order to remove the statute bar, the mere fact of part payment is not of itself conclusive. The payment must have been made as part payment of a greater debt, and under circumstances that will warrant the jury in finding a promise to pay the remainder of the debt. *Wainman v. Kynman*, 1 Exch. 118; *Tippets v. Heane*, 1 Crompt., M. & R. 232; *Waugh v. Cope*, 6 Mees. & W. 824. It is unnecessary now to say whether the rule to that extent would be adopted in this state, but we entertain a clear conviction that payment of specific items of charge, unaccompanied by any circumstances showing a recognition of any other account, will not be sufficient to remove the operation of the statute. The payment must at least have been made on the general account, and with a view to affect the general balance, thereby acknowledging the existence of an open, running account, which is to be the subject of the future adjustment." In *Brown v. Latham*, 42 Am. Rep. 568, the court, speaking of the acknowledgment that would stop the running of the statute, said: "Mere payment is not such an acknowledgment. It must appear that the payment was a partial one, leaving a part of the debt unpaid, and that the debtor so understood it. If this does not appear, the payment does not show his acknowledgment of his liability and willingness to make another payment." The rule was also expressly declared by this court in *Richardson v. Chancellor's Trustee*, 103 Ky. 425, 45 S. W. 774. The payments in this case were made upon the annuity, and not upon the debt of \$4,000. They show no understanding on the part of the debtor that the debt of \$4,000 was to be paid, and

no recognition of it can be inferred from them. On the contrary, they were paid under the contract, which, by its terms, negatives the idea that anything else was to be paid.

The petition overruled.

PAYNTER, J. I dissent from the reasoning of the court, but agree that the case should be reversed. The fundamental error in the opinion and response consists in the assumption that when parties to the contract said one thing they meant another. The opinion, in effect, holds that when S. Price in plain terms says, "I owe" D. L. Price \$4,000, that he meant to and did say that "I do not owe him \$4,000." When both parties to the writing said that the \$62.50, which was to be paid quarterly, was interest on \$4,000 which S. Price owes D. L. Price, the court holds that they said it was not paid as interest on the \$4,000 which S. Price "owes" D. L. Price, but on a debt which had been extinguished the instant the writings were executed. The receipt executed by D. L. Price does not purport to be an evidence of the payment of the \$4,000, for it recites that S. Price owes that sum, on which he is to pay interest, but which "he is to have at my [D. L. Price's] death." The language used forces the conclusion that S. Price did not take a present interest in the \$4,000. The action is upon a writing, which reads as follows: "Jan. 1st, 1879. One day after date I promise to pay to D. L. Price, or order, \$62.50 every three months during his natural life, it being the interest on \$4,000 which I owe him. [Signed] S. Price. Witness: G. P. McCam." At the time of the execution of that paper D. L. Price signed and delivered to S. Price a writing which reads as follows: "Jan. 1st, 1879. Received of S. Price all demands to this date, except \$62.50, to be paid every three months during my natural life, it being the interest on \$4,000.00 which he owes me, and which he is to have at my death. [Signed] D. L. Price. Witness: G. P. McCam." The plaintiff avers that D. L. Price loaned S. Price \$4,000, which was due and payable at his death; that the writing delivered to S. Price was in the nature of a devise, which had been revoked, or was in the nature of a promise to give without consideration, and not enforceable. The appellants defend upon the grounds: First that S. Price and D. L. Price were engaged in business enterprises; that in the settlement D. L. Price asserted certain claims against S. Price, which he denied; that as a compromise and settlement of these disputed claims S. Price agreed that he would acknowledge an indebtedness of \$4,000, and pay D. L. Price during his natural life \$62.50 quarterly, on condition that at the death of D. L. Price the claim for \$4,000 was not to exist against him. Second. That the \$62.50 was an annuity. Third. That the claim was

barred by limitation. To this defense the court sustained a demurrer, and, the appellants refusing to plead further, a judgment was rendered for the \$4,000, etc. It is admitted that S. Price made the quarterly payments according to the writings until a short time before the death of D. L. Price, which occurred about 20 years after their execution. It is insisted in the brief of the appellee that, if it is in the nature of a devise, it could be revoked at any time, which was done; that, if it was in the nature of a promise to give, it was to take effect in futuro, and, the title to the property not having been parted with by the donor, the promise cannot be enforced; if it is in the nature of a devise, D. L. Price had the right to revoke it; if it was a mere promise to give the title remaining in the donor, it is inoperative. An agreement to pay interest at legal rate for a given time does not furnish a consideration to uphold a promise to relinquish the principal, as the law imposes an obligation upon the debtor to pay both principal and interest. It is a well-settled rule that a promise by one to do that which is imposed on him by law to do is no consideration at all. An agreement for the further promise of usury does not suspend the rights of the parties to a contract. In *Tudor v. Goodloe*, 1 B. Mon. 324, Judge Robertson, delivering the opinion of the court, said: "The agreement in this case for the further payment of usury, prohibited by statute, was utterly void, and therefore did not suspend for a moment the rights of any of the parties; and the promise to pay six per cent., which was no addition to that which the law gave, would have been unavailing for want of valuable consideration." S. Price did not, in express terms, promise to pay anything to D. L. Price, except \$62.50 quarterly. The writings simply recite that he owes the \$4,000 to show a consideration for the promised quarterly payments. It does not show whether the consideration pre-existed or was given simultaneously with its execution. They show an express agreement that the \$4,000 is not to be paid. This agreement is as clear as is the one that quarterly payments are to be made. As one defense to the action it is averred that the Prices had been engaged in business enterprises together; that D. L. Price asserted claims against S. Price growing out of these ventures; that he denied alleged indebtedness; and, as a compromise and settlement of these disputed claims, the parties agreed upon a settlement by the terms of which S. Price was to pay D. L. Price \$62.50 quarterly, interest on \$4,000, during the life of the payee, in full settlement of the compromise balance. If this be true, then D. L. Price's personal representative should not be allowed to recover any part of the \$4,000 from the estate of S. Price, for such a compromise and agreement is valid and enforceable. To refuse to en-

force such a contract would be to allow one party to perpetrate a great wrong upon the rights of another.

It is contended by counsel for appellee that it will be in contradiction of the writings if appellants are allowed to prove the alleged compromise and agreement. It is elementary that the terms of a written contract cannot be varied or contradicted by parol testimony without alleging fraud or mistake. The proposition of appellants is not to contradict the terms of the writings, and thus destroy a promise to pay, but to show the real consideration of it, with the view of upholding the agreement that S. Price was not to pay D. L. Price the \$4,000; for, as we have said, it is clear from the writings that it was never to be paid. By section 472, Ky. St., "the consideration of any writing, with or without seal, may be impeached or denied by pleading verified by oath." This section of the statute clearly authorizes a party to a writing to impeach or deny the consideration of it. It can be shown there is no consideration to support a cause of action on it. To do this may destroy a promise to pay embodied in it. This being true, it would be an anomalous condition if the law would not allow a party to a writing to show the real consideration to uphold it. The effect of the argument of counsel for appellee is that you cannot impeach the consideration if in doing so it would have the effect of contradicting the writing. Language in one of the writings under consideration is as follows: "It being the interest on \$4,000 which I owe him." If the consideration of a writing can be "impeached or denied," then, if the facts authorized it, S. Price could have shown that the consideration was vicious, or that none existed. This would have had the effect of contradicting the language quoted, because he says the quarterly payments were interest on "\$4,000 which I owe." In this case S. Price promised to pay a stated sum quarterly. In the writing containing this promise the consideration therefor is stated, and, in effect, it is also stated that that consideration is to cease at the death of the payee. To support that agreement, appellants proposed to show the real consideration for it. It is not proposed to show that S. Price's estate should not pay any of the quarterly installments, but that he only acknowledged himself indebted to the payee as a matter of compromise, to wit, that he was to make the quarterly payments in full satisfaction of all claims the payee had against him. In our opinion, it is competent to show by parol testimony the real consideration for the writings in question. We do not think the plea of the statute of limitations is available. If the writings acknowledged an indebtedness, with the promise to donate it, or if they can be construed as a devise of it, the statute did not run against the debt, as it continued to exist, and was recognized by the

numerous quarterly payments. If the writings were executed as a result of the compromise averred in the answer, then the question of the statute of limitations is not a practical one, as the establishment of the alleged compromise is a complete defense. If the writings could be so construed as to mean that D. L. Price had acquitted S. Price of his indebtedness to him in consideration of the amounts of the quarterly payments provided for, then the indebtedness ceased to exist; therefore was not barred by the statute of limitations. The writings do not import that D. L. Price accepted the \$62.50 quarterly in consideration that he release S. Price of his indebtedness to him, for it recited that they were made as interest on the \$4,000, which ceased at payee's death. To hold that the statute of limitations bars a recovery would require us to say that the writings did not import that the quarterly payments were made as interest on a debt which the payor owed. This cannot be done, because it is expressly stated in the writings that they are made as interest on the \$4,000 debt which payor owes the payee. Had D. L. Price notified S. Price the day after the writings were executed that he revoked the "devise" or promise "to give" the \$4,000, it would not have precipitated the maturity of the debt, because the quarterly payments were to be made as interest on the debt during his lifetime. It was an agreement that the quarterly payments at least should give the payor indulgence on the debt during the life of the payee. A revocation of the promise to give the \$4,000 did not give the payee the right to enforce its payment during his lifetime. The agreement to make such payments was sufficient consideration to uphold the contract that the debt was not to be collected during the lifetime of the payor. If the payee could not precipitate the maturity of the debt, the statute of limitations did not begin to run. Even if the "devise" or promise "to give" had been revoked, as supposed above, and it would have had the effect of maturing the debt, the statute would not have barred a recovery, because each payment was a recognition of the debt.

STATE v. YANDLE.

(Supreme Court of Missouri, Division No. 2
Feb. 4, 1902.)

BURGLARY—INDICTMENT—EVIDENCE— OBJECTIONS.

1. Indictment for burglary need not state the value of the goods stolen, larceny in commission of burglary being a felony without regard to such value.
2. Recent possession of goods taken by burglars is prima facie evidence of the burglary as well as of the larceny.
3. If evidence is admissible for any purpose, objection merely that it is incompetent, irrelevant, and immaterial will not allow review of its admission.

4. To connect defendant with the ownership and possession, when arrested, of a telescope trunk in the room with him, in which were the stolen goods, testimony that he claimed clothing therein is pertinent.

5. Declarations of third persons that they had seen defendants pass on the morning of the burglary is hearsay.

6. Evidence that another had been convicted of the burglary is not admissible to show that defendant was not guilty.

Appeal from circuit court, Webster county; Argus Cox, Judge.

David Yandle was convicted of burglary, and appeals. Affirmed.

L. O. Nelder, for appellant. The Attorney General and Perry S. Rader, for the State.

GANTT, J. The defendant was indicted at the March term, 1900, of the circuit court of Webster county, for burglary and larceny. On the 18th of October, 1900, he was tried and convicted of both burglary and larceny from a dwelling house. The defendant was duly arraigned, and entered his plea of not guilty. The indictment was against defendant and James Yandle jointly. A severance was granted, and they were tried separately. From an offer of the conviction of James Yandle, by defendant, it seems that James was also convicted of the same offense. The evidence quite conclusively shows that on the 2d day of November, 1899, the dwelling house of H. C. Carpenter, situated in Webster county, was broken open in his absence, and a suit of clothes of the value of \$10, belonging to said Carpenter, and in said house at the time, was stolen and carried away. The proof that the lock was broken and the house burglarized prior to 1 o'clock of November 2, 1899, was established by Carpenter and Keeler, who testified to locking it when they left that morning to haul some wood for a neighbor, and to finding the lock broken and the clothes stolen when they returned about 1 o'clock that afternoon. The evidence further disclosed that on the same day of the burglary the defendant and James Yandle left for Kansas. About the 1st of December, 1900, they returned to Webster county, and the town of Seymour City in said county, a station on the Kansas City, Ft. Scott & Memphis Railroad, and were arrested by W. H. Clay, the constable of that precinct, at a two-room cottage, usually occupied by Mrs. Hostetter, but she was absent at the time. He found defendant, David Yandle, under the bed. Some 15 minutes after the arrest by the constable, the deputy sheriff, Newton Ward, arrived, and found in the room where these two were a telescope trunk containing various articles of attire, among which were a blue coat and vest, which were fully identified by several witnesses besides Carpenter as his coat and vest which were stolen when his house was burglarized. Other witnesses testified that this defendant claimed the suit as his own. The defense was an alibi, and the defendant's father, brother, and sister testified to a state

of facts which, if credited, would have rendered it impossible for defendant to have committed the burglary and larceny at the time at which it was fixed by the state's witnesses. Defendant also testified that James Yandle bought the suit of clothes and a gun from a stranger, for \$2.25, on November 2, 1899, and that at James' request he put on the suit and wore it to prevent James carrying them.

The indictment, omitting caption and formal attestation, is as follows: "The grand jurors for the state of Missouri, summoned from the county of Webster, impaneled, sworn, and charged to inquire within and for the body of the county of Webster, upon their oaths present and charge that James Yandle and David Yandle, late of the county and state aforesaid, on or about the 2d day of November, 1899, at the county of Webster and state of Missouri, did then and there feloniously and burglariously break into and enter the dwelling house of one H. C. Carpenter, there situate, by then and there forcing and breaking the lock with which the outer door of said dwelling house was fastened, and by then and there forcibly opening the said outer door of said dwelling house, with intent certain goods and chattels then and there being, the goods and chattels of the said H. C. Carpenter, then and there feloniously and burglariously to steal, take, and carry away, and one coat, one vest, and one pair of pants, all of the value of ten dollars, of the personal goods and chattels of the aforesaid H. C. Carpenter, then and there in said dwelling house being found, did then and there feloniously and burglariously steal, take, and carry away; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state." The indictment is sufficient. It charges every fact necessary to constitute the offense of burglary under section 1881, Rev. St. 1899. It was unnecessary to state the value of the goods stolen, since larceny committed in committing burglary is a felony irrespective of the value of the thing stolen. *State v. Henley*, 30 Mo. 514; *State v. Brinkley*, 146 Mo. 41, 47 S. W. 793.

2. It is conceded by counsel for defendant that the recent possession of the stolen property was prima facie evidence not only of the larceny, but of the burglary as well; and such is the well-settled law of this state. *State v. Babb*, 76 Mo. 501; *State v. Dale*, 141 Mo. 284, 42 S. W. 722, 64 Am. St. Rep. 513.

3. The point made as to the evidence of Mrs. Adams as to an unsigned letter received by her after James Yandle and defendant left certain goods at her house cannot avail, because, after hearing the preliminary proof by Mrs. Adams as to the loss of the letter and the directions she received from James Yandle, the court excluded her evidence, and specifically directed the jury that they would disregard it in the consideration of defendant's guilt or innocence.

4. Error is assigned on the admission of certain evidence of the witness Ben Adams, but the objection is such that precludes a review in this court, as the only ground assigned was that it was incompetent, irrelevant, and immaterial,—an objection which we have uniformly held insufficient if the evidence was admissible for any purpose; and in this case the witness had testified that a day or two after the commission of the burglary the defendant was at his house, wearing a blue coat and vest of the description of that stolen from Carpenter, and left a gun and some clothing, which he asked the witness to hide so no one would see them; and he was only asked what became of this gun and clothing, and he testified this defendant wore the blue suit off when he left there, and never answered what became of the gun. Neither was there any error in the testimony as to certain clothing in the telescope trunk or satchel, because it was pertinent to prove that the defendant claimed it, so as to connect him with the ownership of the telescope in which the stolen pants and vest were found, and his possession thereof when arrested.

5. Again, it is urged that the court improperly excluded the evidence that James Yandle was convicted of this same burglary, and the evidence of Keeler as to the man whom John Cantrell and Bennett said they had seen pass about 10 o'clock on the morning of the burglary, and offered to show it was James Yandle, who was indicted with defendant. It is clear that Cantrell's and Bennett's statements would have been pure hearsay, and was properly rejected. It was no part of the res gestæ, and on its face disclosed that there was better evidence—that is to say, their own evidence—of what they saw. And proof that James Yandle, his co-indictee, was also guilty of the burglary and larceny, would not have exculpated defendant. This was the contention of the state throughout the trial. In a word, evidence tending to prove that another person had an opportunity, merely, to commit the burglary, constituted no defense. The evidence offered was a direct contradiction of that already offered by defendant. Evidence that one person had an opportunity to commit the crime would not exculpate defendant, who also had the opportunity, and committed the crime. The instructions were full on all the points arising in the case, and correctly stated the law.

No error being discovered, the judgment is affirmed. All concur.

STATE v. MELVIN.

(Supreme Court of Missouri, Division No. 1.
Feb. 4, 1902.)

INDICTMENTS—EFFECT OF SECOND INDICTMENT—PRINCIPALS—EVIDENCE—INSTRUCTIONS—REQUESTS.

1. Under Rev. St. 1899, § 2522, providing, "If there be * * * pending against the same

defendant two indictments for the same offense, * * * the indictment first found shall be deemed to be suspended by such second indictment and shall be quashed," the second does not ipso facto quash the first, and, having itself been quashed, the first remains with full force.

2. Defendant being a principal whether he stabbed a person, or was present, aiding and abetting another in so doing, evidence of either warrants a conviction.

3. The giving of an instruction like one asked for by defendant cannot be complained of by him.

4. Failure to instruct on motive is not error, there being no request therefor, and defendant not having requested the court to instruct on all the law of the case.

Appeal from circuit court, Platte county; A. D. Burnes, Judge.

Dick Melvin was convicted of a felonious assault, and appeals. Affirmed.

The indictment in this cause was returned by the grand jury in the circuit court of Platte county on the 7th day of December, 1899, and charged the defendant with a felonious assault. Afterwards, at the same term, another indictment was preferred on the 9th of December, 1899, wherein it was charged that defendant committed a felonious assault upon the same person, one Jeff Simpson, and that Al. Melvin was present, aiding and assisting in said felony. When the defendant was required to plead at the December term, 1900, of said court, he filed a plea in abatement of the first indictment on which he was arraigned, for the reason that he averred that the finding and preferment of the said second indictment ipso facto quashed the first indictment, and that it was no longer pending, and prayed the judgment of the court to discharge him, and that said first indictment to which he was required to plead should be quashed. The indictment found on December 7, 1899, was numbered 1,709, and the indictment of December 9, 1899, was numbered 1,716. On the hearing of this plea the two indictments, with the dates of their filing, were offered, and read to the court, and on the part of the state the record of the court showing that on August 14, 1900, on motion of the prosecuting attorney, the said second indictment, numbered 1,716, had been quashed by the circuit court of Platte county, and the defendant discharged therefrom. The circuit court overruled the plea in abatement and to quash the indictment, and directed the defendant to plead to said indictment of December 7, 1899, and, the defendant standing mute, a plea of not guilty was entered for him on the record, and the cause proceeded. On the part of the state the evidence tended to prove that on Sunday, October 29, 1899, the defendant's mother and his brother John Melvin lived in the village of Waldron, in Platte county, and just across the street a brother of Jeff Simpson, the prosecuting witness, lived. The defendant, Dick Melvin, and his brother Al. Melvin, who at that time was only 17 years of age, were and had been for

some time at work in the state of Kansas, just across the Missouri river from Waldron. There they met one Al. Owens. On Sunday, October 29, 1899, the three went to Waldron, the two Melvin boys ostensibly for the purpose of getting some new clothes their mother had made for them. They reached Waldron between 8 and 4 o'clock in the afternoon of that day. Al. Melvin took the lead when the three men left his mother's home, the defendant and Owens following him very closely. Jeff Simpson was just outside of the yard fence at his brother's house when Al. Melvin saw him, and without any apparent cause whatever said, "There is the d—d devil now; I can soon fix him," and rushed across the street at Simpson. Throwing a small bundle he had in his hands aside, he took out his knife, and assaulted Simpson, who repelled the attack, knocked off the blows, and struck young Melvin in the face with his hand. While this strife was thus proceeding, Dick Melvin, the defendant, with a knife in his left hand, rushed up behind and to the left of Simpson, and stabbed him. The knife passed through the walls of the abdomen, and entered the abdominal cavity, creating a wound which confined him to his room and bed for a month, and was considered by the physicians as extremely dangerous and hazardous. Immediately after the cutting, the defendant, Al. Melvin, and Owens hurriedly left the state, and the defendant, when arrested, was in the state of Kansas, and at first refused to return to Missouri without requisition papers, but finally did so. When defendant saw the blood from Simpson's wound, he said, "My God, boys, let's hit her for Kansas!" and they all three ran off as fast as they could go, and crossed the river into Kansas. On the part of defendant the evidence tended to show that Jeff Simpson began the assault, that Al. Melvin did the stabbing, and that defendant had no knife. Al. Melvin testified he did the cutting. Other facts will be noted, if necessary, in the opinion. The jury found defendant guilty, and assessed his punishment at two years in the penitentiary.

Jas. Hull and Guy Park, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

GANTT, J. (after stating the facts). 1. The first insistence is that the court erred in refusing to sustain the motion to quash, or plea in abatement to the indictment returned on December 7, 1899, under which the defendant was convicted. Section 2522, Rev. St. 1899, which has remained unchanged in all the revisions of the General Statutes of this state since 1845, provides that: "If there be at any time pending against the same defendant two indictments for the same offense or two indictments for the same matter although charged as different offenses, the indictment first found shall be

deemed to be suspended by such second indictment and shall be quashed." In *State v. Eaton*, 75 Mo. 589, wherein the contention was that until the first indictment was quashed by the court, the defendant could not be put on trial on the second indictment, relying upon *State v. Smith*, 71 Mo. 45, and *State v. Webb*, 74 Mo. 833, this court said: "There is nothing in the section to impair in any manner whatever the second indictment. Certainly a plea to the jurisdiction could not be maintained. The court does not lose jurisdiction of the cause because a former indictment, unquashed, was preferred. The right of the state to find a second indictment against the accused for the same offense is distinctly recognized by the statute. The accused may have the first quashed. The court might, without any motion filed by him for that purpose, quash the first indictment; but whether it is quashed or not is a matter of no consequence in the prosecution on the second indictment. Subsequently the same language was reiterated in *State v. Vincent*, 91 Mo., loc. cit. 665, 4 S. W. 430, and in *State v. Anderson*, 96 Mo., loc. cit. 246, 9 S. W. 636; but in *State v. Daugherty*, 106 Mo. 182, 17 S. W. 308, in which the same question arose, Thomas, J., in writing the opinion, went farther, and announced that "the effect of the second indictment was to quash the first"; citing *State v. Vincent*, 91 Mo. 662, 4 S. W. 430. We have seen that the point in *State v. Vincent* was not whether the finding of the second indictment ipso facto quashed the first, but whether the fact that the first was not quashed would prevent a trial on the second; and so this remark of the learned judge, which was not necessary to the determination of that case, was not supported by the authority upon which he rested it, and he did not advance any reason for the assertion. So that the above cases, outside of this decision, do not reach the point now made by defendant that the preferment of the second indictment ipso facto quashed the indictment under which he was convicted, and when, in turn, the second was formally quashed, there remained no legal charge against him, and he was not required to plead it. We are of opinion that his position is untenable. The language of the statute is, "The indictment first found shall be deemed to be suspended by such second indictment and shall be quashed." The language is not "superseded," as in the New York statute. The first is merely suspended, but new life and validity may be imparted to it by the removal of the obstacle which caused the suspension, to wit, the second indictment, as was done in this case, by quashing it on the record. Moreover, it appears plain to us that this court in *State v. Eaton*, 75 Mo. 588, 389, did not construe the second indictment as quashing the first in proprio vigore, because the attorney general urged the court in that case to adopt that construction of this section, but its language falls short of so doing.

Chief Justice Savage, in construing the New York statute, 2 Rev. St. 1829, p. 726, § 42, says the first indictment is superseded by the second, and liable to be quashed (*People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501); and no greater effect can be given to the words of section 2522, Rev. St. Mo. 1899. Giving the words of this section their ordinary and usual sense, as we are commanded to do in the construction of statutes in the absence of a clear intent of the legislature to the contrary, the word "suspended" means "to cause to cease for a time; to interrupt; to delay"; and the statute requires the first indictment to remain suspended pending the period the second is in force, unless actually quashed by the court on the record; but, if the second is itself quashed without the first having been quashed, the first is restored to all its vigor, and we are not authorized to hold that it is quashed ipso facto by the preferment of a second indictment. We think that the whole section read together requires the court to order it quashed before it can be held to be void and incapable of further efficacy under any and all circumstances. It follows that *State v. Daugherty*, 106 Mo. 182, 17 S. W. 303, went too far, and should not be further followed on this point. "Superseded," in the New York statute, is a stronger word than "suspended," in ours, and yet we have seen the New York court hold that the first indictment was only "liable" to be quashed by the finding of the second, and not in fact quashed,—a view which has been three times reasserted since. *People v. Bransby*, 32 N. Y. 536, 537; *People v. Barry*, 4 Parker, Cr. R. 661; *People v. Monroe Oyer & Terminer*, 20 Wend. 108. The circuit court therefore did not err in holding the first indictment was still in full force after the second was quashed on its record.

2. There was no error in instructing the jury, as the court did, that, if they found the defendant either himself feloniously and on purpose cut and stabbed Simpson with a deadly weapon, or was then and there present, feloniously aiding and abetting another person in such cutting and stabbing said Simpson, then he was equally guilty of such felonious assault. Under our laws defendant was a principal in either case, and was properly chargeable as such, and this was exactly what defendant asked and the court instructed at his own request. His first instruction is in these words: "No. 1. The jury are instructed that unless they believe from the evidence beyond a reasonable doubt that Jeff Simpson was assaulted and cut and stabbed as charged in the indictment, by Dick Melvin, or unless they believe beyond a reasonable doubt that Dick Melvin was present, aiding and abetting in said alleged assault, they shall find the defendant not guilty. A reasonable doubt is a substantial doubt, touching defendant's guilt, and not a

mere possibility of his innocence." Defendant cannot complain of error which he invited.

3. The instruction on the presumption from flight was eminently proper under all the evidence. A stronger, clearer case of flight has not come under our observation.

4. The court did not err in failing to instruct on motive. It gave none on that subject for the state, and none was requested by the state, and no request was made by the defendant to have the court instruct upon all the law of the case. *State v. Cantlin*, 118 Mo. 100, 23 S. W. 1091; *State v. David*, 131 Mo. 381, 33 S. W. 28. The instructions for defendant were exceedingly favorable, and all that the facts justified.

We find no error in this record, and the judgment is affirmed. All concur.

MURPHY v. GABBERT et al.

(Supreme Court of Missouri, Division No. 2
Feb. 4, 1902.)

DEEDS—CONSTRUCTION—TIME OF TAKING EFFECT—INVALIDITY—BURDEN OF PROOF—APPEAL—FINDING OF COURT—EVIDENCE—REVIEW.

1. A defendant in an action to recover possession of land, who attacks the validity of a deed under which plaintiff claims title, has the burden of showing its invalidity.

2. The findings of a court, sitting as a jury, supported by evidence, are not reviewable on appeal.

3. A deed of conveyance in ordinary form, containing a clause that "the intention of this instrument is that the grantor relinquishes her right at her death, then this deed is to come immediately into effect, but not until then," is testamentary in character, and inoperative as a deed.

Appeal from circuit court, Buchanan county; W. K. James, Judge.

Action by Margaret Murphy against William Gabbert and others. Judgment for plaintiff, and defendants appeal. Reversed.

Crow & Eastin, for appellants. W. H. Haynes, for respondent.

BURGESS, J. This suit was begun on the 7th day of March, 1898, by plaintiff filing before a justice of the peace of Buchanan county a complaint under chapter 96, Rev. St. 1899, in regard to landlords and tenants, against the defendant William Gabbert, and suing out process thereon for the possession of a small tract of land in that county. Thereafter Gabbert filed an affidavit, in which it was alleged that the title to real estate was involved in the controversy, whereupon the justice certified the case to the circuit court. After the case reached the circuit court, other parties were made plaintiffs and defendants, and the cause proceeded with just as if it had originated in the circuit court. For instance, defendants filed answer attacking the conveyance under

which plaintiff claimed possession on the grounds: First, that the grantor was mentally incompetent to make the deed; second, that the deed was procured by fraud and undue influence; third, that the deed was void because it was testamentary in character. Plaintiff replied to the answer, denying all allegations therein contained. The cause was tried to the court, a jury being waived. No declarations of law were asked or given. The trial resulted in a judgment for plaintiff for the possession of the property, in which it is declared that the deed from Ann Ellison to plaintiff, under which she claims, is a good and valid deed, and conveys to plaintiff a life estate in said lands, with remainder to her children. Defendants, after unavailing motion for a new trial, bring the case to this court by appeal for review.

It was admitted on the trial that plaintiff was entitled to recover if the deed under which she claims is a valid instrument. Defendants therefore assumed the burden. The deed is as follows: "This indenture, made on the Seventh day of April, A. D. One Thousand Eight Hundred and Ninety Six, by and between Mrs. Ann Ellison of Buchanan County, Missouri, party of the First Part, and Margaret Ann Murphy, during her natural life, and at her death to be an revert to her heirs equally of the County of Buchanan in the State of Missouri, parties of the Second Part: Witnesseth, that the said Party of the First part, in consideration of the love and affection (for support) and 1,000.00 Dollars to them paid by the said parties of the Second part, the receipt of which is hereby acknowledged, does by these presents, Grant, Bargain and Sell, Convey and confirm unto said parties of the Second part her heirs, and assigns, the following described Lots, tracts and Parcels of land lying, being and situate in the County of Buchanan and State of Missouri, to wit: All of fifty acres situated on the West side of the South west quarter of Section Thirteen (13) of Township Fifty-five (55) of Range Thirty-six (36), beginning at the Southwest corner of the Southwest quarter of Section Thirteen (13); thence North One Hundred and Sixty (160) rods; thence East Fifty-one (51) rods; thence South One hundred and sixty (160) rods; thence west Fifty-one (51) rods to the place of beginning. The intention of this instrument of writing is such that Mrs. Ann Ellison relinquishes her entire right at her death then this Deed is to immediately come into effect, but not until then. To have and to hold the premises aforesaid, with all and singular the rights, privileges, appurtenances and immunities thereto belonging or in any wise appertaining, unto said party of the Second part and unto her heirs and assigns, Forever, the said Mrs. Ann Ellison hereby covenanting that she is lawfully seized of an indefeasible

Estate in fee in the premises herein conveyed; that she has good right to convey same; that the said premises are free and clear of any incumbrances done or suffered by her or those under whom she claims and that she will warrant and Defend the title to said premises unto the said party of the Second part, and unto her heirs and assigns, forever, against the lawful claims and demands of all persons whomsoever. In witness whereof, the said party of the First Part has hereunto set her hand and seal the day and year first above written.

her
"Mrs. Ann X Ellison. [Seal.]
mark

"Signed, sealed, and delivered in the presence of us: Leo Cowan. James H. Payne."
Duly acknowledged.

It is claimed by defendants that the evidence showed that the deed from Mrs. Ellison to Mrs. Murphy was procured by means of undue influence exercised by the Murphy family over the mind of Mrs. Ellison; that the grantor, Mrs. Ellison, had not sufficient capacity to execute the deed; and that it was without consideration, etc. Upon the questions the court made the following finding: "The court finds: That at the time said deed was executed Ann Ellison was in the possession of her mental faculties to the extent that she knew how, in what manner, and to whom she desired to convey the land mentioned in said deed. That there is no evidence showing that Ann Ellison executed said deed for any other reason than a desire on her own part to recompense Mrs. Murphy for her long-continued kindness to and support of her, and, in consideration of her love and affection for them, to make Mrs. Murphy and her children the beneficiaries of her bounty, and to provide for the future care of herself. There is no evidence of undue influence. That there is no evidence that the husband of the plaintiff occupied any position of trust toward Ann Ellison." There was some evidence tending to show that the deed from Mrs. Ellison to Mrs. Murphy was obtained by undue influence exercised by the Murphy family over Mrs. Ellison and the want of mental capacity on her part to execute the deed, which defendants claim vitiated it even if otherwise valid; but these contentions were found adversely to them by the court sitting as a jury, and, conceding that the testimony on the part of defendants tended to prove the allegations in the answer, upon these questions there was substantial evidence on the part of plaintiff to the contrary, and under such circumstances the finding of the court below is not subject to review on this appeal. *Bailey v. Gunning*, 155 Mo. 682, 56 S. W. 286.

Defendants, however, claim that the deed is testamentary in character, and is therefore void as a deed. It is well settled that an instrument of writing, to be good as a deed,

must pass a present interest in the property attempted to be conveyed, and that where it takes effect and becomes operative alone upon the death of the grantor, it is testamentary in character, and insufficient as a deed. *Miller v. Holt*, 68 Mo. 584; 1 Devl. Deeds, § 809; *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Turner v. Scott*, 51 Pa. 126; *Leaver v. Gauss*, 62 Iowa, 814, 17 N. W. 522; *Donald v. Nesbit*, 89 Ga. 290, 15 S. E. 867; *Bigley v. Souvey*, 45 Mich. 370, 8 N. W. 98; *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1069, 50 Am. St. Rep. 43; *Conrad v. Douglas*, 59 Minn. 498, 61 N. W. 673; *White v. Hopkins*, 80 Ga. 154, 4 S. E. 863; *Hazleton v. Reed*, 46 Kan. 73, 26 Pac. 450, 26 Am. St. Rep. 86; *Singleton v. Bremer's Adm'x*, 4 McCord, 12, 17 Am. Dec. 699; *Habergham v. Vincent*, 2 Ves. 205; *Hannig v. Hannig* (Tex. Civ. App.) 24 S. W. 695; *In re Dietz's Will*, 50 N. Y. 88; *Cunningham v. Davis*, 62 Miss. 366. The test to determine whether an instrument is a deed or a will is whether it is to take effect in present or after the death of the maker. The case at bar therefore depends upon the construction to be given to the clause in the instrument which provides that "the intention of this instrument of writing is such that Mrs. Ann Ellison relinquishes her entire right at her death, then this deed is to come immediately into effect, but not until then." While the instrument contains the usual words "grant, bargain, and sell," they by no means control as to the time when it took effect, which must be determined by the clause quoted. In *Turner v. Scott*, supra, on the 22d day of November, 1840, John Scott executed to his son an instrument of writing purporting to convey to him his farm. The consideration for the instrument was the natural love and affection which the father had for his son; an agreement upon the part of the son that he would live with his father, assist him in his work on the farm, and maintain his mother during her natural life if she outlived her husband. The instrument provided: "Excepting and reserving, nevertheless, the entire use and possession of said premises unto the said John Scott, and his assigns, for and during the term of his natural life; and this conveyance in no way to take effect until after the decease of the said John Scott, the grantor." The court said: "We see nothing in the covenant of warranty to change our construction of the operative words of the grant. As these words were expressly limited to take effect only after the death of the grantor, they were necessarily revocable words. The doctrine of the cases is that, whatever the form of the instrument, if it vest no present interest, but only appoint what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have

used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed, for all parties must be judged by the legal meaning of their words." In *Leaver v. Gauss*, supra, a conveyance was under consideration which contained words purporting to convey real estate in the usual form, but also contained the following language, "To commence after the death of both grantors," and "It is hereby understood and agreed between the grantors and the grantee that the grantees shall have no interest in the said premises as long as the grantors or either of them shall live." Held, that no present estate, to commence at a future day, was created, as contemplated by section 1933 of the Code of that state, and that the conveyance was testamentary in character, and could be revoked by the grantors at their option, notwithstanding a valuable consideration may have been paid therefor. So, in *Pinkham v. Pinkham*, supra, where an instrument in form a warranty deed contained this provision: "This deed is to take effect and be in full force from and after my death. The further and additional consideration of this conveyance is that the said John H. Pinkham shall pay to Ella P. Riddell, my great-granddaughter, fifty dollars (\$50) per annum for ten years from the date, this deed is in full force and effect; that is to say, fifty dollars each and every year for ten years from the taking effect of this deed." It was ruled that the instrument, although in form a deed, as by its terms it was to operate only after the death of the maker, was testamentary in its character, and not a deed, and passed no present estate in the premises therein described. The words used in the deed under consideration in the clause quoted are such an emphatic declaration that the deed was to come immediately into effect upon the death of the grantor, but not until then, that we are constrained to hold that no interest was presently conveyed thereby which interfered with the life estate of the grantor, and, if any effect whatever is to be given to the words of reservation, they limited the fee to take effect on the death, and not before, of the grantor; that is, they limited the estate to take effect in futuro, which at common law can be done only when an estate is granted, not reserved, and might have been revoked by the grantor at any time. The instrument was therefore testamentary in its character, and inoperative as a deed.

The conclusion reached renders it unnecessary to pass upon the other question presented by defendants with respect to the jurisdiction of the special judge before whom the case was tried to hear and determine the case.

For these considerations, the judgment is reversed. All concur.

STATE v. EATON.

(Supreme Court of Missouri, Division No. 2.
Feb. 4, 1902.)

FORGERY—INDICTMENT AND PROOF—VARIANCE—SUFFICIENCY—DEMURRER TO EVIDENCE.

1. Under Rev. St. 1890, § 2001, providing that "every person who shall forge or counterfeit, or falsely make or alter * * * any bill of exchange, draft, check, certificate of deposit, * * * shall be guilty of forgery," proof of a fraudulent alteration of a check by defendant will support an indictment charging him with having forged, counterfeited, and falsely made the same.

2. In a prosecution of defendant, a colored man, for fraudulently altering or passing an altered check given to him by a third person, the manager of a store and the party on whom the indictment alleged the check was passed testified that a negro brought the check back to the cashier's desk and asked him to cash it; that he sold the party certain goods, and gave him cash for the balance; that he was not certain defendant was the man, but that he looked like him. A clerk testified that the negro presented the check to him; that he sold the goods and gave him the money; that he could not tell whether defendant was the man or not. *Held*, a demurrer to the evidence was properly overruled; the case being sufficient to go to the jury.

3. Rev. St. 1890, § 2002, provides that any person who shall knowingly sell for any consideration a forged check shall be guilty of forgery. Section 2003 declares that any person who knowingly has in his possession a forged check, with intent to utter the same, shall be guilty of forgery. *Held*, that an indictment charging defendant with having forged, counterfeited, and falsely made a check, etc., was based on section 2003, and not section 2002, and therefore need not allege that the check was uttered for a consideration.

4. Where an indictment charges that defendant passed a forged check on a third person with intent to defraud, he may be convicted, though the proof shows that the third person was in the employ of another, and that the goods and money given in exchange belonged to the employer; the indictment not charging an intent to defraud any particular person.

Appeal from circuit court, Howard county; Jno. A. Hockaday, Judge.

Erwin Eaton was convicted of crime, and appeals. Affirmed.

The first instruction requested by defendant is as follows: "Before you can convict the defendant upon the second count of the indictment, you must believe and find from the evidence, beyond a reasonable doubt, that the defendant passed the check on said Charles Meyer with the intent to defraud the said Charles Meyer; and if you believe and find from the evidence that the defendant gave the check, as alleged in the indictment, to said Charles Meyer, in exchange for money, goods, or other property belonging to the firm of H. & S. Loeb & Co., and not to the said Meyer, then you should acquit the defendant under the second count of the indictment."

O. S. Barton, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

BURGESS, J. Under an indictment containing two counts,—one charging defendant with having forged, counterfeited, and falsely made a certain check which purported to have been made by Joseph Howard, and the other charging him with passing, uttering, and publishing as true the same forged check,—defendant was convicted on both counts, and his punishment upon each count fixed at five years' imprisonment in the penitentiary. He appeals.

The salient facts, as disclosed by the record, are substantially as follows: The defendant, a negro, had for some time been in the service of one Joseph Howard; and Howard, being indebted to him on that account, on the 30th day of June, 1900, gave him a check, signed by himself, on the Payne & Williams Bank, a banking corporation doing business in Fayette, Mo., for the sum of \$13. The check was thereafter altered, without the knowledge or consent of Howard, by changing the word "thirteen," where it was written in the check, to the word "nineteen," and the figures "\$13.00," as therein written, to "19.00." The remainder of the check was in the handwriting of Howard, as originally written. On the same evening of the date of the check, it was presented at the store of H. & S. Loeb & Co., in Fayette, by a colored man, and exchanged for \$1 worth of goods and \$18 in cash. As to who passed the check and as to what occurred in the store, the testimony of the witnesses for the state was conflicting. Charles Meyer, the manager of the store, and the party to whom the second count of the indictment charges the defendant of uttering and passing the check, testified that a negro man brought the check into the store, and back to the cashier's desk, and asked him to cash it; that he sold the party goods amounting to \$1, and gave him \$18 in money. This witness, after stating that defendant was the man who sold him the check, stated that he was not certain that defendant was the man, but that he looked like him. Geo. W. Sexton, a witness for the state, testified that he was a clerk in the same store; that the negro man came in and presented the check to Sexton; that he (Sexton) sold him the goods, and that he gave to the man the \$18 in change; that he could not tell whether the defendant was the party or not. This was all the evidence on the part of the state. The defendant demurred to the state's evidence, and asked the court to instruct the jury that, under the indictment and evidence in the case, the jury should find the defendant not guilty, which demurrer the court overruled, and refused to so instruct the jury, to which action of the court the defendant excepted. The defendant testified in his own behalf, and denied altering or changing the check given him by Howard. The state then recalled Joseph Howard in rebuttal, who testified that he had seen the

handwriting of the defendant, and that he would say that the name on the back of the check was in his handwriting. This was all the testimony in the case.

It is claimed by defendant that the court should have sustained his demurrer to the evidence, because of the failure of the state to prove that the check described in the indictment was proven to have been forged. This contention is based upon the fact that the statute (section 2001, Rev. St. 1899) under which the first count of the indictment was drawn provides that "every person who shall forge or counterfeit, or falsely make or alter * * * any bill of exchange, draft, check, certificate of deposit, * * * shall be guilty of forgery in the second degree"; and the argument is that the forging of a check and the fraudulent alteration of one are different acts, and of a different nature, and, even if there had been positive proof that defendant altered the check, he could not have been convicted under the first count of the indictment for that offense. This argument would have more force but for the fact that the alteration of a check so as to give it a different effect is as much a forgery at common law as if the name of the person purporting to have drawn it were forged. 2 Russ. Crimes (Ed. 1853) p. *318; 2 East, P. C. 582; State v. Thornburg, 28 N. C. 79, 44 Am. Dec. 67. And the forgery may be especially alleged as constituted by the alteration or the forgery of the entire instrument. State v. Weaver, 35 N. C. 491. State v. Flye, 26 Me. 312, was a proceeding by indictment under a statute which makes it a felony for any person, with intent to defraud, to "falsely make, alter, forge or counterfeit any instrument in writing being or purporting to be the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property, shall be, or purport to be created, increased, transferred, conveyed, discharged or diminished"; and it was held, under an indictment for forging an order, which set it out as it was when altered, where the proof was that it was originally drawn for \$9, and had been altered to \$19, that defendant might be convicted under the indictment. 2 Archb. Cr. Proc. 1569, note. It will be observed that the statute under which the defendant was prosecuted in the case last cited is in almost the exact language of ours, in that, to alter any instrument therein described, with intent to defraud, is forgery, and may be so charged; but it is also true that an indictment is good which charges the crime of forgery, without specifying in what particular, and that a conviction may be had under such an indictment, notwithstanding the evidence may show that the forgery was committed by altering the instrument.

Although it is conceded by counsel for defendant, in his brief, that the evidence as to whether or not defendant was identified as the person who passed or uttered the check

was conflicting, yet he insists that the demurrer to the evidence should have been sustained. But this position is untenable; for it has always been held by this court that when there is any substantial evidence of the defendant's guilt, as in this case, the case should go to the jury, its weight being for their consideration.

The state's first instruction is criticised upon the ground, as claimed, that it submits to the jury an issue not raised by the indictment; that is, that the question of consideration for the uttering or exchange of the check is not raised by the indictment, but is presented to the consideration of the jury by this instruction. The argument is that it is an attempt to cure an omission in the indictment by instruction, but this, we think, arises from a mistaken idea with respect to the section of the statute under which the indictment is drawn. The first count of the indictment is drawn under section 2003, Rev. St. 1899, in which the question of consideration is not made part of the offense, and not under section 2002, as contended by defendant, wherein it is made part of the offense.

The point is also made that the first instruction asked by defendant should have been given, because the witness Meyer, the party alleged in the indictment as the one to whom the check was sold, was simply in the employ of H. & S. Loeb & Co., and that the goods and the money given in exchange for the check were their property. The charge in the indictment is not to defraud any particular person, but a general intent to defraud; and so, if it was uttered or sold with such intent, it does not make any difference to whom the money and property for which it was sold or exchanged belonged. There was ample evidence to justify the verdict.

The judgment is affirmed. All concur.

Ex parte CARTER.

(Supreme Court of Missouri, Division No. 2
Feb. 4, 1902.)

WITNESSES—TESTIFYING AGAINST ONESELF—CONSTITUTIONALITY OF STATUTE.

Rev. St. 1899, § 2206, provides that no person shall be incapacitated or excused from testifying touching any offense committed by another against any of the provisions relating to gaming by reason of his having bet or played at any of the prohibited games or gaming devices, but that the testimony which may be given by such person shall in no case be used against him. Const. art. 2, § 23, declares that no person shall be compelled to testify against himself in a criminal case. Held, that the statute is violative of the constitutional provision, inasmuch as a witness cannot be compelled to give any evidence which may lead to his prosecution.

Habeas corpus by Arnot Carter against the sheriff of Shannon county to secure petitioner's release from the sheriff's custody. Petitioner discharged.

James Orchard, for petitioner.

SHERWOOD, J. This proceeding has been instituted to test the validity of section 2203, Rev. St. 1899, which reads this way: "No person shall be incapacitated or excused from testifying touching any offense committed by another, against any of the provisions relating to gaming, by reason of his having betted or played at any of the prohibited games or gaming devices, but the testimony which may be given by such person shall in no case be used against him." It seems that a prosecution was begun against W. R. Shuck et al., down in Shannon county, for playing "pitch" and "seven-up" for money and drinks. On the trial of that cause, petitioner was sworn as a witness, whereupon the following colloquy ensued between the prosecuting attorney and the witness:

"Q. Are you acquainted with W. R. Shuck?
A. Yes, sir. Q. I will ask you— He stands charged here with betting on a game of pitch, also on a game of seven-up, last July some time. I will ask you to state to the jury if you saw them along about that time playing? A. I must refuse to testify in this case. I am afraid I would incriminate myself. Q. I will ask you to state to this jury if you did not, some time within a year prior,—some time last July,—if they were not over here at this place, and you didn't see them playing pitch for the drinks? A. As I told you before, I refuse to testify, on the same grounds.

"Your honor, I insist that the witness answer the questions.

"The Court: Answer the question. A. I refuse to answer the question, because it would lead to evidence which would incriminate myself, or lead to witnesses by whose testimony I would be convicted, and would humiliate and degrade me, and, if I should give evidence concerning the whole case, it would criminate me."

Upon such refusal the court fined the petitioner for contempt, and ordered him into the custody of the sheriff, in whose custody he now is.

On behalf of his constitutional exemption from being required to answer such questions, petitioner contends that he did not have to answer them. The petitioner contends that his confinement is illegal, and in violation of section 23 of article 2 of the constitution of the state of Missouri, which says "that no person shall be compelled to testify against himself in a criminal case," and that said imprisonment is in violation of that part of the fifth amendment to the constitution of the United States which says, "nor shall any person be compelled, in any criminal case, to be a witness against himself."

The rulings of various courts have not been uniform on the question here presented; one court, and perhaps more, holding to the extreme view that only in a criminal case wherein the person sought to be made a witness was also a party defendant in such case did the constitutional prohibition apply.

Thus in New York the constitution declared that no person shall "be compelled, in any criminal case, to be a witness against himself." Const. art. 1, § 8. And the act there questioned provided that every person offending against the statute should "be a competent witness against any other person so offending," and might be compelled to give evidence before any magistrate or grand jury, or in any court, in the same manner as other persons, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying." Laws 1853, c. 539, § 14. A similar provision was contained in chapter 446 of the Laws of 1857, in section 52. And upon this it was said: "The term 'criminal case,' used in the clause, must be allowed some meaning, and none can be conceived, other than a prosecution for a criminal offense. But it must be a prosecution against him, for what is forbidden is that he should be compelled to be a witness against himself. Now, if he be prosecuted criminally touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot, therefore, be said that in such criminal case he has been made a witness against himself by force of any compulsion used towards him to procure in the other case testimony which cannot possibly be used in the criminal case against himself." And thereupon it was ruled that, as the witness Hackley was not a party defendant to the prosecution, he was compellable to testify before the grand jury. *People v. Kelly*, 24 N. Y. 74.

In Massachusetts, however, the provision of the constitution was that no subject shall be "compelled to accuse or furnish evidence against himself." Const. pt. 1, art. 12. The statute bearing on that subject provided: "No person who is called as a witness before the joint special committee on the state police, shall be excused from answering any question or from the production of any paper relating to any corrupt practice or improper conduct of the state police, forming the subject of inquiry by such committee, on the ground that the answer to such question or the production of such paper may criminate or tend to criminate himself, or to disgrace him, or otherwise render him infamous, or on the ground of privilege; but the testimony of any witness examined before said committee upon the subject aforesaid or any statement made or paper produced by him upon such an examination, shall not be used as evidence against such witness in any civil or criminal proceeding in any court of justice." St. 1871, c. 91. The witness Emory was brought before the joint special committee of the senate and house, and this interrogatory propounded to him: "Have you ever paid any money to any state constable, and do you know of any corrupt practice or im-

proper conduct of the state police? If so, state fully what sums, and to whom you have thus paid money, and also what you know of such corrupt practice and improper conduct." To this he answered: "I decline to answer the question, upon the grounds—First, that the answer thereto will accuse me of an indictable offense; second, that the answer thereto will furnish evidence against me by which I can be convicted of such an offense." For this refusal he was imprisoned. Being brought before Judge Wells on habeas corpus, the case was fully argued, and upon conference with the other judges of the supreme judicial court the opinion delivered by Judge Wells (In re Emery, 107 Mass. 172, 9 Am. Rep. 22) met with the unanimous concurrence of all the judges. In that opinion it is said in regard to the question propounded: "It is apparent that an affirmative answer to the question put to him might tend to show that he had been guilty of an offense, either against the laws relating to the keeping and sale of intoxicating liquors, or under the statute for punishing one who shall corruptly attempt to influence an executive officer by the gift or offer of a bribe (Gen. St. c. 163, § 7)." Regarding the clause quoted from the bill of rights, the opinion says: "By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of an offense by himself, in any prosecution then pending or that might be brought against him therefor, such disclosure would be an accusation of himself, within the meaning of the constitutional provision. In the absence of regulation by statute, the protection against such self-accusation is secured by according to the guilty person, when called upon to answer as witness or otherwise, the privilege of then avowing the liability and claiming the exemption, instead of compelling him to answer, and then excluding his admissions so obtained, when afterwards offered in evidence against him. The common-law maxim is, 'Nemo tenetur seipsum accusare,' the interpretation and application of which has always been in accordance with what has been just stated." Referring to the expression "or furnish evidence against himself," the opinion says that this clause must be equally extensive in its application, and "in its interpretation may be presumed

to be intended to add something to the significance of that which precedes. Aside from this consideration, and upon the language of the proposition standing by itself, it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offense, the sources from which or the means by which evidence of its commission, or of his connection with it, may be obtained or made effectual for his conviction without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the corpus delicti itself. Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it should be limited to confessions of guilt, or statements which may be proved in subsequent prosecutions as admissions of facts sought to be established therein." Proceeding then to consider the effect of the statute of Massachusetts already quoted, the opinion says: "It follows from the considerations already named that, so far as this statute requires a witness, who may be called, to answer questions and produce papers which may tend to criminate himself, and attempts to take from him the constitutional privilege in respect thereto, it must be entirely ineffectual for that purpose, unless it also relieves him from all liabilities for protection against which the privilege is secured to him by the constitution. The statute does undertake to secure him against certain liabilities, to wit, the use of any disclosures he may make as admissions or direct evidence against him in any civil or criminal proceeding." Further on, the opinion, recurring to the constitutional provision then under consideration, says: "No one can be required to forego an appeal to its protection, unless first secured from future liability, and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the privilege accorded by the constitution. Under the interpretation already given, this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate. It is not done, in direct terms, by the statute in question. It is not contended that the statute is capable of an interpretation which will give it that effect; and it is clear that it cannot, and was not intended to, so operate. Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the constitution, or to remove the whole liability against which its provisions were intended to protect them, it fails to deprive them of the right to appeal to

the privilege therein. The result is that, in appealing to his privilege as an exemption from the obligation to answer the inquiries put to him, the petitioner was in the exercise of his constitutional right; and his refusal to answer upon that ground was not, and could not be considered as, disorderly conduct, or a contempt of the authority of the body before which he was called to answer. There being no legal ground to authorize the commitment upon which he is held, he must be discharged therefrom."

In Virginia the bill of rights of the constitution of 1870 contained a provision that had existed in that bill of rights ever since June 12, 1776,—that no man can "be compelled to give evidence against himself." Const. art. 1, § 10. And upon this the court of appeals said that it was the purpose of the framers of that clause "to declare, as part of the organic law, that no man should anywhere, before any tribunal, in any proceeding, be compelled to give evidence tending to criminate himself, either in that or any other proceeding," and that the provision could not be confined "only to cases in which a man is called on to give evidence himself in a prosecution pending against him." And thereupon it was ruled that the witness could not be compelled to answer before the grand jury what he knew of a certain duel, because, as he stated, the answer to the question would tend to criminate him. The act of the general assembly thus brought in question made provision as follows: "Every person who may have been the bearer of such challenge or acceptance, or otherwise engaged or concerned in any duel, may be required, in any prosecution against any person but himself, for having fought, or aided or abetted in such duel, to testify as a witness in such prosecution; but any statement made by such person, as such witness, shall not be used against him in any prosecution against himself." Acts 1869-70, c. 355. The court held that the effect of the statute was to invade the constitutional right of the citizen, and to deprive the witness of his constitutional right to refuse to give evidence tending to criminate himself, without indemnity, and that the act was therefore, to that extent, unconstitutional and void. It held, further, that, before the constitutional privilege could be taken away by the legislature, there must be absolute indemnity provided; that nothing short of complete amnesty to the witness—an absolute wiping out of the offense as to him, so that he could no longer be prosecuted for it—would furnish that indemnity; that the statute in question did not furnish it, but only provided that the statement made by the witness should not be used against him in a prosecution against himself; that, without using one word of that statement, the attorney for the commonwealth might in many cases, and, in a case like that in hand, inevitably would, be led by the testimony of the witness to means and sources

of information which might result in criminating the witness himself; and that this would be to deprive the witness of his privilege, without indemnity. And so the judgment of the hustings court, which ruled to the contrary, was reversed. *Callen v. Com.*, 24 Grat. 624.

In New Hampshire the clause in the bill of rights is exactly like that of Massachusetts, above mentioned. And in the case of *State v. Nowell*, 58 N. H. 314, Nowell declined to answer about selling liquors as clerk, etc., when questioned by the grand jury, giving the usual reasons for his refusal. The statute in that case had this provision: "No clerk, servant or agent of any person accused of a violation of this chapter, shall be excused from testifying against his principal, for the reason that he may thereby criminate himself; but no testimony so given by him shall, in any prosecution, be used as evidence, either directly or indirectly, against him, nor shall he be thereafter prosecuted for any offense so disclosed by him." Gen. St. c. 99, § 20. The supreme court, having been moved for an attachment against the recalcitrant witness, said: "The common-law maxim, thus affirmed by the bill of rights, that no one shall be compelled to testify to his own criminality, has been understood to mean not only that the subject shall not be compelled to disclose his guilt upon a trial of a criminal proceeding against himself, but also that he shall not be required to disclose, on the trial of issues between others, facts that can be used against him as admissions tending to prove his guilt of any crime or offense of which he may then or afterwards be charged, or the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained." But that court further held, in substance and effect, that inasmuch as the statute under review secured the witness against all liability to future prosecution as effectually as if he were wholly innocent, and relieved him from all liabilities on account of the matters which he was compelled to disclose, the witness therefore had, under the statute, all the protection that the common-law right, adopted by the bill of rights in its common-law sense, gave him, and that, if prosecuted, a plea that he had disclosed the same offense on a lawful accusation against his principal would be a perfect answer to the prosecution against himself, and that consequently he was compellable to testify, and liable to attachment should he fail to do so.

In *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 196, 35 L. Ed. 1110, the court considered the fifth amendment to the constitution of the United States, heretofore set forth in connection with and reference to section 860 of the Revised Statutes of the United States, which is the following: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judi-

cial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture,"—and, speaking through Mr. Justice Blatchford ruled: That the meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself, but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime. The protection afforded by section 860 is not coextensive with the constitutional provision. As the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed on constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have, as far as possible, the same interpretation. It is a reasonable construction of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his offense, or the sources from which or the means by which evidence of its commission, or of his connection with it, may be obtained or made effectual for his conviction without using his answers as direct admissions against him. No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. And so the petitioner, who had refused to answer an incriminating question in the lower court, was held entitled to his discharge on habeas corpus; section 860, aforesaid, not being regarded as broad in its power of protection as the amendment before referred to, and therefore constitutionally invalid. And the ruling in *People v. Kelly*, 24 N. Y. 74, that the words "criminal case" mean only a criminal prosecution against the witness himself, was disapproved.

Chief Justice Marshall, when engaged in the trial of Aaron Burr (1 Burr's Tr. 244), on the question whether the witness was privileged not to accuse himself, gave utterance to similar views, saying: "If the question be of such description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would incriminate himself, the court can demand no other testimony of the fact.

* * * According to their statement [the counsel for the United States], a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case, that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed or is attainable against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." This ruling by the eminent chief justice was in 1807; the fifth amendment, among others, having been ratified in 1791.

In the present instance, section 2206 of our statutes, now under comment, must be regarded, under the authorities cited (except *Kelly's Case*, supra), and for the reasons therein given, as falling under the ban of section 23 of our bill of rights. We therefore enter an order discharging the petitioner from custody. All concur.

MILO et al. v. NUSKE et al.
(Supreme Court of Texas. Feb. 17, 1902.)
APPEAL—COUNTY COURT—TIME FOR FILING BOND.

Under Rev. St. art. 2255, providing that an appeal may be taken from any decision or judgment of the county court to the district court upon compliance with the provisions of the act, and articles 2256 and 2258, requiring the party appealing to file his bond within 15 days "after such decision, order, decree, or judgment shall have been rendered," the time for filing the appeal bond runs from the order appealed from, and not from the date of an order overruling a motion for a new trial.

Certified question from court of civil appeals of First supreme judicial district.

Proceedings for the allowance of a claim by Anna Nuske and others against the estate of William Milo. Upon the protest of Emma Milo and others, the claims were dis-

allowed by the county court, and claimants appealed to the district court, where the appeal was dismissed. On certified questions to the court of civil appeals. Affirmed.

H. Paul Georgi, E. P. Turner, and W. O. Henderson, for appellants. Tompkins & McDade, for appellees.

WILLIAMS, J. The court of civil appeals for the First district certifies for decision the following case:

"The appellants, having a claim against the estate of William Milo, deceased, which estate was being administered in the county court of Waller county, presented said claim to the administrator, who allowed same; and it was filed in the county court on July 18, 1900, for approval by the county judge. Appellees, who are interested in said estate, filed a protest against the approval of said claim; and upon a hearing by the county judge on the 4th day of October, 1900, the claim as to one of appellants was wholly rejected, and was approved only in part in favor of the other appellants. On the 6th of October, 1900, appellants filed a motion for a new trial in the county court, which motion was heard and overruled by the county judge on October 11, 1900. The appellants, at the time their motion for a new trial was overruled, gave notice of appeal to the district court, and on the 26th day of October filed in the county court their appeal bond, conditioned as required by law, which bond was duly approved by the clerk of said county court. The appellees filed a motion in the district court to dismiss the appeal on the ground that the appeal bond, not having been filed within 15 days from the original entry of the order appealed from, was not filed within the time prescribed by law. This motion was sustained by the district court, and the appeal dismissed.

"We respectfully certify for your decision the question as to whether or not, upon the facts above stated, the district court erred in holding that the appeal bond was not filed within the time prescribed by the statute, and in dismissing the appeal."

Article 2255, Rev. St., provides: "Any person who may consider himself aggrieved by any decision, order, decree or judgment of the county court shall have the right to appeal therefrom to the district court of the county upon complying with the provisions of this chapter." The party appealing is required by articles 2256 and 2258 to file his bond or affidavit within 15 days "after such decision," etc., "shall have been rendered." Under former decisions of this court, it must be held that the time runs from the order to be appealed from, and not from the order overruling motion for new trial. The statute allowing writs of error from the district court to the court of civil appeals limits the right to twelve months "after the final judgment is rendered." In *Cooper v. Yoakun*, 91

Tex. 392, 43 S. W. 871, the question was presented whether or not this time runs from the date of the main judgment, or from the date of the order overruling motion for new trial; and it was held that the former date controlled. Quoting from *Waterhouse v. Love*, 23 Tex. 560, the court said: "The language is too plain to be mistaken. It bars the remedy at the expiration of two years from the rendition of judgment. The rendition of judgment is an independent fact, distinct from the adjournment of court, from other proceedings at the term, and in the same case; and it is from the happening of this fact that the two years are to be computed." The language under construction in *Cooper v. Yoakun* was "final judgment," and afforded better reason for the contention of appellant that a judgment is not final until the close of the term, and may be set aside or modified at any time during the term, and hence should not be considered the final disposition of the matter until refusal of new trial, than does the probate law, which makes the limitation upon the right of appeal from a decision, order, etc., begin to run from the time when "such decision or order shall have been rendered." Another difference between that case and this is that, in other proceedings, motions for new trials are expressly provided for, and allowed as a matter of right, while no such provision is found in the probate law; but appeal, with trial de novo in the district court, is allowed. The time for appeals from the district and county courts and for writs of error to the courts of civil appeals is expressly fixed with reference to the date of orders overruling motions for new trials or for rehearing (Rev. St. arts. 942, 1387); and this makes the absence of such provision from the statute construed in *Cooper v. Yoakun* and from that now in question more significant. The time for appeals from justices' courts is made to run from the "date of judgment." Rev. St. art. 1670. But by other provisions the right is given to the parties to make motions for new trials, and the duty is imposed on the justice to act upon them. Even under these provisions, the court of appeals first held that the limitation on the appeal ran from the date of the main judgment, and not from the order upon motion for new trial (*Conally v. Gambull*, 1 White & W. Civ. Cas. Ct. App. § 90; *Bach v. Giacchio*, Id. § 1310), but finally adopted the view that the latter date governed (*Kyle v. Becton*, 2 Willson, Civ. Cas. Ct. App. § 49; *Laird v. Friberg*, Id. § 110; *Missouri Pac. Ry. Co. v. Houston Flour Mills Co.*, Id. § 571; *Grant v. Fowzes*, 3 Willson, Civ. Cas. Ct. App. § 105; *West v. White*, 4 Willson, Civ. Cas. Ct. App. § 130, 16 S. W. 788). Whether or not the latter position is reconcilable with the decisions of this court above referred to, we need not consider, since no provision for a new trial in probate matters is found in the statute. It is doubtless true that the probate

court has power to alter its judgments during the term at which they are entered, and that such power may be invoked by proper application from interested parties; but, in the absence of a statute so providing, this cannot be held to modify the fixed and certain rule of the statute prescribing the time within which appeals must be perfected. The power referred to may be exercised at any time during the term, and, as there is no statute prescribing a period of time within which a party may invite such action, it would follow that he may do so when he chooses, so long as the term lasts; and, if the rule contended for were allowed, the time for perfecting an appeal could be protracted at his will. This would leave no certain rule upon the subject, and, when it is considered that many persons may be aggrieved by an order made in an estate, any one of whom may ask the court to review and change it, and may take an appeal from it, it becomes obvious that no such uncertainty was intended. If parties desire to ask a revision by the court of its own order, and also to appeal from it, they can do both, but must still comply with the statute. It may be that an application to set aside an order might be based upon such grounds that an appeal would lie from a judgment refusing it, but such is not the case presented. The effort is to appeal from the original order after the overruling of an ordinary motion for a new trial, seeking merely the revision of the judgment of the court already pronounced. Such, at least, we understand to be the case.

We answer that the district court did not err in holding that the bond was not filed in time, and dismissing the appeal.

WALTON v. STATE

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

MISDEMEANORS—APPEAL—JURISDICTION—RECOGNIZANCE—FAILURE TO REMAIN IN CUSTODY.

Under Code Cr. Proc. art. 886, providing that when the defendant appeals in any case of misdemeanor he shall, if in custody, be committed to jail, unless he enter into recognizance, etc., the court is without jurisdiction of an appeal where appellant has not entered into a recognizance, and is allowed to go from and return to the jail at his own pleasure.

Appeal from Grayson county court; J. D. Woods, Judge.

Albert Walton was convicted of a misdemeanor, and appeals. Dismissed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of carrying a pistol, and his punishment assessed at a fine of \$25. The assistant attorney general has filed a motion to dismiss the appeal, because the appellant has not entered

into recognizance pending the appeal, and has not been confined in jail, as required by law in case recognizance is not entered into; and has attached to the motion the affidavit of J. M. Chancellor to the effect: "That he is acquainted with Albert Walton; that he works at the county jail of Grayson county, and is now, and has been continuously since said 26th day of June, 1901, performing services in and around and out of said jail, making errands from said jail into and through the city of Sherman for the officials and attendants residing at and in said jail; that said Albert Walton has never been confined in the county jail of Grayson county; that he was not confined on the 26th of June, 1901, and that he has not been confined in said jail at any time since said 26th day of June, 1901, but that he works in and around said jail, and goes and comes at his own pleasure, and is on the streets of Sherman daily, either on business or for pleasure, and is now at liberty to go from said jail, and return to same at his own pleasure." Appellant not having been confined in jail as required by article 886, Code Cr. Proc., this court is without jurisdiction, and the motion is accordingly sustained.

Appeal dismissed.

DRIGGS v. STATE

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

MISDEMEANORS—APPEAL—RECOGNIZANCE—STATEMENT OF PUNISHMENT.

Under Code Cr. Proc. art. 887, a recognizance stating the punishment as a fine of \$25, when it was in fact but \$10, is fatally defective.

Appeal from Dallas county court; Ed. S. Lauderdale, Judge.

E. E. Driggs was convicted of a misdemeanor, and appeals. Dismissed.

Woods & Baldwin, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of gaming, and fined \$10. The assistant attorney general has filed the following motion to dismiss this appeal, to wit: "Appellant was charged with the offense of gaming, and upon trial was convicted, and his punishment, as shown by the verdict and judgment herein, assessed at a fine of ten dollars; that subsequent to the conviction, and in open court, he entered into a recognizance which describes the offense as being a misdemeanor, and the punishment as being a fine of twenty-five dollars. Therefore the state would show the court there is a variance between the recognizance and the verdict and judgment herein; that the recognizance misdescribes the judgment of the court, in that the judgment was for ten dollars, and the recognizance recites the same as a judgment for twenty-five dollars. Wherefore the

state prays the court to dismiss this appeal, because there is not such recognizance herein as required by article 887, Code Cr. Proc., and therefore this court is without jurisdiction." An inspection of the record shows it sustains the motion, and it is accordingly sustained.

The appeal is dismissed.

BROWN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

DEPUTY SHERIFF—APPOINTMENT—DE FACTO OFFICER—AGGRAVATED ASSAULT—ACQUITTAL—CONVICTION OF SIMPLE ASSAULT.

1. Where a deputy sheriff, on being appointed, refused to take the oath, and cut the same off from his appointment, and there was no showing that he exercised the duties of the office, or had the reputation in the community of being a deputy sheriff, he was not an officer de facto.

2. Where defendant assaulted an alleged officer while being arrested, which action would have constituted an aggravated assault had the person assaulted been an officer, an acquittal of the charge of aggravated assault was equivalent to a finding that the person assaulted was not an officer; and, as defendant had a right to resist an unlawful arrest, he could not, under the verdict, be convicted of a simple assault.

Appeal from county court, Collin county; J. H. Faulkner, Judge.

C. E. Brown was convicted of a simple assault, and appeals. Reversed.

Garnett, Smith & Merritt and F. E. Wilcox, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of a simple assault, and his punishment assessed at a fine of \$5; hence this appeal.

This is the second appeal. See *Brown v. State*, 60 S. W. 548. The facts before us on the present appeal are substantially the same as those on the former appeal, except with reference to the qualifications of Robertson as deputy sheriff. In the former appeal the proof showed a mere omission to file the oath and bond. In the present appeal it is shown he refused to take the oath in order to qualify, as shown by bill of exceptions.

Appellant complains of the following portion of the charge of the court: "When an injury is caused by violence to a person, intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention." While we do not believe this charge should have been given, yet, in view of the eighth paragraph of the court's charge, we do not believe the same constitutes reversible error.

Appellant complains of the action of the court in instructing the jury that Robertson, the alleged deputy sheriff, was a de facto officer, and that, instead of said charge, the court should have given the requested special instructions as follows: "You are fur-

ther instructed that, if Alex Robertson designedly failed and refused to take the official oath and have his appointment recorded as required by law, then he is not an officer de facto nor de jure, and you will acquit the defendant." In the same connection, we will also notice appellant's third bill of exceptions, which presents the evidence insisted upon by the state as constituting Robertson a de facto deputy sheriff. The written appointment of Robertson by the sheriff of Collin county, dated February 1, 1899, was offered in evidence; but it was shown this was not recorded, nor was the oath of office appended to the same, but it was cut off the paper. Robertson testified he had not taken the oath of office, nor had his appointment filed in the office of the county clerk of Collin county; that he refused to take the oath of office because he was not in position to do regular work (that is, such work as he heard of); that he told the sheriff at the time he would not do regular work, but that, any matter around town that needed special attention, he would attend to it; that he did not remember who had cut the oath of office off the appointment; that he might have done it. On this proof, appellant moved to exclude the evidence of Robertson's appointment as deputy sheriff, claiming it was no appointment, but his assuming to act under it merely constituted him a volunteer. It appears from the record that this alleged appointment was made by the sheriff on the 1st of February, 1899; that the arrest of appellant was made August 6, 1899; that in the interim Robertson had previously made one arrest. The question is, was Robertson a de facto officer, and as such authorized to arrest appellant, or was he a mere volunteer? On the former appeal, on the proof as presented, we held he was a de facto officer. But then the proof presented did not show, as here, that appellant absolutely refused to take the oath of office and file the same in the office of the county clerk in connection with his appointment. There was no proof offered then or now that he exercised the duties of his office, and that he had the reputation in the community of being a deputy sheriff. On the record as here presented, it occurs to us, there was a refusal to accept the appointment. There was certainly a refusal to qualify as deputy sheriff. In this connection our attention has been called to articles 662, 663, and 664 of the Penal Code, and to subdivisions 3 and 4 under the last-named article. These provisions of the Code indicate the circumstances under which an officer is justifiable, in case of homicide, in taking the life of the party resisting arrest; but, of course, they have some application to the question here presented. See article 593, subd. 5, Pen. Code. Subdivisions 3 and 4, referred to, are as follows: "(3) The person executing the order must be some officer duly authorized by law to execute the order, or some person specially appointed in accord-

ance with law for the performance of the duty. (4) If the person executing the order be an officer, and performing a duty which no other person can by law perform, he must have taken the oath of office and given bond, where such is required by law." In case of homicide it would appear that a de facto officer (that is, one assuming the functions of the office without giving bond, taking oath, and having the same filed according to law) could not justify in case he killed one who was resisting arrest. However, we understand our decisions to go beyond the literal scope of these statutes, and that a de facto officer has the same right in making an arrest as a de jure officer. The definition of a de facto officer is given in the books in general terms. Among other definitions, it is held that one is a de facto officer who acts under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or conditions, as taking oath, giving a bond, or the like. 8 Am. & Eng. Enc. Law (2d Ed.) 782. In this case there was not a mere neglect or failure to take the oath, but there was absolute refusal to take such oath. Indeed, it was cut off from the paper constituting the alleged appointment. It occurs to us, there was a refusal here to accept the appointment. Beyond this, there was not that reputation, originating in the discharge of the office and the acquiescence in the community, which would constitute appellant, without a regular appointment, a de facto officer. Under the facts of this case, as presented, we are inclined to the opinion that appellant was not a de facto deputy sheriff.

Appellant very urgently insists the court erred in charging the jury that, if appellant was not guilty of an aggravated assault, then to determine whether or not, from the evidence, he was guilty of a simple assault; and, in this connection, he also insists that the verdict of the jury, finding appellant guilty of a simple assault, is not authorized by the facts, but is tantamount to an acquittal. We are aware that, as a general proposition, one charged with an aggravated assault cannot complain because of his conviction of a simple assault. *Foster v. State*, 25 Tex. App. 543, 8 S. W. 664. In *Jay v. State* (Tex. Cr. App.) 55 S. W. 335, this principle was extended to a charge of aggravated assault alleged to have been committed upon an officer in the lawful discharge of the duties of his office. However, the decision does not indicate that the point here insisted on arose from the facts in that case, or that the question here presented was decided. Appellant here maintains: That if Robertson, the alleged deputy sheriff, was a deputy sheriff, either de jure or de facto, then he had a right to arrest and detain appellant, and any resistance showing personal violence, or intent, coupled with the ability, to commit such violence, would constitute an

assault, and that assault would be, by the terms of the statute, an aggravated assault. If, on the contrary, Robertson was not such de jure or de facto officer, he had no right to arrest, or, having arrested, to detain, appellant; and appellant would have the right to resist such unlawful arrest or detention, and any violence used by him, or threatened violence, for the purpose of effecting his release, and not excessive, would not constitute an assault of any character. That when the jury found appellant guilty of a simple assault, thus acquitting him of an aggravated assault, they, in effect, determined that Robertson was not such officer, and if he was not such officer, of course, appellant had a right to do all the evidence showed he did. It occurs to us that the proposition advanced is a sound one, to wit, if Robertson was an officer, only in that event did he have the right to arrest and detain appellant; and if, in the exercise of such rightful authority, he was assaulted by appellant, the assault would be an aggravated assault. If, on the other hand, Robertson was not such officer, then appellant had a right to resist such arrest, and, if he committed an assault in the necessary resistance to such illegal arrest, he could not be guilty of a simple assault. *Massie v. State*, 27 Tex. App. 617, 11 S. W. 638; *Miers v. State*, 34 Tex. Cr. App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705. The fact that the jury convicted him of a simple assault was equivalent to finding that Robertson was not an officer engaged in the lawful performance of his duties. If this be correct, appellant could not be guilty of a simple assault, because he had a right to resist an unlawful arrest.

The judgment is reversed, and the cause remanded.

HAYS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

CRIMINAL LAW—APPEAL—ORAL CHARGE—REVIEW.

Where the charge was oral, and not contained in the record, alleged error in the refusal of a requested special charge cannot be considered.

Appeal from Johnson county court; W. D. McKay, Judge.

Blake Hays was convicted of selling intoxicating liquors to a minor, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was prosecuted under an indictment charging him with knowingly selling intoxicating liquor to a minor, and upon trial was convicted, and his punishment assessed at a fine of \$25. We find neither statement of facts nor bill of exceptions in the record. The charge of the court, by consent of appellant, was oral; and in the absence of the charge we cannot

say whether or not the court erred in failing to give appellant's special charge. The motion for new trial merely insists that the verdict of the jury and judgment of the court is contrary to the law and the evidence. In the absence of a statement of facts, we cannot pass on this question.

No error appearing in the record, the judgment is affirmed.

STEVENS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

BURGLARY—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

Circumstantial evidence on a trial for burglary held insufficient to sustain conviction, where it does not exclude every reasonable hypothesis except that of the guilt of the defendant, and does not show with the certainty required by rules of circumstantial evidence that the property found in defendant's possession was that of the alleged owner, or that accused was the person who broke into and entered his house.

Appeal from district court, Johnson county; Wm. Polindexter, Judge.

Charley Stevens was convicted of burglary and he appeals. Reversed.

Ramsey & Odell, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary.

It may be stated the breaking of the house was satisfactorily shown. In order to connect defendant with the burglary, the state relied upon circumstantial evidence. The owner of the house stated it contained quite a lot of wheat, some in bulk, and some in sacks; that on Friday evening the house was securely fastened, and on Monday morning for the first time he ascertained it had been broken into, and 35 to 50 bushels of his wheat taken. On Monday appellant sold about 50 bushels of wheat in Cleburne, about eight miles distant from the scene of the alleged burglary. The wheat taken had lime interspersed through it, some of the pieces being about the size of a marble. It was testified by the purchaser, as well as by the weigher, of the wheat, that there was no lime observed in the wheat sold by defendant. Appellant was not a farmer, and therefore did not raise wheat. He had been hauling wheat for other people about the country. He borrowed or hired the wagon on Sunday night prior to the Monday morning on which he sold the wheat. At the time he got the wagon there was a dead hog tied to the rear end of it. This hog was white in color. About four miles from the town of Cleburne, and in the direction of the burglarized house, the carcass of a large white hog was seen on Monday. These are substantially the facts developed, with this additional fact:

that while the alleged owner was in Cleburne on Monday, defendant is shown to have watched his peregrinations around the town. It may also be stated that the wheat lost by the alleged owner was described as being very bright, and what was known as "castor wheat"; that the brightness occurred by its being damaged in the shock by wet weather. In this connection, however, it is admitted there was a great deal of what is known as "castor wheat" raised in that county, and a very large percentage of the wheat was damaged by the rain, as was that of the alleged owner. In order to sustain this conviction, the state was forced to rely upon these circumstances as evidence of the possession by appellant of the alleged stolen wheat. Appellant made a statement at the time of borrowing the wagon, which was proved against him, that he wanted it to haul some wheat he had gotten from a man who was very busily engaged during the day putting up hay, and therefore could not deliver the wheat in the daytime. Applying the rules of circumstantial evidence to the testimony, we do not believe this case has been made out with that certainty which authorizes a conviction. It does not exclude every reasonable hypothesis except that of the guilt of the defendant, nor does it show that certainty required by the rules of circumstantial evidence, that the wheat found in his possession was that of the alleged owner, or that he is the man who broke and entered the house eight miles west of Cleburne. It was not even undertaken to be shown that the white hog found on the side of the road was the one attached to the wagon when he borrowed it, or what became of the hog after he borrowed the wagon. If this was the hog tied to the wagon at the time he borrowed it, it was necessarily conveyed from the town of Cleburne to the point where the carcass was found. If he dragged it from town to that point, there would have been evidence of the trail. The owner of the wagon excludes the idea that the hog was in the wagon, but makes it appear that it was tied to it, to be hauled away. These matters, in connection with the further fact that appellant undertook to secure a wagon from several parties before obtaining one, for the purpose of going after wheat that night, stating in every instance his reason for wanting the wagon at night, in our judgment leaves the evidence too bare of cogency to justify us in affirming the judgment.

The judgment is reversed, and the cause remanded.

McDANIEL v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

NAMES—INDICTMENT—EVIDENCE—HARMLESS ERROR.

1. In a prosecution for adultery, charging that the woman was married to John E. B.,

where various witnesses for the state have testified that her husband was named Ed B., testimony of a witness for the state that he had testified in a divorce suit wherein J. E. B. was plaintiff and the woman was defendant was admissible to show that John E. B. was the same party that witness knew as Ed B.

2. Any error in admitting such testimony was not calculated to prejudice defendant.

Appeal from Tarrant county court; M. B. Harris, Judge.

Somers McDaniel was convicted of crime, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of adultery, and his punishment assessed at a fine of \$100.

Bill of exceptions No. 1 complains that the court erred in permitting the witness for the state to testify that he had been a witness for plaintiff, and testified in a certain suit for divorce in the district court wherein J. E. Beaumont was plaintiff and Flora Beaumont was defendant. The objection to this evidence was that it was immaterial, prejudicial, calculated to influence the jury, and was res inter alios acta. This prosecution against appellant was predicated upon the alleged fact of his living in adultery with Flora Beaumont, the defendant in the divorce suit. The indictment charged that "she, the said Flora Beaumont, being then and there lawfully married to another person, to wit, one John E. Beaumont, who was then and there living," etc. Various witnesses who testified for the prosecution stated that Flora Beaumont's husband was named Ed Beaumont. The foregoing testimony was offered by the state to show that the real name of the husband of appellant's co-defendant was John E. Beaumont. The allegation of the name of John E. Beaumont in the indictment is for the purpose of identification, and the allegation of the name of third parties is for the purpose of identification. Bish. New Cr. Proc. § 677. We have heretofore held that the real name of a person, or the name that he is generally known by, may be alleged and proved, and those facts sustain the indictment. *Bird v. State*, 16 Tex. App. 528. Furthermore, the name of the party alleged in the indictment, like pedigree, age, birth, etc., may be proved by hearsay, and may be proved by general reputation. It is one of the exceptions to the general rule of the inadmissibility of hearsay evidence. The petition for divorce, which was introduced, as well as the testimony of the witnesses above detailed, was admissible to show that John E. Beaumont was the same party that the witness knew as Ed Beaumont. At any rate, we do not think it was such an error as was calculated to injure the rights of appellant, even conceding it to be error.

Appellant also complains of the insufficiency of the evidence to support the con-

viction. We are of opinion that the evidence is amply sufficient.

The judgment is affirmed.

STANDIFER et al. v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE—SUFFICIENCY.

1. A recognizance which is joint and not several is defective.

2. A recognizance which does not state the amount of punishment assessed is defective.

Appeal from Dickens county court; O. S. Ferguson, Judge.

Bill Standifer and another were convicted of crime, and appeal. Dismissed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellants were convicted of injuring a fence, and fined \$10 each. The assistant attorney general has filed a motion to dismiss the appeal because the recognizance is defective. The recognizance is joint, and not several, and neither does it state the amount of the punishment assessed against appellants. The motion is well taken, and the appeal is dismissed.

CLEVELAND v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

INTOXICATING LIQUORS—FURNISHING TO MINOR—KNOWLEDGE OF MINORITY.

Where defendant furnished liquor to a minor, but it appeared that such minor was 18 years old, had a heavy beard, often drank liquor in company with his father and defendant, drank liquor at home with the consent of his parents, showed all the evidence of maturity, and defendant was not informed of his minority, the evidence was insufficient to support a conviction of the offense of "knowingly" giving intoxicating liquor to a minor.

Appeal from Hill county court; L. C. Hill, Judge.

Oscar Cleveland was convicted of giving intoxicating liquor to a minor and appeals. Reversed.

Vaughan, Works & Clarke, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was prosecuted under an information charging that he did "unlawfully and knowingly give and cause to be given intoxicating liquors to Vance Cook, a minor," etc., and upon conviction his punishment was assessed at a fine of \$25.

In the view we take of the record, it is only necessary to consider one question, to wit, the sufficiency of the evidence to support the conviction. It appears that prosecuting witness was 18 years old, had a heavy beard, shaved frequently, and that appellant, in company with the minor's father,

had frequently gone to the town of Itasca, and there bought whisky, giving some to the minor and some to the father, and on some occasions the father would buy the whisky, and give some to the minor and some to appellant. These or similar instances occurred on several occasions. The minor drank whisky about home with the consent of his mother and father, and this was well known to appellant, who lived with the father of the minor a short while. It further appears that the minor was living with his father on the farm of appellant at the time the liquor was given him by appellant. The witnesses for the defense testified that prosecutor, in size and appearance, showed all the evidences of maturity, and did not look under 21 years of age. Appellant testified that he did not know the minor was under 21 years of age, but, on the contrary, thought he was that age. The father and mother testified that they had never forbade appellant giving the minor whisky, and had never informed him of his minority; and there is not a suspicion that he knew prosecutor was a minor. It is not an offense against the laws of this state to give or sell whisky to a minor, per se, but it must be so sold or given knowingly. There is nothing in the record showing that the whisky was so given, but, on the contrary, appellant believed he was 21 years of age, and seemed to be a man, in looks and appearance.

Because the evidence fails to show that appellant knowingly sold or gave whisky to the minor, the judgment is reversed, and the cause remanded.

FLYNN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

NEGLIGENT HOMICIDE—EVIDENCE.

1. Under the statute defining negligent homicide of the second degree as a homicide committed by negligence of a person while in the performance of an unlawful act, and providing that there must be no apparent intention to kill, the submission of such an issue is error; the testimony for the state tending to show a homicide committed on malice, and that for defendant a killing in self-defense in resistance of robbery.

2. Where defendant was convicted of negligent homicide, and the conviction was set aside, it was an acquittal of all degrees of culpable homicide above that of negligent homicide.

Appeal from district court, Lamar county; Ben H. Denton, Judge.

Jack Flynn was convicted of negligent homicide in the second degree, and appeals. Reversed.

Dudley & Sturgeon, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of negligent homicide in the second degree, and his punishment assessed at a fine of \$2,500; hence this appeal.

Appellant presents a number of assignments, but it is only necessary to discuss one; that is, does the evidence sustain the conviction for negligent homicide of the second degree? The testimony on the part of the state tended to show a homicide on malice, while that on the part of defendant tended to show a homicide committed in self-defense against an attempt to rob, or the appearance of an attempt to rob, from appellant's standpoint. Both theories, and the evidence to sustain them, indicate an intentional killing. Our statute defines negligent homicide of the second degree as a homicide committed by negligence of the party doing it, while such party was in the performance of an unlawful act, the same being within the category of misdemeanors, or, such act not being a penal offense, would give just occasion for a civil action. It also provides that the homicide must be the consequence of the act done or attempted to be done, and that there must be no apparent intention to kill. As we understand it, merely carrying a pistol, which was intentionally used to kill, could not result in negligent homicide, because, in the first place, carrying the pistol was not the proximate cause of the death, and shooting with intent to kill showed an apparent intention to kill. By way of illustration as to what would constitute negligent homicide, if one should be unlawfully carrying a pistol, and carry it in such negligent manner as that it should fall from his person onto the sidewalk, and should be discharged and kill a bystander, this would constitute negligent homicide, because the pistol was carried unlawfully, and so negligently as that it was discharged on a public thoroughfare where people were passing. In such case there was no apparent intention to kill. If we look to the record, as stated before, the state's theory was to the effect that appellant entertained malice toward deceased, Peppers, because the latter was interfering with a woman whom appellant was keeping. And according to its contention, the offense would have been at least manslaughter, because the shooting was not shown to have been necessary, and appellant may have been influenced in his action by terror on account of an anticipated attempt to rob him. Appellant's own evidence (and he is the only witness testifying on this point) states that he shot at deceased because he believed he was advancing on him to rob him. From either standpoint it cannot be claimed there was any negligence, because there was an intention to kill. We accordingly hold that the court erred in submitting the issue of negligent homicide at all, even if it be conceded that same was properly submitted in the charge, which is not the case here. We further hold that inasmuch as appellant has been acquitted of all degrees of culpable homicide above that of negligent homicide, and the evidence showing that he is not guilty of that offense, the prosecution must be dis-

missed, unless the state can produce evidence showing negligent homicide.

The judgment is reversed, and the cause remanded.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

INTOXICATING LIQUORS—EVIDENCE—ILLEGAL SALE.

Evidence that a tonic sold contains $3\frac{1}{2}$ to 4 per cent. of alcohol, and that it could be drank in such quantities as to make persons intoxicated, is sufficient proof that it is intoxicating, in prosecution for violation of local option law.

Appeal from Hunt county court; R. D. Thompson, Judge.

Frank Johnson was convicted of an illegal sale of intoxicating liquors, and appeals. Affirmed.

Bennett & Jones, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail; hence this appeal.

Appellant's only contention is that the testimony is insufficient to show that Malt Liquor and Dallas Tonic, sold to the prosecutor, was intoxicating liquor. Referring to the statement of facts, it will be seen that the intoxicating properties of the beverage sold was the controverted question. We are not authorized, however, to pass on the weight or the preponderance of the testimony, the rule being, if there is sufficient testimony to support the verdict, it will be sustained. The testimony on the part of the state shows that the liquor bought was pint bottles, the same size and shape as lager beer bottles; that they were sealed the same as beer bottles, and, when opened, contained gas, which caused the liquid to foam like beer; that it tasted like beer, looked like beer, smelled like beer, was the color of beer, and sold at the same price as beer, and put up and sold by the brewery people who make beer. Witness stated that what he drank did not appear to be as strong as ordinary beer; that he drank a great deal of beer and whisky, and that he could tell an intoxicant; that, in his opinion, the liquor was intoxicating. It is also shown that the state had one Westbrook, a chemist, to analyze two of the bottles of beer bought,—one of Malt Tonic and the other of Dallas Tonic; and also a bottle of beer bought from a saloon in Greenville. According to his testimony, the test showed that the beer bought in Greenville contained 8 per cent. of alcohol, while the Dallas Tonic contained 7 per cent., and the Malt Tonic $7\frac{1}{2}$ per cent. of alcohol. Appellant insists, however, that on the cross-examination of this witness he showed that

the tonic bought contained only $2\frac{1}{2}$ per cent. of alcohol. While it may be conceded that the testimony of Westbrook is not entirely accurate, still we do not understand him to admit that the tonic contained only $2\frac{1}{2}$ per cent. of alcohol. He does state that the alcohol in the bottles which were exhibited in court contained at the least 50 per cent. of alcohol. He states that this alcohol was obtained from about two-thirds of a bottle of each of the liquors analyzed. The bottles exhibited in court were about half full of the liquid said to be alcohol. Concede there was only 50 per cent. of alcohol in these bottles, still the calculation would show more than $2\frac{1}{2}$ per cent. of alcohol to the pint. Besides, this witness says there was at least 5 per cent. of alcohol in the tonic analyzed by him. As we understand, ordinary beer contains from 3 to 5 per cent. alcohol,—some weaker and some stronger. True, although a great number of bottles were sold by appellant claimed to be the same character of beverage as that for which he was prosecuted, and yet no one was shown to have become drunk by drinking the beverage, yet it is a little remarkable as to the quantity of the beverage sold, and mostly drank by beer drinkers. And it is further in testimony in this connection that the druggist who opened up in that precinct and sold liquor on prescription for a short time materially injured the business of appellant in the sale of his tonic. And the evidence of appellant all tends to show that those who were fond of strong drink, while the tonic was on sale, frequented his premises, and drank a great deal of this beer. One witness stated that he drank a great deal of appellant's Malt Tonic and Dallas Tonic, and some people might say he was drunk on it, but he was not; that he did not think it was strong enough to intoxicate him; that it looks, tastes, and smells a good deal like beer, but he never saw any one get drunk on it; that he sometimes drank 15 or 20 bottles of beer in a day. He further stated that he drank a great deal of whisky and beer; that his first choice was whisky, his second beer, and his third was Malt Liquor; that this stuff might make some people drunk, but he did not think it would make him drunk. Appellant also had an expert witness,—Prof. Connor,—whom he brought from Dallas for the purpose, who testified in his behalf. He stated that at the instance of appellant he had analyzed two compounds, one manufactured in Ft. Worth, and labeled "Malt Tonic," and a compound put up and sold by the Dallas Brewery, labeled "Dallas Tonic." After a thorough and complete analysis of the two liquids, he determined that one contained $1\frac{1}{8}$ parts of alcohol, and the other $2\frac{1}{2}$ parts by volume. He states that he followed practically the same process as Westbrook. However, he made his examination by a synthetic table that he had, while Westbrook reached his by a mathematical calculation. This witness stat-

ed that Westbrook used practically the same apparatus that he used, and there was no reason why he should not have made a correct test of the liquor with his apparatus, and he could not say his process was incorrect in any particular. We think that, making due allowance for any possible inaccuracy on the part of Westbrook's analysis, taking the testimony of the two experts and of the witnesses both for the state and the defendant, it is sufficient to show that the beverage sold must have contained from $3\frac{1}{2}$ to 4 per cent. of alcohol, and that this could be drank in sufficient quantities to make persons intoxicated. In addition to this, appellant is shown to have procured a United States internal revenue license for the purpose of selling malt liquors. With reference to beer being an intoxicant, some of the courts take judicial cognizance that it is so, while others leave this question to be settled by the jury according to the proof. Of course, the word "beer" is a general term, and includes both alcoholic liquors and a class of nonintoxicants made from the roots or other parts of various plants, such as spruce beer, ginger beer, and the like. Lager beer is known as a malt liquor. Black, Intox. Liq. § 17. The label on this particular beer advertised it as not containing over 2 per cent. of alcohol. Even if this be true, we are not prepared to say that this quantum of alcohol in beer might not intoxicate some persons. However, it would be an easy matter to place such advertisement on beer containing a much greater percentage of alcohol, and might be simply an evasion; the tendency of the times being to pander to the trade, thus increasing the amount of the alcohol in the beverage. Although appellant was indicted a number of times, he persisted in the sale of this beverage, which, we think, under the proof, shows was calculated to intoxicate people who might drink it in such quantities as may be practically drank. The judgment is affirmed.

TATUM v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

HOMICIDE—EVIDENCE—IMPOTENCE.

On prosecution for murder, where accused claimed that he killed deceased because he had raped accused's wife, and the state claimed that deceased was so old and decrepit as to be impotent, defendant could not show that deceased had said shortly before the homicide that he wanted to get a woman to sleep with, and had proposed marriage to a certain witness some two years before his death.

Appeal from district court, Hill county; W. Poindexter, Judge.

W. M. Tatum was convicted of murder, and appeals. Affirmed.

Ivy & Scruggs and Douglass & Shurtiff, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was charged with the murder of his father-in-law, and upon trial was convicted, and his punishment assessed at 30 years' confinement in the penitentiary.

Bills of exception Nos. 1 and 2 complain that the court erred in excluding evidence to the effect that deceased had told witness that he wanted to get a woman to sleep with, shortly before the homicide. Bill No. 3 is to the exclusion of the testimony of Anna Patrick that, about two years before, deceased proposed marriage to witness. Appellant's contention is that this would tend to rebut the theory of the state that, on account of the age or decrepitude of deceased, he was impotent, and incapable of committing the crime of rape upon the wife of appellant, which, according to the theory of appellant, was the cause of the homicide. This evidence was inadmissible. The court permitted appellant to prove the general reputation for lasciviousness of deceased, and this was all appellant could legally contend for. Underh. Cr. Ev. § 325; Jones v. State, 38 Tex. Cr. R. 88, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719. Under the facts, appellant was guilty of murder in the first degree. At least, the jury would have been warranted in so finding. He deliberately planned and prepared himself for and took the life of his father-in-law, stating he did so because he was tired of him. The jury were amply warranted in finding the verdict they did.

The judgment is affirmed.

McLENDON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 5, 1902.)

AGGRAVATED ASSAULT—INSTRUCTIONS—APPLICABILITY OF EVIDENCE.

1. Where, on a prosecution for aggravated assault, the evidence showed that the prosecutor first made an assault on accused, an instruction limiting accused's right of self-defense to a case where the prosecutor was about to make an assault upon him calculated to inflict death or injury was erroneous, inasmuch as it suggested that accused actually committed the first assault.

2. On a prosecution for aggravated assault, an instruction that, before accused could protect himself against an assault by the prosecutor, it must have been calculated to inflict death or serious bodily injury, was erroneous.

3. On a prosecution for an aggravated assault, an instruction that accused, in repelling an attack made by the prosecutor, was only authorized to use the force necessary, was erroneous, inasmuch as accused would be entitled to defend himself if it were apparently necessary.

4. Where, on a prosecution for aggravated assault, the complaint charged an assault with a deadly weapon, and the infliction of serious bodily injury, but the evidence showed that after accused, who was first assaulted by the prosecutor, had been pressed by the prosecutor against a counter, he struck the prosecutor three times with a pistol, and desisted as soon as he was released, and there was no evidence to show injuries of an aggravated

character, owing to the character of the injuries, and the fact that the pistol so used was not a deadly weapon, the evidence was not sufficient to sustain a conviction.

Appeal from Hunt county court; R. D. Thompson, Judge.

H. McLendon was convicted of an assault and battery, and he appeals. Reversed.

S. D. Stinson and R. L. Porter, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault and battery, and his punishment assessed at a fine of \$100, and prosecutes this appeal.

Appellant objects to the seventh subdivision of the court's charge on the ground that it limited appellant's right of self-defense to John Cole being about to make an assault upon him calculated to inflict death or serious bodily injury; that then he would have the right to repel such attack, using only such force as may have been necessary, etc. The contention here is that the court tells the jury that appellant would have the right to repel such attack if John Cole was about to make an assault upon him, whereas the facts showed that he was not about to make the assault, but, as shown by the evidence, had already made the assault when appellant struck him with the pistol. And, moreover, that the charge tells the jury that, before appellant was authorized to protect himself against said assault, it must have been calculated to inflict death or serious bodily injury upon him, whereas he could defend himself if the assault was not of that character, but of a less degree. And, again, it is urged that the charge tells the jury that appellant was only authorized to repel the attack, and use force for that purpose, if the same was necessary, whereas appellant could defend himself if it was apparently necessary. We think appellant is correct in each of his contentions, and that the charge in question contains the vices pointed out. The charge should not have been given in that shape, and was calculated to injure appellant's rights. All the evidence shows, both for the state and defendant, including the testimony of the witness John Cole, that he (Cole) made the first assault on appellant; that, when he saw him coming down the aisle with the pistol, he grabbed him and pressed him back over some boxes, and onto the counter, and had him bent back over the counter, when appellant, for the first time, struck him over the head with the pistol. And telling the jury that Cole was about to make an assault upon the person of defendant was a suggestion to them that appellant actually committed the first assault. Furthermore, the jury might seriously doubt whether the assault made by Cole on appellant was calculated to inflict death or serious bodily injury. If the assault was of a less character, still appellant

could protect himself against it; and if he used no more force than was reasonably necessary to protect himself, although his assault might itself be calculated to inflict death or serious bodily injury, still he would be justifiable, and appellant, in repelling the attack, could use any force that, from his standpoint, was apparently reasonably necessary.

The verdict of the jury is also objected to on the ground that the evidence does not sustain the conviction for aggravated assault. If the pistol as used was a deadly weapon, or if serious bodily injury was inflicted on appellant, as both these matters were charged in the information, the verdict can be sustained. The proof here showed that appellant only used the pistol, which was a 45-caliber six-shooter, weighing 2½ or 2¾ pounds, to strike with, after he was pressed back on the counter. The pistol used to strike with was not necessarily a deadly weapon, but will be such, or not, according to the size and manner of using it. *Shadle v. State*, 34 Tex. 572; *Stephenson v. State*, 38 Tex. Cr. R. 162, 25 S. W. 784. Here, appellant, according to the testimony, after he was pressed back by prosecutor onto the counter, struck three licks with the pistol, and as soon as prosecutor turned him loose he desisted. He had full opportunity to continue the assault, or to have shot the prosecutor. Evidently, he did not use the pistol as a deadly weapon. An examination of the record discloses that the injuries were not of a serious character. Prosecutor is not shown to have regarded them as serious, and the physician testified that they were neither serious nor dangerous, so that it was not an aggravated assault by the reason of the infliction of serious bodily injury.

For the reasons indicated, the judgment is reversed and the cause remanded.

HILL v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

GAMING—TEN-PIN ALLEY—STATUTES—IM- PLIED REPEAL.

Pen. Code 1895, art. 388, prohibiting betting at any ten-pin alley, was impliedly repealed as to licensed ten-pin alleys by Gen. Laws 1897 (Called Sess.) p. 51, subd. 19, which levies an occupation tax on bowling alleys used for profit, or upon which money or anything of value is bet.

Appeal from Dallas county court; Ed. S. Lauderdale, Judge.

A. P. Hill was convicted of keeping a ten-pin alley, and appeals. Reversed.

Woods & Baldwin, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted under the following information: "That A. P. Hill, on the 15th day of December, 1900, with force and arms, in the county and state afore-

said, did unlawfully then and there keep and exhibit for the purpose of gaming a ten-pin alley," etc. Appellant filed the following motion to quash the information: "Because it is insufficient in law, and charges no offense against the laws of this state, and because the law licensing the right (by the state) of the defendant to keep and run a ten-pin alley for profit, for the purpose of raising revenue, has the effect to repeal the law making it an offense to keep and exhibit and run the same." This exact question was passed upon by this court in *Rutherford v. State*, 39 Tex. Cr. R. 187, 45 S. W. 579, and under the authority of that case we think the motion should have been sustained.

The judgment is accordingly reversed, and the prosecution ordered dismissed.

WALDRIP v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

APPEAL—JURISDICTION—RECOGNIZANCE—FAILURE TO STATE AMOUNT OF PUNISHMENT.

Under Code Cr. Proc. art. 887, requiring the recognizance on appeal to state the amount of punishment assessed against appellant, where a recognizance does not state the amount of punishment the appeal will be dismissed.

Appeal from Borden county court; J. M. Searcy, Judge.

Frank Waldrip was convicted of assault, and appeals. Dismissed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of a simple assault, and his punishment assessed at a fine of \$5. The assistant attorney general has filed a motion to dismiss this appeal on the ground that the recognizance does not state the amount of the punishment assessed against appellant, as required by article 887, Code Cr. Proc. The motion is well taken. *May v. State*, 40 Tex. Cr. R. 106, 49 S. W. 402.

The appeal is accordingly dismissed.

TINKLE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

CRIMINAL LAW—APPEAL BOND—SUFFICIENCY.

A recognizance on appeal, which fails to state the punishment imposed on appellant, as required by Code Cr. Proc. art. 887, is fatally defective, and ground for dismissal.

Appeal from Navarro county court; A. B. Graham, Judge.

Joe Tinkle was convicted of crime, and appeals. Dismissed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of carrying knucks, and fined \$25. The assistant attorney general moves to dismiss this appeal because the recognizance is fatally defective, in that it fails to state the punishment assessed against appellant. The point is well taken under the provisions of article 887, Code Cr. Proc.

The appeal is dismissed.

McARTHUR v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

CRIMINAL LAW—APPEAL—NOTICE TO TRIAL COURT—NECESSITY.

A record on appeal in a criminal case, which does not contain a notice to the trial court of the appeal, is defective, and ground for dismissal.

Appeal from Kent county court; B. N. Grisham, Judge.

Ed McArthur was convicted of crime, and appeals. Dismissed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$25, and 30 days' confinement in the county jail.

The assistant attorney general moves to dismiss the appeal herein because the record does not contain a notice of appeal given to this court in the court below. We find the motion is well taken, and it is accordingly sustained.

The appeal is dismissed.

MERCER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

THEFT—EVIDENCE—ADMISSIBILITY—IMPEACHING CREDIBILITY OF WITNESS—PREJUDICING JURY.

1. In a prosecution for theft, where defendant's counsel had stated privately to the court that defendant had been indicted for seduction in a part of the county where some of the jury were from, and had afterwards married, it was error not to sustain defendant's objection to questions asked his mother, as to whether she would know her daughter-in-law if she saw her, and as to whether she ever saw defendant with his wife, etc., as immaterial and calculated to prejudice the jury.

2. In a prosecution for theft, where defendant's mother had testified to an alibi, it was error to permit her to state on cross-examination that she had testified to an alibi for him in four other cases, also; such testimony not having any tendency to destroy her credibility, and calling the jury's attention to the fact that defendant had been tried for other crimes.

3. In a prosecution for theft of a buggy and harness, testimony by a witness for the state, who claimed that he acted as a detective in the transaction, that a third person reported to him that he had bought a buggy and harness from defendant, and sold it to another party, etc., was not admissible, even to show in what

capacity witness acted; his declarations to other parties not being admissible to corroborate his own testimony that he acted as a detective.

4. In a prosecution for theft, testimony by the prosecuting witness that he was employed by a third person for the purpose of detecting the parties suspected of crime in the vicinity, including defendant, was inadmissible, because introducing against defendant the employer's opinion that defendant was guilty of a crime.

Appeal from district court, Johnson county; W. Poindexter, Judge.

Ernest Mercer was convicted of crime, and appeals. Reversed.

Ramsey & Odell, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was indicted for the theft of a buggy of the value of \$60, and one set of harness of the value of \$8, and upon conviction his punishment was assessed at five years' confinement in the penitentiary.

By the first bill of exceptions it is made to appear: "Mrs. Leakey, on cross-examination, was asked by state's attorney if defendant was married, and witness replied she did not know; she did not see him married. Whereupon counsel asked if she had ever seen his wife, and witness answered that she did not know if she had. Whereupon defendant's counsel stated privately to the court that defendant had been indicted for seduction, and afterwards married; that said occurrence happened in that part of the county from where some of the jury were from, and the state was seeking to elicit this information for the purpose of refreshing the memory of said jurors, and thereby prejudicing defendant's cause. And said counsel, in open court, objected to any interrogatories of said witness on said point, as same were wholly immaterial, irrelevant, and tended to throw no light on any issue in this case, and such immaterial investigation as aforesaid is greatly calculated to prejudice the jury against him, and influence their minds against him." To which the judge attached the following explanation: "There is no proof that the jury, or any member thereof, knew anything about defendant or his former marriage; nor has there been any question asked touching any seduction case in any court, but the question propounded is, 'Is your son married or not?' Witness answered she understood he was, but was not at the wedding, and did not know of her own knowledge, etc. The answers to these questions are, in the opinion of the court, material." "And be it further remembered that in connection with the above bill, and the judge's explanation and approval thereof, the following proceedings were also had: Said witness was asked as to whether or not her daughter-in-law had ever spent a night with her, to which she answered, 'No,' and was asked as to whether or not she would know her daughter-in-law if she were

to see her, to which she answered, not that she knew of. That she was then asked as to whether or not she ever saw defendant with his wife, or with any one he said was his wife, to which she answered, 'No.' To all of which questions and answers defendant objected because same were immaterial and irrelevant, and tended to throw no light on any issue in this case, but, on the other hand, were highly calculated to prejudice, by suspicion, the minds of the jury against defendant. * * * To which the court added the additional explanation "that witness had testified on direct examination that defendant was not twenty-one years old, and that he slept at home, and the court thought it material to show on cross-examination that he was married, as a circumstance tending to show that he was a full-grown man, and slept with his wife, who ought to be the best witness of his whereabouts; and, besides, if he was married, and witness knew it, she ought to know his wife. Upon being informed privately by defendant's counsel that defendant had been prosecuted for seduction, the court called state's counsel up and informed him that no inquiry into that would be permitted, and none was made." We do not think the testimony contained in this bill was admissible, even under the court's explanation. The facts that appellant "may have been or was a full-grown man, and slept with his wife, who ought to be the best witness of his whereabouts; and, besides, if he was married, and witness knew it, she ought to know his wife,"—are not circumstances throwing any light upon the guilt or innocence of appellant as to the charge on which he was being tried. The only tendency of this testimony could have been to call the attention of the jury to the fact that appellant had been prosecuted for seduction, and thereby unduly prejudice his rights in this trial. We are not to be understood as holding that under no conditions would it be a pertinent inquiry to ascertain the whereabouts of the wife of an accused who is on trial, but we fail to see any pertinency or connection of the testimony indicated in this bill with the prosecution here.

The second bill of exceptions is as follows: "Witness Mrs. Leakey (mother of defendant), when upon the witness stand, was being interrogated by state's counsel on cross-examination, having on her direct examination testified, in substance, to an alibi for defendant; and state's counsel asked said witness if she had not testified for an alibi for defendant in three different cases in the district court in the city of Ft. Worth, and also in a case in the district court of this county, whereupon said witness stated she did not understand what an alibi was, and the court informed her an alibi, in law, meant that defendant was at another and different place, and could not have been present when the offense with which he

was charged was committed. After said explanation, witness answered that she had so testified in Ft. Worth, and that she had also so testified in a case in this court. To which question and answer defendant then and there, in open court, excepted, because said testimony was immaterial and irrelevant, and same was inadmissible for the purpose of discrediting the witness, and not throwing any light on the issue of her credibility, or any other issue, and was calculated to prejudice defendant before the jury, and bring before the jury the fact and circumstance that defendant had theretofore been charged with theft in four more cases, which objection was overruled," etc. The court attaches the following explanation: "The court did not allow this witness to state what defendant was charged with in the other cases. The court was of opinion that, if this witness had testified to an alibi for this same defendant in four other different cases, it was a circumstance the jury might take into consideration, in connection with other evidence, in passing on her credibility. It was limited to that purpose at the time and in the charge." Certainly the fact that it was limited would take away some of the vice in the error, but we cannot see how the fact that the mother of appellant had previously testified in other cases to an alibi for her son would or could have any tendency to destroy her credibility. The fact that she had previously testified in other cases in behalf of appellant might have been shown as a circumstance to indicate her bias or prejudice in his favor, but, being his mother, this certainly was unnecessary here. The testimony was highly prejudicial to the rights of appellant, in that it called the attention of the jury to the fact that he had been tried for other and divers crimes. This testimony should not have been admitted.

Bill of exceptions No. 3 is as follows: "Witness Jim Ellis, when on the stand as a witness for the state, was asked the question as to what, if anything, state's witness Jack Hubbard had reported to him when he returned from Ft. Worth on the evening of the day the stolen buggy was sold; and said witness was permitted to answer that Hubbard said to him that he bought a buggy and harness from defendant in Ft. Worth, and had sold it to another party in Ft. Worth; that he had defendant, Mercer, where he wanted him, and where he could not get away, if he did not get the buggy in question from one of his clan. To which question and answer defendant objected because the same was immaterial, irrelevant, and hearsay, calculated to prejudice the jury against defendant,—the same being a mere expression of opinion by witness Hubbard,—which objection was by the court overruled, and defendant excepted." The court appends the explanation "that this was admitted for sole purpose of showing the ca-

capacity in which this witness acted, and was so limited in the charge." The testimony was not admissible for this purpose, because the witness could not corroborate himself. He insisting that he acted in the role of a detective in the transaction, his declarations to that effect to other parties could not be admitted to corroborate himself. Furthermore, it was *res inter alios acta*, and such testimony can never be admitted. Defendant was not present, and knew nothing of the declarations of the witness Hubbard, and same were expressions of opinion of witness Hubbard, as insisted upon by appellant's counsel.

The fourth bill of exceptions is as follows: "Prosecuting witness Jack Hubbard was on the stand as a witness for the state, and was asked by state as to what his business was at Burleson, and what his object was in going into the 'joint business'; and, over objection of defendant, said witness was permitted to state, and did state, that he engaged in the joint business, and was engaged as a detective by one Jim Ellis, for the purpose of detecting the parties suspected of crime at Burleson, including this defendant and one John McGee. To which question and answer defendant objected for the reason that it was immaterial and irrelevant as to what business Hubbard was engaged in, or as to why he was engaged in the joint business, and was calculated to prejudice the jury against this defendant, in causing the jury to believe it was the judgment and opinion of said Ellis and said Hubbard that defendant had committed other crimes, and that it was necessary to go into the joint business, and accept service as a detective, for the purpose of catching him in the act of committing crime, which objections were by the court overruled, and witness answered as stated." The judge qualifies this bill by stating, in substance, the evidence was admitted for the sole purpose of showing the capacity in which witness acted, and character of his connection with defendant and the buggy; and defendant showed that witness was engaged in the joint business. The fact that the detective Hubbard went into the joint business, and was engaged as a detective by Jim Ellis for the purpose of detecting parties suspected of crime at Burleson, including defendant and McGee, would not be admissible testimony. The detective could testify that he acted in that capacity, but that another party employed him for the purpose of detecting this defendant and McGee would be introducing against appellant the opinion of the employer, Ellis, as a criminative fact. It would not be permissible to prove that Ellis thought appellant was guilty of a crime, as disclosed by this bill. Although the court limited the evidence, still it should not have been admitted for any purpose.

For the errors discussed, the judgment is reversed and the cause remanded.

BASS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

DISORDERLY HOUSE—COMPLAINT—SUFFICIENCY—INSTRUCTIONS.

1. A complaint for keeping a disorderly house, charging that defendant on or about a certain day, and in a certain place, "was then and there the owner, tenant, and lessee of a certain house, * * * then and there situate, * * * and as such owner, tenant, or lessee * * * did then and there unlawfully keep and was concerned in keeping said house * * * as a house for the purpose of prostitution, and where prostitutes are permitted to resort and reside for the purposes of plying their vocation," is good.

2. A charge that a disorderly house is one kept for prostitution, or where prostitutes are permitted to resort; that there are three essential ingredients of the offense: (1) That the owner, lessee, or tenant of the house was the defendant; (2) that the house was run as a place where prostitutes were permitted to resort for the purpose of plying their vocation; (3) that prostitutes did resort there for the purpose of plying their vocation, etc.; that if defendant, at any time within two years next before the date alleged, was owner, tenant, or lessee, and kept said house for the purposes named, the jury should find him guilty, —was not objectionable as not responsive to the complaint.

3. The charge is not objectionable, as calculated to mislead the jury into believing that they were bound to convict defendant if the facts stated were proved, whether or not defendant knew prostitutes resorted or resided there for the purpose of plying their vocation.

Error from Dallas county court; Ed. S. Lauderdale, Judge.

M. N. Bass was convicted of crime, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Complaint was filed in the corporation court of the city of Dallas against appellant, charging him with keeping a disorderly house; and upon trial he was convicted, and appealed to the county court of Dallas county. There, upon another trial, he was adjudged guilty, and his punishment assessed at a fine of \$200.

It is contended the complaint is not sufficient. The charging part thereof is as follows: "That M. N. Bass, on or about the 1st day of April, A. D. 1901, and before the making and filing of this complaint, in the city of Dallas, in Dallas county and state aforesaid, was then and there the owner, tenant, and lessee of a certain house, building, edifice, and tenement, then and there situate, and, as such owner, tenant, and lessee of said house, building, edifice, and tenement, did then and there unlawfully keep, and was concerned in keeping, said house, building, edifice, and tenement as a house for the purpose of prostitution, and where prostitutes are permitted to resort and reside for the purposes of plying their vocation," etc. We are of opinion that this complaint is good.

Appellant in his bills of exception and motion for new trial complains of the court's charge, which is as follows:

"A disorderly house is one kept for prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation.

"There are three essential ingredients of this offense that must be established by the state by legal and competent evidence beyond a reasonable doubt: (1) that the owner, lessee, or tenant of said house is M. N. Bass; (2) that said house is run as a place where prostitutes are permitted to resort and reside for the purpose of plying their vocation; (3) that prostitutes did resort and reside there for the purpose of plying their vocation. And if the state fails to establish any one of these ingredients, by legal and competent evidence, beyond a reasonable doubt, you will acquit the defendant.

"The defendant, M. N. Bass, is presumed to be innocent until his guilt is established, by legal and competent evidence, beyond a reasonable doubt, and, in case you have a reasonable doubt, you will acquit him.

"You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony.

"If you believe from the evidence beyond a reasonable doubt that defendant, M. N. Bass, in the city of Dallas, county of Dallas, and state of Texas, at any time within two years next before the 1st day of April, A. D. 1901, was then and there the owner, lessee, or tenant of a house then and there situated, and that said M. N. Bass did then and there unlawfully keep, and was concerned in keeping, said house as a house for the purposes of prostitution, and where prostitutes are permitted to resort and reside for the purpose of plying their vocation, then you will find the defendant guilty, and assess his punishment at a fine of two hundred dollars."

Appellant complains of said charge, because the same is not the law applicable to the offense alleged against him by the complaint, and because there is no allegation in the complaint that prostitutes were permitted to resort or reside at said house for the purpose of plying their vocation at the time defendant is charged to have kept said house; and, further, because the same was calculated to mislead the jury in believing that they were bound to convict defendant if these facts were proven by the state, whether defendant knew prostitutes resorted or resided there for the purpose of plying their vocation or not, thus excluding from the consideration of the jury one of the defenses raised by the evidence. We do not think the charge is subject to the criticisms above stated, but believe it is a proper presentation of the law applicable to the case, and is responsive to the complaint.

Appellant asked various special charges,

all of which, so far as applicable, were given in the main charge of the court.

No error appearing in the record, the judgment is affirmed.

WILBORNE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

CRIMINAL LAW—INDICTMENT—SEPARATE ALLEGATIONS—GENERAL VERDICT.

A general verdict of guilty on a trial on an indictment containing two distinct phases of the offense of abusive language, as defined by Pen. Code, art. 509, is sufficient, where the evidence will sustain either allegation.

Appeal from Tarrant county court; M. B. Harris, Judge.

Will Wilborne was convicted of crime, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of using abusive language in the presence of another, etc., under article 509, Pen. Code, and his punishment assessed at a fine of \$5.

Appellant contends that the allegations in the indictment present two distinct phases of abusive language; that the jury should have found by their verdict under which allegation they rendered the same. We do not understand this to be the rule. If the evidence will sustain either allegation, it can be applied to such allegation. *Willis v. State*, 34 Tex. Cr. R. 148, 29 S. W. 787; *Southern v. Same*, 34 Tex. Cr. R. 144, 29 S. W. 780, 53 Am. St. Rep. 702.

The judgment is affirmed.

CROWLEY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE—SUFFICIENCY.

A recognizance, on appeal from a conviction of misdemeanor, which fails to state the punishment imposed, as required by Code Cr. Proc. art. 887, is defective, and ground for dismissal.

Appeal from Borden county court; J. M. Searcy, Judge.

R. G. Crowley was convicted of a misdemeanor, and appeals. Dismissed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of a misdemeanor, and his punishment assessed at a fine of one dollar. The assistant attorney general has filed a motion to dismiss the appeal on the ground that the recognizance is defective, in that it does not state the amount of the punishment assessed against appellant, as required by article 887,

Code Cr. Proc. The motion is well taken. *May v. State*, 40 Tex. Cr. R. 196, 49 S. W. 402.

The appeal is dismissed.

HARKEY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE—SUFFICIENCY.

A recognizance, on appeal from a conviction of misdemeanor, which fails to require appellant to appear before the court, and "to abide the judgment of the court of criminal appeals," as required by Code Cr. Proc. art. 887, is defective, and ground for reversal.

Appeal from Floyd county court; Arthur B. Duncan, Judge.

High Harkey was convicted of a misdemeanor, and appeals. Dismissed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail. The recognizance fails to require appellant to appear before the county court in order to abide the judgment of the court of criminal appeals. The recognizance is defective, in that it fails to state that portion of the form prescribed by the legislature, "In order to abide the judgment of the court of criminal appeals of the state of Texas in this case," as required by article 887, Code Cr. Proc. The motion of the assistant attorney general is sustained.

The appeal is dismissed.

JONES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

CRIMINAL LAW—APPEAL—FINAL SENTENCE—NECESSITY—MANDAMUS.

1. Mandamus will not issue from the court of criminal appeals to compel the clerk of the court below to enter the sentence in a criminal case on the record.

2. Until the sentence in a criminal case has been properly passed and entered on the minutes of the court below, an appeal will not lie.

Appeal from district court, Navarro county; L. B. Cobb, Judge.

Will Jones was convicted of crime, and appeals. Dismissed.

W. W. Ballew, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for forgery, with two years' confinement in the penitentiary. The assistant attorney general moves to dismiss the appeal because the record does not contain a final sentence. An examination of the transcript sustains this conten-

tion. Appellant files a contest, in which he states, as a matter of fact, sentence was passed upon him during the term of the court at which he was tried, and that by omission of the clerk it was not entered upon the minutes of the court. He prays that a mandamus issue requiring the clerk to enter now upon his minutes said sentence, and for a certiorari to bring up the completed record. The statute provides that where sentence is not pronounced during the term it may be at any subsequent term of the court. There are two methods by which this sentence may hereafter be entered,—one, by simply pronouncing sentence upon defendant, or by proper motion, entering the same *nunc pro tunc*. A mandamus will not issue from this court commanding the clerk of the court below to enter the record of the sentence. However, this does not militate against the right of an accused, when sentence is properly entered, to prosecute his appeal. Under our law, this court in non-capital felonies is without authority to try appeals. In other words, until the sentence has been properly passed and entered upon the minutes of the court below, so as to authoritatively appear to this court, our jurisdiction does not attach.

As the matter is presented, the motion of the assistant attorney general is well taken, and the appeal is dismissed.

RACE v. STATE.¹

(Court of Criminal Appeals of Texas. Dec. 18, 1901.)

OBSTRUCTING A PUBLIC ROAD—EXISTENCE OF PUBLIC ROAD—EVIDENCE—SUFFICIENCY.

A road which has been recognized and worked by the public authorities for some 25 years or more, and which has been traveled by the public for over 20 years, is a public road, though there is no evidence of any condemnation proceedings of the land for a road, nor any evidence that the landowner ever received compensation.

On Motion for Rehearing.

1. A road may be shown to be a public road by evidence of long-continued usage, assignment of hands to work it by the proper authorities, and the like.

2. The mere failure of the commissioners' court to comply with all the statutes relating to laying out public roads will not per se vitiate the orders of such court, and render the land taken not a public road.

3. A road becomes a public road when the commissioners' court recognizes it as a public road by assigning hands to work it, and the public use it as a public road.

4. Where land has been taken for, used, and known as a public road, the landowner cannot obstruct the same, though he has not been paid for such taking, the constitutional guaranty that a person's property shall not be taken for a public use being applicable only to an attempt to take a person's land for a public use.

Henderson, J., dissenting.

Appeal from Anderson county court; G. W. Hudson, Judge.

¹ Rehearing denied February 12, 1902.

George Race was convicted of obstructing a public road, and appeals. Affirmed.

Thos. B. Greenwood and West & Cochran, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of obstructing a public highway, and his punishment assessed at a fine of \$5.

It appears from the statement of facts that the road alleged to have been obstructed ran through the town of Neches, which had been laid out in lots and blocks. The road ran across the lots and blocks purchased by appellant from the New York & Texas Land Company. This company had previously received a deed for said land from the International & Great Northern Railroad, but the deed of the conveyance was not shown; nor was it shown when the International & Great Northern Railroad acquired title. It was shown, however, that the road ran through the ground occupied by said lots for some 25 years or more, and that said road had been worked by hands allotted to work it by the commissioners' court of Anderson county, and that the public had traveled and used it as a public road for as long as 20 years. There was no evidence of any condemnation proceedings as to said property for road purposes, nor was there any evidence that the owner or owners thereof had ever received any compensation. About April 30, 1901, appellant built a fence around the lots he had bought, which obstructed the public road running over the same. It is contended by appellant that the evidence is not sufficient to support the conviction, citing in support thereof *Smith v. State* (Tex. Cr. App.) 40 S. W. 736. That case merely lays down the proposition that a mere permissive use for 20 years of a road over the land of another is not sufficient on which to base prescriptive right in the public to the road. That was not a case where the commissioners' court had created the road a public one, and had assigned hands to work the road, and the same had been continuously used by the public for a series of years, as appellant seems to have concluded. Hence that case is not applicable here. The law with reference to the facts in this case has been thoroughly reviewed and discussed in the cases of *Dodson v. State* (Tex. Cr. App.) 49 S. W. 78, and *Ward v. State* (Tex. Cr. App.) 60 S. W. 757, 1 Tex. Ct. Rep. 565, and we do not deem it necessary to add anything to what we there said. Under the authority of those cases, the judgment herein is affirmed.

HENDERSON, J. (dissenting). The proposition on which the state claimed that it was a public road was that the public had, on account of long usage of the same, acquired a prescriptive right to this certain property as a public road; and it is urgently insisted that the burden was on the state to

show that none of the owners of said land labored under any disability during the period of prescription, and cites us to *City of Austin v. Hall* (Tex. Sup.) 57 S. W. 563. That was a case where plaintiff, Hall, sought to recover damages occasioned by defendant city of Austin constructing the dam on the Colorado river which overflowed the road which plaintiff claimed was a public road, and in effect destroyed said road. That case was certified by the court of civil appeals (48 S. W. 53) to the supreme court, the following statement being made as to the situation, to wit: "It was not shown that the land over which the road runs had ever been condemned in the manner prescribed by statute, or donated by the owners thereof, for a public road; and the plaintiffs sought to establish the fact that it was a public road by prescription, resulting from long-continued use by the public. The road extended across various tracts of land. As to some of these tracts the evidence does not show who were the owners during the prescriptive period, and it does not show whether any of the owners were *sui juris* during the time referred to. In fact, there was no direct proof that the title to the tracts of land referred to had ever passed out of the state." Upon this statement the following question was certified to the supreme court: "In order for the plaintiffs to establish a prescriptive right to the road, was it necessary to show that during the prescriptive period the servient estates—the various tracts of land against which the prescriptive right is claimed—were owned by persons free from legal disability, and against whom limitations or prescriptive right could be acquired by adverse use?" To this question the supreme court replied in the affirmative. It was further remarked in this connection: "A right claimed by prescription rests upon the presumption that the owner of the land has granted the easement, and the grant has been lost. To sustain this claim, it must appear that the use upon which the right is predicated has continued the requisite time, during which the owner was not under disability to resist the claim,"—citing various authorities. It occurs to me that the question here is of a similar character; that is, before the state of Texas can recover a fine from the owner of the land for obstructing the road, all the conditions which would give a prescriptive right must be shown; and it must be shown that during the prescriptive period the owner or owners were in condition to make the grant, and were not under disability to resist the claim. I do not believe, therefore, the state discharged the burden imposed upon it, as no attempt was made to show that the parties who had formerly owned the land were not under disability. Under this view of the case, I think the judgment should have been reversed.

On Motion for Rehearing.

(Feb. 12, 1902.)

BROOKS, J. The judgment was affirmed at the Tyler term, 1901, and now comes before us on motion for rehearing. Appellant insists the court erred in affirming the judgment, in the absence of sufficient evidence under the law to establish that the road obstructed was a public road. We do not think the original opinion in this case is at all in conflict with the decisions of the supreme court on the question as to what is a public road. In *Gowhenour v. State*, 33 Tex. Cr. R. 538, 28 S. W. 201, in passing upon a similar question, we said: "The evidence discloses that the fence was erected by Mrs. Spears across a road which had been laid out by the commissioners' court as a public road; that it had been worked and traveled as a public road since 1889; that overseers had been appointed and hands apportioned each year thereafter for the purpose of working and keeping it in repair; that appellant was a hand thus apportioned, and had also acted as overseer in working said road; and that he removed the fence from across the road. It also appears that Mrs. Spears had not been paid any damages for thus appropriating her land for such purpose, nor is it shown that she ever asked for or claimed such damages or compensation. She had her remedy by civil proceedings in regard to this matter." So we hold in this case that whether the land used as a public road has been paid for or not is a matter that does not affect the question as to whether or not the road is a public road. In *McWhorter v. State*, 43 Tex. 666, the supreme court said: "We are of the opinion that the road may be shown to be public by other evidence than the production of the order of the county court establishing it as such. While there is some obscurity in parts of the evidence, and it is apparently to some extent conflicting, we think it may well have satisfied the jury that that part of the road obstructed by appellant had long been used as a public road, and had been recognized as such by order of the county court apportioning hands to work it." A road may be shown to be a public road by other evidence than by the production of the order of the county court establishing it as such. Long-continued usage, with assignment of hands to work the same by the commissioners' court, regardless of whether all of the steps necessary were taken to a statutory condemnation of the same as a public road, would make the same a public road. We find no authority holding that the bare fact that the commissioners' court has failed to comply with any particular clause of the statute under which they are authorized to act in condemning land for public road purposes *per se* would vitiate the orders of the commissioners' court, and render the land so taken not a public road. The

question of time that the road may have been used as such, as we understand the matter, is not at all material in considering the question as to whether the same is public. As stated above, the orders of the commissioners' court designating the road may be irregular, but, if the commissioners' court assign hands to work a certain road, thereby declaring it a public road, and the hands do work it, and the public use it as such, it then and there becomes a public road. As indicated in *Gowhanour's Case*, *supra*, we have no concern with whether or not appellant has been paid his damages. The furthest this court has ever gone on the question of compensation for land taken is that the party can prevent the same being taken in the first instance. *Bradley v. State*, 22 Tex. App. 330, 2 S. W. 828; *Thompson v. State*, 22 Tex. App. 328, 3 S. W. 232. Our constitution guarantees a person's property shall not be taken, damaged, or destroyed or applied to public use without adequate compensation being made, unless by the consent of such person, and, when taken, except for the use of the state, such compensation shall be first made. If this was a case in which the commissioners' court attempted to take appellant's land, then he could invoke the beneficent principle enunciated in the constitution. But the property has already been taken or used, designated, and known as a public road. Then what are his rights? Can he obstruct the same, inclose it, and use it to the exclusion of the public? We say not. He has his remedy through the civil courts of the country. What they are we are not called upon to say. We hold that the evidence in this case, under an unbroken line of decisions, supports the proposition that the testimony shows the road was a public road, and that appellant willfully obstructed the same. For a full discussion of what is a public road, see *Berry v. State*, 12 Tex. App. 249; *Hall v. State*, 13 Tex. App. 269; *Meyer v. State*, 37 Tex. Cr. R. 462, 36 S. W. 255; *Markham v. Railroad Co.*, 1 White & W. Civ. Cas. Ct. App. § 81; *Dill Mun. Corp.* § 631; *Elliott, Roads & S.* §§ 114, 123, 127, 160.

The motion for rehearing is overruled.

HENDERSON, J. I dissent from the views expressed in the majority opinion, and refer to dissenting opinion on the original hearing, and also refer to dissent in *Ward v. State* (Tex. Cr. App.) 60 S. W. 757, 1 Tex. Ct. Rep. 563.

McGEE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

THEFT—CONSENT—EVIDENCE—INSTRUCTIONS.

1. A witness for the prosecution having testified, on cross-examination, that he had been running a "joint" in the capacity of detective, without being questioned as to his right to act

as detective, cannot show who employed him as such detective, nor that he opened the "joint" at the instance of certain persons.

2. Where a witness for the prosecution on a trial for a crime testified, on cross-examination, that he had been running a "joint" in the capacity of detective, it was error to permit the state to prove that such witness came to town and opened a "joint" at the request of certain persons for the purpose of detecting defendant in crime.

3. Where the prosecution was improperly permitted to prove that a state's witness came to town and opened a "joint" at the instance of certain persons to detect defendant in crime, an instruction limiting the effect of the testimony to showing the capacity in which the witness acted, and that it could not be considered as evidence of defendant's guilt, did not cure the error.

4. On a prosecution for larceny, where defendant relied on the owner's consent, express or implied, to the taking, an instruction that defendant was not guilty if induced to take the property by one who had the owner's consent, or if such a one led the defendant to believe that the owner had consented to the taking, whether or not the owner had actually consented, is erroneous for failing to instruct in reference to an implied consent of the owner and the nature thereof.

5. On a prosecution for larceny, the owner of the property testified that a detective informed him of a contemplated larceny of his property by defendant, a third person, and the detective; that the latter claimed to be working to catch defendant and such third person; and that the owner had stated to the detective that they had better leave his cattle alone, but if they came to get them the detective should go ahead and catch them. The detective testified that he told the owner that defendant and a third person and himself intended to steal his cattle; that he wanted the party from whom they wanted the cattle to be informed, so as not to take any chances. The owner and another were in wait, and watched the taking of the cattle. *Held*, that evidence was sufficient to show that the owner consented to the taking.

6. A person induced by a detective to join in the taking of certain cattle, who knows that such detective has the express or implied consent of the owner to such taking, or who reasonably believes that the consent has been given, is not guilty of larceny.

Appeal from district court, Johnson county; W. Poindexter, Judge.

John McGee was convicted of theft, and appeals. Reversed.

S. O. Padelford and Ramsey & Odell, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of cattle, and his punishment assessed at confinement in the penitentiary for a term of three years.

According to the state's theory, the theft of the cattle of Hunnicutt, the owner, was committed by appellant and one Mercer, in company with one Jack Hubbard, who acted as a detective, in order to entrap and convict McGee and Mercer. According to the state's contention the theft of the cattle was suggested and brought about by appellant and Mercer; that Hubbard engaged in it at their instance, and merely to detect them in the commission of the offense; that Hunnicutt, the owner of the cattle, did not consent for Hub-

bard, who informed him of the proposed theft, to take the cattle, but merely said, "They had better let my cattle alone, but, if they come to get my cattle, go ahead and catch them." Appellant's theory was to the effect that he engaged in the enterprise at the instance of Hubbard, who suggested it, and that it was for the purpose of detecting the Neeley boys, who had a butcher shop in Cleburne; that the project was to take the cattle with the consent of Hunnicutt, the owner, which he understood Hubbard had procured, and dispose of them to the Neeley boys, and have them arrested for violating the law; and that they were to get a reward which had been offered by some persons in that community. This is a sufficient statement of the case to present appellant's assignments.

Appellant's first and second assignments raise an objection to the testimony of Ellis and Jack Hubbard to the effect that Hubbard was acting in the capacity of a detective at the request of Jim Ellis, Armstrong, Lawson, and old man Pierce; that is, at the instance of said parties, some months before the alleged theft, he had come to Burleson, and opened a "joint" where liquor, etc., was sold, in order to ferret out thefts in that community. The court explains the admission of this testimony upon the ground that defendant proved by the witness Hubbard that he had been engaged in running a "joint" at Burleson, and also that appellant brought out that Hubbard was acting as a detective, and the court thought it was permissible to show the capacity in which Hubbard acted throughout, and also to show who employed him to act in that capacity. We are not apprised that Burleson is a local option precinct, unless the meaning of the term "joint" would indicate that it was such. In that event, it is a doubtful proposition that a party can be employed to habitually violate the law in order to detect criminals. Nor do we think that it was proper to show who employed appellant to act as a detective, unless appellant questioned the right of Hubbard to act as such detective.

The fourth bill of exceptions presents the matter of the employment of this detective in a graver light; that is, according to the bill, the state was permitted to prove that the detective came to the town of Burleson, and went into the "joint" business at the instance and request of Ellis and some of the citizens, to get acquainted with Earnest Mercer and John McGee, and see if he could catch them. The court explains this by stating that defendant proved on cross-examination of the witness Hubbard that he had been engaged in the "joint" business in Burleson in the capacity of detective, and the court permitted him to state that he bought an interest in the business and went into it for the purpose of detecting those engaged in stealing, as they frequented this

place; that those who employed him suggested this course. As explained, we do not understand that the court negatives the statement in the bill to the effect that the detective was employed by certain citizens to detect appellant and Mercer in the commission of the crime, as the court says he admitted the testimony for the purpose of detecting those engaged in stealing, evidently alluding to the testimony with reference to McGee and Mercer. This, in our opinion, was a mode of getting before the jury hearsay testimony in regard to other offenses of a very damaging character against appellant. Nor do we understand that the attempt by the court in the ninth subdivision of the charge to limit the effect of this testimony to be considered by the jury as showing, or tending to show, the capacity in which said Hubbard acted, and they could not consider the same as any evidence of the guilt of defendant, was calculated to rectify the evil; for it showed that the jury were still authorized to use the testimony as showing that Hubbard had been employed to catch appellant and Mercer, suggesting to them that the community suspected these parties of thefts, and they desired them caught.

The real battle ground on the trial was as to whether or not Hubbard had the express or implied consent of Hunnicutt, the owner, to the taking of the cattle; it being contended by appellant, if he had such consent, either express or implied, and that he engaged with Hubbard and Mercer in the commission of the offense, that the consent given by Hunnicutt to Hubbard was consent to all. On the other hand, the state contends that Hunnicutt did not give his consent to the taking of the cattle, and that Hubbard had neither his express nor implied consent; and that consequently the court did not err in charging as he did on the issues presented by the testimony, or in refusing to give appellant's requested instructions on the subject. The court's charge on this line was substantially as follows: "If you believe from the evidence that the said H. T. Hunnicutt agreed or consented for the defendant or Mercer, or either of them, to take such cattle; or if the said Hunnicutt consented to the state's witness Hubbard to take said cattle, and that the said Hubbard induced or procured defendant to join him in taking said cattle; or if you believe from the evidence that said Hubbard informed or by his acts or words or both led defendant to believe that the said Hunnicutt had consented for them to take said cattle; that the defendant joined said Hubbard and Mercer, and, while acting alone or in connection with said parties, took said cattle under such belief, whether said Hunnicutt had actually consented or not,—then, in either of said events, you will find defendant not guilty." It is contended by appellant that this charge did not instruct the jury or inform them as

to any implied consent on the part of Hunnicutt to the taking, or instruct them as to the nature of such consent; and, moreover, that the charge required the jury to believe that Hubbard induced or procured defendant to join in the enterprise, whereas appellant insists that, if Hunnicutt either expressly or impliedly agreed for Hubbard to take the cattle, this consent inured to appellant's benefit, regardless of whether or not Hubbard induced them to join in the enterprise. On this proposition appellant asked a number of charges, all of which, in one shape or another, raise the question of express or implied consent of Hunnicutt to the taking. These charges were refused by the court, and appellant assigns as error the action of the court, both in giving the charge heretofore quoted and in refusing his special instructions. In *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126, the question of consent on the part of the owner to the detective, and participation of the detective with the parties intended to be entrapped, and the bearing of such consent and participation on the guilt of the parties, is discussed, and a number of authorities collated. In that case it appeared that Pinkerton's Detective Agency, in Chicago, received by some means a number of letters and postal cards, written by defendant from Dallas to a friend in Chicago, urging him to come to Dallas, and join him in breaking into and robbing some of the banks in the latter city. These letters were forwarded by the agency to a banker in Dallas, who immediately called a meeting of the bankers, and submitted the matter to them. As a result, Pinkerton was requested to send a detective to Dallas to work up the case. Three detectives were sent to Dallas to work up the case, who immediately put themselves in communication with the bankers in regard to the matter. It was finally agreed that the banking house of Adams & Leonard should be broken into on Sunday night. Adams & Leonard agreed to the adventure, and the detectives were in the venture, working in their employ. Pursuant to the plan agreed upon, several officers of Dallas county entered and took possession of the bank during the daytime, and remained there until the burglary was to be effected that night. About 1 o'clock at night the back door of the bank was forced open by the two detectives, Wood and McGuire, who came in and spoke to the concealed parties, and went into the vault. After remaining about an hour, Wood went out, told Speiden (the defendant) they wanted more help, and returned in a short time, and, coming in, closed the door after him. In a minute or two Speiden came in, and closed the door, when the officers arrested him. Summing up, the court say: "To our minds, it is clear that Deroso and the other detectives were the servants and agents of Adams & Leonard, and had full authority to consent to defendant's entry into the bank, and that his

entry was not only with their consent, but at their solicitation. The case is somewhat like that of a man being robbed by his own consent, although the supposed robbers did not know of the consent." And see *Pigg v. State*, 43 Tex. 106; 1 Bish. Cr. Law, § 262; 1 Whart. Cr. Law, § 149. In *Robinson v. State*, 34 Tex. Cr. R. 71, 29 S. W. 40, 53 Am. St. Rep. 701, which held that no consent of the owner was given under the facts of that case, the principle enunciated in *Speiden's Case* was not gainsaid, but a distinction was drawn between said case and that case. In the latter case there was no question but that Robinson suggested the entire matter to Cox, the detective, who reported it to McDowell, the owner of the alleged burglarized premises. McDowell replied to Cox by saying: "Just let him [defendant] come along, and we will try and catch him, and not insist on his coming, and not encourage him to come. If he comes, let him come of his own free will and accord and voluntarily." "I just said, 'Let him come ahead, and not to stop him.'" As said in the opinion, there was no conflict in the testimony of McDowell and Cox upon this issue. In this case it is true that Hunnicutt testified in a somewhat similar strain. He says that "Hubbard told me there was a cattle steal on hand; that John McGee and Earnest Mercer had made a proposition to me to steal my cattle; that they had two other bunches spotted, but that they would probably steal my cattle. He said that he himself was working to catch them, and I told him that they had better let my cattle alone, but if they came to get my cattle to go ahead and catch them. I do not remember that he asked me if I wanted them caught. He said he would not get them unless he notified the parties first to whom they belonged; that he did not expect to get into any trouble to catch them. I told him that I wanted them caught if they got my cattle." Hubbard testified on this point as follows: That he told Hunnicutt that he, with John McGee and Earnest Mercer, calculated to steal a bunch of cattle somewhere, and that his bunch had been spoken of, and that his cattle might be stolen. He further testified: "I went to see Hunnicutt about this cattle stealing, and told him that I wanted the party from whom we wanted to get the cattle to be informed beforehand. I did not want to take any chances on being on a man's place. I might get killed." From this it is evident that Hunnicutt gave his consent to the taking, and this is made manifest also by the fact that Hunnicutt and Ellis went to where the theft was committed and lay in wait, and watched the parties on the night of the theft.

As to the other proposition, as to whether or not the enterprise was suggested and brought about by appellant and Mercer, and that Hubbard entered into it at their suggestion, there is controversy in the testimony. Hubbard claims in his evidence that the mat-

ter of the theft of the cattle was suggested by appellant, or appellant and Mercer, whereas appellant denies this, and claims that he went into it at the instance of Hubbard to detect the Neeley brothers. Aside from the direct testimony, there are some circumstances which would suggest that the enterprise was suggested and brought about by Hubbard. He had gone into the community, according to the uncontroverted testimony, for the purpose of entrapping or decoying McGee and Mercer into the commission of some offense. It seems he waited a number of months before anything was accomplished, and, according to his own evidence, after it was suggested to him by appellant he actively engaged in arranging the program; went to see Hunnicutt, and arranged that branch of it; obtained his consent; and then went with appellant and Mercer, and arranged with the Neeley boys at Cleburne, who were to receive the cattle. But, whether the circumstances support appellant's theory or not, still as to who projected the enterprise, whether Hubbard (the detective) or appellant, is certainly a controverted question. Now, if the jury should believe that the detective inaugurated the enterprise, and that he had the consent of Hunnicutt to the taking of the cattle, and which it seems to us he did, then undoubtedly, if Hunnicutt gave his express or implied consent to Hubbard to the taking of the cattle, or if appellant reasonably believed that such consent had been given to Hubbard, whether express or implied, in either event he was entitled to an acquittal. This question was not fairly presented to the jury in the court's charge, and the requested instructions, or some of them, should have been given.

It is not necessary to discuss other features of the case, but for the errors pointed out the judgment is reversed, and the cause remanded.

HARRIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

GAMING—BETTING UPON TENPIN ALLEYS—STATUTES—IMPLIED REPEAL.

There can be no conviction for the offense of betting at a game of tenpins committed prior to the act of 1901 (Gen. Laws 27th Leg. p. 267), making it unlawful to bet upon tenpin alleys; Pen. Code 1895, art. 888, prohibiting betting in any tenpin alley having been impliedly repealed as to licensed tenpin alleys by Gen. Laws 1897 (Called Sess.) p. 51, subd. 19, which levied an occupation tax on bowling alleys used for profit, or upon which money or anything of value is bet.

Appeal from Tarrant county court; M. R. Harris, Judge.

W. R. Harris was convicted of betting at a game of tenpins, and appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted for unlawfully betting at a game played with tenpins, and his punishment assessed at a fine of \$10; hence this appeal.

The conviction was for an alleged offense committed prior to the act of 1901, making it unlawful to bet upon tenpin alleys, and under the authority of *Rutherford v. State*, 39 Tex. Cr. R. 137, 45 S. W. 579, the judgment must be reversed, and the prosecution ordered dismissed.

BLADES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

GAMING—BOWLING ALLEYS—BETTING—INFORMATION—EVIDENCE—INSTRUCTIONS.

1. Where an information for a violation of Gen. Laws 27th Leg. p. 267, prohibiting the keeping or exhibiting of a tenpin alley for the purpose of gaming, charged accused merely with exhibiting, and not with keeping, such an alley, but the uncontroverted evidence showed that he both exhibited and kept such alley, a charge requiring conviction if the jury believed that accused was engaged in keeping or exhibiting such alley was not erroneous.

2. Under Gen. Laws 27th Leg. p. 267, prohibiting the keeping or exhibiting of a tenpin alley for the purpose of gaming, where all the players contributed an equal amount towards the purchase of a knife, which was given to the player making the highest score, the keeper of the alley depending on the profit on the knife for his remuneration, the alley was kept for betting purposes.

Appeal from Hunt county court; R. D. Thompson, Judge.

A. H. Blades was convicted of a misdemeanor, and appeals. Affirmed.

Evans & Elder, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted under an information for exhibiting a tenpin alley for the purpose of gaming, and his punishment assessed at a fine of \$25, and confinement in the county jail for 10 days; hence this appeal.

The information charges and the proof shows that the offense was committed on the 12th day of July, 1901; consequently the conviction was since the law of 1901 went into effect. The legislature having adjourned on the 9th day of April, 1901, and the law took effect 90 days after adjournment. See Gen. Laws 27th Leg. p. 267. Evidently the law above alluded to was made in view of the holding of this court in *Rutherford v. State*, 39 Tex. Cr. R. 137, 45 S. W. 579. The act in question makes the keeping or exhibiting, for the purpose of gaming, of any tenpin alley, an offense, and same shall be considered as used for gaming if the table fees or alley fees or money or anything of value is bet thereon, regardless of whether said alley is licensed by law or not. The *Rutherford Case*, as stated before, turned on the proposition that a game of tenpins had been licensed

by law, and was subject to an occupation tax. Appellant contends that the court committed an error in charging the jury to convict appellant, if they believed he was engaged in keeping or exhibiting said alley for betting, etc., whereas the information did not charge him with keeping, but merely with exhibiting, said alley. While it is true keeping and exhibiting may be two distinct offenses, and one may be guilty of keeping, and not of exhibiting, or vice versa, still the uncontroverted proof here shows that appellant was both the keeper and exhibitor. Appellant was the owner of the alley, and the same was run by him prior to the new law going into effect. He suspended operations on the 8th of July, but on the 10th resumed again. He had full control of the alley, and had a license to run it. If there was any question as to his keeping the alley or as to his exhibiting the same, then appellant's contention that the court ought not to have charged on keeping might be sound. There is no question that both his keeping and exhibiting was not manifested by a single act, but same was continuous in its nature. One might display or exhibit a bank or game of tempins by a single act, but in keeping he must do more than this. Appellant is shown to have both kept and exhibited the tempin alley.

However, it is strenuously contended by him that the same was not kept or exhibited for the purpose of gaming; that is, he insists, under the authority of *Stearnes v. State*, 21 Tex. 692, that the prohibited game, where it is a table or banking game, must be one against the many; that is, the banker or exhibitor against the outsider, as is the case in faro, monte, etc. We do not understand this to be the rule in all prohibited games; but Judge Roberts, in the *Stearnes Case*, supra, was merely endeavoring to show that the game of grand raffle was a banking or table game. We quote from the opinion this language: "The characteristic principle or element of the gaming tables or banks specified in the Code, as faro, monte, etc., is that they have a keeper, dealer, or exhibitor, and operator on the basis of one against the many; the dealer, keeper, or exhibitor against the betters, directly or indirectly. In some of them the principle is obvious, the keeper betting directly against each and all the betters, and they against him, as in faro, vingtun, etc. In others it is disguised, and the betters seem to be contending against one another. Such is the case in pool and keno. The keeper charges and takes a percentage upon all the bets that are made, and is therefore interested in stimulating and protracting the betting. The more is bet, the more he makes." And again: "If a party should establish in his house a table for gaming purposes, and carry it on himself, without betting upon it himself, but to enable others to

bet (as in pool), and should, instead of charging a percentage upon the bets, depend upon the custom of the betters at his bar to compensate him, the evil would be no less, because he perhaps made less. He might even not be present all the time during the playing, in some such case that might be devised. Here, although, according to the rules of such games, he could not strictly be said to be the keeper or exhibitor, still the community would not be misled by such a change in the mere mode of deriving his gains, and it would be said, 'in common language,' that he kept or exhibited the table."

Now, it will be observed from the statute that the game of tempins is named, and whether or not it be a banking game, as defined, or a table game, does not matter. If a tempin alley is kept or exhibited for the purpose of gaming,—that is, if the table fees or alley fees, or money or anything of value, is bet thereon,—it comes within the prohibition of the law. According to the proof, the manner of betting on said tempin alley was as follows: Appellant would invite people to take a chance in a knife at 10 cents each. He would collect 10 cents each from five persons, and each would roll the balls on the alley, and the one who made the best roll, according to the rules of the game, would be entitled to the knife. He would then give the winner the knife or 35 cents in money, whichever he wanted. The exhibitor sold the betters a chance in the knife, which was to be determined by the parties rolling on the tempin alley. The man who made the best roll got the knife or the money, and the remainder got nothing. He got his money out of the profits on the knives. He sold the chance in the knife at 10 cents each, and valued the knife at 50 cents. If three men wanted to roll, he would collect 30 cents, and put up a 30 cent knife. If ten men desired to roll, he would put up a \$1 knife, and collect \$1; that is, 10 cents a chance in each instance. Now, it is evident from this statement that all the parties who rolled on the game were betting against each other the amount which each put up against the chance to win the entire amount; that is, where money was taken instead of the knife, and there were five players, the winner gained or won 50 cents in money, and in that event the exhibitor took 15 cents of the amount, thus getting his profits through the betting, and stimulating the game by making it a betting game. The mere fact that he announced and advertised that the alley was not exhibited for gaming was a mere subterfuge, as from the evidence it appears that the sole purpose of his exhibition was to obtain bets from the players, either on knives, or, at the preference of the winner, a part of the money staked on the game.

There being no error in the record, the judgment is affirmed.

YOUNG v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

LOCAL OPTION—VIOLATION—PROSECUTION—EVIDENCE.

1. Where, on appeal from a conviction, the statement of facts is not approved by the presiding judge, the same cannot be considered.

2. On a prosecution for violation of the local option law, it was proper to allow the state to introduce testimony of various witnesses that they got whisky from accused, and that the orders given by him for whisky were sent him C. O. D.; the testimony being admitted to show the system of defendant's business.

3. Where, on a prosecution for violation of the local option law, it is shown that accused was shipping liquor to himself C. O. D. into the local option territory, a violation was shown.

4. Code Cr. Proc. art. 723, provides that, wherever it appears by the record in any criminal action on appeal that any of the requirements of certain preceding articles shall have been disregarded, the judgment shall be reversed if the error is excepted to on the trial. *Held*, that conduct of the court alleged to have been erroneous, under one of the designated preceding sections, cannot be considered, no exception having been taken at the trial.

Appeal from Ellis county court; J. E. Lancaster, Judge.

Lum Young was convicted of violating the local option law, and he appeals. *Affirmed*.

Mark Smith, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail.

Inasmuch as the statement of facts is not approved by the presiding judge, it cannot be considered. There were five bills of exception taken during the trial to the introduction of testimony. The substance of the testimony in these bills is practically the same, at least it is to the same effect, and they show that the state, over appellant's objection, was permitted to introduce the testimony of various witnesses that they got whisky from appellant, and the orders given by appellant for whisky were sent him C. O. D. This testimony was admitted, as explained by the court, to show system of defendant's business, and his intent in carrying on his liquor traffic by the means indicated by the witnesses. We are of opinion this testimony was properly admitted. As shown by the bills, appellant was shipping into the local option territory by express, C. O. D., a considerable amount of whisky. It was shipped to himself, and the orders introduced in evidence and those given the parties who testified show very clearly that this was the means resorted to by appellant to evade the operation of the local option law. A party cannot ship whisky into a local option territory and dispense it to others in this manner. In fact, we are of opinion this was a rather thinly gotten up evasion of the law.

Appellant complains of the failure of the charge to restrict the effect of the testimony admitted over his objection, as set out in the bills. No exception was reserved to the action of the court in this respect, either by bill of exceptions or in motion for new trial. Under the construction given article 723, Code Cr. Proc., it is too late to complain of these errors where they are raised for the first time in the appellate court. This is a misdemeanor, and the rule, even under the law aforesaid, was never held to be as strict in misdemeanors as in felonies. *Loyd v. State*, 19 Tex. App. 321.

The judgment is affirmed.

WILHELM v. STATE.

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

ARSON—EVIDENCE—RELEVANCY—IMPEACHING WITNESS—LETTERS IN EVIDENCE—REVIEW.

1. On a prosecution for arson, the state showed that several days prior to the burning of the house accused had tried to rent a house about 300 yards from the house burned in which to run a beer "joint," and that the owner refused, and stated his reasons. *Held*, that on appeal, in the absence of a statement of facts, the evidence would not be regarded as immaterial, and not connected with the burning, inasmuch as it might have been pertinent on the question of motive.

2. Accused while on the stand having been asked about certain letters written by him, and the letters having been proved to have been so written, their introduction for the purpose of impeachment would not be regarded as error on appeal, their contents not appearing.

Appeal from district court, Lamar county; Ben H. Denton, Judge.

Henry Wilhelm was convicted of arson, and he appeals. *Affirmed*.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for arson, appellant's punishment being assessed at nine years' confinement in the penitentiary.

Appellant's first bill of exceptions recites that the state, over his objections, was permitted to prove by W. F. Chisum that several days prior to the burning of E. C. Chisum's house defendant and W. E. Chisum had a conversation, in which defendant tried to rent a house about 300 yards from said E. C. Chisum's house, in which he (defendant) wanted to run a beer "joint," who refused, and stated his reasons. The grounds of objection are that it proved no issue, was immaterial, and in no way connected with the burning of the house for which this conviction was obtained, and because it was calculated to mislead the jury, and there was no law to prohibit defendant from running a beer "joint" at said place. The record does not contain a statement of the facts, as this evidence may have been very pertinent.

on the question of motive on the part of appellant for the burning of the house set out in the indictment. At least, the bill of exceptions does not show sufficient facts to indicate the irrelevancy or inadmissibility of the testimony.

The court permitted the state to introduce several letters in evidence, to which the defendant objected, said letters being introduced for the purpose of impeaching the defendant. The court explains this by stating that the letters were not introduced until after defendant had been on the stand, to which defendant did not object; and the district attorney asked him all about the letters, but admitted they could be introduced for impeaching purposes. The letters were proved by the witness Martin to have been written by defendant, and they were in his handwriting. But counsel did not object to the letters because they were written while defendant was in jail. We are not apprised of the contents of the letters, inasmuch as the bill does not undertake to set out either a literal copy of the letters, or the substance of what they contained. As presented by the bill and qualification, there is no error made to appear.

A bill of exceptions was also reserved to the argument of the prosecuting attorney. There is nothing in the bill, as explained by the court, worthy of discussion. The record being before us without statement of facts, and so far as we are able to ascertain no error was committed. The judgment is affirmed.

GERSTENKORN v. STATE.¹

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

GAMING—INDICTMENT—ALLEGATIONS—SUFFICIENCY—BILL OF EXCEPTIONS.

1. An indictment for gaming, which charges that defendant "did then and there unlawfully play at a game with cards at a public place, to wit, a gaming house" is sufficient.

2. Bills of exceptions which are not approved by the presiding judge cannot be considered on appeal.

Appeal from Johnson county court; W. D. McKoy, Judge.

Henry Gerstenkorn was convicted of gaming, and he appeals. Affirmed.

Henry Gerstenkorn, in pro. per. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of gaming, and his punishment assessed at a fine of \$10.

The charging part of the indictment is that defendant "did then and there unlawfully play at a game with cards at a public place, to wit, a gaming house." This allegation is attacked by motion to quash. Under the authorities the indictment is suffi-

cient. *Thorp v. State* (Tex. Cr. App.) 59 S. W. 43; *Miller v. Same*, 35 Tex. Cr. R. 650, 34 S. W. 959; *Gomprecht v. Same*, 36 Tex. Cr. R. 434, 37 S. W. 734.

There are what purport to be two bills of exception incorporated in the record, neither of which is approved by the presiding judge, and therefore cannot be considered. The evidence is not in the record.

The judgment is affirmed.

BOYCE v. STATE

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

CRIMINAL LAW—NEW TRIAL—PLEA OF GUILTY—NEWLY DISCOVERED EVIDENCE—REHEARING—VARIANCE BETWEEN OPINION AND RECORD.

Where the evidence for the state fully sustained the charge, and defendant, after testifying, again took the witness stand and testified that a portion of his former testimony was false, and changed his plea from not guilty to guilty, a motion for a new trial, setting up newly-discovered testimony of witnesses that the assault was not committed by defendant, but by some one else, was properly refused.

On Motion for Rehearing.

1. That this court in its opinion stated that defendant, after consultation with his attorney, withdrew his plea of not guilty, and pleaded guilty, while the record shows that his attorney entered the plea of guilty, is immaterial, as the plea was sufficient, whether it was made by defendant in person or by his attorney.

2. That an opinion affirming a conviction stated by mistake that the plea of not guilty was withdrawn, and one of guilty entered, after the "second consultation" with defendant's attorney, when in fact only one consultation was held, was immaterial error.

Appeal from Hunt county court; R. D. Thompson, Judge.

Monroe Boyce was convicted of an aggravated assault, and he appeals. Affirmed.

Huffar, Nichols & Rollins, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an aggravated assault, and fined \$25. When the case was called for trial, he entered his plea of not guilty. Evidence was introduced in behalf of the state, followed by witnesses for defendant, including himself. After defendant was excused from the witness stand and consulted with his attorneys, he was recalled as a witness, and further testified that certain portions of his prior statements were false; that he was in South Greenville directly after the assault was committed upon Flanders, whereas in his prior statement he stated he was not at that point. He was again excused as a witness, and had further consultation with his attorneys. At the conclusion of the second consultation, he withdrew the plea of not guilty, and entered a plea of guilty. The judgment recites that defendant pleaded guilty. The court verbally instructed the jury to find defendant guilty, which they did, assessing his fine at

¹ Rehearing denied February 19, 1902.

\$25. Appellant filed a motion for new trial, setting up newly-discovered testimony of two witnesses, who stated they were cognizant of the fact that appellant was not the party who made the assault upon Flanders, but that it was made by one Dan Wright. The court refused to grant a new trial, and appeal was prosecuted. This action of the court is assigned as error. The state fully sustained the allegations of the indictment that defendant was the party who committed the assault. The assaulted party, Flanders, identified defendant as the man who struck him, and gave the facts connected with his knowledge and acquaintanceship with appellant. In addition to this, appellant pleaded "Guilty." Under this character of case, we do not believe the motion for new trial should have been granted. The judgment is affirmed.

On Motion for Rehearing.

(Feb. 19, 1902.)

At a former day of this term the judgment was affirmed, and the cause now comes before us on motion for rehearing.

In the first ground of his motion, appellant contends the court erred in using this language in the original opinion: "He was again excused as a witness, and had further consultation with his attorneys. At the conclusion of the second consultation he withdrew the plea of not guilty, and entered a plea of guilty." It is contended there is no evidence in the record that appellant withdrew his plea of not guilty, and none that he entered a plea of guilty; and he further contends there is nothing in the record to show that appellant had a second consultation with his attorneys, and that the court erred in finding as a fact that appellant pleaded guilty in the court below. The judgment in regard to the plea of guilty is as follows: "On this day, this cause being called for trial, came the parties and announced, 'Ready for trial.' The defendant enters his plea of guilty. Thereupon came a jury of good and lawful men," etc. Defendant testified in his own behalf, and, after being cross-examined by the state, the record recites the following: "The witness was here excused. After consultation between defendant and counsel, defendant took the stand again, and testified that he had not told the truth when he said he went directly to Emiline Hill's after the fuss; that it was a fact that he was out on South Hill late that night, and that he saw old man Henry and John Henry at a certain house, and was with them from about eleven o'clock on for a long time; that it was true that he slept at Emiline Hill's that night; that, when he saw old man Henry and John Henry, they told him the officers were hunting him for striking Flanders; that it was not true, as stated by him, that the first time he heard he was accused of this crime was when the sectionmen told him next morning. * * * Witness excused.

Defendant's counsel then stated to the court that they withdrew their plea of not guilty, which had been previously entered, and now entered a plea of guilty, and begged the mercy of the court and jury. No more evidence was introduced. The rest of the witnesses were discharged. The court instructed the jury orally that they should find defendant guilty, on his plea of guilty of aggravated assault, and fix his punishment; telling them what the penalty was. When the defendant withdrew his plea of not guilty and pleaded 'Guilty,' the county attorney and counsel for defendant tried to agree on the amount of penalty to be assessed. Failing to reach a satisfactory agreement they made the agreement that, inasmuch as the jury were there, we would let them retire and fix the penalty, and the county attorney would not suggest any amount, but would permit counsel for defendant to ask for the lowest fine. This agreement was explained to the court and jury, and the jury returned a verdict assessing the penalty without further evidence or instruction." It is placed beyond any question, if this record be true, that counsel for appellant did withdraw the plea of not guilty and enter the plea of guilty. It is also certain, if the recitation in the judgment is true, that a plea of guilty was entered. The following language would seem to indicate that perhaps defendant himself withdrew his plea of not guilty, to wit: "When the defendant withdrew his plea of not guilty and pleaded guilty, the county attorney and counsel for defendant tried to agree on the amount of the penalty to be assessed," etc. But be that as it may, defendant was in court, his counsel were acting for him in open court, there was some discussion between counsel as to the penalty, about which they failed to agree, and the jury were left to settle that matter. Whether, critically speaking, the original opinion was correct in stating that appellant in person withdrew his plea of not guilty and entered the plea of guilty, it is substantially correct, and the criticism is rather hypercritical. Now, as to the statement in the original opinion that this plea of guilty was withdrawn and the plea of guilty entered after the second consultation with his attorneys, we would say that perhaps the exact language of the record stated would hardly bear this statement, but it is a matter of small moment whether or not counsel consulted with their client. The whole thing transpired in open court, and occupied some minutes of discussion and preliminary arrangement before it was finally submitted to the jury to fix the amount of the punishment under the plea of guilty. Perhaps it would have been more in consonance with the record not to have used the expression "second consultation," but we regarded it then, as now, of no practical importance. The facts, as disclosed by the excerpt of the record, show that appellant testified, was excused, was again placed upon the stand as a witness, and testified

that portions of his former testimony were false, going into the detail of the matter to some extent, and was again excused, and that the attorneys for appellant then withdrew the plea of not guilty and entered his plea of guilty. In order that the record and the opinion may be in literal consonance with each other, we have reviewed these matters, so that there can be no question as to what transpired with reference to the matter about which the motion for rehearing is filed.

The motion for rehearing is overruled.

**EMERSON et al. v. A. F. SHAPLEIGH
HARDWARE CO.**

(Court of Civil Appeals of Texas. Jan. 29, 1902.)

**APPEAL—FILING OF BRIEFS—STIPULATION—
ORAL AGREEMENT—DILIGENCE.**

An agreement of counsel provided for the filing of appellant's brief on or before a certain date, and that a copy thereof should be delivered to appellee on or before that date. No briefs were filed as stipulated, nor until the day the cause was set for submission; and a copy was not furnished attorneys for appellee until two days before they were filed, and appellee filed no briefs. Appellant's attorneys alleged an oral agreement with attorneys for appellee extending the time for filing briefs. *Held*, that under rule 46, requiring such agreements to be in writing, appellant could claim no benefit therefrom, and, having shown no excuse irrespective of the agreement, the appeal would be dismissed.

Appeal from district court, El Paso county; J. M. Goggin, Judge.

Action between Emerson & Berrien and the A. F. Shapleigh Hardware Company. From a judgment in favor of the latter, the former appeal. Dismissed.

M. W. Stanton, for appellants. Beall & Kemp, for appellee.

JAMES, C. J. On appellee's motion to dismiss appeal the following facts appear: Judgment was rendered on December 20, 1900. Motion for new trial overruled February 18, 1901, and appeal perfected on March 11th. The transcript came to the clerk of this court on June 29, 1901, together with a motion to file and the following agreement of counsel: "Emerson & Berrien, Appellants, vs. A. F. Shapleigh Hardware Co., Appellee. No. ——. We hereby agree that the motion of said appellants to file transcript in said cause may be immediately taken up and granted, and request that an order be made and entered of record to that effect, and that an order also be made, as the law directs, allowing the withdrawal of said transcript; and said parties, acting by and through their attorneys, further agree that the said appellants may file their brief in said cause in said court of civil appeals on or before the 1st day of August, 1901, and shall on or before that date deliver a copy of same to attorneys for said appellee, and filing of briefs in the trial court is hereby

waived; and it is further agreed that attorneys for appellee shall have the use of said transcript, and a right to file a brief in said cause on or before the submission thereof, and the said parties request the honorable court of civil appeals to make in said cause orders pursuant to the terms of this agreement. M. W. Stanton, Attorney for Appellants. Beall & Kemp, Attorneys for Appellee." The clerk then indorsed upon the transcript the date it was received, and that it was not filed for the reason that it had not been received within the 90 days. The motion was not then acted upon, because the court was not in session, it having adjourned for the term the day before. The motion was acted on October 7th, and granted. Counsel for appellants, it appears, had possession of the transcript all during the vacation, for the purpose, evidently, of briefing it, and complying with the provisions of the above agreement. It was returned to the clerk of the court, and filed on October 17th. Appellants' briefs were not filed in this court until January 8, 1902, the day on which the cause was set for submission. The briefs were evidently not prepared until just previous to the last-mentioned date, and a copy thereof was not furnished appellee's counsel until January 6, 1902. None was ever filed in the district court. Appellants' counsel does not show satisfactory or sufficient reasons for failing to comply with the terms of the agreement respecting briefs, nor proper diligence in the preparation of his case for submission, irrespective of the agreement. An oral agreement with appellee's counsel is alleged, the purport of which is stated to be that the time for filing briefs would be extended, and that the cause would be set in this court by agreement at a date when both parties could attend, and at a date which would give ample time to both parties for the preparation of briefs. One of appellee's counsel (the other being absent) denies such agreement, but, independent of this, the rule No. 46 for the government of this court requires agreements of this character to be in writing, and we would have no right to enforce the agreement here alleged, unless expressly admitted. Appellee has not filed briefs, and is in position to insist on the rules, and we think it is entitled to have them applied under the circumstances before us.

The appeal will be dismissed for want of prosecution.

EDWARDS et al. v. MIDDLETON et al.

(Court of Civil Appeals of Texas. Feb. 1, 1902.)

**COSTS—DEPOSIT—DISMISSAL OF ACTION—
REINSTATEMENT.**

1. Where plaintiffs' attorneys, on filing the petition, made a deposit on costs, and notified the clerk that they would make further deposits as demanded, such action did not pre-

vent the filing of a motion to require the plaintiffs to give security for costs.

2. Where a judgment of dismissal for failure to comply with a rule for costs is insufficient as originally entered by the clerk, he has authority during the term to correct the defect, and enter a proper judgment.

3. Plaintiff's attorney failed to comply with a rule for costs, and the case was dismissed, but it appeared on a motion to reinstate that before the filing of the motion plaintiff's attorneys received a printed copy of the docket showing that the cause was set for trial, and that they were ready at all times to give the required bond, but failed to do so through want of knowledge that a bond would be insisted on prior to the call of the case for trial. A bond was tendered, and plaintiffs' attorneys testified that there was a good cause of action, which would be barred by limitation if it was necessary to commence a new action. *Held*, that the cause should be reinstated.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by Charles O. Edwards and others against T. S. Middleton and others. From a judgment overruling a motion to set aside an order dismissing the cause for failure to comply with a rule for costs, plaintiffs appeal. Reversed.

Matlock, Miller & Dycus, for appellants. Templeton & Harding, for appellees.

TEMPLETON, J. This is an appeal from a judgment overruling a motion to set aside an order dismissing the cause for failure to comply with the rule for costs. The suit of plaintiffs, which was in the form of an action of trespass to try title, was filed on August 24, 1900. At the time the petition was filed the attorneys for the plaintiffs, who lived at Ft. Worth, sent the clerk of the court a check for \$10 as a deposit on the costs, and notified him that they would make further deposits from time to time as demanded. The clerk made no demands for further deposits, and on November 20, 1900, filed a motion for security for costs, which was granted on December 10, 1900. No notice of the motion was given to the plaintiffs. The defendants filed their answers on that day, and on December 30, 1900, the case was, by agreement of parties, continued as on application of the plaintiffs. On April 18, 1901, the attorneys for the defendants wrote to the attorney for the plaintiffs that the rule for costs had been entered, and the clerk wrote them to the same effect. No bond was filed or other action taken by the plaintiffs, and on the first day of the next term of the court—that is, on May 20, 1901—the cause was dismissed because of the failure of plaintiffs to comply with the rule. The order of dismissal was entered by the judge on his docket, and like orders were entered in 20 other cases. The clerk of the court entered on the minutes a single general judgment of dismissal in all the cases, including this case, giving the number and style of each case, the judgment showing that all the cases were dismissed for failure to comply with the rule for costs. On May 28, 1901, the plaintiffs

filed a motion to reinstate. They tendered a good and sufficient cost bond, and offered to pay all costs which had accrued up to that time. In addition to the facts above stated, they showed that some time before the filing of their motion they received a copy of the printed docket of the district court of Ellis county showing that this cause was set for trial for June 10, 1901; that they were ready and willing at all times to give the required bond, but failed to do so by oversight, or, rather, a want of knowledge that a bond would be insisted upon prior to the call of the case on the day set for trial. They also alleged in their motion, which was sworn to, that they believed that they had a good cause of action, but that, if the order of dismissal was not set aside, and they were compelled to institute a new suit, such suit would be barred by the statute of limitations. The motion to reinstate was resisted by the defendants, and was overruled by the court. At the same time a formal judgment of dismissal *nunc pro tunc* was entered on the minutes, the purpose being to correct the supposed irregularity attending the original entry of judgment.

The rule for costs was properly entered, and it was the duty of appellants to comply therewith on or before the first day of the next term of court. The making of the original deposit, accompanied by the offer to make future deposits, would not prevent the filing of a motion to require the plaintiffs to give security for costs. The rule may be demanded in all cases except those excluded by law, and, when demanded in the manner required by statute, it should be entered. What will constitute a compliance with the rule is a question which is not before us for decision. The statute does not require notice of the filing of the motion to be given. It would seem that when, as in this case, the motion is in proper form, and is duly filed and placed on the docket, and is disposed of when it is regularly reached on the call of the docket, the plaintiff must take notice thereof, provided this is done before the cause is continued for the term. However, in this case the plaintiffs had actual notice that the rule had been entered, and this was clearly sufficient. If the judgment of dismissal, as originally entered by the clerk, was insufficient, the court had authority, during the term, to correct the defect, and to enter the proper judgment. While the rule was legally entered, and the plaintiffs should have complied therewith, their failure to do so was due to oversight, or at most to simple carelessness, and not to willful negligence. They were ready to give the required security at any time, and there is some appearance of reason in their excuse for failing to comply with the letter of the statute. It was not entirely unreasonable for them to suppose that the filing of the bond on or before the day set for trial would be acceptable to the clerk. At any rate, they were

not grossly negligent, and, as soon as they were notified of the dismissal they tendered a sufficient bond, which secured the officer who filed the motion against them, and all cause for complaint on his part was removed. The defendants would not have been injured by the acceptance of the bond and the setting aside of the judgment of dismissal. The rule was entered for the purpose of obtaining security for the costs, and this would have been accomplished had the bond offered been approved and the judgment of dismissal vacated. It does not appear that such action would have even delayed the trial, as the motion to reinstate was made and the bond tendered nearly two weeks before the day set for trial. No right of the defendants which existed when the cause was dismissed would have been prejudiced by reinstating the case on the docket. On the other hand, the cause of action of the plaintiffs was seriously jeopardized, if not destroyed, by the course pursued. While the plaintiffs' attorneys may have been somewhat at fault, the penalty visited upon the plaintiffs was, in our opinion, too severe. We think the cause should have been reinstated upon the terms proposed, and, because this was not done, the judgment is reversed, and the cause remanded.

Reversed and remanded.

BRIAM v. SULLIVAN et al.

(Court of Civil Appeals of Texas. Jan. 29, 1902.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF CREDITOR—PRESENTATION OF VERIFIED STATEMENT—JUDICIAL PROCEEDINGS.

1. Under Sayles' Ann. Civ. St. art. 82, providing that the statement of a creditor, verified and filed with an assignee for the benefit of creditors, shall be prima facie evidence sufficient to justify its allowance, etc., an assignee is not compelled to allow a claim so presented, if he believes it illegal.

2. Where a note provided for an attorney's fee of 10 per cent., should "judicial proceedings" be used in collecting, such fee was not collectible on acceptance and payment of the note by an assignee for benefit of creditors; that officer not being appointed by a court, nor under the direction or control of one.

Appeal from Bexar county court; Robt. B. Green, Judge.

Action by D. Sullivan & Co. against August Briam, Jr. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Hines & Tallafarro, for appellant. J. C. Sullivan and J. A. Buckler, for appellees.

FLY, J. This suit was instituted by appellees in the county court to recover of appellant, as assignee of the firm of L. M. Welton & Co., a claim of \$210 against the assets of said firm, and to compel the assignee to pay the same, with other claims. Judgment was rendered as prayed for.

The firm of L. M. Welton & Co. was indebted to appellees in the sum of \$2,000, evidenced by a promissory note which provided for "an attorney's fee of ten per cent., should judicial proceedings be used in collecting." After the firm made an assignment for the benefit of creditors, appellees filed with the assignee their acceptance of the assignment, and duly presented their claim to the assignee, which was allowed by him for all except the attorney's fee herein sued for, amounting to \$210. Under a proper construction of article 82, Sayles' Ann. Civ. St., the assignee is not compelled to allow a claim that he knows to be illegal; but, by its provisions, proof of the claim of a creditor as provided by law will justify the allowance of the claim, and give the creditor a right to his proportional share of the debtor's estate. The statute does not rob the assignee of all discretion, but, under certain circumstances, justifies his action, and forces a contest of the claim on the assignor or disputing creditor. The statute is for the protection of the assignee, in allowing claims properly verified, and not for the purpose of compelling him to allow any claim, however preposterous or illegal it may be, if it is so verified. We therefore conclude that the assignee had the authority to refuse to allow the whole, or any portion deemed by him invalid.

We are also of the opinion that the attorney's fees were properly rejected, because no "judicial proceedings" were "used in collecting it." The assignee was not appointed by a court, and was not under the direction or control of one, as in the case of an administrator or guardian, and by no method of reasoning can the mere presentation of a claim to an assignee be transformed into collecting the note by "judicial proceeding." If presenting a claim to an assignee is collecting by judicial proceeding, presenting it to any agent or trustee would be. The cases of Simmons v. Terrell, 75 Tex. 277, 12 S. W. 854, and Morrill v. Hoyt, 88 Tex. 59, 18 S. W. 424, 29 Am. St. Rep. 630, do not sustain the position that filing the verified claim with the assignee was a "judicial proceeding." In one of those cases the claim was presented to an administrator, and in the other to a guardian; and the reason given for the ruling was that, while the presentation of the claim was not technically a suit, it was a resort to a judicial tribunal, because it had to be collected through the medium of the probate court. Those cases have extended the scope of the language of the notes as far as judicial construction can go, and they cannot be invoked to make the presentation of a claim to an assignee, under Texas law, a collection through a judicial proceeding. Because, under certain conditions, an assignee might be removed by a court, would not render the presentation of a claim to him a collection by judicial proceeding. Any trustee can be removed in like manner.

The judgment of the county court is reversed, and judgment here rendered that appellees take nothing by their suit, and that appellant recover of them all costs in this court and the trial court expended.

FRAZER v. BEDFORD et al.

(Court of Civil Appeals of Texas. Jan. 11, 1902.)

STOCK LAW—LIABILITY FOR TRESPASS.

1. Under the stock law (Gen. Laws 1899, c. 128), prohibiting certain animals from running at large, the owner of such animals is conclusively negligent if they get at large, and is liable for damages caused by their breaking into premises sufficiently fenced to turn animals authorized to run at large.

2. One may maintain action for damages from animals running at large contrary to the stock law (Gen. Laws 1899, c. 128), the remedy by impounding being declared cumulative by section 16.

Appeal from Fannin county court; W. A. Evans, Judge.

Action by J. H. Frazer against J. D. Bedford and others. Judgment for defendants. Plaintiff appeals. Reversed.

R. B. Ragsdale, E. C. Armstrong, and Taylor & McGrady, for appellant. G. W. Wells and Lusk & Thurmond, for appellees.

TEMPLETON, J. Some cattle belonging to the appellees escaped from a pen in which they were confined, and broke into the inclosed premises of appellant, and damaged his crop. The stock law provided by Acts 1899, p. 220, c. 128, had been legally adopted in the territory in which the premises of appellant and the cattle pen of the appellees were situated. Appellant sued appellees to recover his damages aforesaid, and a jury trial resulted in a verdict and judgment for the defendants. The court instructed the jury, in substance, that if the defendants used such care as an ordinarily prudent man would and should have used under the circumstances to prevent the cattle from escaping and entering upon the inclosed lands of the plaintiff and destroying his crop, then they should find for the defendants. The plaintiff requested a special charge, which was refused, to the effect that it was the duty of the defendants to keep their cattle confined so as to prevent them from escaping and entering his inclosed lands and damaging his crop, and that, if they failed to do so, then the jury should find for the plaintiff. Complaint is made of the action of the trial court in giving the said charge and in refusing the special charge, and the proposition is presented that in a district in which the stock law is in force the liability of the owner of stock which is prohibited from running at large for damages caused by such stock breaking into the inclosed premises of another is absolute and unconditional. In this case it was shown conclusively that the

fence of appellant was sufficient to turn all classes of stock which were permitted by law to run at large in that territory. In *Graves v. Rudd*, 65 S. W. 63, we held that where, in a stock-law district, cattle were in a field which was inclosed by a good fence, and escaped therefrom without fault on the part of the owner, and entered upon the inclosed lands of another, and damaged his crop, the same constituted a trespass, and that the damaged party had a right to impound such stock, and hold the same until his fees and damages were paid. A writ of error was refused in that case, and the question may be regarded as settled. It follows that, had appellant seized the cattle which trespassed upon his premises, he would have had a legal right to hold them until his fees and damages were paid, notwithstanding they had escaped without fault on the part of appellees. The latter were unconditionally liable to him for the damages inflicted by the trespassing cattle, and he could sue to recover his damages in the court having jurisdiction of his cause of action. The remedy provided by statute is not exclusive, but cumulative. See concluding part of section 16 of the act of 1899. This provision of the law simply recognizes a principle which would doubtless be applied even in the absence of such provision. The remedy pursued by appellant in this case was milder than the summary one provided by the statute, and the appellees have no cause to complain that resort was not had to the more vigorous procedure. The contention of appellant in respect to the charges under consideration must be sustained.

The doctrine of the absolute liability of the owner of animals for trespasses committed by them is somewhat of a novelty in Texas, but it is simply the application of the rule at common law. In *Shear. & R. Neg. § 627*, the rule is thus stated: "The owner of large animals (such as horses, oxen, sheep, etc.) is under an unqualified obligation at common law to restrain them from trespassing upon the land of other persons; and he is therefore unconditionally liable as a trespasser himself for any trespass committed by his animate property, the law conclusively presuming negligence against him without regard to the facts of the particular case. Whatever damage his animal does while trespassing is an aggravation of the trespass, for which he is also liable." This statement of the rule is not in accord with that made by Mr. Bishop in his work on *Noncontract Law* (section 1220), but appears to be in harmony with the great weight of authority, and was quoted with approval by the supreme court of this state in *Agency Co. v. McClelland*, 89 Tex. 493, 34 S. W. 98, 35 S. W. 474, 31 L. R. A. 669, 59 Am. St. Rep. 70. The common-law doctrine of absolute liability was modified by the act of February 5, 1840, now article 2499, Rev. St. 1893, which limited the liability of the owner of

stock to damages inflicted upon premises which were inclosed by a lawful fence. In *Lazarus v. Phelps*, 152 U. S. 85, 14 Sup. Ct. 477, 38 L. Ed. 363, the supreme court of the United States explains the object of the statute in this language: "As there are, or were, in the state of Texas, as well as in the newer states of the West generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others." The act owed its origin to the necessities of the people, which arose from the conditions attending the early settlement of the country, and, but for these conditions, the common-law rule would doubtless have been applied from the beginning. As the conditions which made the limitation necessary have largely passed away in some portions of the state, the limitation itself has been somewhat modified. Under the act of 1899, supra, it is a trespass for any animal to enter the inclosed premises of one not its owner, which premises are inclosed by a fence sufficient to exclude stock which is permitted to run at large. The object of the act was to provide a means by which a majority of the freeholding voters of the counties enumerated could accept the law, and by that method relieve themselves of the necessity and expense of fencing their premises against the stock which they elected to prohibit from running at large. In a territory in which the law has been duly adopted, the landowner is guilty of no fault or negligence in failing to fence against the animals which are forbidden to roam the country at will. The owners of such stock must keep the same confined at their peril, else they will be held liable to account for the damages which may be inflicted on their neighbors by such animals. Since they have control of the agency by which the damage is occasioned, it is more consistent with reason and justice that they should suffer than should their neighbors, who have no means whatever of preventing the injury, except by going to the expense of fencing against such animals, to require which would defeat the purposes of the law.

The judgment is reversed, and the cause remanded. Reversed and remanded.

GULF, C. & S. F. RY. CO. v. MILNER.
(Court of Civil Appeals of Texas. Jan. 4, 1902.)

RAILROADS—WHISTLING FOR CROSSING—FRIGHTENING HORSE—RES GESTÆ.

1. Though a statute requires the blowing of a locomotive whistle at a certain point for a crossing, the company will be liable for the frightening of a horse by such whistle, if the

engineer saw and realized that it would frighten him, in the absence of a showing that injury to another at the crossing might have resulted from failure to give the signal.

2. Declaration of engineer, where his attention was called to a runaway horse, after blowing signal for crossing, that he had not seen the horse before he blew the whistle, is admissible as part of the res gestæ.

3. The exclusion of the evidence was not immaterial because the runaway horse was seen by the conductor and the fireman, and they failed to prevent the blowing of the whistle, where the court cannot say that the conductor or fireman knew that the engineer did not see the horse, and if they did that they should have warned him of the situation, or should have anticipated that the engineer would not perform his duty and blow his whistle if he did see him, where the situation required him to refrain from so doing.

Appeal from Johnson county court; O. T. Plummer, Special Judge.

Action by G. B. Milner against the Gulf, Colorado & Santa Fé Ry. Co. Judgment for plaintiff. Defendant appeals. Reversed.

Ramsey & Odell and J. W. Terry, for appellant. J. A. Stanford and D. M. Watkins, for appellee.

RAINBY, C. J. Appellee sued to recover of appellant for injuries to himself and buggy, alleged to have been caused by his horse taking fright at the blowing of a whistle, etc., of one of the defendant's engines in the city of Cleburne. The evidence shows that appellee and a companion were in a buggy traveling along a public highway near defendant's track, and at a point near a whistling post, where signals were required by statute to be given in approaching a crossing. A locomotive engine was being operated along said track at the point stated. Signals were given which frightened the horse, causing him to run away, injuring plaintiff and his buggy. Plaintiff seeks to recover on the theory that the blowing of the whistle was negligence, as the employes of defendant saw that the horse was frightened, and they should have refrained from sounding the signal, under the circumstances. Defendant contends that the signal was made in obedience to the requirement of the statutes, and no liability exists therefor, though injury may have resulted therefrom. The court charged the jury, on this phase of the case, that, if the horse was frightened by the signal for the approach to the crossing, it "would not render defendant liable for the injury, unless said employes and agents of defendant saw and realized, or had reasons to know, that such noise would cause fright to the said horse, and probably result in injury, and the burden of proving such knowledge on the part of the employes and agents of defendant blowing such whistle is upon the plaintiff." We are of the opinion that this charge is correct, in the absence of some fact tending to show that injury to another at the crossing might have resulted from the failure to blow the whistle. 3 Elliott, R. R. par. 1264; *Railroad Co. v. Blain* (Tex. Civ. App.) 62 S. W. 552. The remarks of the court in *Railroad Co. v. Yarbrough* (Tex.

Civ. App.) 89 S. W. 1000, are applicable here, viz.: "Even though there was occasion for blowing the whistle, still, if the employé saw that the horse would be frightened by the noise, and he could desist from blowing the whistle consistently with his duties, and without damage to the master's business, it would be the duty of the servant to refrain for a reasonable time from blowing the whistle under such circumstances, and a failure to so desist might properly be regarded by the jury as negligence." The object of the statute in requiring a signal to be given on a train's approaching the crossing was evidently to warn those who were on or about to go on the crossing that injury might be prevented thereby; and this requirement should never be disregarded, except in cases of emergency, where the giving of the signal would likely cause injury. When the life of a person is imperiled by the lawful operation of a train, and the danger is discovered by the employés, they must use all the means at their command to avert the danger. So, in a case of this character, if the employés discover the danger, they must desist from blowing the whistle, if it can be done consistently with their duty to those using the crossing. Just what should be done or not done must be controlled by the particular circumstances surrounding each case. If the operatives saw that the giving of the signal was liable to frighten plaintiff's horse, and thereby cause injury, then they should have refrained from giving it, provided they could have, by the proper operation of the train for the safety of those on board the train, protected from harm those at the crossing.

Appellant complains of the action of the court in refusing to admit a statement of the engineer made at the time of the accident under the following circumstances, as shown by a bill of exception properly reserved, to wit: "Baebel, a witness for the defendant, testified that he was the fireman on the engine upon which the whistle was blown, which it is claimed was the cause of the injury to the plaintiff in this case; that said whistle had been blown by the engineer on said engine as a signal for a public crossing; and that after said whistle was blown, and plaintiff's horse had started to run, he (the witness) called the engineer's attention thereto by remarking, 'Look yonder at the runaway.' That witness was then asked by counsel for defendant, the following question: What did the engineer say when you called his attention to the runaway? To which question the witness would have replied that the engineer then said, in effect, that he had not seen the plaintiff before he blew the whistle. The said question was asked for the purpose of showing that he did not have such knowledge at the time the whistle was blown. To which question counsel for said plaintiff objected upon the ground that it would be hearsay evidence, which objection was sustained by the court." This

statement was *res gestæ*, and the court erred in not admitting it. *Railway Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1089, 27 Am. St. Rep. 902; *Railroad Co. v. Bryant* (Tex. Civ. App.) 54 S. W. 364. If the plaintiff was not seen by the employés, no liability would attach, under the circumstances. It was therefore a material inquiry, and no legitimate evidence bearing thereon should have been excluded.

For the error stated, the judgment is reversed and the cause remanded. Reversed and remanded.

On Rehearing.

(Jan. 25, 1902.)

It is insisted by counsel for appellee that under the evidence the exclusion of the statement made by the engineer, as was proposed to be shown by the fireman, was immaterial, as the evidence shows, without contradiction, that, if appellee was not seen by the engineer when the whistle was blown, he was seen by the conductor and fireman, and they were in a position to have prevented the blowing of the whistle, and their failure to do so was negligence chargeable to the appellant. It is not shown by the evidence who had control of the operation of the engine, what was the duty of each in that respect, nor whose duty it was to blow the whistle at the post. If it was the duty of the engineer to blow the whistle, and he did blow it, and at the time he did not see appellee, then negligence cannot be charged to him. Nor can it be said, as a matter of law, that the conductor or fireman knew that the engineer did not see appellant, and, if they did, that they should warn him of the situation, or, if he saw appellee, that they should anticipate that he would not perform his duty, but, instead, blow the whistle, if the situation required him to refrain from doing so. The evidence leaves it in doubt as to the engineer seeing the appellee. Whether the engineer saw appellee is important in determining the question of negligence of the employé, and we cannot tell what effect the admission of the evidence excluded would have produced upon the jury.

The motion for rehearing is overruled.

FORST et al. v. ROTHE et al.¹

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

PUBLIC LANDS—SCHOOL LANDS—TRASPASS—QUESTION OF TITLE—EVIDENCE—PRESUMPTION—APPEAL—GROUNDS OF REVERSAL.

1. Where the evidence in an action involving title to school land shows that the land was sold to plaintiff, though defendant had made a prior application for its purchase, but there is no evidence that the latter complied with all requirements necessary to entitle him to the land, it will be inferred that his application

¹ Rehearing denied February 12, 1902.

was rightfully refused, and that he does not occupy the position of a purchaser.

2. Where the evidence in an action for wrongfully pasturing cattle on plaintiff's land shows a possession of the land by plaintiff before defendant entered into possession of a portion thereof, and that defendant's application for the purchase of the land as school land was denied, and it does not appear that he fulfilled all the requirements entitling him to purchase the land, he is a mere trespasser, and liable for damages.

3. The validity of an award of school land will not be considered in an action by the person to whom the land is granted for damages against a mere trespasser who exhibits no title to the land.

4. Where the judgment rendered is the only result possible under the evidence, it will not be reversed on appeal for errors committed at the trial.

Appeal from Medina county court; H. E. Haass, Judge.

Action by Henry Rothe and others against Joseph Forst and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Geo. Powell and V. H. Blocker, for appellants. Ed De Montel, W. J. Harper, and S. B. Easley, for appellees.

JAMES, C. J. This is an action to recover pasturage for cattle alleged to have been kept in a pasture of appellees, and turned loose therein by appellants on or about October 13, 1900. The contention of appellants is that certain portions of the pasture were not owned by appellees, and certain of appellants were entitled to such portions (being state land) by reason of actual settlement under the law governing school lands, and that no more cattle were pastured therein by appellants than were warranted by the acreage to which they were so entitled. Some of the cattle belonged to defendants Forst, and were pastured by defendant H. E. Smith; and the court directed a verdict in favor of defendant T. H. Smith, who, it appears, has nothing to do with turning the cattle in. The testimony shows clearly that Henry Rothe, one of the plaintiffs whose pasture this was, had possession and maintained and controlled it (about 28,000 acres) since 1886. There is not sufficient shown by this record to establish title in appellants, or any of them, under the laws governing school lands, to the surveys they claimed. There can be no doubt that, under the testimony, plaintiffs showed prior possession of the inclosed lands at and long before defendants' entry, and this was sufficient to enable them to recover damages for injuries to the possession against parties who failed to prove title. *House v. Reavis*, 89 Tex. 630, 35 S. W. 1063. Such prior possession would be sufficient to recover upon in trespass to try title. *Lockett v. Glenn* (Tex. Sup.) 65 S. W. 482.

It appears that appellant H. E. Smith settled upon one section of school land in the pasture; that he had applied to purchase it, and his application had been rejected; and that an application by one of the appellees

to purchase it had been accepted, although the latter appears not to have actually maintained a residence thereon. It is not shown why H. E. Smith's application was rejected, and the evidence does not show that he complied with all requirements necessary to have the land awarded to him; and, upon this state of facts, it must be inferred that his application was rightly refused, and that he did not occupy the attitude of a purchaser. It appears, also, that appellant T. H. Smith claimed two other sections of school land in said pasture. He had applied to purchase these tracts, but his application had also been rejected. Upon this testimony, defendants were trespassers upon plaintiffs' possession; and, as this testimony is undisputed, they were legally liable for the reasonable damages sustained by plaintiffs, and the amount of damages, if any, was the only question for the jury. Defendants should have been prepared to show title in themselves when they invaded the inclosure of plaintiffs. In our opinion, it was no justification that the land was state land, and, if it were, the evidence shows that one of defendants had been awarded said section by the state; and whether this award was right or wrong, or had been lost by failure to live thereon, does not matter in this action, so long as defendants exhibited no title.

The assignments of error which relate to demurrers to the petition are not well taken. As no other result than a judgment for plaintiffs was legally possible under the testimony, any errors, if any, that may have been committed on the trial, are immaterial.

It appears from the evidence that there is litigation pending in the district court concerning the title to said school section or sections, and therefore what is said in this opinion relates only to this particular action and this particular record.

Judgment affirmed.

ELKINS v. KEMPNER.

(Court of Civil Appeals of Texas. Jan. 22, 1902.)

APPEAL—FILING OF BRIEF—INEXCUSABLE DELAY.

Under Rev. St. art. 1014, providing that an appellant shall file the transcript with the clerk of the court of civil appeals within 90 days from the time of perfecting the appeal; and article 1417, requiring briefs to be filed in the court below not less than 5 days before the filing of the transcript,—an appeal in which appellant's briefs were not filed until 92 days after the transcript was filed, and only 2 days before the case was set for submission, will be dismissed.

Appeal from district court, Wilson county; M. Kennon, Judge.

Action between George Elkins and I. H. Kempner. From a judgment in favor of the latter, the former appeals. Dismissed.

Dibrell & Mosheim and Wiseman Bros., for appellant.

NEILL, J. The appellee has filed a motion to dismiss this appeal because the appellant has failed to prosecute it by filing briefs within the time prescribed by statute and the rules of this court. The judgment appealed from was rendered on the 6th day of June. The appeal was perfected on the 13th of July, and a transcript of the record was filed in this court on the 11th day of October, 1891. A copy of appellant's brief was not filed in the court below until the 6th day of January, 1902; and copies were not filed in this court until the 8th Inst.—the day the case was set for submission. It is thus seen that appellant took the entire time, allowed by Rev. St. art. 1015, to file the record in this court. Not less than 5 days before filing the transcript here, he should have filed with the clerk of the district court a copy of his brief. Id. art. 1417. It was not filed there until the expiration of 92 days from the time the record was filed in this court, which was only 2 days before the time the case was set for submission. This gave the appellee no time to prepare and file his briefs in answer to appellant's. He was entitled to 20 days after notice of filing appellant's brief in the court below. This statement, in our opinion, shows an infraction of the statute so grossly negligent and inexcusable as to make it our duty to grant this motion and dismiss the appeal. *Hunt v. Glasscock*, 65 S. W. 209, 3 Tex. Ct. Rep. 406; *Railway Co. v. Holden* (Tex. Sup.) 54 S. W. 751; *Railroad Co. v. Killingsworth* (Tex. Civ. App.) 43 S. W. 1045.

Appeal dismissed.

UNITED BENEV. SOC. v. SHEPHERD.

(Court of Civil Appeals of Texas. Jan. 18, 1902.)

PLEADING—PETITION—DEMURRER—EFFECT OF SUSTAINING DEMURRER—DEFENSE—NECESSITY OF PLEADING WAIVER.

1. Where a demurrer to a petition on the ground of the insufficiency of its allegations is sustained, and plaintiff fails to amend, the court must enter a final judgment for defendant on the demurrer, and cannot proceed to the trial of the case.

2. Where defendant, in an action on a certificate issued by it, insuring plaintiff against bodily injuries, pleads provisions in the certificate, plaintiff cannot prove a waiver of such provisions without pleading the facts showing such waiver.

Appeal from Rains county court; G. G. Pierson, Special Judge.

Action by George W. Shepherd against the United Benevolent Society. Judgment for plaintiff, and defendant appeals. Reversed.

McMahan & Potts, for appellant.

TEMPLETON, J. Shepherd sued the United Benevolent Society on a certificate of membership issued to him by the society, and which insured him against "bodily injuries

of which there shall be external, visible signs, effected through violent and accidental means, by reason of which, and independent of all other causes, he shall be immediately and wholly disabled from performing any and all the duties of his occupation." The certificate was attached to, and made a part of, the petition; and it was alleged that his foot was accidentally crushed, and that, "by reason of said accident and injury, plaintiff was totally disabled." A demurrer was presented to the petition on the ground that the same did not show that he was disabled, independent of all other causes, from performing any and all of the duties of his occupation, and did not show to what the defendant was required to answer. The demurrer was sustained. No further pleading was filed, but the court proceeded to try the case without a jury, and rendered judgment for the plaintiff for \$260.

It was incumbent upon the plaintiff to allege and prove an injury which came within the terms of the certificate. In other words, he was bound to allege and prove that during the life of the certificate he was injured, and thereby disabled, by the means and in such manner as to bring his case within the clause of the certificate quoted above. He attempted to allege these facts, but the court sustained the exception to that portion of his petition; and, when this was done, he was left without any plea in that respect. The demurrer having been sustained to this vital part of his petition, no cause of action remained, and there was nothing for the court to try. The demurrer was properly sustained, and the plaintiff was thereupon bound to amend his petition, and allege facts showing a cause of action under the certificate; and, in case of his failure to do so, the court should have entered final judgment for the defendant on the demurrer.

The defendant, in its answer, pleaded a provision in the certificate which made it the duty of the plaintiff to make proof of the duration of the alleged disability within three months from the termination thereof, and which prohibited the bringing of suit on the certificate until after the expiration of three months from the making of such proof. No reply was filed to this plea by the plaintiff, but on the trial he was permitted to prove a waiver by the defendant of said provision of the certificate, by showing a denial of liability. In the absence of such plea by the plaintiff, the waiver could not be shown. It was the duty of the plaintiff, if he relied on the waiver, to plead the facts which would show that the society had waived its right to insist on the clause of the certificate relating to the making of proof of the duration of the disability.

The remaining assignments of error are not well taken.

The judgment is reversed, and the cause remanded. Reversed and remanded.

SAN ANTONIO & A. P. RY. CO. v. ADAMS.
(Court of Civil Appeals of Texas. Jan. 22, 1902.)

RAILROADS—FIRE—SPARKS FROM ENGINE—EVIDENCE—NEGLIGENCE—PRESUMPTION.

1. Where a fire occurred near a railroad right of way immediately after the passing of a train, and there was a strong wind blowing from the track towards the place where the fire started, and a fire had started near the same place a few days before, immediately after the passing of a train, a finding that the fire was started by sparks from the engine was supported by the evidence.

2. In an action for damages from fire communicated to adjacent grass by sparks from a locomotive, proof that the railroad company used the best spark arresters, and that the fire did not originate on the right of way, is insufficient to overcome a prima facie case by plaintiff.

3. Where a fire alleged to have been communicated to plaintiff's grass by sparks from a locomotive was seen as it was starting by men who were digging a well for plaintiff, and could have been extinguished by them before it did much damage, their failure so to do did not preclude a recovery by plaintiff, the well diggers not being in his general employ.

Appeal from Kendall county court; Henry Theis, Judge.

Action by William Adams against the San Antonio & Aransas Pass Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Houston Bros. and Hines & Tallafarro, for appellant. F. W. Schewppe, for appellee.

FLX, J. This suit originated in a justice's court, where appellee obtained a judgment for \$200 as damages for the destruction by fire of 80 acres of grass, 100 cedar posts, and 5 tons of hay. On appeal to the county court appellee recovered judgment for \$180. It was in proof that on March 13, 1899, a train belonging to appellant passed along its track near the land of appellee, and a few minutes thereafter the grass on the land was seen to be on fire near the right of way. A few days before, a fire had started in the grass shortly after a train had passed, but was extinguished. The fire destroyed the grass on about 80 acres of land, and 5 tons of hay, and 100 cedar posts. There were several men at work drilling a well, and they were using an engine, but it was not running at the time of the fire, and it was, according to one witness, 200 feet, and another, 300 yards, from where the fire originated, and it does not appear probable that the grass caught fire from that engine. It was in evidence that appellant was using the best spark arresters, but there was no evidence that the engine was being carefully and properly operated. In the case of *Railway Co. v. Levine*, 87 Tex. 437, 29 S. W. 466, it was said: "It is the established law in this state that when fire is set out by sparks from an engine on a railroad the law presumes negligence, and the plaintiff is entitled to recover for damages done by

the fire so set out, unless the railroad company shall prove that its engine was provided with the best approved apparatus for arresting sparks and preventing their escape, and properly operated." This doctrine is reiterated in *Scott v. Railway Co.*, 93 Tex. 625, 57 S. W. 801, and it is further said: "But the jury might have found that the testimony of the witnesses as to the actual condition of the spark arrester was true, and yet that sparks escaped and caused the fire, and that this was due to the negligent management of the engine; or they might have found that sparks escaped and caused the fire through negligence, the exact character of which, whether in defective appliance or careless handling of the engine, they could not ascertain." The special charges asked by appellant and refused by the court were clearly erroneous, because, by their terms, proof that appellant used the best and most-approved spark arresters, and that the fire did not start on the right of way, was a perfect defense to the prima facie case made by appellee, without reference to the manner in which the engine was operated.

It is contended by appellant that there was no evidence tending to establish that sparks from its engine ignited the grass. It was in proof that a fire had occurred immediately after appellant's train passed, that a strong wind was blowing from the road towards the grass, that a fire had occurred two days before near the same place just after appellant's train has passed, and these circumstances would be sufficient to justify a conclusion that the fire was communicated by the train. *Railway Co. v. Holt*, 1 White & W. Civ. Cas. Ct. App. § 836; *Railroad Co. v. Hart*, 2 Willson, Civ. Cas. Ct. App. § 419. The *Holt* Case is approved in *Railway Co. v. Timmermann*, 61 Tex. 660.

The men who were digging the well and saw the fire at its inception, and who testify that they could have extinguished it before it did much damage, were not in the general employ of appellee, and he cannot be responsible for their conduct, however reprehensible, in failing to extinguish the fire.

The judgment is affirmed.

RIO GRANDE & E. P. RY. CO. v. MEN-DOZA.¹

(Court of Civil Appeals of Texas. Dec. 23, 1901.)

APPEAL—AFFIRMANCE—DISMISSAL.

A writ of error to review a judgment on appeal to the court of civil appeals was dismissed in the supreme court because the record did not show the rendition of a final judgment against the appellant in the trial court, and appellee thereafter moved in the court of civil appeals for the affirmance on certificate, and the court then continued the cause to enable the appellant to bring certiorari to correct the judgment; the order reciting that it was rea-

¹ Rehearing denied January 22, 1902.

sonably apparent that a final judgment had been rendered. Appellant failed to take steps to cause the record to be corrected, but filed a petition in error in the district court instead. *Held*, that the appellee's motion for affirmance would be granted, and the appeal and writ of error dismissed.

Appeal from district court, El Paso county; J. M. Goggin, Judge.

Action by Julio Mendoza against the Rio Grande & El Paso Railway Company and the Atchison, Topeka & Santa Fé Railway Company. A judgment in favor of plaintiff was reversed in the court of civil appeals (60 S. W. 327), and an application for a writ of error to the supreme court was dismissed for want of jurisdiction (62 S. W. 418), and plaintiff files a certificate and asks an affirmance. Motion granted, and appeal dismissed.

Turney & Burgess and J. W. Terry, for appellant. M. W. Stanton, for appellee.

JAMES, C. J. Cause No. 2,202 on this court's docket was the one in which the record failed to show a final judgment, in that there did not appear to have been any judgment disposing of the Atchison, Topeka & Santa Fé Railway Company, and in which the supreme court held this court had no jurisdiction of the appeal for that reason. *Mendoza v. Railroad Co.*, 62 S. W. 418. After the rendition of that opinion the appellee, Mendoza, filed in this court a certificate asking affirmance on May 30, 1901. Thereupon this court, in view of the circumstances, and in view of the fact that the certificate showed a judgment dismissing the Atchison, Topeka & Santa Fé Railway Company, and to enable appellant to perfect the record on appeal in this particular, entered the following orders:

"A., T. & S. F. Ry. Co., Appellant, vs. Julio Mendoza, Appellee. (No. 2,202.) Appeal from El Paso County. In this cause it is ordered by the court that the judgment heretofore at this term rendered herein, reversing the judgment and remanding the cause, be set aside, and the opinion delivered herein be withdrawn, and the cause be reinstated on the trial docket of this court as before submission. And in view of what appears in a certificate for affirmance filed by appellee, it being reasonably apparent to that court that there was a final judgment of the district court in this cause disposing of the Atchison, Topeka & Santa Fé Railway Company, which is not in the record as filed, the cause will be continued to afford appellant an opportunity to file a motion for certiorari to perfect the record, if it sees fit to do so.

"Rio Grande & El Paso Ry. Co., Appellant, vs. Julio Mendoza, Appellee. Appeal from El Paso County. Motion to Affirm on Certificate. This motion is continued for the term."

And before adjournment the court entered this further order:

"It is ordered by the court that all motions and all causes not heretofore disposed

of be, and they are hereby, continued until the next term of this court."

Appellant has not seen fit to avail itself of the benefits of said first order, and has taken no steps to perfect the record, and, instead, prosecutes a writ of error; the petition therefor having been filed in the district court June 12, 1901. Under these circumstances, the motion for affirmance, being in all things regular, should prevail, and the proceedings in appeal and in writ of error dismissed.

NEVILLE et al. v. MITCHELL.

(Court of Civil Appeals of Texas. Jan. 25, 1902.)

PRIVATE NUISANCE—DAMAGES—LIMITS OF—MEASURE OF—PLEADING—INSTRUCTIONS—APPEAL—ERROR.

1. A husband, in an action for a nuisance causing the sickness of his wife, may recover for the loss of the society and the comfort of the wife, resulting therefrom.

2. Plaintiff, in an action to recover for medical expenses incurred for his wife and children in the treatment of sickness resulting from a nuisance, should allege the sums expended for the wife and for the children, respectively, and that such expenses were necessary and reasonable.

3. Where defendant is entitled to prove certain facts under a general denial, and proof thereof is received, the action of the court in sustaining a demurrer to a special answer alleging such facts is not reversible error.

4. Where there is evidence in an action for sickness caused by a nuisance that the sickness was not caused, but only prolonged, thereby, the instructions should clearly state that under such facts the plaintiff is not entitled to damages for the entire sickness, but only for the continuance thereof caused by the nuisance.

5. Where a requested charge is not correct, but calls the attention of the court to an issue raised by the evidence, as to the extent of defendant's liability, the duty is imposed on the court of giving the proper instructions as to such issue.

6. The person operating a cotton gin which, in connection with other gins, constitutes a nuisance, is not relieved from liability because his business is lawful in itself, or because the other mills contribute to the injury complained of, but he is liable only for the portion of the injuries which result from the operation of his mill.

Appeal from district court, Hunt county; H. C. Connor, Judge.

Action for a nuisance by R. B. Mitchell against George W. Neville and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Perkins, Gilbert & Perkins, for appellants. Bennett & Jones, for appellee.

RAINEY, C. J. Appellee sued to recover of appellants damages for building and operating a gin plant in such close proximity to his residence as to constitute a nuisance, and for an injunction restraining the operation thereof where located. Appellee alleged, in substance, that, by reason of the construction and operation of said plant, lint an-

dust have been blown into his house and his cistern, and the noise of its operation has disturbed his family; that cotton seed have been allowed to decay and emit obnoxious odors; that cattle were allowed to tramp the ground around its standpipe or water tank, which leaked or was allowed to run over; and that from these causes his family was made sick, and he was deprived of the comforts of his wife's society, and incurred medical expenses on account of the sickness of his wife and children. Defendants answered by general and special demurrers, general denial, and specially various grounds as defenses. Upon a trial, plaintiff recovered judgment, from which this appeal is prosecuted.

For injury to the wife, resulting from a nuisance, the husband can recover for loss of the society and comfort of his wife caused thereby. *Rodg. Dom. Rel. par. 269; Hotel Co. v. Cobb (Ind. T.) 53 S. W. 478.* Therefore the trial court did not err in overruling the special exception of defendants to the allegations in plaintiff's petition seeking a recovery for such loss.

The plaintiff having sought to recover for medical expenses incurred for both wife and children, the better practice would have been to allege how much was expended for the wife and how much for the children, and also to allege that such expenses were necessary, and that the charges therefor were reasonable. Our decisions hold that proof must be made that such charges are reasonable. *Wheeler v. Railway Co., 91 Tex. 860, 43 S. W. 876; Railway Co. v. Warren, 90 Tex. 567, 40 S. W. 6.*

A demurrer of plaintiff was sustained to the allegations of defendants' special answer to the effect that the persons who came to the gin for the purpose of unloading cotton, etc., were law-abiding citizens, and conducted themselves in a proper and lawful manner; that at times there had been mud and water around said gin, but such had not been caused by the construction and operation thereof, but because of the nature of the soil and its level condition; and that, if cows were around and about said gin at times, it was not at all unusual in that community and neighborhood, as most people kept cows, and permitted them to run at large. In view of the allegations of the plaintiff's petition, the defendants, under their general denial, were entitled to prove the matters set up in said answer. The record shows that evidence was admitted in proof of the matter set up in the answer; hence no harm resulted to defendants by the demurrer being sustained.

That part of the main charge applying the law to the facts is complained of by appellant. None of said objections are vital, yet the charge is not entirely free from criticism, in that it is somewhat confusing, in not clearly instructing the jury as to the right of plaintiff to recover damages in case they

should believe the sickness of plaintiff's wife was not caused by the nuisance, but only prolonged thereby. There was some evidence tending to show that the sickness was not caused by the nuisance, but that it was only prolonged by reason thereof; and it is possible, from the wording of the charge, that the jury may have been led to believe that plaintiff was entitled to all damages incurred by reason of the sickness, though they may have believed that the sickness was only prolonged by reason thereof.

The evidence showed that there were an oil mill, a corn sheller, and another gin plant close to plaintiff's residence, but not so near as defendants' gin, which plants were operated by similar motive power, and made similar noises, and were in other respects subject to other objections made by plaintiff to defendants' plant; and there was some evidence tending to show that said plants contributed to the injuries complained of by plaintiff, and that said plants were operated separately and independently, and in no way connected in their operation with defendants' plant. Defendants asked a special charge, which was refused, to the effect that the establishment and operation of a gin plant is a lawful avocation, and if the same was operated in the usual manner and if other plants were situated near, and operated in a similar manner, and contributed to the injury, etc., then plaintiff could not recover, unless the jury should find that the injury was caused solely by the operations of the defendants' plant, and, further, that if said plants contributed during a portion of the time to the annoyance of plaintiff's family, etc., then defendants could in no event be held responsible for the noises caused by the other plants. The requested charge was not correct, as written, but it called the attention of the court to an issue raised by the evidence, as to the extent of defendants' liability; and a proper charge covering this phase of the case should have been given by the court, as this issue was not touched upon in the main charge. *Kirby v. Estill, 75 Tex. 484, 12 S. W. 807; Earle v. Thomas, 14 Tex. 583; Railway Co. v. Hodges, 76 Tex. 90, 13 S. W. 64; Freybe v. Tiernan, 76 Tex. 286, 13 S. W. 370; Railway Co. v. Hill (Tex. Civ. App.) 58 S. W. 255; Williams v. Emberson (Tex. Civ. App.) 55 S. W. 595; Railroad Co. v. Miles (Tex. Civ. App.) 50 S. W. 168.* That a person is engaged in a lawful business is not necessarily a defense to an action for a nuisance. Every person has the right to the reasonable enjoyment of his own property, and to conduct a lawful business, so long as he does not violate the rights of others in an essential degree. But when he uses his property or conducts his business in a manner prejudicial to the rights of others in an essential degree, he becomes liable to the party injured. *Wood, Nuis. (2d Ed.) p. 1.* What conditions create a nuisance depends upon the circumstances of each particular case. What would

be lawful and reasonable in one locality might be unlawful and a nuisance in another. Id. p. 2. It would have been error for the court to have charged the jury that because "the establishment and operation of a gin plant is a lawful avocation," and because the other plants contributed to the injury, plaintiff could not recover. But the other paragraph of the charge embodied a correct principle of law, if the other plants were operated separate from, and independent of, defendants' plant. Where a nuisance results from the acts of several, acting separately and independently of each other, each is responsible only to the extent of the injury inflicted by his own wrong, and can be assessed only for the damages caused by him. *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 Pac. 305; *Martynowsky v. City of Hannibal*, 35 Mo. App. 70; *Wood*, 77 N. (2d Ed.) p. 831; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566. A defendant is entitled to have all his defenses affirmatively presented, and it is error for the court not to do so, where special charges are requested calling attention to the omissions. *Railway Co. v. McGlamory* (Tex. Sup.) 35 S. W. 1058; *Telegraph Co. v. Andrews*, 78 Tex. 305, 14 S. W. 641. The court having failed in this particular, the judgment must be reversed.

No proof was made that the amount expended for medical attention was reasonable. Appellee proposes to enter a remittitur for this, but, as the judgment must be reversed for the other error pointed out, an offer to remit avails him nothing.

The judgment is reversed, and the cause remanded. Reversed and remanded.

W. G. RAGLEY LUMBER CO. v. GOLDSMITH.

(Court of Civil Appeals of Texas. Jan. 11, 1902.)

INSTRUCTIONS OUTSIDE OF CASE MADE BY PLEADINGS.

The case made by the pleadings in action for injury to employé being that when the belt came off a wheel moving plaintiff's machine, and while the machinery was still in motion, plaintiff was required by his duty to put it back on, and in so doing was injured, an instruction as to his rights in case it was not his duty to put on the belt, but he supposed it was, is outside such case, and erroneous.

Appeal from district court, Wood county; H. M. Cate, Special Judge.

Action by M. E. Goldsmith, as next friend and for herself, against the W. G. Ragley Lumber Company. Judgment for plaintiff. Defendant appeals. Reversed.

L. S. Schluter and F. J. McCord, for appellant. M. D. Carlock, for appellee.

BOOKHOUT, J. The appellee, Mrs. M. E. Goldsmith, acting for herself and as next friend for the minor son, J. F. Goldsmith,

on the 13th day of March, 1900, filed two suits in the district court of Wood county, against the appellant for damages alleged to have been sustained by herself and said minor son by reason of personal injury received by her said minor son while engaged in the service of appellant company at its sawmill in Wood county, Tex. The allegations in both petitions are substantially the same, except that in the case of Mrs. M. E. Goldsmith against the appellant, wherein she sued for herself, she alleged that the employment of her said minor son by the appellant was without her knowledge or consent. The other allegations in both petitions are substantially as follows: "That about January 10, 1900, the said J. F. Goldsmith, minor son of appellee, Mrs. M. E. Goldsmith, was employed by appellant, and required to work at a dangerous and hazardous place, to wit, near moving machinery, in which he was required, and it was part of his duty, to separate the slabs from the lumber; and near his place of work was a wheel, around which was a band that ran the live rollers, and when said band became detached it was dangerous to undertake to place said band back upon said wheel, and the said J. F. Goldsmith, as a part of his said duty, was required to place said band, when it became loose or off said wheel, back upon said wheel." Then follows an allegation that "this danger was well known to appellant, but unknown to the said J. F. Goldsmith," and that "appellant failed to warn and caution said Goldsmith of said danger, and that appellant knew the said J. F. Goldsmith was inexperienced; that while the said J. F. Goldsmith was engaged at his work near said moving machinery, and on January 25, 1900, and while the machinery was in motion, the belt from one of the wheels came off, and while the same was still in motion the said J. F. Goldsmith was required to, and it became a part of his duty to, put said belt back on said wheel; that while attempting to do so his little finger was caught in the machinery, and so crushed as that it had to be amputated, causing him great physical pain, etc.; that he lost three months' time by reason of said injury, and his earning capacity has been greatly depreciated by reason of the loss of said little finger,"—and praying for damages for her said minor son in the sum of \$2,000, and for herself in the sum of \$1,105. The appellant answered in both cases: (1) By general denial; (2) contributory negligence on the part of J. F. Goldsmith; (3) that the injury complained of was received and sustained while the said J. F. Goldsmith was performing a voluntary act, not required of him by his employment, and that said injuries could not and would not have occurred if he had remained at his place and post of duty, and engaged at the work for which he was employed by appellant; (4) that the work and employment in which said J. F.

Goldsmith was engaged was not dangerous, and that, but for his own negligence and voluntary act, he would not have been injured. At the April term, 1901, of the court, the two cases were consolidated. At the same term of the court there was a jury trial, resulting in a verdict and judgment in favor of J. F. Goldsmith for \$1,000, and for his mother, Mrs. M. E. Goldsmith, in the sum of \$250. Defendant has perfected an appeal to this court.

The first error assigned is as follows: "The court erred in its main charge to the jury, wherein it charged the jury as follows: 'But if, when injured, the said Goldsmith was in the exercise of ordinary care, considering his age, and was engaged in an act which he had not been forbidden to perform by his employer, and if the same was an act which a person of ordinary prudence, intelligence, and care, similarly situated, would have judged to be a part of the duties incident to his employment, and necessary to expedite the work, and if there was no apparent danger in performing such act, and if you believe that Goldsmith, believing it to be his duty to do this particular act, and in doing it as carefully as he knew how, was injured by reason of inexperience and immature age, then he could recover, and you will so find, and assess his damages,'—because said charge was not the law, as applicable to the case made by the pleading or proof in the trial of the cause." We are not prepared to say that this charge does not announce a correct proposition of law. The wording of the charge is, however, in some respects, unfortunate. If J. F. Goldsmith was a minor and inexperienced when employed by appellant, it was the duty of appellant to instruct him as to his duties, and, if the performance of the same was accompanied with danger, to have warned him of such danger. If he was not instructed, and a belt came off a wheel which moved the machinery in connection with which he was working, and Goldsmith believed it to be a part of his duty to replace said belt, and a person of ordinary prudence, of his age, and with the knowledge he possessed, would have so believed, and, so believing, he attempted to replace said belt, and in so doing he acted with ordinary care (that is, such care as a person of his age and intelligence would have exercised), and in so attempting to replace said belt he was injured, then he was entitled to recover. *Railway Co. v. Brick*, 83 Tex. 598, 20 S. W. 511; *White v. Waterworks Co.*, 9 Tex. Civ. App. 465, 29 S. W. 252; *Cotton Co. v. Harkey* (Tex. Civ. App.) 48 S. W. 1005.

It is contended that this charge is erroneous, in that it submits to the jury an issue not presented by the pleadings. This contention is sustained. The case made by the pleading is, in substance, that when the belt came off, and while the machinery was still in motion, the plaintiff was required, and it

became his duty, to put it back on, and that in so doing he was injured. The charge set out in the assignment is outside of the case made by the pleadings, and is one upon which the verdict of the jury may have been found. *Loving v. Dixon*, 50 Tex. 75; *Denison v. League*, 16 Tex. 408; *Markham v. Carathers*, 47 Tex. 22; *Railway Co. v. Terry*, 42 Tex. 451.

For the error indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

MASSIE v. ATCHLEY et al.

(Court of Civil Appeals of Texas. Jan. 11, 1902.)

EXEMPTIONS—PHYSICIANS—TYPEWRITER.

A typewriter is not exempt as a tool or apparatus belonging to the profession of a physician, though he uses it in correspondence and advertising his business.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Action by J. M. Massie against A. C. Atchley and others. Judgment for defendants. Plaintiff appeals. Affirmed.

W. T. Strange and Curtis Hancock, for appellant. W. R. Harris, for appellees.

RAINEY, C. J. The appellant sued to recover damages for the wrongful seizure and sale under execution of one typewriter, which he alleges was exempt under law. A general demurrer was sustained to plaintiff's petition, and, he failing to amend, judgment was rendered for defendants.

Plaintiff's petition alleges, substantially, that at the time of said seizure he was a practicing physician, duly authorized and licensed to practice medicine in all of its branches; that in the prosecution of such practice he conducted a large correspondence, extending into many counties of this state, and furnished medicine to parties in such counties; that he advertised extensively throughout the state his business and practice, and that in the prosecution of said profession and occupation as aforesaid it was reasonably necessary for him to have and use a typewriter; that he was skilled in the use of it, and with it he was able to properly dispatch and readily transact and conduct his said correspondence and advertisement, and the same was done by means of said typewriter, etc.; and that same was an apparatus or tool of his said profession, as pursued by him, and that same was exempt. The only issue raised is, does the allegations show that the typewriter was a tool or apparatus belonging to the profession of physician? The Century Dictionary and Encyclopedia defines a physician as "one who practices the art of healing disease and preserving health; a prescriber of remedies for sickness and disease; specifically, a person licensed by some competent authority, such as

a medical college, to treat diseases, and prescribe remedies for them." The statute (Rev. St. 1895, art. 2395, subd. 5) exempts from forced sale "all tools, apparatus and books belonging to any trade or profession." The typewriter is alleged to be used for the purpose of correspondence and advertising plaintiff's business. Correspondence and advertising are not acts that constitute a part of the practice of healing diseases and prescribing remedies, and a typewriter used for the purpose of correspondence and advertising is not a tool or apparatus belonging to the profession of practice of medicine, in contemplation of the statute. A physician has a legal right to use it for that purpose if he pleases, yet the fact that he does so, and that it is a convenience, does not thereby make it a tool or apparatus belonging to that profession. To make a tool or apparatus exempt, it must be shown to belong to a trade or profession pursued by the party claiming the exemption. The allegations of plaintiff's petition not only fail to show the typewriter exempt in this instance, but, on the other hand, alleges facts which, to our minds, show it not to be exempt. The case of *Smith v. Horton*, 46 S. W. 401, decided by this court, is decisive of this case, the same principles being involved. See, also, *Id.* (Tex. Sup.) 46 S. W. 627.

We are of the opinion that the trial court did not err in sustaining the demurrer, and the judgment is affirmed. Affirmed.

TEXAS M. RY. CO. v. PARKER.

(Court of Civil Appeals of Texas. Jan. 18, 1902.)

COSTS—CLERK'S FEES—WITNESSES—COMPENSATION—WIFE OF PARTY.

1. Under Rev. St. art. 2494, providing that a clerk shall not have fees for filing any paper issued by him, a clerk cannot tax costs for filing subpoenas and citations issued by him.

2. A clerk may tax costs for filing affidavits of witnesses showing their attendance, such affidavits not being issued by the clerk within the meaning of Rev. St. art. 2494.

3. Under Rev. St. art. 2453, only allowing a clerk fees for recording returns on a writ when the law requires such return to be recorded, a clerk cannot charge fees for recording the return on a citation, there being no law requiring the recording of such return.

4. A clerk, under Rev. St. art. 2268, requiring him to give a certificate of attendance on the affidavit of a witness, can only make one charge therefor in taxing costs, taking the affidavit and giving the certificate being one act, and coming under the item in the schedule of fees allowing a fee for "administering an oath, with a certificate and seal."

5. A witness is not liable to the clerk for the latter's issuance of a certificate of attendance for such witness, the fee therefor being properly taxed as costs.

6. The wife of a party to a suit is not entitled to pay for attendance as a witness.

Appeal from district court, Hunt county; H. C. Connor, Judge.

Action between the Texas Midland Railway Company and S. H. Parker. From a

judgment overruling a motion to retax costs, the former appeals. Reversed.

A. H. Dashiell, for appellant. Chas. W. Ogden, for appellee.

RAINEY, C. J. This is an appeal by appellant from a judgment of the district court overruling a motion to retax costs.

1. Complaint is made of the clerk taxing as costs the filing of 6 subpoenas, 1 citation, and 18 affidavits of witnesses' attendance. The court found that all these papers were issued by the clerk in this case. The statute (article 2494) provides that "no clerk * * * shall be entitled to any fee for filing any process or paper issued by him and returned into his court." This provision, we think, precludes the right of the clerk to charge for filing papers issued by him. The affidavit of witnesses as to attendance cannot be considered as being issued by the clerk, and he is entitled to charge for filing same.

2. Complaint is made of the item of 50 cents charged by the clerk for recording the return on the citation. The statute (article 2453) only allows fees for "recording returns on any writ when such return is required by law to be recorded." There is no law requiring the return of citation to be recorded. Hence this charge is erroneous.

3. The clerk charged for taking the affidavits of witnesses, and, in addition thereto, for issuing certificates of attendance. The statute (article 2268) provides for the clerk giving a certificate on the affidavit of a witness as to attendance, but, in our opinion, only one fee should be charged. The taking of the affidavit of a witness and giving the certificate should be considered as one act, and a separate charge for each should not be made, but a charge only for the two combined; that is, the clerk is only entitled to 50 cents for taking the affidavit of a witness and giving the certificate of attendance. This charge comes under the item in the schedule of fees which allows 50 cents for "administering an oath, or affirmation, with certificate and seal." This fee should be taxed as costs, and the witnesses not held responsible therefor.

4. A party to a suit is not entitled to pay for attendance as a witness. The wife of a party to a suit, though it involves his separate property, is interested in the result; for, if judgment be rendered against him for costs, it would affect the community property to that extent, and she would be considered a party as to its binding effect. *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924. The relation of husband and wife is so intimate that whatever affects his interest affects hers, and her attendance should be considered in the same light as his, and it is not the policy of the law that she should receive pay as a witness in such a case.

The judgment is reversed, and the cause remanded, with instructions to the district court to retax the costs in accordance with the views herein expressed. Reversed and remanded.

**MISSOURI, K. & T. RY. CO. OF TEXAS
v. WALDEN.¹**

(Court of Civil Appeals of Texas, Nov. 30, 1901.)

**MASTER AND SERVANT—INJURY TO SERVANT—
NEGLIGENCE OF FOREMAN—ASSUMPTION
OF RISK—INSTRUCTIONS—APPEAL—HARM-
LESS ERROR.**

1. Plaintiff and his fellow servants were pulling the lower end of a brace from a building by a rope, when it struck on an obstruction; and plaintiff was directed by defendant's foreman to raise the brace over the obstruction, and, before doing so, told the foreman to wait; but the latter directed the other workmen to pull before plaintiff had lifted the brace over the obstruction, which caused it to fall on plaintiff. *Held*, that negligence of the foreman authorized a verdict to plaintiff.

2. Plaintiff, in attempting to lift the brace over the obstruction, only assumed the risk of dangers either apparent or known to him, and not dangers resulting from negligent acts of the foreman.

3. Where defendant concedes that plaintiff's injuries are sufficient to support the verdict in his favor, the admission of erroneous evidence as to the injuries is harmless error.

4. Where the general charge restricts plaintiff's right to recover to the sole ground of the negligence of the foreman in directing plaintiff's fellow servants to pull a rope, it is not error to refuse to instruct that there can be no recovery if the men pulled the rope without being so directed.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by J. H. Walden against the Missouri, Kansas & Texas Railway Company of Texas for injuries received by plaintiff while in the employ of defendant. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. S. Miller and Head & Dillard, for appellant. Randell & Wood, for appellee.

BOOKHOUT, J. This suit was filed by the appellee against the appellant to recover damages for personal injuries incurred through the negligence of appellant. A trial resulted in a verdict and judgment for the plaintiff, and the defendant has appealed.

1. The first assignment of error complains of the action of the court in refusing defendant's motion to instruct a verdict for the defendant, made at the conclusion of the plaintiff's evidence. The substance of the plaintiff's testimony was that at the time of the accident appellee was working for appellant on its car sheds in the city of Denison, removing a brace 30 feet long, 12 inches wide, and 2½ to 3 inches thick, which was fastened diagonally across the outside of its

car sheds, on some upright pieces; the lower end being near the ground; the upper end being some 20 feet above the ground. John Corcoran was appellant's foreman, and appellee was directed by the appellant to work under the direction of said Corcoran. Corcoran directed appellee to take a maul and knock the lower end of the brace loose from said upright pieces, which appellee did. Then Corcoran directed appellee to tie a rope around the lower end of the brace, which order was obeyed. Corcoran then directed a number of appellee's co-laborers to take hold of said rope and pull the brace out from the shed. In doing so, the brace struck an obstruction,—one of the rails of appellant's railroad. Appellee, under the direction of Corcoran, lifted it over the obstruction. In pulling it out, it struck a second obstruction, which was a piece of wood next to another rail of appellant's railroad. Corcoran again directed appellee to come around between the brace and the men who had hold of the rope, and lift the brace over the second obstruction. Appellee, in obedience to an order of Corcoran, went up within a short distance of the brace, and got hold of the rope, and as he did so he said to Corcoran to wait. When appellee pulled on said rope for the purpose of lifting said brace over said obstruction, Corcoran gave an order to the men holding the rope to pull on the same, which was obeyed, thereby suddenly loosening the brace, and the same fell upon appellee and injured him. Appellee did not know that there was any one working at the top of the brace. He did not know that Corcoran was going to give an order to pull on the rope attached to said brace while he was in the act of lifting the same over the obstruction. On cross-examination he testified that he had been in railroad employment about 16 years, and a good part of that time in the building of bridges and tearing down and repairing bridges. Previous to entering upon the work in which he was injured, he had been repairing cars for the appellant. He knew that the manner in which the braces were being removed from appellant's shed was accompanied with some danger. He was hurt on Friday, and a day or so after the accident Mr. Jenkins, claim agent of the appellant, drew up a statement at appellee's house and read it over to appellee. He stated that John Corcoran was there, and went on to state to Mr. Jenkins how it was, and Mr. Jenkins wrote this down. Appellee could not read, and testified he could not sign his name. He says: "I can make scratches about it;" that the signature to the statement was about like his mark. He was asked if he made the statement, "I have no blame to attach for my accident, which I consider purely an accident likely to happen to any one." He testified that he did not. On the following Monday he went to the hospital. Upon the closing of appellee's testimony, he rested his case. The attorneys

¹ Rehearing denied December 21, 1901, and writ of error denied by supreme court January 23, 1902.

for the company thereupon asked the court to instruct a verdict for the defendant, which the court declined to do. The evidence was sufficient to require the submission of the case to the jury. If Corcoran ordered appellee to come around between the brace and the men who had hold of the rope, and lift the brace over the second obstruction, and appellee, in obedience to such order, went up within a short distance of the brace, and took hold of the rope for the purpose of lifting the brace over the obstruction, and at the time told Corcoran to wait, and Corcoran did not wait, but ordered the men holding the rope to pull, and, in obedience to said order, they did pull, thereby suddenly loosening the brace, and the same fell upon appellee and injured him, then he would be entitled to recover, unless, in obeying the order of Corcoran, and in attempting to lift the brace over the obstruction, he was guilty of contributory negligence. This depends upon whether an ordinarily prudent person, situated as appellee was, and with the knowledge of the facts he possessed, would have obeyed the order of the foreman, and attempted to lift the brace over the second obstruction. When appellee, in obedience to the order of Corcoran, attempted to lift the brace over the obstruction, he assumed the risk of such danger as was known to him, and such as was open and apparent. He did not assume the risk of danger caused by the negligence of the foreman. He had the right to assume that the foreman would not do any act or give any order which would make the lifting of the brace over the obstruction more hazardous. We conclude that the act of Corcoran in giving the order to appellee to lift the brace over the second obstruction, and in failing to give heed to the appellee's request to wait, and in giving the order to the other employees to pull on the rope, and in causing them to pull, was negligence, and that appellant is chargeable with the same; that said negligence was the proximate cause of appellee's injuries, and that he has sustained damages in the amount found by the jury. Appellee did not assume the risk of the danger resulting from executing the foreman's order and was not guilty of contributory negligence. There was no error in refusing to instruct a verdict for the defendant.

2. It is contended that the court erred in permitting the appellee to testify, over its objection, that Dr. Acheson, the company's doctor, examined his (plaintiff's) foot. The objection was that the evidence was irrelevant and wholly immaterial. We are of opinion that the evidence was not subject to these objections. However, if the evidence was not admissible, its admission, in view of the record, would not be ground for reversing the judgment. It is admitted by the appellant that the evidence of appellee's injuries is sufficient to support the verdict. In view of this admission, if the court had

erred in admitting the testimony such error was harmless.

3. It is contended that the court erred in refusing defendant's special charge to the effect that if the men, other than Corcoran, pulled the rope without any specific direction from him, and thereby caused the injury, the jury should find for the defendant. The court, in its general charge, restricted the plaintiff's right to recover to the sole ground of Corcoran's having given the order to pull the rope at the time plaintiff was undertaking to lift the brace over the obstruction. We think the main charge fairly covered this phase of the case, and that there was no error in refusing the special charge.

Finding no error in the record, the judgment will be affirmed. Affirmed.

GREENWOOD et ux. v. HOUSTON ICE & BREWING CO.¹

(Court of Civil Appeals of Texas. Jan. 17, 1902.)

REQUESTED INSTRUCTIONS—NECESSITY.

Where defects in the charge of the court are such as can be taken advantage of only by requested charges, and none are asked which can properly be given, the defects are waived.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by the Houston Ice & Brewing Company against Thomas Greenwood and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

J. M. Gibson and T. G. Horser, for appellants. Baker, Botts, Baker & Lovett, for appellee.

GILL, J. This suit was brought by the appellee against the appellants on a promissory note for \$300, and to foreclose a lien upon certain real estate, evidenced by a deed of trust executed by appellants to secure same. The suit on the note was not resisted, but the foreclosure of the lien was opposed on the ground that the real estate was the homestead of appellants at the date of the execution of the deed of trust, and that the instrument was not executed with the requisite formalities, nor for any of the purposes for which a lien could be created against a homestead. A jury trial resulted in a verdict and judgment against Thomas Greenwood for the amount of the note, and foreclosure of the lien as against both defendants. From this judgment the parties cast have appealed.

The judgment is assailed by complaints against the charge of the court, and the contention that the undisputed facts show the premises to have been the homestead of appellants at the date of the execution of the deed of trust. The defects, if any, in the charge of the court, are such as could be taken advantage of only by requested charges.

¹ Rehearing denied.

ges, and none were asked by appellants which should have been given. Whether or not the premises were a homestead was a question upon which the evidence was conflicting. It was largely a question of credibility of witnesses, and the verdict finds ample support in the evidence. No reversible error is presented, and the judgment is affirmed.

Affirmed.

DAILY v. HOLLIS.

(Court of Civil Appeals of Texas. Dec. 21, 1901.)

PUBLIC POLICY—BIDDING ON CONTRACT—STIFLING COMPETITION—CONTRACT BETWEEN BIDDERS.

Where two competing contractors agree as to the amount that each shall bid for doing certain work, on an understanding that the successful bidder shall share his profits with the other, the successful bidder is not liable to the other on such agreement; the same being contrary to public policy.

Appeal from district court, Bowle county; J. M. Talbot, Judge.

Action by Tom Daily against G. J. Hollis. From a judgment in favor of defendant plaintiff appeals. Affirmed.

Glass, Estes & King, for appellant. Smelser & Mahaffey, for appellee.

TEMPLETON, J. The appellant, Tom Daily, and the appellee, G. J. Hollis, resided, the one in Texarkana, Tex., and the other in Texarkana, Ark., and were independent, competing, and rival contractors and builders of the said city. They were never partners, but sometimes when Hollis had a contract he sublet part of the work to Daily. The Pintsch Compressing Company, a corporation, desired to erect a gas plant on the Arkansas side of the city, and had prepared the plans and specifications thereof, and determined to let the contract for such building to the lowest responsible bidder. For the purpose of securing offers and bids that were honestly competitive, and of thereby obtaining fair and reasonable terms, the company advertised for sealed bids for the construction of said plant; the bidder to furnish all the material necessary, except iron, and to do and perform all the work and labor required in building the plant. The bids were open to all the contractors of Texarkana and vicinity, of whom there were several besides Daily and Hollis, and the right was reserved to reject any and all bids. Daily saw the advertisement of the Pintsch Company, and applied to its agent for a copy of the plans and specifications, which he obtained and examined with a view to filing a bid for the contract. Subsequently Hollis learned of the advertisement, and also sought the said agent for the same purpose. He then ascertained that Daily had the plans and specifications, and was figuring on sub-

mitting a bid. Daily and Hollis got together, and, after some negotiations, reached an understanding by which it was agreed that Hollis should present a bid, offering to take the contract at and for the sum of \$3,476, and that Daily should make a bid offering to take the contract for \$35 in excess of that sum. It was further agreed that in case the Hollis bid was accepted the contract, though in the name of Hollis alone, should be performed by both Hollis and Daily, and that they should share equally in the profits of the undertaking. It was calculated that it would cost \$2,876 to complete the contract, leaving a net profit of \$600. In pursuance of the agreement, Daily and Hollis prepared and submitted separate and distinct bids,—one, in Daily's name, of \$3,511; and one, in Hollis' name, of \$3,476. The bids were sealed, and were received by the Pintsch Company and opened, along with bids of other contractors. It was found that Hollis' bid was the lowest filed, and the contract was awarded to him. A written contract was thereupon entered into by Hollis and the company for the construction of the plant upon the terms of his bid. The object of the agreement between Daily and Hollis was to prevent competition between them, and thereby secure the contract on more favorable terms, and insure to each an interest in the profits. The separate bids were made in order to preserve the appearance of rivalry and competition, and in that way impose on the company, and secure the letting of the contract upon terms which might not be accepted if it was known that the bids were the result of a combination of bidders. The company knew nothing of the agreement between Hollis and Daily, and supposed that the bids of each were made in good faith, and that Hollis alone was interested in the bid filed in his name. The contract between Hollis and the company was fully and faithfully performed by the parties to it. The net profits realized by the contractor were \$1,097. Daily assisted Hollis in performing the contract according to the agreement between them, and thereby became entitled to one-half of the said profits, if the agreement was enforceable. Hollis paid Daily \$109, leaving a balance of \$439.50, which he refused to pay. Daily brought this suit to recover the balance claimed by him, which he alleged amounted to \$518; charging in his petition that he and Hollis were partners in the contract. Hollis denied the partnership, and pleaded substantially the facts above stated in avoidance of legal liability; his contention being that the agreement was not enforceable, because it was contrary to public policy. His view of the matter was adopted by the trial court, and judgment was rendered accordingly.

If Daily and Hollis agreed to seek the contract jointly because they desired to work together, and in the belief that the association would be to their mutual advantage, and

would enable them to better carry out the contract if it should be secured, then the agreement was not illegal. If their purposes were innocent, the taking of the contract in the name of Hollis alone would not be reprehensible. But the agreement did not owe its origin to any such motive. They were rivals in business, and each of them was seeking this particular job. Neither of them needed or wanted the aid of the other in performing the contract. The agreement was entered into for the purpose of stifling competition between them, and by that means of securing the contract upon better terms than could have been obtained in fair and open competition. To consummate their purpose and impose on the Plntsch Company, resort was had to the artifice of filing a bid in the name of Dally, and thus keeping up the appearance of competition. It is useless to speculate as to whether the company was actually damaged. The intention of Dally and Hollis was to obtain an unfair advantage, and the means employed were calculated to accomplish their purpose. The improper motive underlying the agreement, and the method adopted of carrying it into effect, stamp it as essentially vicious. To uphold and approve such practices would be to encourage double dealing and fraud, and to retard the making of desirable improvements. The law will not compel the parties to such an agreement to a fair division of the spoils of their unlawful enterprise. *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Gibbs v. Smith*, 115 Mass. 592. In *James v. Fulcro*d, 5 Tex. 512, 55 Am. Dec. 743, two persons agreed that one of them should bid in a lot to be sold at public auction; the lot to be paid for by both, and afterwards divided between them upon lines agreed on. The agreement was upheld, as it appeared that neither of the parties wanted the whole lot; but each desired the portion he was to get under the agreement, and could get it in no other way. The purpose and effect of the agreement were not to prevent competition, and no deception was practiced in carrying it out. It was declared by the court that bidders at such sales cannot be permitted to enter into combinations to stifle competition, with the design of purchasing property at less than its fair value, but that they may unite in any such number as may be necessary to make the purchase advantageous to themselves, provided this junction of interests be without "dishonest motives" or injurious consequences; and it was further declared that such bidders had the right to consult and promote their own interests, but could not resort to any fraudulent artifice for that purpose. In *Flanders v. Wood*, 83 Tex. 277, 18 S. W. 572, three architects, who had separately prepared and filed plans and specifications for the building of a court house, agreed that, if either set of plans was accepted, the amount received should be divided between

them all. The agreement was approved, as it was not to withdraw any of the plans, but to leave them in competition as they were. The court approved the doctrine of *Atcheson v. Mallon*, supra, where it was held that a contract between two competitive bidders, made when they filed their bids, that they should divide the profits, was against public policy and void. We approve the finding of the trial court that the agreement shown in this case was not consistent with a sound public policy, and that therefore the plaintiff was not entitled to recover.

The judgment is affirmed.

BRANDENBURG v. NORWOOD.¹

(Court of Civil Appeals of Texas. Dec. 7, 1901.)

VENDOR'S LIEN NOTE—FORECLOSURE—JUDGMENT—JURISDICTION.

1. A petition in the district court alleged that the deceased husband of defendant executed a note for the price of land; that the note reserved a lien; that the plaintiff was the owner of the note; that the husband had died intestate; that one year had elapsed since his death; and that no administration had been granted on his estate, the sole property of which was the land. *Held*, that the facts were sufficient to confer jurisdiction on the district court.

2. Where a note is given in payment for land, the vendor has a lien by implication, in the absence of a reservation of a lien in the note.

3. A transfer of a note given in payment of the price of land carries with it the vendor's lien.

4. Where the maker of a vendor's lien note is deceased, and there has been no administration on the estate, it is proper in a suit against the maker's widow to foreclose the lien to adjudge a lien on the land, but not render judgment against the defendant.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Suit by P. T. Norwood against Emma Brandenburg and others. From a judgment in favor of plaintiff, defendant Emma Brandenburg appeals. Affirmed.

Henry & Henry, for appellant. Dan. T. Leary, for appellee.

BOOKHOUT, J. This was a suit instituted by P. T. Norwood against Emma Brandenburg, Birtle Brandenburg, Artie Brandenburg, and Harry Brandenburg upon a note executed by Amos Brandenburg, deceased, to establish a debt and foreclose a vendor's lien on a tract of land described in the petition. The defendant Emma Brandenburg answered by general demurrer and general denial. The other defendants did not answer. A trial resulted in a judgment for Norwood establishing his debt, and foreclosing the lien upon the property, and ordering the land sold to pay the debt; from which judgment the defendant Emma Brandenburg has appealed to this court.

Appellant's first assignment of error complains that the court erred in overruling her

¹ Rehearing denied January 4 1902.

demurrer to the petition, for the reason that it appears from the petition that the county court alone has jurisdiction over the subject-matter of this suit, the collection of the note and enforcement of the lien; and, further, that the petition does not state any facts sufficient to confer jurisdiction upon the district court authorizing said court to render judgment for the collection of said debt by a sale of the land as the property of the estate of Amos Brandenburg, deceased. The petition alleged, in substance, that on January 21, 1897, one Amos Brandenburg executed his promissory note to one M. D. Tilson for the sum of \$300, with interest at 10 per cent. per annum from date until paid, and 10 per cent. attorney's fees if sued on; that M. D. Tilson transferred the note to plaintiff before its maturity, without recourse; that he is the owner of the note (attaching a copy of the note as Exhibit A); that said note was for part of the purchase money of a certain tract of land in Bowle county (giving the metes and bounds of said land), J. B. Floyd, H. R. Sur.; that on January 1, 1897, M. D. Tilson conveyed said land to Amos Brandenburg by deed in writing; that in said note and deed a lien was reserved to secure the payment of the note; that since the execution of the note Amos Brandenburg died intestate, and left surviving him a widow, to wit, Emma Brandenburg, and three children,—Artie Brandenburg, 8 years old, Birtie Brandenburg, 6 years old, and Harry Brandenburg, 4 years old; that more than one year has elapsed since the death of Brandenburg; that no administration has been granted; that there is no necessity for an administration on said estate; that said minors have no guardian; that said land is used by defendants as their homestead, and is the only property of said estate; that the note has never been paid. Plaintiff prays for citation, the appointment of a guardian for the minors, for judgment for his debt, interest, attorney's fees, and costs, and for foreclosure of his lien on the land, with an order for the sale of the land. The facts alleged in the petition were sufficient to confer jurisdiction upon the district court, and the court did not err in overruling the exceptions to the petition. *Solomon v. Skinner*, 82 Tex. 345, 18 S. W. 698.

Appellant's second assignment of error complains substantially that the court erred in rendering judgment for the plaintiff, P. T. Norwood, for \$450, and establishing a lien upon the land in controversy, and in ordering the land sold as under execution as the property of Amos Brandenburg, deceased, to satisfy said judgment, for the reason that there is no evidence that said land was ever conveyed to said Amos Brandenburg in his lifetime by M. D. Tilson, and the evidence fails to show that the land belonged to the estate of Amos Brandenburg, deceased; that the evidence fails to show that Emma Brandenburg had received the land in contro-

versy from the estate of Amos Brandenburg, deceased, and fails to show the sale of the land by Tilson to Brandenburg, and the note does not reserve a lien on the land. The note recites the sale of the land by M. D. Tilson to Amos Brandenburg, and that it was given in payment therefor. It described the land by metes and bounds. It does not, in express language, reserve a lien on the land. This was not necessary. The note having been given in payment for the land, the vendor has an implied lien thereon to secure the purchase money. *Briscoe v. Bronaugh*, 1 Tex. 330, 46 Am. Dec. 108; *Flanagan v. Cushman*, 48 Tex. 242. The transfer of the note carried with it the lien. There is evidence that at the time of the trial Amos Brandenburg had been dead about three years, that he left no other property, that the note sued on was the only debt against him, and that there had been no administration upon his estate. We conclude that there is no merit in the second assignment of error, and the same is overruled.

Complaint is made of the judgment, in that it is not against the defendant. The judgment established the debt, and adjudged the debt a lien upon the land. It provided for its satisfaction from the proceeds of the sale of the land. No personal judgment was rendered against defendant. The judgment was proper. *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931.

Finding no error in the record, the judgment is affirmed. Affirmed.

GULF, C. & S. F. RY. CO. v. MATTHEWS et al.

(Court of Civil Appeals of Texas. Jan. 25, 1902.)

RAILROADS—ACTION FOR DEATH—RUNNING OVER PERSON ON TRACK—EXPERT TESTIMONY—EFFECT OF TRAIN STRIKING PERSON WHILE STANDING—OBJECTION FOR FAILURE TO LAY PREDICATE—ORDINANCES—FAILURE TO ENFORCE—RAPID RUNNING OF TRAIN—NEGLIGENCE PER SE—KNOWLEDGE OF ORDINANCE—TRESPASSERS ON TRACK—USE OF TRACK AS FOOTWAY—EVIDENCE—INTOXICATION OF DECEASED—INSTRUCTION—MISCONDUCT OF JURY.

1. Upon the issue of whether a person run over by a railway train was standing or walking on the track or lying on it when struck, evidence that a train striking a man standing on the track would throw him off, and would not run over him unless he was lying down, was relevant and material.

2. The question of whether a train, on striking a man standing or walking on the track, would throw him off or run over him, and whether or not it would be more apt to run over him if he were lying on the track, is peculiarly within the knowledge of locomotive engineers and other persons familiar with such accidents, and hence is a proper subject for expert testimony.

3. The objection that the proper predicate was not laid for expert testimony, if not urged when the testimony was offered, need not be considered on appeal.

4. Where an ordinance made it a misdemeanor to run trains in any part of a city at greater than a certain speed without con-

tinually ringing the bell, neglect of the municipal authorities to enforce such ordinance in a part of the city did not excuse a violation there, so as to relieve a railroad company from liability for injuries caused by a violation of the ordinance.

5. Violation of the ordinance is negligence entitling a party injured thereby to recover.

6. The fact that a party injured did not know of the ordinance does not affect the railroad company's liability.

7. Where a portion of a railroad track was commonly used as a footway to the knowledge of the company, a person so using it is rightfully upon the track, and entitled to the same benefit from an ordinance prohibiting the rapid running of trains as a person at a crossing.

8. On the issue of whether or not an ordinance prohibiting the running of trains at more than a certain rate of speed anywhere in the city limits applied to a certain part of the city, evidence as to how trains were customarily operated at that place, and the cost and practicability of operating them there in the manner required by the ordinance, and that the ordinance was unreasonable, was not admissible.

9. Though it was made a misdemeanor by ordinance to trespass on the premises of another without his consent a person walking on part of a railroad track habitually used as a footway to the knowledge of the railroad company, not being a trespasser, was not guilty of a misdemeanor.

10. In an action against a railroad company for negligently causing death, where defendant claimed that deceased was intoxicated at the time, a charge requiring a finding for defendant if deceased was intoxicated, without regard to whether his intoxication contributed to the accident, was properly refused.

11. Where the brother of plaintiff, who was looking after the case for her, met a juror whom he intimately knew, and the juror bought drinks and cigars for both, while the brother paid for their dinners which they ate together, such action was sufficient cause for setting aside a verdict in plaintiff's favor, though both parties testified that the case was not mentioned.

Error from district court. Grayson county, Rice Maxey. Judge.

Action by Maggie Matthews and others against the Gulf, Colorado & Santa Fe Railway Company. From a judgment in favor of plaintiffs, defendant brings error. Reversed.

J. W. Terry, Chas. K. Lee, and Culver & Hay, for plaintiff in error. Wolfe, Hare & Semple, for defendants in error.

TEMPLETON, J. The defendants in error, who are the wife and minor children of J. L. Matthews, deceased, brought this suit to recover the damages sustained by them on account of his death, which, it was alleged, was occasioned by the negligence of the plaintiff in error. On a trial before a jury they obtained judgment for \$10,000.

A little after 6 o'clock in the morning of May 8, 1899, a north-bound freight train of the plaintiff in error ran over a man, who afterwards proved to be the said J. L. Matthews. The man was dead when found a few minutes later. There were no eyewitnesses to the accident except the engineer and fireman of the train. The accident occurred within the limits of the city of Ft.

Worth, and near the northern boundary thereof. Matthews had been doing some grading on the road of plaintiff in error near Cleburne, and owned a grading outfit, consisting of the necessary teams and tools. He quit work, and, leaving his outfit at Cleburne, went to Ft. Worth on the day before his death, in company with one Turner. He went there expecting to get work at a gravel pit, or from the Texas & Pacific Railway Company. One of his employes was to bring the grading outfit across the country to Ft. Worth, and meet Matthews at a certain point on Main street, about 3 o'clock p. m. on May 8th. Matthews and Turner separated about 10 o'clock p. m. on May 7th at a lodging house on Main street, where Matthews was stopping, agreeing to meet at 7 o'clock next morning on Front street, near the Union Depot, in the southern part of the city, for the purpose of going to look for a camping place for the grading outfit. It appears from the testimony of a clerk of the lodging house that some time between 10 and 1 o'clock that night Matthews, after engaging a bed, left the lodging house, saying that he would be back in about an hour. He did not return, however, and his whereabouts from that time until the accident occurred were not shown. He was somewhat intoxicated when he left the lodging house, the evidence being uncertain as to what extent. He was shown to be a man who sometimes drank to excess. It was the theory of the defendants in error that Matthews had learned of a noted and generally used camping ground, which was located a short distance north of the place where the accident occurred, and that he was on his way to look at the same, and that while he was walking along the track he was overtaken and run down by the train. It was shown by the testimony of one witness that a man answering the general description of Matthews passed down the track a little ahead of the train. It was the theory of the plaintiff in error that Matthews was drunk, and that while going about the city in that condition he became lost, and wandered upon the track, and fell or lay down, or was assaulted and robbed, and his body left there by his assailant. The engineer and fireman testified that they were keeping a sharp lookout, and saw and ran over an object lying on the track, but did not know that it was a man until afterwards, though they thought it might be a man. The weather was very foggy that morning, and they testified that on account of the fog they did not discover the object until they were almost upon it, and could not be sure what it was. There was an attempt made to impeach the engineer by testimony showing that he had made statements which conflicted in some respects with the testimony delivered by him on the trial. There was evidence to the effect that the body was warm when found, and that fresh blood was flowing from it.

The court instructed the jury to find for the defendant if they believed that Matthews was lying on the track when he was struck by the train, and authorized a recovery by the plaintiffs only in the event that the jury believed that Matthews was struck and killed while walking along the track.

The plaintiff in error offered to prove by one Gumpert that he was a locomotive engineer of 13 years' experience, and had frequently run over animals when the same were walking, standing, and lying on the track, and had run over persons when they were walking and lying on the track; that his experience as an engineer was that in 99 cases out of 100 a person or animal walking or standing on the track would not be run over, but that the cow-catcher would throw them off the track; that this is particularly true as to a train running 25 or 30 miles an hour, or at a rapid rate of speed; that, in his opinion, the chances are 99 in 100 that, if the train ran over a man on the track, he was lying down on it when he was struck. The evidence in this case showed conclusively that Matthews was run over on the track, and that the train was running at a speed of 25 or 30 miles per hour when it struck him. The testimony of Gumpert was objected to on the grounds that it was immaterial and irrelevant, and called for his opinion on a question upon which he was not entitled to express an opinion, the question not being a proper one for expert testimony. The objection was sustained, and the evidence excluded. The plaintiff in error offered to make the same proof by six other experienced engineers, but the same objections were made to their evidence with like result. It is clear that the proposed testimony was neither immaterial nor irrelevant. The remaining objection that the question was not a proper one for expert testimony requires more serious consideration. The general rule relating to the admissibility of such evidence is thus stated by Lawson on Expert Evidence: "Every employment which has a particular class devoted to its pursuit is an art or trade, and persons instructed therein by study or experience may give their opinion." This language was quoted with approval in *Railway Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742, and it was there held that the business of railroading comes sufficiently within the rule to make the opinions of those engaged in it admissible. This, of course, does not mean that an experienced railroad man may give his opinion as to any and every matter connected with the business. The general rule just stated is qualified by another rule, which limits the testimony of the expert to such matters as require technical knowledge to understand. *Lawson, Exp. Ev. rule 37*. If the uninitiated and inexperienced person can reach a satisfactory conclusion upon the point in question when the facts upon which the conclusion is to be based have been established,

then the opinion of the expert is not admissible. But, if the conclusion can be drawn only by one having special knowledge or experience in that line of business, the opinion of the specialist is admissible. In this case one of the vital questions in issue was whether, when Matthews was struck by the train, he was standing up or lying down. The defendant proved by two witnesses that he was lying down. The plaintiffs introduced evidence tending to show that he was standing up, and attempted to impeach one of the defendant's witnesses. It was conclusively shown that the entire train passed over the dead man. If, as contended by the plaintiffs, the testimony introduced by the defendant on this issue was false, then the position of Matthews at the time he was struck was unexplained, except by circumstances. Thereupon the question arose whether, if Matthews was standing up when struck, he would have been thrown from the track, and not run over. The defendant offered to prove by engineers that, in their opinion, based upon long experience, a man or animal struck while standing on the track would almost invariably be thrown from the track, and not run over. The objection of the plaintiffs was, in effect, that the jurors were as competent as the engineers to decide whether such was the fact. This objection carries with it the idea that the effect of a train striking a person or animal standing or lying on the track is a matter of common knowledge, and that the special knowledge and experience of the engineer is not needed to solve the question. It seems absolutely certain that this proposition is unsound. Suppose the object struck is standing on the track. Will it be thrown directly off? Will it be thrown forward, and fall on the track? Will it be thrown upward and fall on the cow-catcher, and, if so, will it fall or be thrown off in front or to one side? One not learned in the sciences involving the action of physical forces and not experienced in watching the result of such action might speculate upon these questions, but the difficulty of his reaching a satisfactory conclusion upon them is apparent. On the other hand, the experienced engineer, who has witnessed many such events, is in a position to speak with some degree of authority in these respects. If he is qualified to speak, and the jury believes that his opinion is fairly and truly given, his testimony would aid them in arriving at a conclusion. In view of the evidence in this case, we think that the testimony of the engineers should have been admitted, and that it was material error to exclude it. This conclusion is clearly in accord with the rules of law governing the admission of such evidence, and is in line with the decision in *Cooper v. Railroad Co.*, 44 Iowa, 141, where it was held that an engineer might give his opinion as to what would be the effect of a backing train striking a cow standing on the track.

The defendants in error suggest in their brief that the proper predicate was not laid. This objection was not urged when the testimony was offered, and we are not called upon to consider it. But, even had the objection been interposed at the proper time, it is by no means clear that it would have been well taken. According to the theory of the defendants in error, the position of Matthews at the time he was struck was wholly unexplained, except that it was their contention that he was either walking or standing on the track. The hypothetical questions asked were, therefore, necessarily general in their nature, and defendants in error could not complain that they were framed to meet the case presented by their contention. A substantial similarity of conditions should, however, be shown by the predicate testimony.

The plaintiff in error had fenced its track at the place of the accident, the fence extending north beyond the city limits. The train had passed the last crossing within the city. A witness testified that the fence was broken, so that people could and did pass through. How long the fence had been in that condition, and whether the company knew that fact, was not shown. The company had issued notices warning the public to keep off its tracks and grounds, which notices had been posted at various places along its line of road. The nearest place to the scene of the accident where such notice was posted was at the depot in the southern part of the city, about $1\frac{1}{2}$ or 2 miles from the point where Matthews was struck. There was testimony to the effect that the track at the place of the accident had been commonly and habitually used by the public for a long time, to such extent, and so openly and notoriously, that the company either knew or should have known of such use. It was not shown that the company actually consented to the use of its track, but the evidence suggests the theory that it acquiesced therein. It was made a misdemeanor by the ordinances of the city of Ft. Worth to run a train within the limits of the city at a rate of speed greater than six miles per hour, or without continually ringing the bell. The evidence is conclusive that the train was run at a much greater rate of speed than six miles per hour, and was conflicting as to whether the bell was ringing. The court instructed the jury that if the track at the point of the accident was commonly and habitually used by the public as a footway, and the company knew and acquiesced in such use, and if Matthews was struck and killed while walking on the track, and if the train was run in violation of the ordinances of the city relating to the matter of speed or the ringing of the bell, and if the excessive speed or the failure to ring the bell was the cause of the accident, then the plaintiffs were entitled to recover. The plaintiff in error objects to this charge on

the ground that under the facts shown the ordinances were not applicable to such places as that where the accident occurred, and that in respect to such places they were unreasonable and void. It also offered testimony, which was excluded, for the purpose of showing that the ordinances had never been enforced at the place of the accident, and that the officers of the law who were charged with the enforcement thereof had recognized the right of the plaintiff in error to disregard the same. We are of opinion that the objections of the plaintiff in error are not well taken. As criminal statutes, the ordinances were operative in all parts of the city, and the fact, if it be a fact, that the city officers neglected to enforce them, or even connived at the violation thereof, would not excuse any infringement of the same. The object of the ordinances is manifest. In cities like Ft. Worth it is dangerous to human life to operate railway trains at a rapid rate of speed, or without proper warning signals, and the ordinances were adopted to protect the public against the danger. Any member of the public lawfully upon the track of a railway company within the city limits would be entitled to the benefit of the ordinances, and as to such person a violation of such ordinances would be negligence on the part of the company. Whether the company would owe a duty to a trespasser not to violate the ordinances is a question which is not before us for decision. If, as submitted in the charge under consideration, the track of the plaintiff in error at the point of the accident was commonly and habitually used by the public as a footway with the knowledge and acquiescence of the company, then Matthews was rightfully upon the track, and the same reason existed why the ordinances should be applied at such place as at crossings down town. Neither would the fact, if it was a fact, that Matthews did not know of the ordinances, change the duty which the company owed to him as a member of the public to observe the laws which the city had enacted for the protection of the public. The testimony offered by plaintiff in error tending to show how trains were customarily operated at such places, and the cost and practicability of operating them at such places in the manner required by said ordinances, and that the ordinances were unreasonable, was not admissible on the issue here considered. If it was burdensome to plaintiff in error to comply with the ordinances at the point where the accident took place, it had voluntarily assumed the same by assenting to the use of the track at that point by the public.

It was made a misdemeanor by the ordinances of the city for any person to trespass upon the premises of another, without his consent. The plaintiff in error insists that Matthews was a trespasser because he was upon the track in violation of this ordi-

nance. If plaintiff in error acquiesced in the use of its track at that point by the public, the ordinance would not apply, for in such case Matthews was not a trespasser.

The special charges asked by the plaintiff in error on the issue concerning the intoxication of Matthews were properly refused, as the same required a finding for the defendant if Matthews was intoxicated, without regard to whether his intoxication contributed to the accident.

Pending the trial of this case in the district court, one of the jurors, who was afterwards selected as foreman of the jury, and J. W. Woosley, whose mother was a sister of J. L. Matthews, met during a recess of the court. The juror set up the drinks to Woosley. They then had dinner together, Woosley paying therefor. After dinner the juror bought cigars for both. They had a private conversation on the streets, which lasted several minutes. Woosley was looking after and managing the case for Mrs. Matthews. He employed the attorneys for the plaintiffs, and went to Ft. Worth to look up testimony. He boarded at the same hotel with Mrs. Matthews during the trial. Woosley and the said juror lived at Whitewright, where they were in business. They were intimate friends. They testified that the case was not mentioned, that their meeting was accidental, and that their conversation was of a purely social nature. The juror bore a good reputation. These facts were shown on the hearing of defendant's motion for a new trial, and were insisted upon as a reason why the motion should be granted. We are of opinion that the point was well made, and that the trial court erred in not sustaining the motion upon that ground. The importance of guarding a jury engaged in the trial of a cause from improper influences is too well understood to require argument. While Woosley was not a party to this suit, and had no pecuniary interest in it, his connection with the case was such that it was manifest impropriety for a juror to exchange courtesies with him. The juror may have been entirely innocent of any wrong intention, and it is even possible that the eating, drinking, smoking, and social intercourse with the kinsman and manager of the plaintiffs did not affect his verdict. However, such conduct was reasonably calculated to do so, and may have done so without the juror knowing it. No matter how innocent the parties may have been, their conduct was improper, and it is impossible to say that injury to the defendant did not result from it. The only safe rule to adopt upon a question like this is to require of the jurors and interested parties such circumspection as will prevent all suspicion of improper influence. Jurors and parties should keep strictly aloof from each other pending the trial, and, if they do not, but meet under circumstances from which injury to the other party may be reasonably apprehended, a ver-

dict for the party engaging in intercourse with the juror cannot be sustained. Such a transaction is incapable of explanation. If parties were permitted to excuse improper conduct of this character on the ground that no wrong was intended, and probably no injury was done, it would be impossible to draw the line anywhere short of absolute corruption. We are unwilling to lend encouragement to practices which, if tolerated, would undermine the purity and efficiency of our jury system. The authorities bearing on this question are numerous and somewhat conflicting. In *Marshall v. Watson* (Tex. Civ. App.) 40 S. W. 352, the authorities upon which our conclusion is based are collated and reviewed. We concur in the views there expressed, and have found no Texas case which announces a different rule.

It is impracticable and unnecessary to discuss the many assignments of error presented.

For the errors indicated above, the judgment is reversed, and the cause remanded. Reversed and remanded.

WESTERN UNION TEL. CO. v. McCONICO.¹

(Court of Civil Appeals of Texas, Jan. 11, 1902.)

TELEGRAMS—DELAY IN DELIVERY—SUNDAY HOURS—INSTRUCTIONS.

1. In an action against a telegraph company for delay in delivering a message, where the fact that defendant had established office hours on Sunday, and that it did not maintain a force for the delivery of messages on other hours during that day, was undisputed, testimony of plaintiff's witnesses that, on certain occasions, telegrams had been delivered to them out of business hours, was insufficient to show an abrogation of the rule respecting hours, where defendant's employes testified that such telegrams were delivered for accommodation, merely.

2. A telegraph company maintained office hours on Sunday in plaintiff's town from 6 to 10 a. m. and 4 to 6 p. m. During the closed hours the operator received a telegram announcing the death of plaintiff's mother, and hung it on the hook for delivery when the messenger reported. The only train which plaintiff could have taken was due at 4:03 p. m., and usually stopped 3 or 5 minutes. On the day in question it did not leave until 4:15 or 4:20. The messenger was 12 minutes late in reporting, and the telegram was not delivered until about 4:20, when it was too late to catch the train. It took the boy 3 or 4 minutes to number, copy, envelope, and address the message. Plaintiff resided about 2,000 feet from the depot. He testified that, had he received the message within 6 minutes of the departure of the train, he could have caught it. *Held*, that a verdict for plaintiff for delay in delivering the message soon enough after 4 p. m. to enable plaintiff to take the train could not be sustained.

3. Failure to charge on a certain issue was not error, where the charge requested thereon was included in a charge erroneous in other respects.

4. In determining whether a telegraph company was negligent in delivering a message re-

¹ Rehearing denied.

ceived during closed hours on Sunday, the time consumed, after the office was opened, in copying, numbering, enveloping, and addressing the message, was properly computed.

5. A telegraph operator in New Orleans is not presumed, in law, to know the Sunday hours of the company at a town in Texas, and, in accepting a message for transmission, does not undertake to deliver it regardless of such hours, in the absence of a specific agreement to that effect.

Appeal from district court, Brazos county; J. C. Scott, Judge.

Action by A. D. McConnico against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

A. H. Jayne, for appellant. Lamar Bethea, V. B. Hudson, and Doremus & Butler, for appellee.

GILL, J. This suit was brought by appellee to recover of appellant damages for negligent failure of appellant to make timely delivery to him of a telegraph message announcing the death of his mother at New Orleans, by reason of which delay he was deprived of the opportunity to attend her funeral. A jury trial resulted in a verdict and judgment for plaintiff for \$1,000, from which the telegraph company has appealed.

The defense urged by defendant was that it had established, as reasonable office hours for Sunday at the place of delivery, from 8 to 10 o'clock a. m., and from 4 to 6 o'clock p. m.; that between the hours 10 a. m. and 4 p. m. the telegraph office was not kept open for public business, and that during those hours the messenger boy was discharged from duty; that the message was received at 1:35 p. m. on Sunday, the 19th day of November, 1899, and was delivered within 15 or 20 minutes after 4 o'clock. It denied generally the allegations of negligence.

The facts are as follows: A. D. McConnico, the plaintiff, was a banker residing at Bryan, Tex. His home was between 1,200 and 2,000 feet from the telegraph office, and he had lived there for many years. His mother, sister, and C. E. Rice, his brother-in-law, lived in New Orleans. On the morning of November 19, 1899, C. E. Rice sent to plaintiff, at Bryan, Tex., the following telegram over the wires of the defendant: "New Orleans, La., November 19, 1899. To A. D. McConnico, Bryan, Texas: Ma died this morning at four o'clock. Chas. E. Rice." The person mentioned in the message was the mother of plaintiff, who died at 4 o'clock on the morning of the date named, and was buried the following day at New Orleans. The only train on which plaintiff could have taken passage in order to reach New Orleans in time for the funeral was due to arrive at Bryan at 4:03 p. m., and usually stopped at that point from 3 to 5 minutes. On the date in question, which was Sunday, the train was late, and actually arrived at Bryan at 4:12 p. m., and left at between 4:15

and 4:20. The message was taken off the wires at 1:35 p. m., but was not delivered until about 4:20, at which time the train had left Bryan, and was about a mile from the depot. W. W. Harris was the telegraph operator for defendant at Bryan on the day in question, and had been for a great many years. He was also the agent and telegraph operator for the Houston & Texas Central Railroad Company at that point, the telegraph instruments of both companies being located in the same room. The telegraph company had established office hours for Sunday at from 8 to 10 o'clock a. m. and from 4 to 6 o'clock p. m. From 10 to 4 o'clock on Sundays, Harris was in the employ of the railroad company, and the rules of defendant did not require that he take or receive messages between the hours named. The messenger whose duty it was to deliver messages had been discharged at 10 o'clock a. m. on the day in question, and was not required to report for duty again until 4 o'clock p. m. Whit Doremus, who had been taught telegraphy by Harris, but who was not in the employment of either the railway or telegraph company, had on the day in question relieved Harris, and was working for the railway company in his stead. He it was who, while working at the railway instrument, heard the call from the telegraph instrument, and voluntarily took the message in question from the wire, and hung it on the hook for delivery when the messenger came on duty. Realizing the importance of the message, and being acquainted with McConnico, he went downstairs to telephone the message to him, but the room in which the telephone was situated was locked. He had no one by whom he could send the message, and, as he could not abandon his railroad duties, he awaited the coming of Harris. The latter arrived at the office between 3 and 3:15 o'clock, and, seeing the message on the hook, requested Doremus to see some of plaintiff's family, and inform them of the message, or send some one with it to the house. Doremus did not see any one, and, having business of his own, did not himself deliver it. Harris could not leave the office, because a freight and the passenger train were ordered to meet at Bryan; but he also tried to phone or send the message, but failed because he could not get to the phone, and could not find any one to send it by. The messenger boy, whose duty it was to return to the office and report for duty at 4 o'clock, was playing ball about one-fourth of a mile from the office; and, hearing the train whistle, he mounted his pony, and arrived at the depot just as the train pulled in. This was 12 minutes later than he should have resumed his duties. He at once went to the office, numbered and copied the message, inclosed it in an envelope, addressed it, and delivered it to plaintiff by 4:20, or perhaps a little earlier. It took him 3 or 4 minutes to number, copy, envelope,

and address the message. Plaintiff testified that, had he received the message in time, he would have taken the 4:08 train and attended his mother's funeral. He also stated that, had the boy delivered the message to him within 5 or 6 minutes of the departure of the train, he could have caught the train, which was late, bought a ticket on credit, and gone; that he would not have stopped to make any preparations for his journey. That the defendant had established office hours for Sunday at Bryan, as alleged, is absolutely undisputed, as is also the fact that it did not maintain a force of messengers for the delivery of messages during the hours named. Plaintiff, conceding that proof of office hours as alleged would excuse the company between the hours of 10 to 4 o'clock, sought to avoid the force of these facts by attempting to show that the defendant, by a systematic disregard of the rule as to office hours, had abrogated it, and was now estopped to urge it as a defense. The evidence affecting this issue is substantially as follows: Plaintiff stated he had received messages between 10 and 4 o'clock on Sunday, but did not know when nor how many. Witness Lee stated he had received messages between those hours, and had sent many. It may have been done for him as a matter of accommodation. Witness Ettle had received messages between those hours, but could not tell how many, or from whom. Gen. H. B. Stoddard, who was engaged in the business of buying cotton, testified that on one or two occasions he had sent and received messages between those hours. He had been in Bryan many years. He did not know whether or not it was a personal favor to him. Harris stated that the company had established such a rule years before, and he had recognized and maintained it; that he discharged the messenger boy between those hours, and had no means of delivering messages during that time. He frankly admitted that many times he had found means to deliver important messages between those hours, but it was for the accommodation of the addressee, and not because the rules required it; that he had the right to refuse to take them off the wires between these hours, but frequently did so, and hung them on the hook, so that they could be more speedily delivered after 4 o'clock; that he had frequently received messages for transmission between those hours, but always subject to delay until 4 o'clock. He further stated that urgent telegrams were sometimes delivered out of office hours for accommodation, and that he would have delivered this one if the means had been at hand; that he could not recall a year in all his services with the company when he had not on some Sunday delivered messages under the circumstances named. To the same effect was the testimony of Doremus. Charles Adams, the messenger boy of defendant, when called by plaintiff, testified

that he was not on duty between 10 and 4 o'clock; that, from what he had heard, no messages were supposed to be taken off the wires between 10 and 4 on Sunday, but that it was sometimes done, and they were hung on the hook for delivery after 4 o'clock. He stated that he had on occasions delivered messages between 10 and 4 on Sundays, and had seen Harris receive for transmission on Sundays.

Under an appropriate assignment of error, it is contended by appellant that the evidence shows, without contradiction, that office hours had been established as alleged, and that the evidence is insufficient to sustain the verdict on the ground that they had been abrogated by usage. It clearly appears, from a fair analysis of the testimony of plaintiff's witnesses on this issue, that it is not inconsistent with the testimony of Harris and Doremus. It in no sense disputes the statement that such a rule had been established; and the messenger's statement that he was not on duty between the hours named corroborates the testimony of Harris and Doremus, and goes far to sustain the contention of appellant. Indeed, the character of effort made on the part of Harris and Doremus to deliver the message before 4 o'clock makes it plain that both were conscious of the existence of the rule, and felt that they were under no legal duty to deliver it out of office hours. No suspicion is cast upon the truth of the testimony of either of these witnesses. The testimony of plaintiff's witnesses on this issue neither adds to nor takes from the force of Harris' statement, and leaves the case in the same attitude upon this issue as if no one but he had testified. He states that, notwithstanding the rule, he has frequently procured the delivery of messages between those hours as a matter of accommodation, and not because his duty required it. Plaintiff and his witnesses, the recipients of this kindness, not extended by the defendant through its paid employés, but by them as individuals, without extra charge, have testified to no more. They do not claim to know what the custom of defendant was in this respect, but merely relate isolated instances extending through a period of many years. They do not claim to know what motive prompted the delivery or receipt of the messages they mention, and are unable to state whether or not they were indebted to the personal kindness of the agent. This agent had served the defendant at that point for the greater part of 20 years, was generally acquainted in the town, and it was but natural and human that, when messages of moment to the purse or feelings of his friends and acquaintances came to his hands out of office hours, he should make some effort to deliver them, regardless of the rules of his master. According to both his and the plaintiff's statement, they were acquaintances and friends, and he made some effort to deliver the mes-

sage, notwithstanding the rules, and notwithstanding the fact that the company had furnished him no messenger between 10 and 4 o'clock. He may not have done all he ought to have done as an individual, but, if the rule was actually in existence, the law did not require of him anything. If the rule was existent, and his employment did not require an effort on his part to deliver between those hours, it would be a wrong to defendant and a wrong to the public to mulct defendant in damages because its agents had at times rendered a greater service to its patrons than the law required. To hold that the voluntary acts of the agent, as shown by the proof, rendered under circumstances which have not misled plaintiff to his injury, should amount to an abrogation of the reasonable rules of the defendant, established for the orderly conduct of its business, would force defendant to forbid its servants, on pain of dismissal, to deliver messages in any case except during office hours. It would be to say the agents of defendant may respond to the ordinary dictates of human kindness only at the peril of their master. The law permits telegraph companies to establish and maintain reasonable office hours. Their employes need rest and refreshment, as do the employes of other concerns. Such companies are not required to employ more than one shift of men unless the business justifies it. Thus it has been held that telegraph companies will not be required to maintain an office at a station on their line where it can be operated only at a loss. It is reasoned that such a course would unduly increase the cost of messages to the general public, and the interest of the small neighborhood to be benefited by the maintenance of the small office must yield to the interest of the general public. We are of opinion the defendant showed, without dispute, that office hours had been established as alleged. The reasonableness of the rule is not questioned; and we are of opinion that the evidence by which it was sought to show the abrogation of the rule by usage and custom is insufficient to support the verdict on that ground.

We are also of opinion that the verdict cannot be sustained on the ground that the company was negligent in failing to deliver the message early enough after 4 p. m. to enable the plaintiff to catch a train which, if it had been on time, he could in no event have caught, and which the evidence shows he could have used, if at all, only by extraordinary haste, and the purchase of a ticket on credit. Extraordinary haste on the part of the messenger (even if he had resumed his duties on time), the readiness of plaintiff to undertake a journey to New Orleans without preparation, the lateness of the train, and his ability to procure a ticket without money, must have all concurred, to enable plaintiff to attend the funeral. The verdict cannot be reasonably accounted for

on any other ground than that the jury concluded the rule as to office hours had been abrogated, and, as we have shown, the evidence is insufficient upon this point.

Appellant further complains of the failure of the trial court to charge upon the burden of proof. Such a charge should have been given, if properly requested, but the charge requested upon the subject was included in a charge erroneous in other respects.

The evidence showed that it took from three to five minutes to copy, number, register, envelope, and address the message before undertaking its delivery, and that this was a universal custom of the telegraph companies. The appellant requested the court to direct the jury, in determining the question of negligence occurring after 4 o'clock, not to compute the time consumed in complying with this regulation. We think the charge should not have been given in the form requested. The time reasonably necessary for the preparation of the message for delivery should have been excluded from the computation, and the court should so charge.

The court should have given the requested instruction to the effect that the agent at New Orleans was not presumed, in law, to know the office hours at Bryan; that, in accepting it for transmission, the defendant did not thereby undertake to deliver, regardless of office hours, in the absence of a specific agreement to that effect; and that, under the facts, the message was sent subject to established office hours. But in view of the general charge of the court, and special instructions given, we are inclined to think this was not error requiring a reversal of the judgment, if the facts otherwise supported it.

The remaining assignments present no error, and need not be considered in detail.

For the reasons given, the judgment is reversed, and the cause remanded. Reversed and remanded.

DUPREE v. TAMBORILLA.¹

(Court of Civil Appeals of Texas. Jan. 17, 1902.)

ELECTRIC LIGHT EMPLOYE—PERSONAL INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. Where rods supporting an electric lamp had become rusted after several years' use, so that a trimmer using them to support himself while caring for the lamp was injured by their breaking, and the receiver of the electric company had never had the rods inspected, he was guilty of negligence.

2. A trimmer employed by an electric light company, who, in caring for a lamp at the top of a 30-foot pole, used the iron rods supporting the lamp to steady himself, his weight resting at the time on the step below, was not guilty of contributory negligence, where the rods appeared to be solid iron three-fourths of an inch in diameter, though they were in fact hollow and rusted, so that they broke, causing him to fall to the ground.

¹ Rehearing denied.

3. The fact that the trimmer was required to report by entries in what was called the "Trouble Book" any defect that he saw on the lines did not preclude his recovery for the injury, where he was not instructed to look for defects not observable without the application of some test, and was not furnished with appliances to test the rods, etc.

4. In an action against a receiver of an electric light company for injuries received by a trimmer, where other witnesses had testified as to the manner of ascending poles, and defendant himself had introduced much testimony on that point, and it was shown that plaintiff acquired most of his experience while in the employ of the company before the receiver was appointed, and it did not appear that the construction of the poles or lamps had been changed by the receiver, or that the manner of ascending them had been altered, it was not error to permit a witness for plaintiff to testify as to the mode of ascending the poles while he was employed by the company, several years before.

Error from district court, Harris county; Wm. H. Wilson, Judge.

Action by Joseph Tamborilla against Blake Dupree, receiver. Judgment for plaintiff, and defendant brings error. Affirmed.

Hutcheson, Campbell & Hutcheson, for plaintiff in error. W. C. Oliver and Jas. B. & Chas. J. Stubbs, for defendant in error.

GILL, J. Joseph Tamborilla brought this suit against Blake Dupree, the receiver of the Citizens' Electric Light & Power Company of Houston, Tex., to recover damages for personal injuries sustained by plaintiff by a fall from one of the electric light poles in charge of defendant, while the plaintiff was engaged thereon, as an employé of defendant, in the discharge of his duties. The negligence averred against defendant consisted in permitting the metal rods which supported the electric lamp on top of the pole, from which plaintiff is alleged to have fallen, to become weak and insufficient, so that, when plaintiff took hold of them in the discharge of his duties, they broke and caused him to fall. The defendant pleaded general denial, assumed risk, and contributory negligence. The cause was tried before the judge without a jury, and resulted in a judgment for plaintiff for \$5,000. The receiver has, by writ of error, brought the cause here for revision.

The plaintiff, who was in the employ of the electric light company as "trimmer" when the concern was placed in the hands of the receiver, continued his duties as an employé of the receiver, and was so engaged when the injuries complained of were sustained. The Citizens' Electric Light & Power Company was engaged in furnishing light to the city of Houston and its inhabitants by means of electric lamps, some of which were placed on the tops of tall poles, as herein-after described, and the receiver had continued the business. The duties of plaintiff as trimmer were to make daily visits to the electric lamps in the district assigned to him,

to insert new carbons, and to see that the lamps were properly adjusted for the night. In order to reach such lamps as were supported on the tops of poles, it was necessary that he should climb to the top of the poles by means of iron pins driven in the sides of the poles, about 18 inches apart. These pins constituted steps upon which the climber placed his feet in ascending; the last step being placed a short distance from the top of the pole, and the whole forming a sort of ladder designed for the use of trimmers and others whose duties might require them to ascend. Across the extreme top of this pole was fitted an iron casting, the two arms of which extended at right angles from the pole, and in which were fastened the iron rods or tubes which supported the lamp and its hood. The rods or tubes were two in number, one running up from each arm of the casting. Their height above the casting was about 38 inches. On their top was placed the hood of the lamp, and between them was hung the lamp itself. The combined weight of the hood and lamp was about 45 pounds. The rods or tubes were ¾-inch iron gas pipe, and, from their appearance alone, it did not appear whether they were solid iron rods or hollow tubes. Plaintiff thought they were solid rods, and could not have ascertained that they were otherwise by the exercise of ordinary care in the discharge of his duties as trimmer. While the evidence is conflicting as to whether these tubes were designed to be used by the trimmer in reaching and sustaining the position necessary for the proper trimming and adjustment of the lamp, the evidence is sufficient to support the conclusion reached by the trial court that this was one of their ordinary and proper uses. At the time of the accident, plaintiff had been discharging his duties as trimmer for more than a year, and had daily climbed the pole from which he ultimately fell and was injured. He testified that he had each time used the rods in practically the same way. On the occasion in question he climbed to the top of the pole, placed one foot on the last metal step, and, taking hold of the rods or tubes, raised himself to an upright position, so that his body was opposite the lamp, reached one arm around the supporting rods, while he held the other with his opposite hand, and while doing so both rods snapped off near their connection with the casting, and he fell to the ground and was injured as alleged. The poles appear to be about 30 feet in height. The tubes in question had been in use for several years, and the evidence shows that they are rapidly weakened by rust in the damp climate of Houston. An examination of these rods immediately after the fall disclosed the fact that they were badly eaten with rust; they being eaten entirely through in some places, and the entire rod being reduced to the thickness of tin after the rust was knocked off. The rust adhered to the rods while they

were in position, and their condition was not disclosed to casual observation. Had the rods been solid, as they appeared to be, they would not have broken; and, had they been sound tubes, the accident would not have occurred. The receiver had never had these rods inspected, and was guilty of negligence in failing to ascertain their condition and renew them before they reached the dangerous condition in which they were found. The plaintiff was not an inspector, and was not guilty of negligence in failing to ascertain the condition of the rods, nor in the method he used in reaching the position necessary to enable him to perform his task.

All the assignments of error, save one, assail the sufficiency of the evidence to support the judgment. Defendant contends that the evidence shows that the metal rods were designed alone to support the weight of the lamp and hood, were sufficiently strong for that purpose at the date of the accident, were never intended to be used as a means of climbing to the necessary position or of sustaining any part of the weight of the climber, and that plaintiff was guilty of contributory negligence and assumed the attendant risk in so using them. It should be borne in mind that the lamp was at a considerable and dangerous height from the ground; that the trimming of the lamp required the use of both hands. The position necessarily assumed in performing this task placed practically the entire body higher than the top of the pole and the metal casting or cross arm, thus leaving nothing by which the operator could steady or support himself, save the rod supporting the lamp and hood. The consensus of the testimony shows that even the most careful and prudent and experienced trimmers, and those who knew the rods were not solid iron, placed some weight on these upright supports while adjusting the carbons; and this is true in the very nature of things. The defendant must have known from the character of the structure that the rods would be used by trimmers in reaching and maintaining their perilous position. The weight of the pendent lamp and hood was about 45 pounds, and plaintiff ought not to be held to the unreasonable presumption that the rods had barely sufficient strength to support the lamp and hood, and no excess of strength to answer the uses which their appearance invited. He was never told not to use them. Never advised that they were not solid, and their size (which was greater than the metal foot rests) and their apparent solidity, instead of warning him not to use them, invited him to rely on them in gaining and maintaining a position where some support other than his feet and knees was so obviously necessary. But defendant contends that, even if it be conceded it was proper to use them to steady the body, plaintiff was negligent in using them to pull up or raise his weight by, and that in so doing, and in standing on the top

step, instead of, the step next to the top he voluntarily and recklessly did an unnecessary and improper thing, which alone caused his injury. According to plaintiff's testimony, they did not break while he was raising himself to the proper position, but when he put his arm around to reach the lamp. Plaintiff did not place his entire weight on the rods, but expressly stated that nearly all his weight was on his foot which he had placed on the step. He and the witness Riley stated this to be the usual and proper way. Other witnesses, while claiming that the safer way is to stand on the next to the last step, and put the leg through and over the crotch of the casting, admit that it is an awkward thing to do; and nearly all the witnesses concede that the trimmer is left to his own judgment as to the safest and best way, and that they do not all use the same method. They all concede that the use of both hands is necessary in adjusting the carbon, and that, even when standing on the last step but one, with one leg through the crotch, or thrown around the post over the top step, as shown in one of the photographs, the body is utterly without lateral support, unless the rods are used for the purpose. As to the safest and best way to do the work, there is a substantial conflict in the evidence; but, even if this were not true, the plaintiff is not held to the adoption of the safest method. He is held only to the exercise of ordinary care for his safety in the light of the facts which he knew, or must be held to have known. It seems to us that no reasonable man would expect that what appeared to be solid iron rods, three-fourths of an inch in diameter, would snap off like brittle wood, without a warning bend, or time to catch a more substantial support. His dally position on the pole was one of peril, at best; and he had the right to presume, in the absence of knowledge to the contrary, that his master had made and maintained the supports on which he might rely for safety in a reasonably safe condition. It will not do to say he evidently put more weight on the rods than he usually did. In doing his work, which it was his duty to do with reasonable dispatch, the law did not require that he should, at his peril, measure to a fraction the amount of weight he might with safety impose upon the rods. It was the master's duty to construct against the use to which he might reasonably expect they would be subjected. On the whole case, we think it fairly appears, as found by the trial court, that the act of plaintiff in using the rods as he did was reasonable and natural, and such as the master, in the light of all the circumstances, ought to have foreseen and provided against. Whether, under any circumstances, it was proper for the trimmer to use the top step as plaintiff did, has been determined by the trial court, on competent evidence, adversely to the contention of defendant, and

we do not feel authorized to disturb the finding.

It is further contended by defendant that plaintiff was an inspector,—so made by the receiver,—and that this is shown by the undisputed evidence. It is true, plaintiff's duties required him to ascend the pole daily, and he was required to report by entries in what was termed the "Trouble Book" any defect or disorder he saw on the lines; but it also appears that he was not instructed to look for defects not observable without the application of some test, and he was furnished no tools or appliances with which to test the soundness of the poles, or the extent to which rust had damaged the iron rods. He reported from time to time such defects as he saw, but the evidence is sufficient to support the conclusion that he was in no sense made an inspector of the appliances, the defects in which caused the accident. Nor can he be held, under the facts, to have known that the receiver had not adopted some system of inspection whereby he could have been advised from time to time of the condition of the various fixtures on which the safety of the employes depended. We do not deem it necessary to discuss and distinguish from this case the authorities cited on this point by appellant. We think, under a fair construction, they are inapplicable to this case. The principles of law which control the case are familiar and well settled, and it would serve no useful purpose to discuss them, or to cite authority in their support.

By the seventh assignment of error, defendant complains of the action of the court in permitting the witness Ballinger to testify as to his manner of climbing the poles in 1894 and 1895, while in the employ of the company of which the defendant is receiver. The objection was not overruled when made, but, as the trial was before the court, it was admitted subject to objection. If error, it was not harmful, and the assignment might be overruled upon this ground. But in hearing this evidence the court did no more than hear the witness Ballinger testify to matters about which others had been permitted to testify without objection, and to which defendant had addressed much testimony; that is, the manner in which various linemen had ascended the poles. It was shown that plaintiff himself had acquired most of his experience as an employe of the light company before becoming an employe of the receiver, and it does not appear that the construction of the poles and lamps had been changed by the receiver, or that the method of ascending the poles had been altered either by order of the receiver or by custom. The main force of the objection goes rather to the weight than to the admissibility of the evidence. The case is plainly one of fact, and we are clear that it is not such as would authorize us to interfere on the ground that the evidence is insufficient,

or that the judgment is manifestly against the truth of the case.

Much of defendant's brief is addressed to matters affecting the weight of the evidence and the credibility of various witnesses,—plaintiff among the number. We have not deemed it necessary to follow the brief and discuss at length the force of the testimony. We have thought it sufficient to state our conclusions with such elaboration and explanation as are necessary to a clear understanding of the nature of the case.

The judgment is affirmed. Affirmed.

TEXAS & P. RY. CO. v. DAVIS.¹

(Court of Civil Appeals of Texas. Jan. 3, 1902.)

APPEAL—STATEMENT OF FACTS—NECESSITY—TAXING COSTS.

1. Where, on appeal from an order overruling a motion to retax costs, there is no statement of facts in the record, though time was given appellant in which to file the same, it will be presumed that there was no error, the giving of time indicating that the court heard the motion on evidence pertinent thereto.

2. The matter of taxing costs is left largely to the discretion of the trial court.

3. The court on appeal cannot revise the discretion of the court as to costs unless plainly abused.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

Action between the Texas & Pacific Railway Company and Britton Davis. From an order overruling the former's motion to retax costs, it appeals. Affirmed.

Edwards & Edwards, for appellant. Falvey & Davis, for appellee.

NEILL, J. Appeal from an order overruling a motion of appellant to retax costs and tax such of them as accrued between certain dates against appellee, upon the ground that during the interim the court had no jurisdiction of the case. There is no statement of facts in the record in relation to the subject-matter of this appeal, although in the judgment appealed from overruling the motion 10 days after adjournment was given appellant in which to file the same. This indicates that in considering the motion the court heard and determined it upon evidence pertinent to the matter. In the absence of such a statement it will be presumed in favor of the judgment that the court did not err in the matter as is claimed by appellant. It is therefore affirmed.

On Motion for Rehearing.

(Feb. 19, 1902.)

In this motion it is asserted that "the motion to reform the judgment as to the question of costs adjudged against appellant and the appeal from said motion show clearly that the motion was tried upon the record in the cause without the introduction of testimony, and that the inadvertent state-

¹ Writ of error denied by supreme court.

ment in the notice of appeal in regard to the statement of facts should be treated as surplusage, and the cause decided upon the record made in the cause." This assumes that the order granting appellant 10 days after adjournment in which to file a statement of facts was made through inadvertence. We know of no principle which would authorize us to make such an assumption against the correctness of a record as would destroy its obvious import and meaning. The motion to retax costs, from which this appeal is prosecuted, was of such a nature as might require evidence to enable the trial court to properly dispose of it. And it is apparent from the order granting appellant 10 days after adjournment to file a statement of facts that evidence was heard, else such an order would not have been made. The evidence may have shown such facts as would, in its discretion, authorize the court in overruling appellant's motion. The matter of taxing costs is left largely to the discretion of the district court. *Jones v. Ford*, 60 Tex. 132. We are not authorized to revise its ruling upon such discretionary matter unless it plainly appears from the record that this discretion has been abused. *Cox v. Patten* (Tex. Civ. App.) 66 S. W. 67.

The motion is overruled.

ILLINOIS CENT. R. CO. v. LANDRAM.¹
(Court of Appeals of Kentucky. Feb. 12, 1902.)

APPEAL AND ERROR—AMOUNT IN CONTROVERSY.

Where plaintiff sued to recover \$1,000, and defendant corporation, by its answer, admitted a liability of \$1.40, upon appeal by defendant from a judgment against it for \$200 the amount in controversy is less than \$200.

Appeal from circuit court, Livingston county.

"To be officially reported."

Action by Ora Landram, by next friend, against the Illinois Central Railroad Company, to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Dismissed.

Quigley & Quigley and Pirtle & Trabue, for appellant. J. W. Bush and C. C. Grassham, for appellee.

O'REAR, J. This was an action by appellee to recover of appellant \$1,000 damages for an alleged breach of contract to carry appellee as a passenger over a given route at a given rate. Appellant, by its answer, admitted a liability of \$1.40, and offered to pay into court that sum and the costs of the action. Issue was joined, and a trial was had as to its further liability. The jury re-

turned a verdict in favor of appellee for \$200, and judgment was rendered for that amount. A plea is interposed to the jurisdiction of this court. Section 950, Ky. St., concerning jurisdiction of this court in civil cases, reads: "No appeal shall be taken to the court of appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than \$200.00, exclusive of interest and costs." Generally, when the defendant to such an action appeals, the amount of the controversy is the amount of the judgment against him. That which is in controversy is necessarily that part of the recovery, in case of a defendant, which is disputed. The plaintiff sued for \$1,000, and defendant admits \$1.40 as owing. Then but \$998.60 was in controversy. As the plaintiff recovered the verdict and judgment for \$200, if the plaintiff had appealed, the sum in controversy would have been the undisputed part of her claim; but upon the defendant's appeal it is \$198.60 only. Having admitted, by pleading, \$1.40 of the liability alleged, it could no longer be said to be in dispute. The \$800 not recovered is not now in dispute, because plaintiff is concluded by the judgment allowing \$200 only of her total claim, and she is satisfied,—at least, does not appeal. *Pennie v. Insurance Co.*, 67 N. Y. 279; *Marlow v. Marlow*, 56 Iowa, 300, 9 N. W. 229; *Tipton v. Chambers*, 1 Metc. 567.

The appeal must be dismissed, with damages.

SPALDING v. GRUNDY.¹

(Court of Appeals of Kentucky. Jan. 16, 1902.)

TRIAL—MISCONDUCT OF COUNSEL IN ARGUMENT.

Misconduct of counsel for appellee in argument to the jury is ground for reversal.

Appeal from circuit court, Marion county.
"Not to be officially reported."

Action by Georgia Spalding against John Grundy, Jr., to recover damages for an assault. Judgment for defendant, and plaintiff appeals. Reversed.

Lev Russell, for appellant. Ben Spalding, for appellee.

PAYNTER, J. This case is reversed because of the improper manner in which the attorneys for the appellee argued the case to the jury. It is unnecessary to point out the particular misconduct in the argument, as doubtless on another trial the attorneys will confine themselves within the limit of legitimate and proper argument.

The judgment is reversed for proceedings consistent with this opinion.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

BROWDER et al. v. LONG'S EX'R et al.¹
 (Court of Appeals of Kentucky. Feb. 7, 1902.)
ATTORNEY AND CLIENT—CONTRACT FOR FEE
—RELIEF OBTAINED WITHOUT FILING
SUIT AS WAS CONTEMPLATED.

Where a devisee, deeming it to be to her interest to prevent a sale of certain property by the executors while she lived, employed attorneys for that purpose, and agreed to pay them a certain fee, the greater part of which was not payable until her death, and the attorneys prepared a petition against the executors, and presented it to them before filing, whereupon they agreed not to sell the property if the attorneys would not file the petition, and that agreement was kept, the attorneys were entitled to the stipulated fee, though they did much less work than was contemplated when the contract was made, as they would have been entitled to no more than the contract price, however much work they might have done.

Appeal from circuit court, Logan county.
 "Not to be officially reported."

Exceptions to claim of W. F. Browder and S. Y. Trimble, allowed by commissioner's report of settlement of the estate of Mary Long, deceased. Judgment sustaining exceptions and allowing claim in part only, and W. F. Browder and S. Y. Trimble appeal. Reversed.

W. S. Pryor, S. Y. Trimble, and Wilbur F. Browder, for appellants. Wallace & Miller, for appellees.

HOBSON, J. Nimrod Long died a resident of Logan county in the year 1887, the owner of a large estate. By his will he devised to his wife, Mary A. Long, an annuity of \$2,000 as long as she lived, and empowered her by will to dispose of \$30,000 of his estate. He informed his wife of the provisions of the will, and she did not renounce it, although it would have been much to her interest to do so. He told her that she would be perfectly secure in the annuity and in the \$30,000 which she was authorized to dispose of by will; that he had two valuable lots in the city of Chicago, which were leased for a long term; that the leases would not expire during her life, and the property therefore could not be sold. After her husband's death his children and executors proceeded to sell, some time before the year 1892, one of these Chicago lots, for about \$300,000, and distributed the money. Mrs. Long then got uneasy, for, if they sold the other lot, the estate unadministered in Kentucky would not be sufficient to secure her. She went to the Deposit Bank of Russellville, and explained the provisions of her husband's will, saying that she did not want to sue her stepchildren, and made to the bank a deed of trust for all her property, so that it, as trustee, would bring a suit for the protection of her rights. She suggested to the bank to employ S. Y. Trimble as attorney, and during the negotiation also suggested that, as there would be a big fight, the trustee had also better employ W. F.

Browder. The lawyers were seen, and agreed to take the case at a reasonable fee, to be fixed after the work was done. This did not suit Mrs. Long, and after negotiations it was finally agreed that they should have a fee of \$1,200, \$200 to be paid cash and \$1,000 at Mrs. Long's death. The \$1,000 was postponed until Mrs. Long's death because she did not want to pay it during her life, and this was taken into consideration in fixing the amount of the fee. Browder and Trimble, after looking into the matter, conceived the idea that the suit could be filed at Russellville, and that, if the executors were to be required to make public all their doings since the testator's death, including the amounts they had received, and what they had done with it, they would be glad to suspend the sale of the Chicago property. So they prepared the petition along this line, and, having prepared it, conceiving that the executors would not want it filed, and that an arrangement could be made with them better before the petition was filed than afterwards, took the petition to the executors, who thereupon made an agreement not to sell the Chicago property if they would not file the petition. The agreement was kept, and the property was not sold until after Mrs. Long's death,—about the year 1897,—and \$30,000 of the proceeds was paid to Mrs. Long's executor. The property sold for something over \$160,000. When Mrs. Long's estate came to be settled, Trimble and Browder filed their claim, and on exceptions to the commissioner's report the court fixed the amount of their fees at \$500. From this judgment they appeal.

The ruling of the court seems to have been based on the idea that the suit prepared by the attorneys was not filed, and that, as they did but little work,—much less than was contemplated,—they should not have the full fee. This would be true if they had served on the contract proposed by them that they should be paid a reasonable fee for their services. But this proposition was declined by Mrs. Long and the trustee, and an express contract was made, by which their fee was fixed at \$1,200, \$1,000 of which was to be paid at Mrs. Long's death. Under this contract, however much trouble they might have had, and however the litigation might have been prolonged, the \$1,200 was all they would have been entitled to. They also took the risk, too, of Mrs. Long outliving either or both of them, or living at least much longer than she did. Mrs. Long took the risk of the attorneys being able to accomplish the result speedily and under such circumstances that the fee on the basis of the proposition made by them would have been smaller. The contract was fairly made. It was discussed and considered by both Mrs. Long and the trustee. The evidence is undisputed. The attorneys performed valuable services. They accomplished all she desired, and, not only this, they brought it about in

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

a way very much more satisfactory to her than a litigation with her husband's children would have been. It does not appear that she ever complained of the contract which she deliberately made. The court should not have disregarded the express contract. It was not unreasonable, and, however much work the attorneys might have done, they would have been entitled to no more than their contract fee. They were therefore entitled to the contract price.

It is urged for appellees that the amount of the fee was fixed in view of the filing of a suit and the bitter litigation that was expected to follow, and that, as the matter was adjusted without litigation, the contract price was not in fact earned. The gist of the contract was the protection of Mrs. Long's interest by the stopping of the sale of the Chicago property. If the attorneys had brought one suit, and failed in it, and then brought a second suit, or a third, they would have been entitled to no more than the contract price. The fee was not to be paid for the bringing of an action, but for the securing of Mrs. Long's rights, and the fact that this was accomplished in a different way, and with less friction than was anticipated, does not affect the right of the attorneys to their stipulated fee.

Judgment reversed, and cause remanded, with directions to enter a judgment in favor of appellants as above indicated.

HODGES et al. v. ARVIDSON et al.¹

(Court of Appeals of Kentucky. Feb. 12, 1902.)

MECHANIC'S LIENS—CONSTITUTIONALITY OF STATUTE.

Ky. St. § 2463, giving to a material man a lien upon property improved with materials furnished by him, is constitutional, though it requires the owner, in effect, to know at his peril, before settling with the contractor, that he has paid for all material purchased by him.

Appeal from circuit court, Fayette county. "Not to be officially reported."

Action by Hodges & Campbell against A. Arvidson and another to enforce a lien of plaintiffs as material men. Judgment for defendants, and plaintiffs appeal. Reversed.

E. L. Hutchinson, for appellants. Falconer & Falconer, for appellees.

O'REAR, J. Appellees Arvidson were the owners of a certain lot in Lexington. They contracted with one Coryell to build a house on the lot. When the house was completed, the owners paid the contractor in full the contract price. Some months thereafter, appellants, who were material men, and who had furnished to the contractor the material of which the house was constructed to the extent of \$121.38, subject to a small credit, filed their affidavit and account in the

office of the clerk of the county court for the purpose of procuring a lien on the property under section 2463, Ky. St. Arvidsons' answer pleads that they did not know that appellants had furnished any part of the material to the contractor, Coryell, and without knowledge or notice of that fact they had paid Coryell the full contract price before appellants filed a notice of their lien in the clerk's office. The lien was filed under section 2463, Id., which gave to the material men a lien upon the property which the material goes to improve when the improvement is made under the contract with the owners, whether the owner actually knew who furnished the material; that is, this section seems to require the owner to know from whom the contractor buys the material, and to know that the material is paid for, or the material men otherwise satisfied, or suffer a lien to go against the property. This section of the statute was attacked by the answer in this case as being unconstitutional, and was so held to be by the circuit court. Appellants declining to plead further, their petition was dismissed.

In the case of Hightower v. Bailey, 56 S. W. 147, 49 L. R. A. 255, the constitutionality of the statute in question was under consideration by this court, and it was then held that the section was constitutional, and that the lien attached in the case similar to the one at bar.

The judgment is reversed, and cause remanded for proceedings not inconsistent herewith.

BOWEN v. COOPER.¹

(Court of Appeals of Kentucky. Feb. 7, 1902.)

EASEMENTS—ADVERSE USE OF PASSWAY.

Defendant, having for more than 80 years used a passway over plaintiff's land, has acquired a right to the way by prescription, the presumption being that the use has been as a matter of right, the way being a well-worn road when defendant bought his land, and being then a necessity to his farm; and the fact that he has recently bought a strip that gives him another outlet does not affect his right, the new road being more circuitous than the old one, and not so good a road; nor is his right affected by the fact that for a short time he discontinued the use of a part of the passway by going over his own land.

Appeal from circuit court, Clark county. "Not to be officially reported."

Action by Richard F. Cooper against Armstead Bowen for an injunction. Judgment for plaintiff, and defendant appeals. Reversed.

Edward W. Hines and Rodney Haggard, for appellant. Hathaway & Hodgkin, for appellee.

HOBSON, J. Appellee, Richard F. Cooper, instituted this action against appellant, Armstead Bowen, to restrain him from using

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a passway he claimed over Cooper's land. Bowen, by his answer, which was made a counterclaim, alleged that his land was adjacent to Cooper's, and that Cooper's land lay between him and the public road leading to the county seat, the post office, mill, church, etc.; that he had owned the land for 35 years, and during all that time had had continuous, adverse, and uninterrupted use of the passway; that many years ago Benjamin Allen owned both the farms, and conveyed the land owned by Bowen to his son, William Dull Allen, who occupied it for 30 years before Bowen bought it, and used the passway as a matter of right during the whole of that time, it having been established for the use of this tract over the remaining land of Benjamin Allen so as to give him an outlet. The allegations of the answer were controverted by reply. The proof was taken, and on final hearing the court adjudged that Bowen was not entitled to the passway, and enjoined him from using it.

It is shown by the proof that Bowen bought his place from William Dull Allen, and has lived on it for 35 years. William Dull Allen was settled on it by his father, who conveyed it to him over 30 years before Bowen got it. The passway was used as far back as any of the witnesses recollect, although some of them are as much as 70 years old; and there seems to have been no controversy about it until shortly before this suit came up. It has during all this time been a traveled way, without any substantial change in the route, until, a year or so before this suit was brought, Bowen for a short time went across one of his fields, and thus discontinued for a few months the use of about 200 yards of the road. This change was made by consent, and when he wanted to go back to the old road the controversy arose. He had enjoyed the old road for over 30 years before this temporary change was made, and lost no right by going over his own land for a while, instead of using the whole length of the passway. In *O'Daniel v. O'Daniel*, 88 Ky. 185, 10 S. W. 638,—a case not unlike this,—this court said: "It is argued that there was never any assertion of right by those who traveled over this passway but such as consisted in its use, and it must, therefore, be presumed the use was merely permissive. We cannot concur in such conclusion. When appellant purchased this land, the passway from the farm to the county seat was plain and unmistakable, and when appellee purchased his farm it was equally as manifest, and there was no reason for inquiring as to the duration of the time the passway had been used. It was the only passway, and, while its use for a less time than 15 years conferred no right, the appellant could, at his peril, rely upon its use for so long a period as to make it appurtenant to his farm, and as vesting in him the right of way." "At common law

the long enjoyment of an easement gave the right to the easement; and the use, continuing uninterrupted for twenty years or longer, when unexplained, created the presumption that the claim or use was adverse. Under our statute of limitation the continued use for fifteen years unexplained would create the presumption as to the right, and in this case the use for more than half a century certainly established the right to the passway; and it was not necessary to show by positive testimony that the appellant had claimed this use as a matter of right, and so proclaimed to his neighbors. The burden was, in fact, on the defendant (appellee), after such a long use of his premises, to show that the use was merely permissive." These principles have been followed by this court in subsequent cases. The proof clearly establishes the necessity of the passway to the farm of Bowen, and we think it equally clear that ever since his purchase of the land, some 35 years ago, he has used it as a matter of right. It is true that recently he has bought a strip of land that gives him another outlet, which is more circuitous, and not so good a road; but before that the farm would seem to have been dependent on the passway in question. When Benjamin Allen settled his son on the farm and opened the passway for him, or allowed him to open it, it was a necessary outlet; and, being a well-worn road when Bowen bought the land, he had a right to look upon it as a way of right, and his use of it as a matter of right for 30 years without interruption would give him a way by prescription independently of its use by William Dull Allen.

Judgment reversed, with directions to enter a judgment in favor of appellant for the passway in contest.

BUCKWALTER v. HUTCHERSON.¹

(Court of Appeals of Kentucky. Feb. 11, 1902.)

LOGS AND LOGGING—WRITING CONSTRUED NOT TO RESTRICT RIGHTS CONFERRED BY PREVIOUS DEED—EXTRANEOUS EVIDENCE TO EXPLAIN WRITING.

1. Where a grantor, by his deed conveying land, reserved all white oak timber of certain dimensions suitable for staves, the deed reciting that it was understood that the grantee was to have "the part of trees that may be left by the stove makers," a writing thereafter executed by the grantor on the same day, reciting the reservation in the deed, and stating that "it is mutually agreed by the parties that the grantee 'has the right and privilege to follow immediately after the stove makers, and appropriate to his use all remaining timber and parts of trees left by said stove makers,'" did not vest in the grantee the title to any trees which the grantor had reserved in the deed, but merely referred to such timber as remained over and above the trees reserved by the grantor and the parts of trees left by the stove makers; and therefore, the stove makers, having failed, in first going over the land, to cut some of the trees reserved, had the right to return and cut them.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

2. To enable the court to construe the contract, it was competent to prove the custom of stave makers in cutting trees, so as to place the court in the position of the parties at the time the contract was made.

Appeal from circuit court, Rowan county. "Not to be officially reported."

Action by J. R. Buckwalter against J. W. Hutcherson. Judgment for defendant, and plaintiff appeals. Affirmed.

James E. Clerke, for appellant. W. A. Young and Beckner & Jowett, for appellee.

HOBSON, J. On March 4, 1897, J. W. Hutcherson agreed to sell to J. R. Buckwalter 4,400 acres of land at \$2.50 an acre, but in the writing was this reservation: "Said Hutcherson reserves all the white oak timber suitable for split staves that is eighteen inches in diameter and upward measured at the stump two feet from the ground. It is understood Buckwalter is to have the part of trees that may be left by the stave makers." In pursuance of this contract, Hutcherson on April 2, 1897, made a deed to Buckwalter for the land, with this reservation: "It is understood, however, and hereby provided, that said J. W. Hutcherson reserves all the white oak timber suitable for split staves that is eighteen inches and upwards measured at the stump two feet from the ground. It is understood that Buckwalter is to have the part of said trees that may be left by the stave makers, and that said Hutcherson is to have three years from and after this date in which to cut and remove said timber herein reserved." After the deed was drawn at the lawyer's office, the parties went to a bank, and concluded the transaction there. After the purchase money had been paid, and just as Hutcherson was leaving the bank for the train, Buckwalter called him back, and asked him to sign a memorandum of the contract for his convenience. Hutcherson signed the paper without reading it or at least without giving it careful attention, supposing it was a mere recital of the terms of the deed. The paper so signed is as follows: "Said Hutcherson has this day deeded to J. R. Buckwalter a tract of land on Dry creek, Rowan county, Kentucky, and reserved the white oak timber that is suitable for split staves that is eighteen inches and over in diameter measured two feet from the ground, and is to have three years in which to cut and remove said timber. It is mutually agreed by the parties that said Buckwalter has the right and privilege to follow immediately after the stave makers, and appropriate to his use all remaining timber and parts of trees left by said stave makers, and said Hutcherson agrees to operate the business so as to finish up in the hollows and creeks before beginning elsewhere on new territory, and to operate in a careful manner so as to avoid unnecessary breaking down or injury to the timber; and that said Buckwalter is to have

and enjoy equal advantages and privileges of storing lumber, bark, and ties at the railroad switch, and the handling and loading of same." In cutting trees reserved by Hutcherson, the stave makers did not cut clean, but left some behind, and when Hutcherson had them return to cut the trees Buckwalter claimed them on the idea that Hutcherson was obliged to cut all the trees he wanted when he first went on the land. The court below decided against Buckwalter, and dismissed his petition.

In construing written instruments evidence is competent which places the court in the light of the parties at the time the contract was made. It is shown by the proof that many trees are cut for staves which are found unfit for that purpose after they are cut from defects that cannot be discovered while the tree is standing. It is also shown that a large part of the trees cannot be used for this purpose, and that all the trees which are cut would greatly depreciate in value if left lying on the ground two or three years. In the light of these facts and the circumstances under which the last paper was executed, we do not see that there is any doubt as to its proper construction. Hutcherson had reserved certain trees, both in the original contract and in the deed. The title to these trees was in him, and nothing had been said between the parties, so far as the record shows, as to his releasing or giving up to Buckwalter any part of the trees which he had reserved. The contract signed after the deed had been delivered and the purchase price paid refers expressly to the terms of the deed. It then proceeds with these words: "It is mutually agreed by the parties that said Buckwalter has the right and privilege to follow immediately after the stave makers, and appropriate to his use all remaining timber and parts of trees left by said stave makers." This conferred on Buckwalter a privilege of value, for otherwise the timber cut by the stave makers might have greatly depreciated, lying on the ground, before the end of three years. The purpose of the stipulation was, not to take from Hutcherson anything that he had reserved, but only to give Buckwalter the privilege of entering for the purpose of utilizing what Hutcherson's men left. It is shown by the proof that stave makers will at first select the best trees, and sometimes a tree is overlooked. It was not contemplated by such a stipulation as this to vest in Buckwalter the title to Hutcherson's trees which he had reserved in the deed. The words "all remaining timber and parts of trees left by said stave makers" must be read in connection with the deed, which had been delivered when this writing was drawn, and must be construed to refer to such timber as remained over and above the trees reserved by Hutcherson and the parts of trees left by the stave makers. The contract purports only to confer on Buckwalter certain privileges

or rights. It recognizes the provisions of the deed, and must, therefore, be read as subservient to it, and not as inconsistent with its express stipulations fixing finally the title of the parties in the trees.

Judgment affirmed.

COMMONWEALTH v. BRIGHT.¹

(Court of Appeals of Kentucky. Feb. 7, 1902.)

HOMICIDE—EVIDENCE—CONTRADICTION OF WITNESS.

1. It was error, on a trial for murder, to admit testimony as to a conversation between a witness and deceased in regard to a doctor's bill against defendant's wife, who was then dead, and also as to a conversation between deceased and another, who furnished the coffin for the burial of defendant's wife.

2. It was error to permit defendant to prove that it was said that deceased was inclined to be domineering and overbearing among his own race.

3. Where a witness for defendant testified that he had not made certain statements relating to a collateral matter, it was error to permit the prosecution to prove that he had made such statements.

Appeal from circuit court, Lincoln county. "Not to be officially reported."

Alfred Bright, convicted of murder, was awarded a new trial, and the commonwealth appeals. Opinion certified.

R. J. Breckinridge and J. S. Owsley, for the Commonwealth.

GUFFY, C. J. The appellee was indicted in the Lincoln circuit court, charged with the murder of Samuel Blakemore. The trial resulted in a verdict of guilty, and fixing the punishment at confinement for life in the penitentiary. The court, however, awarded him a new trial, and the commonwealth has prosecuted this appeal to this court for the purpose of having the law properly construed in regard to the admission and rejection of testimony and instructions given.

Testimony was admitted in regard to a conversation between a witness and Blakemore in regard to a doctor's bill that the doctor held against the defendant's wife, who was then dead, and also as to a conversation between the deceased and W. O. McWhorter, who furnished the coffin for the burial of defendant's wife. This testimony was clearly incompetent, and should not have been admitted.

The defense was allowed to prove that it was said that the deceased was inclined to be domineering and overbearing among his own race. No such testimony should have been admitted. This applies to all such testimony by the different witnesses who were allowed to speak in regard to his reputation in that respect.

P. J. Culton was introduced as a witness for the defense, and was asked questions in regard to conversations between himself and the wife of deceased with reference to the

prosecution of the defendant, many of which statements he denied making, and the commonwealth was allowed to contradict him in respect thereto by the widow of the deceased; and it is said that it was the erroneous admission of her testimony in respect thereto that caused the court to grant a new trial to the defendant. It is now insisted by the prosecution that the testimony so introduced was competent, and that the court erred in deciding otherwise upon a motion for a new trial. The rule is well settled that the statement of a witness, when asked as to a collateral fact or circumstance, cannot be contradicted by the adverse party by showing that he did make such statement. We are therefore of the opinion that the testimony of Mrs. Blakemore as to her conversation with and the statements of Culton should not have been admitted.

It is also contended by the appellant that the court erred in giving any instruction on the subject of manslaughter; but, taking into consideration all the facts and circumstances involved in this case, we are not inclined to hold that the giving of such an instruction was prejudicial to the commonwealth.

This opinion is ordered to be certified to the court below.

DEPOSIT BANK OF FRANKFORT et al. v. THOMASON et al.¹

(Court of Appeals of Kentucky. Feb. 12, 1902.)

ATTACHMENT—BOND EXECUTED BY CLAIMANT OF ATTACHED PROPERTY—DEFECTIVE BOND NOT VOID—BREACH OF BOND.

1. The execution by the claimant of attached property of the bond provided for by Civ. Code Prac. § 214, and the delivery of the property to him thereunder, does not discharge the lien created by the levy; and he must make himself a party to the action under Civ. Code Prac. § 29, or be concluded by the judgment therein.

2. Though a bond executed by the claimant of attached property did not conform to the requirements of Civ. Code Prac. § 214, it was not void, as the obligors will not be heard to complain that it does not contain substantially all the necessary conditions demanded by that section, the property having been surrendered to the claimant thereunder; and in so far as its terms are in excess of the terms of the section they will be treated as harmless surplusage, it being the duty of the court, as provided by Civ. Code Prac. § 682, upon the suggestion of any party in interest, to require a new and sufficient bond to be executed with the same effect as if originally executed.

3. After possession of the property has been delivered on the faith of the bond, and it has been sold, it is too late for the obligors to complain that no bond was executed to one who owned the property jointly with the debtor.

4. There is no breach of such a bond until there has been a judgment subjecting the property and the debtor has failed to satisfy the judgment, and until then an action on the bond is premature.

5. Under Civ. Code Prac. § 232, the liability of the obligors may be tried out in the original action in which the attachment issued.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Franklin county.

"Not to be officially reported."

Actions by the Deposit Bank of Frankfort and the Bank of Kentucky against Susan M. Thomason and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

D. W. Lindsay and Frank Chinn, for appellants. B. G. Williams, for appellees.

O'REAR, J. Appellant banks had judgments against S. A. Jones and others, upon which executions had issued and been returned "No property found." Actions were then begun under section 439 of the Civil Code of Practice to enforce the collection of the judgments, in which attachments issued against the debtors' property. These attachments were, by the sheriff, levied upon the undivided half interest of two of the execution defendants in 100 acres of wheat. Appellee Susan M. Thomason, a claimant of the property levied on, and who was not a defendant to the original actions, executed before the sheriff the following bond: "The sheriff of Franklin county having levied an attachment issued on the 17th day of June, 1897, from the Franklin circuit court in favor of the Deposit Bank of Frankfort against S. A. Jones, William Jones, and J. W. Jones for the sum of \$1,461.80, and in favor of the president, directors, and company of the Bank of Kentucky for \$375.00 upon one-half of about 100 acres of wheat that has been appraised at \$479.94, we undertake that, if it shall be adjudged that the said property, or any part of it, is subject to said attachment, Susan M. Thomason, who claims it, will pay said banks, plaintiffs in said attachment, the value of the property so subjected and 10 per cent. thereon, not exceeding the amount of said attachment and 10 per cent. thereon. July 13th, 1897." Thereupon the sheriff caused the wheat so levied on to be appraised. The appraisers fixed its value at \$479.94. It is averred that the sheriff then delivered the property to the claimant. Appellants, the execution creditors, then brought this suit on the bond against the claimant and her surety, alleging that the wheat levied on was in fact the property of the execution debtors Jones, and was subject to appellants' executions, and asked that they be given judgment for its value, \$500. The defense set up another action pending in the courts of this commonwealth between the same parties concerning the same subject-matter; also pleaded the claimants' ownership of the property, and set out the nature of the other proceedings. The court sustained a demurrer to this reply, and dismissed the petition.

In view of the conclusion at which we have arrived, we have not deemed it necessary to attach much importance to the plea of abatement. It may or may not have been good. But the demurrer should have been carried back to the petition, and sustained.

Civ. Code Prac. § 214, provides how a claimant of property levied on by attachment in a proceeding to which he is not a party may procure a release of the attachment. The section is: "The sheriff may deliver any attached property to the person in whose possession it is found, upon the execution, in the presence of the sheriff, of a bond to the plaintiff by such person, with one or more sufficient sureties, to the effect that the obligors are bound, in double the value of the property, that the defendant shall perform the judgment of the court in the action, or that the property or its value shall be forthcoming and subject to, the order of the court." The execution of the bond under this section does not discharge the lien created by the levy. *Bell v. Wrecking Co.*, 3 Metc: 558; *Oppenheimer v. Riley*, 6 Bush, 118; *Hobson v. Hall* (Ky.) 14 S. W. 958. The claimant must make herself a party to the action under section 29 of the Code, or be concluded by the judgment of the court in that action. *Miller v. Desha*, 3 Bush, 212. An inspection of this bond shows that it does not conform to the requirements of the only section of the Code under which it could have been taken. It and the proceedings attending its execution show that it was fashioned under the requirements of section 645 of the Code, a section applicable alone to proceedings by a claimant other than the execution debtor to obtain a release of his property levied on under an execution. Summary proceedings are allowed on this bond. Section 648, etc.

It is argued for appellees that the bond in this case is void,—First, because of the defect just stated; and, second, because, under section 206 of the Civil Code of Practice, the possession of personal property jointly owned by the debtor and another shall not be taken by the sheriff, unless the plaintiff first executes a bond to the other joint owner to pay him damages he may sustain if the attachment has been wrongfully sued out. The first objection is not enough to make the bond void. It would, in any event, be good as a common-law bond. But it was an evident attempt to comply with the requirements of the law on that subject. The bond was merely defective. It contained substantially all the necessary conditions demanded by section 214; at least, the obligors will not be heard to complain that it does not. In so far as its terms are in excess of the requirements of the section,—as, for example, the provision for 10 per cent. damages,—they may be treated as harmless surplusage. Upon the suggestion of the fact to the court by any party in interest, it was the duty of the court to require a new and sufficient bond to be executed, under section 682 of the Code, viz.: "If a bond provided for by this Code be adjudged to be defective, a new and sufficient one may be executed in such reasonable time as the court may fix, with the same effect as if originally executed." The second

objection is one that the other joint owner may have raised, or that the sheriff may have availed himself of, before the attachment was levied. But after levy, and after the possession of the property has been delivered on the faith of this bond, and the property has been sold abroad, it is too late to raise that question. We hold that the bond sued on was intended to be, and will be treated as having been, executed under section 214, Civ. Code Prac. It may be perfected as permitted by section 682. The question, then, is, has there been a breach of this bond? The obligation is that the defendant will perform the judgment, or the obligors will have the property or its value forthcoming to answer the judgment of the court. Until there has been a judgment subjecting the property, and the judgment debtor has failed to satisfy it, there is not a breach. *Hansford v. Perrin*, 6 B. Mon. 597; *Bland v. Creager*, 13 B. Mon. 509. This action was premature. It should have been dismissed. The parties can try out the obligor's liability in the original action in which the attachment issued. Section 282, Civ. Code Prac.

Judgment affirmed.

CHESAPEAKE & O. RY. CO. v. DODGE.¹

(Court of Appeals of Kentucky. Feb. 12, 1902.)

PUNITIVE DAMAGES—GROSS NEGLIGENCE—EXCESSIVE VERDICT.

1. Punitive damages may be awarded against a corporation for an injury resulting from the gross negligence of its servants.

2. "Gross negligence" was properly defined, in an instruction to the jury, as the failure to exercise slight care.

3. Though plaintiff does not seem to have suffered any severe or permanent injuries, and did not himself consider it necessary to call in a physician,—merely complaining that for some two months or more he did not have the full use of his arm, and for some weeks suffered from dizziness in the head,—a verdict for \$825 will not be set aside as excessive, in view of the fact that one verdict has already been set aside upon that ground, and that the jury was properly instructed that it might award punitive damages.

Appeal from circuit court, Kenton county. "Not to be officially reported."

Action by J. R. Dodge against the Chesapeake & Ohio Railway Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Simrall & Calvin, for appellant. B. F. Graziani, for appellee.

DU RELLE, J. Appellee in February, 1898 (being then 79 years of age), was driving out of Covington to his home, in Kenton

county, in a two-seated vehicle, with the top down, and his wife and another lady on the back seat. At the intersection of Madison avenue and Seventeenth street the appellant company has a crossing, at which it maintains safety gates. Appellee, driving in the rear of several other vehicles, had not gotten entirely across, when the safety gates or poles were lowered; there being two on each side of the crossing. One of the poles striking his horse on the back, the horse plunged forward and broke off the end of one of the poles, which struck appellee on the arm and head. The horse, which was a gentle animal, was readily stopped, Mr. Dodge's contusions were dressed in a neighboring drug store, the ladies were taken where they wished to go, and later in the evening he drove out to his home. He does not seem to have suffered any very severe or permanent injuries, and did not himself consider it necessary to call in a physician, but complains that for some two months or more he did not have the full use of his arm, and for some weeks suffered from dizziness in the head. Having brought suit, alleging gross negligence in the lowering of the gates, he obtained a verdict for \$1,200, which was set aside as excessive by the trial court. A subsequent trial resulted in a verdict and judgment for \$825.

It is complained, first, that no case has been made out upon which the jury was authorized to award punitive damages, which were allowed by the instructions to be given if the jury should find the negligence to be gross. But in *Railroad Co. v. Stewart* (Ky.) 63 S. W. 596, the cases relied on as holding that punitive damages may only be awarded where the conduct of the negligent party is such as to evidence malice, or a reckless disregard of the safety of others, or a wanton injury, were considered and overruled.

We do not think the instruction that gross negligence was the failure to exercise slight care was erroneous. Such an instruction has been frequently recognized by this court as proper. See *Railroad Co. v. Kelly's Adm'r*, 100 Ky. 421, 88 S. W. 852, 40 S. W. 452; *Greenwood v. Coal Co.*, 14 Ky. Law Rep. 836; and numerous other cases.

The law embodied in the instructions asked for by appellant seems to have been substantially given in the instructions which were given by the court.

The objection upon the ground that the damages were excessive is urged with great force; but, in view of the fact that one verdict has already been set aside upon that ground, we are not disposed to disturb the finding of the jury, especially in view of the fact that the instructions authorized the jury, in their discretion, to award punitive damages, and that such an instruction has been recently recognized by this court as proper to be given. Judgment affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

JUDAH v. KENTUCKY TRUST CO. et al.¹
(Court of Appeals of Kentucky. Feb. 12,
1902.)

PAYMENT OF BOND—TRANSACTION—WHETHER PAYMENT OR SALE.

Where the holder of a bond received the amount of the bond from one whom he had reason to believe was making payment for the obligor, there was a payment, and not a sale of the bond, as there could be no contract of sale without a meeting of the minds of the parties.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by the Kentucky Trust Company and Lee E. Cralle against Caroline Newberger to enforce a mortgage lien. Judgment denying claim of D. Judah to one of the bonds sued on, and he appeals. Affirmed.

Arthur M. Rutledge, for appellant. Gordon & Gordon, Wm. Kreiger, and Lafon Allen, for appellees.

DU RELLE, J. On January 22, 1896, Caroline Newberger executed to the Kentucky Trust Company, appellee, her several coupon bonds, numbered from 1 to 7, for \$500 each, payable to the trust company or bearer, due two years from date, secured by a mortgage executed to the trust company, as trustee, upon a lot of land on Walnut street, between Floyd and Preston streets, in Louisville. The bonds were sold by the trust company to various persons, appellee Lee E. Cralle becoming the purchaser of bonds numbered 4 and 5. In February, 1898, Cralle appears to have insisted upon the payment of at least one of the bonds held by him, and, applying at Mrs. Newberger's residence, was referred to her son J. L. Newberger, at "The World," a store operated by appellant Judah, who was her son-in-law, where, after some negotiation, he obtained a check for the amount of bond No. 5, and turned the bond over to Judah. The remaining bonds not being paid by Mrs. Newberger, this action was instituted for a sale of the mortgaged property to satisfy the other six bonds. Judah came in by answer, claiming title to bond No. 5, alleging its nonpayment, and asserting a lien to secure that bond as well as the others. Issue was joined upon the answer, the controversy turning upon the question whether Judah, in his transaction with Cralle, paid off bond No. 5, so that it no longer remained a charge against the mortgaged property, or became himself a purchaser of it, retaining a lien, and entitled to a pro rata share of the purchase money realized from the sale of the mortgaged land. The property, when sold, brought sufficient money to pay costs, and the six other bonds in full, but not enough to pay all seven of the bonds in full. If the transaction was a sale of the bond, Judah obtains a pro rata therein, and the other bondholders are obliged to prorate with

him and take less than the face of their bonds. If it was a payment of the bond, Judah gets nothing, and the holders of the six other bonds are paid in full. On behalf of Judah it is contended that he bought the bond, paying for it by a check signed by J. L. Newberger upon an account at the Louisville Trust Company standing to the credit of "M. Newberger, by J. L. Newberger," or that he himself affixed the signature, "M. Newberger, by J. L. Newberger," to the check which he gave Cralle, but that in either event the money came out of the funds of D. Judah & Co., instead of depositing these funds to the credit of D. Judah & Co. in the German Insurance Bank, and that these deposits were made to the credit of the M. Newberger account because the German Insurance Bank held a note of Newberger, Frankel & Co., an insolvent firm, upon which Judah & Co. were indorsers, and he feared the appropriation by the German Insurance Bank of the entire amount of his firm's deposit to the payment of that note. The account of "M. Newberger, by J. L. Newberger," seems to have originated after the purchase by J. L. Newberger, as agent for M. Newberger, a younger brother about 21 years of age, of certain notes and accounts belonging to the firm of Levi, Newberger & Co., also insolvent, of which firm J. L. Newberger had been a member; and to this account were deposited such sums as were realized from the notes and accounts thus purchased, and subsequently such sums as Judah withdrew from the business of Judah & Co. and deposited to the credit of that account, to prevent their appropriation by the German Insurance Bank to the payment of the Newberger, Frankel & Co. note. There is naturally considerable conflict of testimony. Judah does not remember whether the check was signed by him or by J. L. Newberger, and the check is not produced; it being explained that it was lost or misplaced. In the view we have taken of the transaction between Judah and Cralle, it is unnecessary to consider the conflict of testimony, or whether Judah had the right to sign his brother-in-law's name. Nor is it necessary to consider the discrepancies in testimony urged in the briefs. Judah appears in this case as claiming to have bought the bond. If he did so, it would seem that he was entitled to it, and to a pro rata of the purchase money, without reference to where or how he obtained the money. Appellees claim that he paid the bond in order to postpone proceedings to enforce the mortgage lien, and that he did this as agent of his mother-in-law, Mrs. Newberger, or of one of his brothers-in-law, and out of their money. If the transaction was intended to be a payment, then, no matter where or how he obtained the money, or whether he advanced it himself, it was a payment, and not a sale, and he is not entitled to prorate with the holders of the other bonds. A sale is a contract. Mutuality is of the essence of a

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

contract. Payment is not a contract, but the discharge of a contract. There can be no sale of a note or bond unless the holder expressly or by implication agrees to sell. The decided weight of the testimony, as we see it, is that Cralle, having negotiated with J. L. Newberger, having demanded payment, and been promised payment by him, believed that he was receiving payment of his bond, and had no reason to believe otherwise. This being so, there was no contract of sale. There was no mutuality. There was no meeting of the minds. The transaction was the discharge of a pre-existing contract. 2 Daniel, Neg. Inst. §§ 1221, 1222; Binford v. Adams, 104 Ind. 41, 3 N. E. 753; Edw. Bills & N. 728; Collins v. Adams' Ex'rs, 53 Vt. 433.

We see no reason to disturb the finding of the chancellor, and the judgment is affirmed.

SIGLER et al. v. TAPP.¹

(Court of Appeals of Kentucky. Feb. 5, 1902.)
CONSTRUCTION OF WILL—WORDS EXCLUDING CERTAIN HEIRS.

Where a testator devised all of his estate to his eight children, naming as one of them "Mary Sigler (dead)," and then added the words, "except Mary Sigler's five children, which I gave one dollar each," the children of Mary Sigler took only one dollar each.

Appeal from circuit court, Webster county.

"Not to be officially reported."

Action by J. S. Tapp against Dixie Stinitt and others for a sale of land and division of the proceeds. Judgment denying claim of Samuel Sigler and others, who intervened claiming part of the proceeds, and they appeal. Affirmed.

John G. Bailey and Clifton J. Pratt, for appellants.

PAYNTER, J. Wiley Jones by his will devised to his wife, Dorcis Jones, during her life or widowhood, 80 acres of land on Highland creek, a storehouse and lot near Jones' island, and all of his personal property. The testator provided in his will to whom his property should go at the termination of the life estate. He did so in these words: "At the death of my said wife, the real and personal estate aforesaid I give and bequeath to my eight children, George R. Jones, Mary Sigler (dead), Martha Wallace, Gabe Jones, Harriet E. Lee, Lavina E. Bertwith, Ed. L. Jones, Virginia A. Wiley, in equal shares, except Mary Sigler's five children, which I gave one dollar each; George and Edmond Jones both having had their parts each of my land, which I here charge them with. I further direct all the property, both personal and real, going to Harriet E. Lee and Virginia A. Wiley, be left to them and the heirs of their body, so their husbands shall have no power to sell or transfer the same." The question here involved is, did Mary Sigler's

children take any part of the estate, except \$1 each? The testator used inartificial terms in disposing of the remainder interest in the estate. However, we are of the opinion that by the language employed he clearly manifested an intention that they should have but \$1 each of his estate. Suppose he had simply said that he bequeathed to his eight children, "except Mary Sigler's five children," his real and personal estate; it would be manifest that he excluded them from participation in his estate. The mere fact that the testator added to the words of exclusion the provision that they were to have \$1 each does not so modify the terms of exclusion to the extent of nullifying them. Our opinion is that the court below properly held that Mary Sigler's children did not take any part of the estate, except \$1 each.

The judgment is affirmed.

CITY OF LOUISVILLE v. KIMBEL.¹

(Court of Appeals of Kentucky. Jan. 22, 1902.)

MUNICIPAL CORPORATIONS—AUTHENTICATION OF TAX BILLS—BURDEN OF PROOF.

In an action by a city to recover taxes, in which defendant, by his answer, denied that the city assessor made out or authenticated the tax bills by his signature or a fac simile thereof, the burden was upon plaintiff to show that the tax bills were made out and signed by the assessor.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by the city of Louisville against W. C. Kimbel to recover taxes. Judgment for defendant, and plaintiff appeals. Affirmed.

H. L. Stone, for appellant. Lane & Harrison, for appellee.

PAYNTER, J. The city of Louisville instituted this action to recover taxes alleged to be due it by the appellee for certain years. With the petition there were filed tax bills for the years in question, on which there were indorsements to the effect that they were original tax bills, and which purport to have been signed by the assessor. The appellee denied that the assessor of the city of Louisville made out or authenticated them by his signature or a fac simile thereof. We think that the denial is sufficient to put in issue the question as to whether the city assessor made out or authenticated the tax bills in suit. The case was pending for some years, and no preparation seems to have been made to prepare the case for trial. Under the doctrine of City of Louisville v. Johnson, 95 Ky. 254, 24 S. W. 875, the averments in the answer placed upon the city the burden of showing that the tax bills were made out and signed by the assessor. This it failed to do.

The judgment is affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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WHITMAN McNAMARA TOBACCO CO. v. WURM.¹

(Court of Appeals of Kentucky. Feb. 18, 1902.)

NEGLIGENCE—DISCHARGING HOT WATER INTO GUTTER—CONCURRENT NEGLIGENCE—RIGHT OF PLAINTIFF TO SUE EITHER OF TWO WRONGDOERS—HARMLESS ERROR.

1. The question of defendant's negligence in discharging hot water into a gutter, whereby plaintiff, a boy five years old, was scalded, was properly submitted to the jury.

2. The court properly instructed the jury that, though plaintiff may have been pushed into the gutter by a companion, that fact constituted no defense, as the companion's negligence, if any, could not be imputed to plaintiff as contributory negligence, and plaintiff had the right, though such negligence contributed to the injury, to sue either of the wrongdoers without joining the other.

3. In an action by a next friend, the error, if any, in permitting the next friend to testify, after other witnesses had testified on the trial, was harmless, as the testimony related only to the extent of the injury, which was already shown by other evidence.

Appeal from circuit court, Kenton county. "Not to be officially reported."

Action by Arthur Wurm, by next friend, against the Whitman McNamara Tobacco Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Tisdale & Gray, for appellant. Wm. Goebel and M. L. Harbeson, for appellee.

WHITE, J. This is an action for damages for personal injuries. The appellee, a boy about five years old, fell into a gutter on the side of the street in Covington, into which appellant had discharged some hot water, and was severely burned. The negligence charged is in discharging the water, while hot, into the open gutter alongside the pavement. This was denied, and a plea of contributory negligence interposed. Upon trial a verdict and judgment resulted for the sum of \$400, to reverse which this appeal is prosecuted.

The proof on the trial showed that this little boy had carried dinner to his grandfather, who worked near the appellant's factory, and while going along the sidewalk met some other boys, who jostled or bumped against appellee, and pushed him off the walk, and he fell into the open gutter of the street. He was picked up, and carried a short distance home, and when his clothing was removed it was found he was scalded. The skin came off with the clothes. He was painfully burned, but there was no permanent injury. He was confined several weeks. The water in the gutter had been discharged from appellant's factory, but a short distance above, into the gutter.

The court gave instructions as to negligence of appellant in letting the hot water into the gutter; as to contributory negligence of appellee as a boy; and also that if the ap-

pellee was jostled by another boy, and thereby was thrown or fell into the hot water, this would constitute no defense to appellant. The definitions of "care" and "negligence" were given. To all of these instructions objection and exception was taken, but counsel does not suggest error save to No. 4, which precludes the defense that appellee was jostled by another boy. We are of opinion that this instruction is the law. If it be true that the injury was the result of the negligence of two persons, appellant and the boy who jostled appellee, there might still be a recovery against either without joining the other. It is no defense for a party guilty of negligence to say, "There are others equally guilty as I." Nor could appellant say that the other boy contributed to the injury of appellee, as it was not pretended that appellee was in any way chargeable with the other boy's negligence.

The amount of the judgment is reasonable and purely compensatory.

Appellant also complains of the action of the trial court in permitting the next friend to testify after other witnesses had testified on the trial. If this be error, it is not, in this case, such error as will require or justify a reversal. The testimony of the next friend is not as to any material fact showing liability. It is only as to extent of the injury, which was already shown by other evidence.

We perceive no error in the judgment, and the same is affirmed, with damages.

JONES' ADM'R v. ILLINOIS CENT. R. CO. et al.¹

(Court of Appeals of Kentucky. Feb. 18, 1902.)

REMOVAL OF CAUSES—ADMINISTRATOR—CONFLICTING CLAIMANTS—PARTIES TO ACTION—JURISDICTION TO APPOINT ADMINISTRATOR—QUESTION OF RESIDENCE FOR JURY.

1. It seems that a motion by defendant railroad company, a nonresident corporation, for a removal of the cause to the United States circuit court, was properly overruled, as defendant's conductor and engineer, who are residents of the state, and jointly charged with negligence, are joined as defendants.

2. Defendant having filed an answer to the merits, in which it was denied that plaintiff's intestate, for whose death plaintiff, as administrator, was seeking to recover damages, was, at the time of his death, a resident or citizen of C. county, in which plaintiff was appointed administrator, and that plaintiff was duly appointed and qualified as his administrator, it was error to reject an amended answer alleging that R. was claiming to have been appointed administrator by the M. county court, and as such was seeking to recover damages for the death of the intestate, the amendment praying that he be made a party defendant that he might be bound in the event of a judgment in plaintiff's favor.

3. As the widow testified that she married the intestate in C. county, that they lived together there, that they never resided elsewhere, and that all of their household furniture had always been kept there since the mar-

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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riage, her testimony was evidence to go to the jury in support of the jurisdiction assumed by the O. county court, though she also testified to facts which militate strongly against her theory of the husband's residence.

Appeal from circuit court, Lyon county.
"Not to be officially reported."

Action by the administrator of William Jones against the Illinois Central Railroad Company and others to recover damages for the death of plaintiff's intestate. Judgment for defendants, and plaintiff appeals. Reversed.

Molloy & Utley, J. K. Hendrick, and Hazelrigg & Chenault, for appellant. Pirtle & Trabue, P. H. Darby, and Wilson & James, for appellees.

DU RELLE, J. Having been appointed administrator of William Jones, deceased, by the Carlisle county court, appellant instituted this action in the Lyon circuit court to recover of the appellee railroad company and a conductor and engineer of said company in its employ \$10,000 damages for the death of his intestate, alleged to have been caused by the gross negligence of the appellees in making a running switch at Cumberland river, in Lyon county. The appellee company filed a petition in proper form to transfer the case as to it to the United States circuit court for the district of Kentucky, alleging a separable cause of action as against it. This motion was overruled, and the action of the court seems supported by the cases of *Pugh v. Railway Co.* (Ky.) 39 S. W. 695; *Railroad Co. v. Dixon's Adm'r* (Ky.) 47 S. W. 615; *Kane v. City of Indianapolis* (C. C.) 82 Fed. 770. After the filing of an answer to the merits, in which it was denied that appellant's intestate was, at the time of his death, a resident or citizen of Carlisle county, Ky., and that appellant was duly appointed and qualified as his administrator, an amended answer was offered and rejected, asking that F. G. Rudolph be made a party to the action, upon the ground that he claimed to have been appointed by the McCracken county court administrator of the same intestate, and as such administrator was seeking to recover damages for the death of said intestate in the same court in which this action was pending. The action of the circuit court in rejecting this amendment was, we think, erroneous. Appellees were entitled to have the McCracken administrator made a party to the action, so that, in the event of a judgment in favor of the Carlisle administrator, the former would be bound thereby. Upon the conclusion of the testimony the court gave a peremptory instruction in favor of appellees upon the ground, apparently, that there was no testimony to support the contention that the intestate was, at the time of his death, a resident of Carlisle county. This, we think, was erroneous, in view of the testimony of the widow, whose testimony is to

the effect that she married the intestate in Carlisle county, that they lived together there, that they never resided at any other place, and that all of their household furniture had always been kept there since the marriage. And while she also testified to facts which militate strongly against her theory of her husband's residence, and there is considerable testimony upon the other side in contradiction of it, we think her testimony was evidence to go to the jury in support of the jurisdiction assumed by the Carlisle county court. *Jacobs' Adm'r v. Railroad Co.*, 10 Bush, 268.

For the reasons given, the judgment is reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

GERMANIA SAFETY VAULT & TRUST CO. v. DRISKELL et al.¹

(Court of Appeals of Kentucky. Feb. 6, 1902.)

ADMINISTRATORS — TRUST COMPANY — FUNDS OF ESTATE — DEPOSIT — INSOLVENT BANK — NEGLIGENCE — NOTICE TO CORPORATION — ADMINISTRATOR'S SETTLEMENT — CONCLUSIVE — ESTOPPEL OF DISTRIBUTEE.

1. While it was the duty of a trust company acting as administrator to deposit the funds of the estate in bank, it was guilty of negligence in depositing them in an insolvent bank, and therefore liable for loss resulting therefrom, where its president had actual knowledge, at the time of the insolvent condition of the bank, and its officers whose duty it was to look after deposits of trust accounts had heard rumors sufficient to put them on inquiry, which, if made, would have revealed to them the true condition of the bank.

2. Though the president of the trust company was also president of the bank, his knowledge of the bank's condition was the knowledge of the trust company, in a controversy between it and the distributees of the estate, though the rule might be otherwise in a controversy between the two corporations.

3. The fact that the clerk of the trust company having immediate charge of the deposits acted in good faith, believing the bank to be solvent, does not exonerate the company, in view of the fact that the superior officers of the company having supervision of the matter had knowledge of facts sufficient to charge them with notice.

4. The trust company cannot rely on the general reputation of the bank, where its president was also president of the bank, and thus had the means at hand, coupled with the duty, to acquaint himself with its condition.

5. The fact that an ex parte settlement made by the administrator with the county court included as a part of the administrator's receipts the amount the estate had on deposit when the bank closed, as evidenced by a certificate of the receiver of the bank, does not preclude the distributees from claiming from the administrator any balance resulting from the loss of the deposit, after crediting dividends received, as it does not appear that the certificate was ever accepted otherwise than as a memorandum entitling the holder to dividends in the distribution of the assets of the bank.

6. The fact that one of the distributees agreed to the appointment of the trust company as administrator, and was to receive a

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

part of the administrator's commission for special services rendered by him, does not estop him from questioning the act of the administrator in selecting a bank in which to deposit the funds of the estate, as he had no knowledge of, or control over, deposits.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by John D. Driskell and another against the Germania Safety Vault & Trust Company to charge defendant for loss resulting from its negligence as administrator of the estate of William Driskell, deceased. Judgment for plaintiffs, and defendant appeals. Affirmed.

O'Neal & O'Neal and Kohn, Baird & Spindle, for appellant. Simrall & Doolan, for appellees.

O'REAR, J. Appellant, Germania Safety Vault & Trust Company, was a corporation whose charter authorized it to act as administrator of decedents' estates, in connection with its other business. One-half of its capital stock was by the act of incorporation set apart, and required to be, and was, invested in such securities as by law were permitted to be invested in by trustees. This fund was by the act made liable exclusively first to the discharge of the corporation's trust or fiducial obligations. This company was appointed and qualified as the administrator of the estate of William Driskell, deceased. It deposited the cash belonging to this estate in the German National Bank, which was a banking corporation having its place of business in the same building as the trust company. During this time the same person was president of both companies, and each company had as many as three directors in common. The bank failed, having on hand money of the Driskell estate amounting to \$3,867.27. Shortly after the failure of the bank, the trust company made a deed of assignment for the benefit of creditors generally. It was then removed as administrator of Driskell, and one Carmichael was appointed and qualified as administrator de bonis non. The trust company filed an ex parte settlement of its accounts as administrator of William Driskell in the Jefferson county court, which, without exception, was confirmed. The receiver of the German National Bank gave to the trust company, as administrator of Driskell, a certificate showing the amount of its deposit owing on that account. In the final settlement with the county court, above referred to, the trust company accounted for this certificate, and took credit for its amount. The administrator de bonis non received and receipted for it, with other evidences of indebtedness belonging to the Driskell estate. On a final settlement of that estate, the balance owing on this certificate was set apart to appellees as distributees. The bank paid 60 cents to the dollar upon its liabilities, and appellees sued the trust company, the former

administrator, to charge it, and especially to have recourse upon that part of its securities set apart by its charter as indemnity to its fiducial accounts, for the balance of this deposit, represented by the receiver's certificate mentioned. The circuit court granted the relief prayed for.

The record discloses that the president of the bank, who was also president of the trust company, knew that these funds were deposited in that bank, and knew that the bank was unsafe. He was actively and daily engaged in the management of the affairs of the two institutions. What actual knowledge of the bank's condition, its directors, who were also directors for the trust company, had, is not clearly shown.

Counsel for appellant present, and have interestingly discussed, several propositions, upon which we are invited to lay down the law applicable to this case. Disposing of them in the order presented, it is first asserted that it was the duty of the Germania Safety Vault & Trust Company, as administrator of Driskell, to deposit the funds of the estate in some bank, and that it was not negligence to deposit them in the German National. We agree that it was the duty of the administrator to deposit the money in some safe bank. It would have been culpable negligence not to have done so, considering the amounts passing through the administrator's hands,—more than \$10,000. The administrator will be held to that degree of care, at least, that prudent and cautious business men ordinarily exercise in their own affairs. But this duty is not discharged by depositing the funds in any bank. Nor would it be by depositing it without inquiry or investigation as to the standing of the depository. The administrator must have reasonable grounds to believe, and in good faith believe, the institution to be solvent, before he deposits the estate's funds with it. From this it follows that if the administrator knew the bank was in a doubtful condition, or if he had notice of such facts as reasonably should have caused him to first make further and more particular inquiry into the bank's solvency, yet he deposited the estate's funds there without satisfactory evidence of the bank's solvency, and the money is thereby lost, it is an act of negligence for which he will be liable. In the case at bar there were rumors generally astir in that community, and particularly within financial circles, affecting the integrity of the bank, before and during the time of these deposits. These rumors had come to officers of the trust company whose duty it was to look after deposits of trust accounts. They took no steps to verify or disprove them. Besides, the president of the trust company had actual knowledge of the faulty condition of the bank. This knowledge was acquired necessarily in the course of numerous dealings between the two institutions, and by reason of his own relation to them. Others of ap

pellant's directors were also so situated that they should have known and could have known, and, in the absence of their testimony in the record, we must presume did know, of the bank's actual condition. Under these circumstances, the court is of the opinion that to deposit the estate's funds in such a bank was negligence on the part of the administrator. For a loss resulting from it, it should answer to the persons damaged.

2. Appellant's second proposition is that "J. M. McKnight, as president of the German National Bank, was in an attitude hostile to the Germania Safety Vault & Trust Company, and his knowledge of the bank's condition was not imputable to the trust company, and was not its knowledge of the bank's condition." There are circumstances in which the proposition asserted would apply. Were this a controversy between the two corporations concerning a contract between them, and if it were more to the interest of the bank that the knowledge of its president in the transaction under consideration be concealed from the trust company, it might be so that in such state of case the president of the bank would not, even as president of the trust company, divulge to the latter the knowledge acquired in his other position inimical to the latter's interest. The reasons and authorities for this proposition are not pertinent to the case in hand. Here there is no contest between these corporations concerning any transaction between them. It is a claim by a distributee of an estate committed to the hands of the trust company, as administrator, against the administrator, for its lack of care, which has caused a loss to the estate. In this the bank is in no wise involved. The trust company has caused to be conferred upon it the privilege of acting in these trust capacities. It must necessarily assume all the liabilities and duties belonging to such an office. Necessarily it acts only through its official boards. It must be held to contract with all intrusting to it such business that it will select men of prudence, judgment, honesty, and reasonable skill in these places, and that they shall bring to the discharge of their duties to these estates not only their skill, but that whatever knowledge they may have, wherever or whenever obtained, will be used to protect these interests exactly as if they were acting personally as such administrators or trustees. If an administrator knows a bank is on the verge of bankruptcy, it would be gross negligence for him to deposit the trust funds in it, no matter how he came by his knowledge. The thing that makes the act negligence in that case is doing what he knows he ought not to do. *Holden v. Bank*, 72 N. Y. 286. In the state of case in hand, the administrator (i. e., the trust company) can only have such knowledge as is in the brain of its officials, or in the records that its servants have made for it. The administrator's caution is the caution

exercised by these officials. Its conscience is their conscience. It will not be heard to say, therefore, that it has selected negligent or even rascally officials, who took up other duties so incompatible with their obligations to the administrator that they could not give the estate the full benefit of either their sagacity, their prudence, their judgment, or their knowledge of affairs vitally affecting the trusts committed to them. 4 *Thomp. Corp.* §§ 5226, 5227; 2 *Pom. Eq. Jur.* § 675; *Kissam v. Anderson*, 145 U. S. 443, 12 *Sup. Ct.* 960, 36 *L. Ed.* 765; *Merchants' Nat. Bank v. State Nat. Bank*, 10 *Wall.* 604, 19 *L. Ed.* 1008. Another principle, whose age and familiarity attest its wisdom, might well control this particular question; that is, "where a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong, rather than by a stranger." *Macon Co. v. Shores*, 97 U. S. 279, 24 *L. Ed.* 889; *Graves v. Bank*, 10 *Bush*, 23, 19 *Am. Rep.* 50; *Insurance Co. v. Scott*, 81 *Ky.* 549. The wrong in this case was the negligence of the president and directors of the trust company in making the deposit in a bank which they knew to be insolvent, and in wrongfully assuming such relations as made it impossible for them to honestly and faithfully protect the trust confided to them. The effect of this wrong should fall upon those who selected such agents, rather than upon strangers who had neither control of their selection nor action.

3. It is claimed that the officers of the trust company acted in the utmost good faith in depositing the trust funds in the German National Bank, and the trust company is therefore not liable. What has been said above largely disposes of this question. But it was shown on the trial that the clerk of the trust company, who had immediate charge of these deposits, acted in good faith, and without guilty knowledge, in making the deposits. A corporation may not escape liability for lack of care by showing that its subordinate officers were ignorant of the facts that would have put them on notice if known, when the superior and controlling officials of the corporation had such knowledge, and where such superiors had actual control and supervision over the matter in question. "Knowledge of a servant may be imputed to the master" is a familiar doctrine; but to impute to the master the servant's ignorance, as a protection against the master's knowledge, would be new. It was shown that many people of supposed business sagacity believed the bank to be solvent, and evidenced this belief by continuing to keep large deposits there till the bank was closed. The general deposits were about \$400,000. This, at best, but proves how thoroughly practiced was the scheme by which the bank was wrecked. That it was calculated to, and in fact did, deceive many depositors, or the community gener-

ally, cannot detract from the guilty knowledge of the bank's real condition by those who were in charge of it and conducting the dual policy which, while deceiving the public, was wrecking the bank. What might have been good faith in a stranger, in relying on the bank's reputation, would not be allowed as such to a managing official of the bank. He will not be permitted to rely on the general reputation of the institution, when he has the means at hand, coupled with a duty, to actually acquaint himself with its true condition. He may not close his eyes to the truth and follow an illusion.

4. What was the effect of the settlement of the accounts by the trust company as administrator? It is claimed for the appellant that the ex parte settlement in the county court is conclusive till surcharged by a suit for that purpose. The effect of this settlement was to state the accounts of the administrator, which was done. The balance collected in cash, above disbursements, was shown. As representing a part of this balance, there was a certificate of the receiver of the bank where the administrator had kept its deposits. This certificate was not a "security" nor an "investment." It was merely a memorandum of an official in charge of the liquidation of the defunct bank that this estate had on deposit in that bank when it closed the amount stated, and that he has audited it as a claim against the bank's assets. When this certificate was turned over to the administrator de bonis non, it was not claimed in the settlement or the receipt that it was cash. The county court could not have compelled its acceptance as such. Nor does it appear that it attempted to do so. This transaction did not exonerate the trust company from any liability previously incurred. Nor is it shown that the administrator de bonis non accepted the certificate otherwise than as what it purported to be,—a memorandum entitling the holder or owner to withdraw such dividends in the distribution of assets of the bank as might be awarded to it. This was done, and credited on the original liability of the trust company. The settlement did not conclude those interested in the estate from claiming from the former administrator any balance resulting from the loss of the deposit after crediting the dividends receivable from the broken bank's assets.

5. It was charged in the trust company's answer that appellee John D. Driskell, representing himself and his brother,—they being the only distributees of the Driskell estate,—had agreed to the appointment of the Germania Safety Vault & Trust Company as administrator, and had, as part of that agreement, stipulated that he was to be consulted in the management of the estate, and receive part of the compensation, and that the appellees were estopped to question the validity of any of the acts of the administrator. The proof shows that many of the assets of this

estate were notes and other debts owing the decedent by persons living at some distance from Louisville, and in the neighborhood where John D. Driskell resided. It also shows that he was acquainted with these debtors, and familiar with their circumstances; that many of the debts were of long standing, some of them of doubtful solvency, and against some of them the statutes of limitation had run nearly to completion. The administrator agreed to employ and did employ John D. Driskell to assist it in looking up these debtors, and look after such as needed special and quick attention. For this service, and other services in looking after some real property connected with the estate, the administrator agreed to pay John D. Driskell two-fifths of its commission. It was not shown that appellees, or either of them, knew where the deposits in question were being made, or were consulted about it, or had any control over it. From these facts we cannot hold that there was an estoppel against appellees. They neither consented to nor counseled, nor were they aware of the fact of, the deposit now in litigation; nor were they aware of the actual or reputed condition of the bank at that time. There is nothing shown in this record that should operate upon their consciences to offset the culpability of appellant.

The judgment is affirmed, with damages.

NEW YORK LIFE INS. CO. v. BROWN'S ADM'R.¹

(Court of Appeals of Kentucky. Feb. 7, 1902.)

APPEAL AND ERROR—FAILURE TO INCORPORATE DEPOSITIONS IN BILL OF EXCEPTIONS—LIFE INSURANCE—ASSIGNMENT OF POLICY TO PERSON HAVING NO INSURABLE INTEREST.

1. Depositions read to the jury on the trial of an ordinary action, and also the record of another action read as evidence, being omitted from the bill of exceptions, cannot be considered as a part thereof, though referred to therein as copied in other parts of the transcript, and therefore, as a part of the evidence is not before the court, there can be no reversal on the ground that the verdict is against the evidence.

2. While a policy of life insurance assigned to one having no insurable interest in the life of assured cannot be enforced by the assignee, the assignment does not render the policy void, but there may be a recovery thereon by the administrator of assured, the policy being payable to his "executors, administrators, or assigns"; and this is true though the assured may, when he took out the policy, have contemplated the assignment he made, as the application and policy both recognized his right to assign the policy, and did not limit the assignment to some person having an insurable interest.

3. As defendant did not ask an instruction presenting the question of fraud in procuring the policy, that question is not presented.

Appeal from circuit court, Pike county.
"Not to be officially reported."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Action by the administrator of Charles L. Brown against the New York Life Insurance Company on a policy of life insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Humphrey, Burnett & Humphrey and Hager & Stewart, for appellant. Edward W. Hines, T. L. Edelen, J. M. York, C. C. York, and Geo. Pinson, Jr., for appellee.

BURNAM, J. This action was instituted by appellee, as administrator of Charles L. Brown, deceased, against appellant, the New York Life Insurance Company, upon a policy for \$5,000 on the life of Brown, payable to his executors, administrators, or assigns. Two defenses were pleaded by the company: First, that the insured had in his application, in answer to questions propounded to him by the company, made false and fraudulent answers as to the condition of his own health and as to the disease which had caused the death of his mother and other members of his family; second, that the insured, Charles L. Brown, knowing that he was not a proper subject for life insurance, and that he was afflicted with consumption, which facts were also well known to one George Pinson, Jr., fraudulently conspired with him to procure the issue of the policy sued on, under an agreement that Pinson, who had no pecuniary or other interest in his life, should have the benefit of such insurance. It appears from the evidence that the deceased, at the solicitation of an agent of the company, applied for the policy on 31st day of July, 1897, and was on that day subjected to a physical examination by one of the surgeons of the company; and that the annual premium of \$105 due upon the policy was paid to the agent of the company by Pinson, the deceased stating to the agent of the company that the money was advanced by Pinson for him at his request. The policy of insurance was issued by the company at its home office in New York City on the 17th day of August, 1897, and was addressed to the deceased in care of George Pinson, Jr. After it was received, Brown entered into a written agreement with Pinson, by which it was stipulated that, in consideration of Pinson paying the annual premiums upon the policy as they became due, and \$500 at the death of the insured to his father, or such other person as he might direct, the policy was assigned and delivered to Pinson. Brown died about 10 months after his application. Pinson at first claimed the benefit of the contract which he had made with Brown, and refused to surrender the policy to his administrator, but subsequently did so in consideration of his employment as an attorney by the administrator at the agreed fee of \$1,750. A jury trial resulted in a verdict for the full amount of the policy against appellant.

The principal grounds relied on for a re-

versal are: First, that the verdict is flagrantly against the weight of the evidence; and, second, because of the refusal of the circuit judge to give an instruction based upon the theory that the policy was a wagering and speculative contract, and obnoxious to public policy. The instruction based upon the first defense relied on is, perhaps, more favorable to the defendant than it was entitled to, and we would be very reluctant to disturb the verdict of the jury upon this ground, even if we had before us all the evidence heard by the jury upon this trial. But, as a matter of fact, the record shows that the depositions of Frances Mitchell and Dr. Hadden were used as evidence upon the trial, and they are not embraced in the bill of exceptions. It is true that the clerk, in copying the bill of exceptions, has referred to these depositions in other parts of the transcript. This, however, under the rulings of this court is not sufficient to make them a part of the bill, or authorize their consideration upon this appeal. See *Young's Adm'r v. Railroad Co.*, 7 Ky. Law Rep. 165; *Railroad Co. v. Finley* (Ky.) 5 S. W. 753; *Forest v. Crenshaw*, 81 Ky. 51. And, in addition to the two depositions referred to, the record of the suit of Brown's Adm'r against Pinson is omitted from the bill, and the trial judge did not certify that the bill contains all the evidence.

There is great diversity in the opinions of courts of last resort as to the right to take out life insurance for the benefit of a stranger. Many of the courts hold that, where a person obtains a policy on his life, and pays the premiums himself, he may make the policy payable to one who has no insurable interest in his life, and by so doing no rule of law or public policy would be violated. See *Johnson v. Van Epps*, 110 Ill. 551; *Association v. Houghton*, 108 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; *Hurd v. Doty* (Wis.) 56 N. W. 371, 21 L. R. A. 746. But in this state the rule is well established that no one can enforce a policy of insurance issued upon the life of another without having an insurable interest in the life of such person. See *Basye v. Adams*, 81 Ky. 368, and *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057. But it is equally well settled that the contract of insurance is not violated by the designation of a person prohibited by law from being the beneficiary. See *Caudell v. Woodward*, 90 Ky. 646, 29 S. W. 614; *Weigelman v. Bronger*, 96 Ky. 132, 28 S. W. 334; and *Cooke, Life Ins. & Ben. Soc.* p. 106. In *Beard v. Sharp* it was held that, where the beneficiary in a policy on the life of his mother agreed with a stranger, who had no interest in the life of the insured, that, if he would pay the assessments during the remainder of the life of the insured, he should have one-half of the insurance, and in pursuance to the agreement a new certificate was issued, payable one-half to each of them, that this subsequent agreement did not invalidate the policy, but that

the only interest of the stranger was the right to have repaid to him the moneys advanced to pay the premiums; that all the overplus of the fund belonged to the beneficiary who had an insurable interest in the life of the insured. Pinson testifies that he had no interest in the policy at all until after the agreement of August 26th; that he only advanced the first premium as a matter of accommodation, expecting Brown to pay him out of his salary as a teacher of a public school.

The gist of the defense relied on in the second paragraph of appellant's answer is that there was a fraudulent conspiracy between Brown and Pinson to deceive the company as to the true condition of Brown's health, and thereby induce them to issue the policy. Appellant does not plead that the mere fact that the insured intended, when he applied for the policy, to assign it to Pinson, would, of itself, render the policy void, and, in our opinion, it would not have had such an effect, especially in view of the fact that both the policy and application recognize the right of Brown to change the beneficiary and assign the policy, and no limitation or restriction is contained in the policy itself requiring such assignment to be made to one having an insurable interest in his life. And we are confirmed in this view by the fact that the application expressly provided that both the policy and application were to be construed with reference to the law of the state of New York, where assignments are permitted to parties having no insurable interest in the life of the insured, and the policy is incontestable after it has been in force one full year, the premiums having been duly paid. And that neither Brown nor Pinson supposed they were doing anything wrong in making such an agreement is shown by the fact that Pinson notified both the agent of the company who took out the policy and the examining surgeon of the contemplated arrangement at the date of the application, and it was subsequently recorded as a public document. Besides, appellant did not ask for an instruction submitting the question of fraud, and that question is therefore not before this court upon this appeal.

Perceiving no error prejudicial to the rights of appellant, the judgment is affirmed.

LUDLOW v. LUDLOW & C. COAL CO. et al.¹

(Court of Appeals of Kentucky. Jan 21, 1902.)
USURY—SUFFICIENCY OF EVIDENCE TO SUSTAIN DEFENSE.

Though some of the credits indorsed on the notes sued on raise a suspicion that more than the legal rate of interest was paid at the dates of those credits, yet as it seems that, upon the entry of final credits on the several notes, only legal interest was collected, the de-

fense of usury was not sustained; the charge of usury being expressly denied, and no evidence introduced in support of it.

Appeal from circuit court, Kenton county.
"Not to be officially reported."

Action by Johanna Merger against the Ludlow & Cincinnati Coal Company and William S. Ludlow on several promissory notes. Judgment against defendant William S. Ludlow, and he appeals. Affirmed.

Harvey Meyers, for appellant. Orlando P. Schmidt, for appellee Merger.

GUFFY, C. J. Appellee Merger instituted this action against the Ludlow & Cincinnati Coal Company and the appellant, Wm. S. Ludlow, seeking to recover judgment for \$5,000 on three several promissory notes executed to her by the said company and the appellant, Ludlow, with interest from the 17th day of June, 1897. The appellant, for answer, (1) pleaded no consideration; (2) that the execution of said notes was procured by fraud and misrepresentation; (3) that the coal company had paid to appellee a large sum of money on said notes which had not been credited thereon, and charged interest at the rate of 8 per cent. per annum; that more than \$240 of the interest credited on said notes was usurious; and he pleaded and relied upon the statute in such cases, and asked that plaintiff's claim be purged of usury. No defense was made by the coal company, and judgment was rendered against it for the amount claimed in the petition. The reply of the appellee to the answer is a complete traverse of all the averments in the answer. The case was finally transferred, over the appellee's objection, to equity. On the 14th of September, 1899, the appellant filed an amended answer, and, to conform his pleadings to the proof, pleaded: (1) That at the time of the execution of the notes sued on he was not indebted to the plaintiff or said coal company, but executed the notes as surety for the company, and the plaintiff knew said facts, and accepted said notes with full knowledge thereof. (2) He reiterated the allegation of the first paragraph as herein set out, and says that plaintiff, Merger, is indebted to the coal company in manner and form, viz., the substance of which is that she subscribed for \$2,400 worth of stock in said company, and had not paid for same; and he pleaded same as set-off or counterclaim against plaintiff. In the third paragraph it is alleged that the money loaned to the coal company was loaned for the purpose of enabling said coal company to carry on its business, and that defendant signed said notes as surety for the company, with full knowledge of the plaintiff of the fact that he was surety only for said company, and that he signed the same only for the purpose of enabling said company to carry on its business, and that said funds were to be applied by the company to that purpose, and that he signed the notes as

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

surety on the 17th day of June, 1892, but the plaintiff had before that time, on the 17th day of June, 1892, in anticipation of said notes, and without the knowledge of this defendant, paid W. G. McCoy, claiming to represent the company, the sum of \$1,800, which sum the plaintiff thereafter attempted to, and does now, include as part of the principal of the note sued on. It is further alleged that on the 6th of July, 1892, prior to the execution of the notes by the defendant, and without his knowledge, the said plaintiff paid over to said McCoy or to the coal company the further sum of \$1,000 by check on the Farmers' & Traders' National Bank, and is now attempting to include said \$1,000 as part of the principal of the notes herein sued on; that said sums were paid by said plaintiff to said company before he became a party to the contract sued on, and that he was not aware that the said sums had been paid, and that he did not consent thereto, and was not aware thereof; and he says that said sums, or either of them, should not be charged against him as surety on the notes herein sued on. This amended answer was all traversed of record. Upon final hearing the court rendered judgment in favor of plaintiff for the amount claimed, and from that judgment this appeal is prosecuted.

The appellant filed grounds for a new trial, the substance of which is that the court erred (1) in not allowing a credit for the face value of the stock of the Ludlow & Cincinnati Coal Company subscribed for by appellee; (2) the court erred in not allowing a credit for the claim of \$1,800, amount furnished by Mrs. Merger to the coal company prior to the execution of the notes sued on; and (3) that the court erred in not allowing credit for \$1,000, being amount of check given by Mrs. Merger before the execution of the notes.

It is further insisted for the appellant that there was usury embraced in the judgment, and that the judgment should be reversed for that reason. It may be that the credits indorsed on some of the notes might raise a suspicion that more than the legal rate of interest had at that time been paid; but, under the pleadings and proof in this case, it seems that, upon the entry of final credits upon the several notes, only legal interest was collected, and the charge of usury having been expressly denied, and no evidence introduced in support of it, we cannot hold that the judgment contains any usurious interest.

The evidence shows, as well as the pleadings, that the appellee subscribed for \$2,400 worth of the stock in said company; but the uncontradicted evidence shows that she paid for the same, or that the stock was issued

to her at the instance of the president in settlement of an old debt that he owed to her, and that the company was indebted to him in a large sum of money, and that he credited his claim therefor before the notes in suit were executed. As to the \$1,800, the preponderance of the proof is that it was not furnished to the coal company until after the execution of the notes; and the same may be said as to the \$1,000 check, which seems to have been given on the 6th or 7th of July.

This record shows that the entire property of the coal company was at one time mortgaged to the appellant in order to adjust or make some settlement with the party to whom the company had made an assignment for the benefit of creditors, but it does not appear that the appellee participated in that settlement of the debt, which debt seems to have been referred to as \$4,000. Afterwards it seems that the mortgage was foreclosed without making the appellee a party thereto, and purchased by appellant for about \$1,800, and that he afterwards sold the same for about \$9,000, which, perhaps, was not quite sufficient to reimburse him for payments that he had made, and debts he held against the coal company. It is further clearly shown that W. G. McCoy, the president of the coal company, and Mrs. Lizzie McCoy, secretary and treasurer of said company, executed to appellant a guaranty to hold him harmless on account of the liability he incurred in signing the notes aforesaid, before or at the time that he signed same; hence their interest would be that he should succeed in defeating the claim of the plaintiff. Therefore the argument of the appellant that said W. G. and Lizzie McCoy were interested in the success of the appellee is not tenable. Moreover, the evidence clearly establishes that all the money loaned was used by the company to pay the debts and liabilities of the company. The appellant had no conversation whatever with the appellee in regard to the loaning of said money or the execution of the notes prior thereto. The conversation had respecting same was between W. G. McCoy, the president of the company, and the appellant; the appellant having, perhaps, no interest in the company, except that they were his tenants, occupying his property in the transaction of their business. We think the entire evidence in this case conduces to show that Ludlow understood and was perfectly familiar with the whole business, so far as appellee and the coal company were concerned, and, like a prudent man, took care to obtain a guaranty against any loss that he might sustain by reason of having to pay the notes in suit.

For the reasons indicated, the judgment appealed from is affirmed, with damages.

**OLLIGES v. KENTUCKY CITIZENS'
BUILDING & LOAN ASS'N'S
ASSIGNEE.¹**

(Court of Appeals of Kentucky. Feb. 7, 1902.)

**BUILDING AND LOAN ASSOCIATIONS—RIGHT OF
BORROWING MEMBER TO REOPEN SETTLE-
MENT—RECOVERY OF USURY PAID—DEDUC-
TION OF PROPORTIONATE SHARE OF LOSSES
AND EXPENSES.**

In an action by a borrowing member to reopen a settlement made with the association, and to recover usury paid, it was error to dismiss plaintiff's petition upon the ground that she should be charged with her share of the losses and expenses of the business, where no effort had been made to ascertain what that share would be, as she was entitled to have her share of the expenses and losses definitely ascertained, and credited upon whatever might be due her by the association, and to a judgment against the association for the overplus.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by Mary Ann Olliges against the assignee of the Kentucky Citizens' Building & Loan Association to reopen a settlement made with the association, and recover usury paid. Judgment for defendant, and plaintiff appeals. Reversed.

C. B. Blakey, for appellant. Phelps & Thum and Stanley E. Sloss, for appellee.

BURNAM, J. In May, 1892, appellant borrowed from the Kentucky Citizens' Building & Loan Association \$900, and at the same time subscribed for 10 shares of the stock of the association. She made 16 monthly payments of \$15 each, as interest and premiums; and on the 7th of February, 1896, she paid an additional sum of \$1,033.50, and surrendered her certificate of stock, which was valued at \$184.80, making, in all, a payment of \$1,168.80, to obtain a discharge of her liability to the association and the cancellation of her mortgage. On the 4th of February, 1897, she instituted this suit against the association, claiming that she had paid it \$277.98 in excess of the legal rate of interest, and prayed judgment against the association for that amount. In June, 1897, the association made a general deed of assignment for the benefit of its creditors to W. R. Logan, who instituted this suit for the purpose of settling the assigned estate; and he also filed an answer in appellant's suit for usury, in which he said that at the time the settlement was made with appellant, in 1896, the company was really insolvent, and that she could have been required to bear her part of the cost and expenses; that she had gotten out of the association more than other stockholders could get; that she had not borne her fair share of the necessary operating expenses of the company,—and asked that her petition be dismissed. Afterwards, by agreement, an order was entered consolidating this with the case of Logan, assignee, against the building and loan association; and the petition in this

case was taken as an answer, counterclaim, and cross petition of appellant, and the cases ordered heard together. The case was submitted upon appellant's motion for judgment, which the chancellor overruled upon the ground that appellant should be charged with her share of the losses and expenses of the business while she was a member of the association, and subsequently, without any ascertainment of what her share of such expenses and losses, dismissed her petition. This was error. In this case appellant seeks to reopen the settlement made by her with the company in February, 1897, and to recover a judgment for excessive payments alleged to have been made by her in that settlement. If, as a matter of fact, she was not charged in that settlement with her proportionate share of the expenses and losses of the concern up to the date of her withdrawal from the association, she is entitled in the proceeding to have those expenses and losses definitely and clearly ascertained, and credited upon whatever may be due appellant by the company, and to a judgment for the overplus against the association.

For the reasons indicated, the judgment dismissing appellant's petition is reversed, and the cause remanded for proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. CARTER.¹

(Court of Appeals of Kentucky. Feb. 14, 1902.)

**EASEMENTS—PASSWAY ACROSS RAILROAD—
PRESCRIPTIVE RIGHT—DAMAGES FOR OB-
STRUCTION—PUNITIVE DAMAGES—RIGHT TO
ERECT GATES.**

1. In an action against a railroad company to recover damages for obstructing a passway across its road, to which plaintiff claimed a right by prescription, the court properly instructed the jury that if plaintiff, and those under whom she claimed, had used the passway continuously and adversely for more than 15 years prior to the obstruction complained of, they should find for her such sum as would fairly compensate her for being deprived of the use of the passway and for the annoyance thereof.

2. It was error to give an instruction authorizing punitive damages if the jury believed the fence obstructing the passway was built for the purpose of vexation, or maliciously or wantonly, as the defendant acted in good faith, and, at most, was merely mistaken as to its right.

3. The erection of a gate across the passway was not an unreasonable obstruction, and plaintiff was therefore entitled to damages only for the time between the erection of the fence across the passway and the construction of a gate at that point.

Appeal from circuit court, Boyle county. "Not to be officially reported."

Action by Jane Carter against the Louisville & Nashville Railroad Company to recover damages for the obstruction of a passway. Judgment for plaintiff, and defendant appeals. Reversed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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C. R. McDowell, R. P. Jacob, and B. D. Warfield, for appellant. **Robert Harding and John W. Rawlings**, for appellee.

O'REAR, J. Appellee's husband owned a lot of one acre adjoining appellant's right of way in Boyle county. There was on it a small dwelling house at the time of his purchase. He paid for the property \$150, and in his deed it was agreed that, in the event of his selling it, the vendor should have the right of repurchase at the same price, by paying in addition the value of such improvements as Carter may have made thereon, and, in the event of their disagreement as to their value, it was to be settled by arbitrators, one to be selected by each of the parties, and they to select a third. Carter built a small frame building for use as a storehouse, in which small stocks of merchandise were kept from time to time. He also fenced the lot, and built an ice house and stable. From the evidence we gather that the improvements do not now materially enhance the value of the property. The storehouse rented, when it rented at all, at about \$3 per month. Carter died about 12 years ago. His widow, the appellee, and some of their children, have continued to occupy the premises as her homestead. She claims such right of occupancy under the statute of this state giving the widow and infant children the right to occupy the homestead of the decedent during the minority of the children and the widow's lifetime and occupancy. She claims that this property was set apart to her as her homestead.

For about 20 years appellee and her husband, he in his lifetime and she as his widow and by virtue of her occupancy of the homestead since, have used a passway across appellant's line of railroad just in front of this lot. This passway was used in connection with the lot named as a way of ingress and egress. It is claimed for appellee that this passway was claimed by her and her husband and used by them as a matter of right for this period of time. Awhile before the bringing of this suit appellant fenced both sides of its right of way by the building of a wire fence. It left no openings or gate at the point where appellee had been using the passway. She brought suit for damages for its obstruction, claiming it was wrongfully and maliciously done. The evidence shows that the fence was ordered built along this point because the railroad had been troubled and put to expense by the frequent killing and injury of stock along this section. No other purpose was shown for the building of the fence.

The court submitted to the jury the question whether appellee's use of the right of way was adverse to appellant, and, as claimed and used by her and her husband in his lifetime and by the widow since, was as a matter of right, and not by permission; and, if they had so used it continuously and

adversely for more than 15 years before the obstruction complained of, then the jury were told to find for appellee such sum as would fairly compensate her for being deprived of the use of the passway and the annoyance thereof. We think this instruction properly submitted the issue on this point.

The court further instructed the jury that, if they believed the fence was built for the purpose of vexation or maliciously or wantonly by appellant, they should find for appellee punitive damages, or "smart money." We fail to see anything in this record justifying that instruction. The fence was built on the company's right of way. Its motive in building it was fully and fairly explained, and was not only lawful, but commendable. The company seems to have acted upon the theory that the passway formerly used by appellee was merely by its permission, which it had a right at any time to withdraw,—a question, we admit, which is not entirely free of doubt. They appear to have acted upon their judgment in this matter. This act, at the worst, was a mistake only as to their right. The manner of executing the work, and the character of the work done, neither indicates a malicious motive nor a purpose to annoy or vex appellee. The instruction as to punitive damages should not have been given.

The verdict returned (\$600) necessarily includes "smart money"; for it is much beyond any fair or reasonable compensation for being deprived of the use of the passway for the length of time that appellee was deprived of it,—that is, from some time in September to about the following March or April. At the latter date appellant erected gates at the point where the passway was claimed, thus recognizing appellee's right to so use it. They had a right to so erect gates across the passway. It was not an unreasonable obstruction by appellant of its property. *Bland v. Smith* (decided Jan. 17, 1902) 66 S. W. 181.

The judgment is reversed, and cause remanded for a new trial, under proceedings not inconsistent herewith.

VEST v. VEST.¹

(Court of Appeals of Kentucky. Feb. 14, 1902.)

HOMESTEAD—CREATION OF DEBT AFTER PURCHASE OF PROPERTY—PAYMENT BY SURETY FOR DEBTOR.

Defendant was entitled to a homestead as against the claim of plaintiff for money paid as defendant's surety, it appearing that defendant bought and paid for the land in controversy before the debts paid were created.

Appeal from circuit court, Boone county. "Not to be officially reported."

Action by C. H. Vest against T. J. Vest to recover money paid by plaintiff as surety for

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

defendant. Judgment allowing defendant a homestead in land upon which an attachment was levied, and plaintiff appeals. Affirmed.

J. G. Tomlin and John S. Gaunt, for appellant. T. E. Curley, for appellee.

O'REAR, J. Appellant, O. H. Vest, was the surety of T. J. Vest, appellee, on certain debts to the Farmers' & Traders' Bank of Covington and to the Walton Deposit Bank, which appellant was compelled to pay. He sued appellee, and caused an attachment to issue in the case, which was levied upon a house and lot occupied by him and his family. The controversy in this case is as to the right of appellee to a homestead in the property mentioned. To defeat that claim appellant alleged and sought to prove that the creation of the debts so paid by him was anterior to appellee's purchase of his homestead, and therefore, under Ky. St. § 1702, appellee's right to a homestead was subordinate to these debts. We do not decide, and do not deem it necessary in this case to decide, whether, if appellant became bound as surety of appellee before he bought the homestead, but did not pay the debt until after the purchase of the homestead, it would bring his claim within the saving of the statute supra. We conclude from the evidence in this case that the debts paid by appellant were not created before appellee bought and paid for the house and lot. Such was the finding of the circuit court.

The judgment is affirmed.

WELCH et al. v. LEFLER et al.¹

(Court of Appeals of Kentucky. Feb. 14, 1902.)

DEEDS—CORRECTION OF MISTAKE—STRIKING OUT DEFEASANCE CLAUSE.

It was proper to correct a deed by striking out a defeasance clause which the evidence showed was inserted by mistake, all persons who might be presumed to have a remainder or contingent interest being before the court.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by James W. Lefler and others against Charles W. Welch and others to correct a mistake in a deed. Judgment for plaintiffs, and defendants appeal. Affirmed.

S. B. Kirby, for appellants. O'Neal & O'Neal, for appellees.

GUFFY, C. J. James E. Watson and wife conveyed to Jas. W. Lefler, Elizabeth Q. Stewart, under the name of Elizabeth Lefler, and Charles W. Welch certain lands, with the condition that grantors were to have a life estate therein, and were to keep same during their natural lives, and that the gran-

tees were to support and take care of the grantors during their lives. The grantors at the institution of this suit had departed this life. In said deed appears the following clause:

"This conveyance is also made upon the following conditions: In the event one of the said second parties dies without issue, then his or her portion is to be divided equally between the other second parties; but, in case he or she should leave issue, then said issue shall inherit the part of their ancestor."

It seems that the land had been conveyed by fee-simple title from the original vendees until Jas. W. Lefler became the claimant of the entire lands by fee-simple title, and, in this action against all the other parties who might be presumed to have a remainder or contingent interest, sought to correct the deed by alleging and proving that the paragraph therein heretofore quoted was inserted by mistake of the draftsman. The court upon final hearing adjudged that said plaintiff Lefler was the sole owner in fee simple of all the aforesaid tracts or parcels of land, with power and authority to sell, convey, or otherwise use or dispose of same, to which the infant defendants excepted, and prayed an appeal to this court, which was granted.

It is clearly shown by a deed executed after the execution of the deed first mentioned that the original grantor recognized that he had conveyed a fee-simple title to the grantee in the original deed, subject only to his life interest and the provisions for care and attention to himself and his wife. This is shown by deed from Jas. E. Watson and others to Chas. W. Welch, etc. The deposition of the draftsman of the deed also clearly shows that the paragraph of the deed heretofore quoted was inserted by mistake, and that it was not the intention of either grantors or grantees that any such provision should have been in the deed, and his deposition sufficiently explains and shows how the mistake occurred.

Judgment affirmed.

CITY OF COVINGTON v. HUBER et al.¹

(Court of Appeals of Kentucky. Feb. 14, 1902.)

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURY FROM DEFECTIVE STREET—CROSS PETITION OF CITY AGAINST PROPERTY OWNERS—TRIAL BEFORE FORMATION OF ISSUE ON CROSS PETITION.

1. In an action against a city to recover damages for personal injuries resulting from a defective street, in which defendant, after the filing of a reply, filed an amended answer and cross petition, seeking to make abutting property owners parties defendant, and pleading that they were liable, if there was any liability at all, it was not error to require a trial of the issue between the original parties before the formation of an issue on the cross

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petition, as plaintiff had the right to sue the city alone, and, if there was any right of contribution, it may yet be enforced.

2. The court properly instructed the jury that if plaintiff's injuries were caused by a hole or depression in the street which had existed long enough to enable the city to know of its existence, and "such hole or depression being so left was negligence on the part of the city," plaintiff was entitled to recover damages to compensate her for her pain and suffering.

Appeal from circuit court, Kenton county.
"Not to be officially reported."

Action by Elizabeth J. Huber against the city of Covington to recover damages for personal injuries. Upon cross petition of defendant, William Beuttel and wife were made parties in the cause. Judgment for plaintiff, and defendant city appeals. Affirmed.

F. J. Hanlon, for appellant. W. McD. Shaw, for appellees.

WHITE, J. The appellee Huber brought this action to recover damages for personal injuries received by her on a sidewalk on Fifth street, between Madison and Scott streets, Covington. Appellee, while going along the sidewalk in company with others at about 2 o'clock in the morning, stepped into a depression or hole in the sidewalk, on a dark, rainy night, with no lights, and fell. She was injured by sprains in her ankle, wrist, and thumb, as well as other injuries to her body caused by the fall. Damages were claimed in the sum of \$2,520, upon the alleged negligence of appellant in causing the hole or depression to be made and remain in such dangerous condition, or that the depression or hole had been suffered there to be and remain for many weeks and months; that the officers, agents, and servants of appellant knew of the existence of the dangerous hole, or by the exercise of ordinary care and caution could have known of same, and could have repaired same, but did not do so; and that no notice was given to appellee or to the public of the dangerous condition of the sidewalk. For answer, appellant denied all negligence, and pleaded contributory negligence in appellee, but for which the injury would not have happened. A reply denied contributory negligence. After the reply had been filed, appellant filed an amended answer and cross petition, seeking to make William and Mary Beuttel parties defendant, and to plead, as against them, that, if there was a liability at all to appellee Huber, it was by Beuttel and wife, as the hole or depression, if such there was, was caused and made, and so permitted to remain, by those parties, in digging up the sidewalk to make sewer connection, and that it was the duty of Beuttel and wife to replace the sidewalk in a safe condition. There was a demurrer filed to this cross petition by Beuttel and wife,—that, so far as this record shows, was never acted upon,

but is yet undisposed of. A trial was had on the issues presented between the appellant and appellee Huber, which resulted in a verdict and judgment for appellee Huber for \$500; and, after the reasons and motion for new trial had been overruled, this appeal is prosecuted.

The reasons for new trial are the action of the court in setting the case for trial on the issues between appellee Huber and the city without waiting the formation of an issue on the cross petition; that the damages are excessive; error in refusing and giving instructions.

We are of opinion that there was no error in refusing a continuance until the pleadings on the cross petition were filed. The issues had already been made before the amended answer and cross petition were filed, and the issues that might have been made on the cross petition could not, in any event, defeat appellee Huber's right to recover of the city. Appellant could not say, as a defense or as a reason for continuance, "There are two of us liable, if either, and you cannot have judgment unless against both." If it be conceded that the defendants in the cross petition were liable, it would not be a defense to another joint tortfeasor. Appellee might have elected, as she did, to sue only one, without in the least diminishing her right to recover full damages for the injury. If there existed a right of contribution or recoupment between appellant and Beuttel and wife, the judgment rendered does not hinder a recovery thereon.

The amount of recovery is not excessive. If appellee was entitled to recover at all, the damages assessed by the jury are within reason.

Appellant asked the court to give to the jury 10 instructions, from "a" to "j," all of which the court refused. The court gave four instructions. No. 1 told the jury that if there existed a hole or depression in the sidewalk, and appellee's injuries were sustained by reason thereof, and such hole or depression had remained for a time long enough to have enabled appellant to know such condition, or if appellant did know of such hole or depression, and such hole or depression being so left was negligence on the part of the city, plaintiff was entitled to recover damages to compensate for her pain and suffering. Instructions Nos. 2 and 3 defined "negligence" and "care." No. 4 simply told them that nine might find a verdict. In our opinion, these instructions presented fairly the whole of the law of the case, and there was no error in refusing either of the 10 offered by appellant. There was no evidence to authorize an instruction as to contributory negligence.

The evidence fully sustains the verdict, and, as we perceive no error in the judgment, the same will be affirmed, with damages.

JOHNSON v. STONESTREET et al.¹

(Court of Appeals of Kentucky. Feb. 14, 1902.)

DEEDS—UNDUE INFLUENCE.

A deed conveying land worth from \$2,500 to \$3,000 in consideration of the grantee's undertaking to support the grantor while he lived was properly set aside as obtained by undue influence, as the grantor, who was 80 years of age, was, though not of unsound mind, feeble in mind and body, and there was no tie of blood, or even of long friendship, between the parties.

Appeal from circuit court, Owen county.

"Not to be officially reported."

Action by S. A. Stonestreet and others against B. Johnson to cancel a deed. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lindsay & Botts and D. W. Lindsay, for appellant. W. S. Pryor and Chas. Strother, for appellees.

WHITE, J. The appellees, the heirs of Thornley Schooler, deceased, brought this action against appellant, Johnson, to set aside and cancel a deed of date October 26, 1897, executed by Thornley Schooler to appellant, conveying two tracts of land in Owen county, one containing 100 acres, the other 75 acres, for the reasons that the same was executed by Schooler when he had not sufficient mind and capacity to execute a valid contract; and, further, that the deed was obtained by fraud and undue influence over Schooler, and that the consideration therefor was grossly inadequate,—as is alleged, almost a deed of gift. The consideration recited in the deed is the agreement by Johnson to pay to Susie Welch, a sister of Schooler, \$300 at Schooler's death, to pay all debts of Schooler, and to board and clothe Schooler, to pay his medical bills and funeral expenses. The land conveyed is worth \$2,500 to \$3,000, according to the proof. The answer is a denial of mental incapacity; a denial of undue influence or any fraud in procuring the execution of the deed; a plea of payment of the \$300 to Mrs. Welch, of \$75.15 funeral expenses, and that after the execution of the deed the appellant cared for, maintained, fed, and clothed Thornley Schooler, paid his bills and debts, and thereby expended large sums of money, but, except as indicated, the amount is not stated; that the care and attention of appellant and family to Schooler was reasonably worth \$5,000; and, in the event the deed be set aside and canceled for any purpose, that he be given judgment and lien on the land for such sum. Upon these issues proof was taken and trial had, and the court, by the judgment appealed from, canceled the deed because of undue influence, and gave appellant a judgment for the sum of \$1,942.60 for expenditures and for care and attention of Schooler, less \$600, for rents of the land, to bear interest from the date of the

judgment; this to be a lien on the land, to enforce which a decree was entered directing a sale thereof. From this judgment the appellant prosecutes this appeal and appellees a cross appeal.

The questions presented are of fact, rather than of law. The proof shows that Schooler was about 80 years of age, and in feeble health, having a chronic bladder trouble, and also bronchitis. He had no wife or children, his relatives being brothers, sisters, and their children. He had been an active, industrious farmer; owned these two tracts of land, with practically no debts. For several years before 1897, when this deed was executed, Schooler had rented his farm to tenants on shares, he living with the tenants. The rental income was more than sufficient to supply the wants of Schooler. Appellant and his family are in no way related to Schooler,—are strangers to his household. Appellant, Johnson, had rented the farms for the years 1896 and 1897, agreeing to pay a part of the crop,—probably one-fourth, and to take care of Schooler while there. In October of the second year this deed was executed. At or shortly after the execution of the deed Schooler gave to Johnson a horse, and to two of Johnson's children a colt apiece. Schooler continued to live with appellant, as the deed provided, till in the spring of 1899, when Schooler died. The proof of a great many witnesses was taken as to the mental capacity of Schooler at about the date of the execution of the deed, as well as afterwards, and we conclude from this proof that Schooler, when the deed was executed, was rational, and his mind as good as could be expected in one of his age and physical condition. He could not be said to be of unsound mind, but from his age and ill health his mind was not strong and active as it had been. He was old and feeble, and had reached his second childhood. Under this condition of health, affecting both body and mind, he made this deed to appellant, a stranger in blood. At that time Schooler could go about and wait on himself generally, and required little extra care or attention. We may fairly conclude from the proof that appellant and the members of his family were kind to the old gentleman, and that he was satisfied to live with them. But there is no satisfactory reason shown why Schooler should deed this land to appellant absolutely to obtain less than appellant was paying annually as rent. The annual income paid by appellant was a part of the crop over and above the care and attention bestowed upon Schooler, and this for only a portion of the land embraced in the deed. If the contract had been the use of the land during the lifetime of Schooler in consideration of the care and attention given him, the contract would have appeared reasonable and fair, for the excess of rent paid thereon from year to year might reasonably be expected to compensate for the extra care and attention necessary further

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along as the old gentleman grew older and more feeble. Under all the facts and circumstances we conclude that the contract is an unconscionable bargain, obtained by appellant; and as no ties of blood, or even long friendship, are shown to have existed, the chancellor, looking at all the facts and surroundings, was authorized to reach the conclusion that the contract and deed were obtained by undue influence. Proof of such facts is generally circumstantial, from the very nature of the case, and we are of the opinion that the facts and circumstances shown in the proof here are sufficient to sustain the judgment and decree of annulment and cancellation of the deed.

On the cross appeal as to the amount allowed appellant for care, attention, nursing, board, and clothing furnished decedent, Schooler, we are of opinion that it is fair and reasonable, considering the case and the circumstances. The other sums for expenditures by appellant accord with the facts proven. The rental charged is fairly within the proof.

On the whole case we are of opinion that the judgment of the learned chancellor below should be affirmed, both on the original and cross appeal.

UNITED STATES BUILDING & LOAN ASS'N'S ASSIGNEE et al. v. DENNY et al.¹

(Court of Appeals of Kentucky. Feb. 14, 1902.)

BUILDING AND LOAN ASSOCIATIONS—COMPROMISE WITH BORROWING MEMBER.

A contract between a building and loan association and a borrowing member, by which they settled the matter of usury contained in the debt, and agreed upon the price to be paid by the association for the member's stock, and allowed it as a credit upon his debt, was valid, the existing controversy as to the amount due and the problematical value of the stock being a sufficient consideration to support the contract; and, as time was not of the essence of the contract, the member had a right to comply within a reasonable time, and the validity of the contract was not affected by the making of an assignment by the association for the benefit of creditors before the member had complied with the contract.

Appeal from circuit court, Todd county.
"Not to be officially reported."

Action by the assignee of the United States Building & Loan Association and others against C. A. Denny and others to enforce a mortgage lien. Judgment for defendants, and plaintiffs appeal. Affirmed.

Perkins & Trimble and Caruth, Chatterton & Blitz, for appellants.

O'REAR, J. The United States Building & Loan Association loaned to appellee Denny \$800, securing it by a mortgage upon a lot in Elkton, and by a pledge of 10 shares of stock then subscribed for by appellee,

and upon which he agreed to make certain monthly payments, including 60 cents per month on each share of stock as dues, which went to the maturing of the stock, and \$4 per month for interest, and \$4 per month for premium on the loan. After the loan had been standing for some time, and the monthly payments had been made, and before the assignment of the loan association, appellee proposed a settlement of his loan. This proposition involved the ascertainment of the amount of balance due by appellee by applying to the original loan, first, the payment of interest and premium to the discharge of legal interest upon the loan, balance upon the principal sum, and then to apply the value of appellee's stock which was to be canceled. There was also some controversy over crediting certain sums which had been paid as fines, and an additional sum which had been paid as a membership fee. The negotiations were carried on by correspondence, resulting in an agreement in February, 1897, in which appellee proposed to pay appellant \$278 in full settlement of the balance owing it, and to cancel to it his stock in the association. This was slightly in excess of the sum that appellee insisted that it was owing, and was slightly below the sum appellant was offering to take. However, the parties agreed to it. Appellant association notified appellee of its acceptance of his proposition, and that it would send a release, duly executed, with draft attached and note, to the bank at Elkton, with directions to deliver to him the papers upon his paying the \$278. These papers reached the bank when appellee was absent from the town, and upon his return, a few days later, he learned that the association had made a deed of assignment to the Columbia Finance & Trust Company for the benefit of creditors. Immediately following the execution of assignment was a litigation by certain stockholders, claiming that the deed was not authorized by the association, and denying insolvency. Appellee waited two or three weeks to inform himself of the validity of the transfer, and as to whether his payment to the assignee of the sum agreed upon would be a discharge of his debt. When he called at the bank, within about three weeks after he had learned that the papers were there, he found that appellant had recalled them the day before. Appellee then offered to pay the sum to the bank, and, being refused, offered to pay it to appellant, with interest from the date of the acceptance of the proposition. It was refused. Appellant brought this suit to enforce the lien upon the lot, claiming a balance of \$619, and claiming that the value of appellee's stock could not be credited upon the loan, and could not be paid to him until final liquidation, or under the orders of the court in Jefferson county, in which the suit was pending, to settle the affairs of the estate. The court is of the opinion that the contract

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between the association and its borrowing member, by which they settled the matter of usury contained in its debt against him, and in which they agreed upon the price to be paid by the association for appellee's stock in it, and allowed as a credit upon his debt, was a meeting of the minds of parties competent to contract about those matters. The controversy existing between them and the problematical value of the stock were sufficient consideration to support the agreement. It was a contract in every essential. It was such a contract that, had the value of the stock of appellees been greater than was allowed in this settlement, he would have been compelled to accept the settlement and to have specifically performed it. *Association v. Florence (Ky.)* 55 S. W. 207.

Time was not of the essence of this contract. Appellee had the right to comply within a reasonable time. The contract having been fairly entered into, fully understood, and mutually binding upon the parties, it was not within the power of one of them to revoke it, or to affect its validity by his subsequent assignment of his estate for the benefit of creditors. Such should have been the judgment of the court. Instead, the court treated the settlement as having been revoked by appellee's failure to comply with it before the assignment. The court, however, credited the debt by the book value of appellee's stock, \$316. It also credited the debt by a supposed error in interest amounting to some \$30, leaving a balance due of \$300, for which it rendered judgment against appellee, and decreed the sale of the mortgaged property to satisfy it. This was error. But it was error in this case prejudicial to appellee, and not to appellant; for appellee owed only \$278, with legal interest from February 13, 1897. Appellee has not prayed a cross appeal. Appellant, having recovered more than it was entitled to, will not be heard to complain of the judgment.

The judgment of the circuit court is therefore affirmed.

ROBINSON & CO. v. HILL.¹

(Court of Appeals of Kentucky. Feb. 13, 1902.)

PLEADING—INCONSISTENT DEFENSES—HARMLESS ERROR.

1. In an action on several promissory notes given for the difference in an exchange of engines, in which defendant by his answer pleaded a breach of warranty, and also a settlement by which it was agreed that plaintiffs should take back their engine and ship to defendant his old one, cancel the notes sued on, and pay defendant what he had paid out for freight, the defenses were not inconsistent, and the court properly refused to require defendant to elect.

2. It being evident that the judgment was based exclusively upon the defense of settle-

ment, errors referring exclusively to the breach of warranty were harmless.

Appeal from circuit court, Hardin county.

"Not to be officially reported."

Action by Robinson & Co. against O. M. Hill on several promissory notes. Judgment for defendant, and plaintiff appeals. Affirmed.

S. H. Bush, for appellant. Sprigg & Chelf, for appellee.

BURNAM, J. The appellant in this action sought to recover a judgment against the appellee on three notes executed by him, amounting to \$625, which were given as boot in exchange of an old Gaar-Scott traction engine, valued at \$375, for a 16 horse power Peerless traction engine, valued at \$1,000. The appellee answered in two paragraphs. In the first he admits that he executed the notes sued on, but alleges that plaintiff warranted the engine for which they were executed to be well made, of good material, and, with proper management, to do as much work as any other of similar size made for the same purpose, and that as a matter of fact it was not made of good material, and did not have the power that it was rated at in the contract of sale, and did not come up to the warranty in this and many other respects. In the second paragraph he says that he notified appellant, within 10 days after he took possession of the engine, of these imperfections, and demanded that it should make good its warranty; and that thereupon the treasurer of plaintiff company, and one of the firm, came to see him, and made a contract with him in lieu of the old one, and in settlement of all their differences, by which it was agreed that plaintiff should take back its engine, and ship back to him his old one, cancel the note sued on, and pay him \$67, which he had paid out for freight; and he pleads this settlement as a bar to the suit, and asks that plaintiff be compelled to comply with his contract, and deliver to him his old engine, and for a judgment for \$67, the amount of his freight. The plaintiff denied the alleged breach of warranty, and also the settlement relied on in the second paragraph of the answer. Upon the trial before a jury, the testimony upon both grounds of defense was conflicting. The jury returned the following verdict: "We, the jury, find for the defendant, allowing him for his old engine \$175.00; also allowing him for freight paid out, \$67.00; and cancelling his three notes, aggregating \$625.00. The plaintiff to take back the engine as it sets, and the defendant to take care of it until plaintiff can remove same." And judgment was rendered pursuant to the verdict, and plaintiff appeals.

The chief ground relied on for reversal is that the lower court erred in refusing to require the appellee to elect which cause of action he would rely on,—the breach of warranty set out in the first paragraph of his

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answer, or the compromise of it in the second. It is very earnestly insisted that these grounds of defense are inconsistent, under subsection 4 of section 113 of the Civil Code of Practice. It has been held by this court that, in an action for negligence against a railroad company, the defendant had a right, under the Code, to traverse the petition, and plead contributory negligence and a compromise (see *Jones v. Railway Co.*, 82 Ky. 610; *Buford v. Railway Co.*, 82 Ky. 286); and that pleas of non est factum and no consideration were not inconsistent (see *Smith v. Doherty* [Ky.] 60 S. W. 380). In the latter case the court quoted and approved the following rule for determining whether pleas were inconsistent or not: "Two or more pleas may be made if all may be shown to be true, and are inconsistent only when the proving of one necessarily disproves the other." Applying this rule to the facts of this case, the pleas are not inconsistent, and the court did not err in overruling the motion to elect.

A number of alleged errors in the admission of testimony and in the instructions given to the jury are relied on. But it is evident that the judgment was based exclusively upon the defense relied on in the second paragraph of the answer; and as to this defense there was ample testimony to support the verdict, and there was no error in the instructions given the jury. It is therefore unnecessary for us to consider alleged errors which refer exclusively to the breach of warranty relied on in the first paragraph of the answer.

Judgment affirmed.

CARTER et al. v. CARTER et al.¹

(Court of Appeals of Kentucky. Feb. 13, 1902.)

JUDICIAL SALES—REFUSAL TO GIVE PURCHASER TIME TO EXECUTE BOND.

Where the accepted bidder at a decretal sale had been warned before the sale to have his securities ready, and to be prepared to execute bond promptly, the commissioner did not err in refusing to give him "a day or two," as requested by him, to look around to see if he could execute bond, and in proceeding at once to resell the property, the commissioner knowing him to be insolvent, and having no assurance that he could give bond. Besides, as the purchaser and the chancellor offered him the privilege, before the sale was confirmed, of giving bond and taking the property at his bid, which he failed to do, he was not prejudiced.

Appeal from circuit court, Crittenden county.

"Not to be officially reported."

Action by Bertha Carter and others against T. H. Carter and others. Judgment for plaintiffs. Exceptions by T. H. Carter and others to commissioner's report of sale of land. Judgment overruling exceptions, and they appeal. Affirmed.

A. O. Moore and Jas. A. & John A. Moore, for appellants. James & James, for appellees.

BURNAM, J. Appellants ask a reversal of the judgment of the Crittenden circuit court overruling exceptions to the confirmation of the report of the sale of a large tract of land described in the judgment of the court rendered at its June term, 1900, and made part of the record of this appeal. The grounds upon which a reversal is asked are—First, that, after having knocked off the land to T. H. Carter at the price of \$11,200, the commissioner who made the sale refused to allow him a reasonable time or opportunity to execute bond therefor, and arbitrarily sold the property to J. H. Moss, who had just bid \$11,150; second, that the commissioner erred in not offering to sell less than the whole tract to pay the judgments; third, that the price for which the land was sold was so inadequate as to import fraud. The real estate adjudged to be sold consisted of a tract of about 875 acres of land, and the judgment directed that it should be subdivided into six parts, and that the parts should be offered separately, and then the entire tract as a whole, and that it should be sold in the manner which realized the largest amount of money. In conformity with this provision of the judgment, the land was subdivided into six parts, and the aggregate amount bid on them when offered in this way was \$10,325; when offered as a whole, \$11,150 was bid.

We will consider the grounds relied on for reversal separately. First, the master commissioner who made the sale testifies that on the morning of the sale he had a conversation with the appellant T. H. Carter, who was one of the defendants, and who resided upon the tract of land, in which he notified him that, if he intended to bid for the property, he must be prepared to execute the bond promptly, and that the day before the sale another of the defendants offered him \$50 not to make the sale on the day on which it was advertised; that immediately after the land was knocked off to T. H. Carter at the price of \$11,200 he asked him if he was prepared to execute the bond; that he answered that he was not; that he did not know whether he could do so that evening, but that he thought he could in a day or two, if he was given that length of time; that knowing that Carter was insolvent, and not believing that he could execute the bond at all, he immediately began to cry the sale again, starting with the next lowest bid of \$11,150; and that the land was knocked off at that bid to J. H. Moss. It also appears that, after the exceptions were filed, Moss, the purchaser, offered to give up his purchase to appellant, and allow him to have it, if he would execute bond therefor and relieve him, and that during the trial of the exceptions, before they were over-

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ruled, the circuit judge notified appellant, with the consent of the purchaser, that, if he would execute bond in conformity with the judgment, Moss, the purchaser, was willing for him to have the property. All these facts are admitted by Carter, who in addition thereto testifies that he never tried to execute a bond. While a commissioner has no right to refuse to accept a bid, and it is his duty to allow the purchaser a reasonable time to execute the bond, he must, of necessity, be the judge of what time he will give, and this depends in a large degree upon the probability of the purchaser being able to make a bond. In this case appellant was warned before the sale to have his securities ready, and to be prepared promptly to execute the bond. This he failed to do, and, as he admits that he was insolvent, the commissioner did not err in refusing to give him the time requested to look around to see if he could execute the bond, as he had no reasonable assurance that this could be done. Besides, he was not prejudiced in any way, as both the purchaser and the circuit judge offered him the privilege of giving bond and taking the property at his bid before the sale was confirmed, and, as he failed to do this, he has no ground of complaint.

The next ground of complaint is equally untenable, as the land was sold by the commissioner in strict conformity with the provisions of the judgment, and, even if it be conceded that the land brought less than its real value, that would not be sufficient cause for setting aside the sale. But we are by no means satisfied by the testimony that it would bring more at another sale. The willingness of the purchaser to surrender his bargain, and the failure of appellant to find a purchaser when invited to do so by both the chancellor and the purchaser, are more potent arguments than mere expression of opinion by parties as to its value who indicate no disposition to buy the property. Upon the whole case, we think there is no ground for reversal.

Judgment affirmed.

NOEL v. GAINES et al.¹

(Court of Appeals of Kentucky. Feb. 18, 1902.)

HUSBAND AND WIFE—FRAUDULENT CONVEYANCE—RIGHTS OF CREDITORS.

Though property purchased by a debtor, and conveyed to his wife after he became insolvent, was paid for by him out of his own means, yet as the wife at the time placed in his hands several notes, which represented the proceeds of gifts which he had made to her while he was solvent, and out of these notes he afterwards reimbursed himself, as was intended, the transaction was not fraudulent, even as to the surety in a note the proceeds of which were partly used by the husband in paying for the property.

Appeal from circuit court, Franklin county.

"Not to be officially reported."

Action by John C. Noel against John W. Gaines and wife to set aside a conveyance as fraudulent. Judgment for defendants, and plaintiff appeals. Affirmed.

D. W. Lindsay and John W. Rodman, for appellant. Jas. A. Violett and Frank Chinn, for appellees.

BURNAM, J. The appellant, John C. Noel, brought this suit in December, 1896, seeking to subject a house and lot which had been conveyed by J. M. Wakefield to the appellee Bettie Gaines in May, 1893, to the payment of certain alleged indebtedness due by John W. Gaines. He says that on the 8th of May, 1893, he became surety for him upon a note for \$4,750 to the State National Bank; that this debt was renewed, and partial payments made thereon, resulting in a note for \$2,984.28, which he was compelled to pay as surety in December, 1896; that in July, 1894, he and John B. Gaines became sureties for John W. Gaines to the same bank upon a note for \$4,000, which was renewed several times, and he was finally compelled to pay it as surety; that in May, 1893, after the execution of the note to the bank, J. W. Gaines purchased a house and lot in Broadway street, in the city of Frankfort, from J. M. Wakefield, at the price of \$6,000, and paid \$4,500 of the purchase money out of the proceeds realized by the discount of the identical note signed by him as security on the 8th of May, 1893, and had the title taken to his wife, Bettie Gaines, without valuable consideration, in fraud of his rights as a creditor. The defendant in her original and amended answer denies the alleged fraudulent intent in the purchase and conveyance of the house and lot from Wakefield, or that the purchase money or any part thereof was paid by her husband, John W. Gaines. On the contrary, she alleges that, while her husband acted as her agent in the negotiations which led up to the purchase of the property from Wakefield, she placed in his hands notes aggregating about \$6,000, for the purpose and with direction to use them in the purchase of the house and lot, and that, while it was true that a part of the proceeds of the note borrowed from the State Bank was used by him in the payment of the property, he had in his possession the notes which she had placed in his hands for the purpose, and which he subsequently collected and used to reimburse himself for the moneys so advanced by him, and denied plaintiff's right to subject the property or any part of it to the debt sued for. Appellant, by reply, denied that John W. Gaines acted in the purchase of the property only as the agent of his wife, or that she furnished the means with which to pay for the property, or that

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she had any means to furnish. The proof establishes that \$3,000 of the money borrowed on the note, dated May 8, 1893, was used by J. W. Gaines in payment of a lien note executed by Wakefield to one Bush as a part of the purchase price of the property which had been assigned by Bush to the Bank of Kentucky, and which was a lien upon the property, and that \$1,500 of the money was used to pay off other notes due the same bank by Wakefield which were liens upon the property, and that the remaining \$1,500 was applied to the payment of a note which had been paid by J. W. Gaines as security for Wakefield, and these liens upon the property were subsequently released. And the appellant, J. C. Noel, testifies that at the time he signed the note of May 8, 1893, Gaines informed him that he intended to use the money to pay for the Wakefield property, which he had purchased in order to collect the \$1,500 which he had been compelled to pay as Wakefield's security, and that he did not know for several years after the transaction that the title to the property had been taken to the appellee Mrs. Gaines. Mrs. Gaines, on the other hand, testifies that in October, 1892, she sold and conveyed a house and lot owned by her in Bellpoint to one McCloy for \$3,000, and that she accepted payment there for a land note for \$2,000 on W. B. Luckett, bearing interest from its date, for the first payment, and took two notes on Mrs. McCloy, each for \$500, due in one and two years thereafter, with a lien upon the house for the last payment; that at this time she was the owner and in possession of a land note which had been given by Milton Arnold to her husband for \$1,000, and of the notes on Wakefield for \$1,600; that she disposed of her Bellpoint residence with the intention of buying a home in Frankfort, and that about the 1st of May, 1893, she concluded to purchase the Wakefield property, and that for this purpose she delivered to her husband the various notes under an agreement that he was to use them or their proceeds in the purchase; that the property had been bought for her before the 8th day of May, 1893, but the transaction was not actually concluded by the execution of a deed until that day, and that she had occupied, controlled, and claimed the property ever since; that before the purchase she consulted her brother J. C. Noel as to the advisability of buying the property, and that he said to her that it would be better for her to put her money in farming land, and that he understood that the deed was to be taken to her. She was subjected to a very rigid cross-examination as to the source of her title to these notes, and in explanation thereof said that from 1879 to 1884 she kept a boarding house, and that, with her husband's consent, she collected the money paid by the boarders, he paying all the expenses of the house, and that in this way she ac-

cumulated \$1,000, which she loaned to her husband, and which was used in the purchase of a tract of land, which he subsequently sold to Milton Arnold, and that when the land was sold her husband turned over to her the note of \$1,000 executed therefor by Arnold. She further testifies that her husband bought and paid for the Bellpoint residence in 1886, and had it deeded to her, and that she occupied it until the fall of 1892; that during this period she kept boarders, and, under a similar agreement with her husband, accumulated \$1,200, which she advanced to take up the Wakefield notes of \$1,500, on which her husband was bound as security, which he turned over to her, and that she subsequently paid the balance of \$300 to him. Mrs. Gaines is fully corroborated by her son Noel, who testifies that she kept the notes claimed by her in his safe from the time she sold her Bellpoint property, in the fall of 1892, until they were withdrawn by her and delivered to her husband, about the 1st of May, 1893, to be used by him in the purchase of the property in controversy. Her daughter Mary also testifies to her mother's possession of these notes, and their delivery to her father to be used in buying the Wakefield property, and that this purchase was hastened by her anxiety for the family to quit boarding, and buy a home of their own. It is clearly shown that during this period, and for some time thereafter, John W. Gaines was a thrifty and successful business man, with good credit, and owning unincumbered property worth in the neighborhood of \$20,000. About the 1st of March, 1894, he became interested in the manufacture of spokes, using convict labor for this purpose, and he put into the business a large amount of money, a great deal of which was borrowed from banks, with the appellant, J. C. Noel, as his security. This venture proved unfortunate, and in December, 1895, the greater part of his stock and machinery was destroyed by fire, and shortly afterwards he was compelled to make an assignment. Shortly after the purchase of the property from Wakefield, suits were instituted in the name of J. W. Gaines and wife to collect the notes on Luckett and Mrs. McCloy, and the proceeds of the Luckett note, amounting to about \$2,000, were applied by Gaines as a credit upon the \$4,750 note, dated the 8th of May, 1893. He also collected the McCloy and Arnold notes, and appropriated them to his own use. There is no testimony conducing to show that either Gaines or his wife were actuated by any improper motive in the purchase of the Wakefield property. The main fact in inducing them to purchase that property was the desire to secure the \$1,500 notes due them by Wakefield. Whilst Gaines was under no legal obligation to permit his wife to appropriate to her own use the moneys paid to her by the boarders, or to have purchased and had conveyed to her the Bell-

point property, there was nothing wrong or illegal in such an agreement, as there is no claim that any creditor was prejudiced thereby. In fact, it affirmatively appears that at this time he had no creditors, and it was certainly a very good scheme to encourage industry and economy on the part of the wife, and to interest her in accumulating and saving money for the purchase of a home. The fact that Gaines did not actually use the notes which had been turned over to him by his wife in the purchase of the property, but preferred to appropriate them to his own use, and to use his own money in the purchase of the property, does not affect the rights of his wife to the property.

We are of the opinion that the evidence fails to show that the Wakefield property was a gift from the husband to the wife, and therefore void as to existing liabilities, under section 1907, Ky. St.

For reasons indicated, the judgment is affirmed.

FRANK FEHR BREWING CO. v. MULLICAN et al.¹

(Court of Appeals of Kentucky. Feb. 13, 1902.)

PRINCIPAL AND SURETY—CONCEALMENT FROM SURETY OF PRINCIPAL'S SHORTAGE.

1. Where one of the sureties, in a bond executed by M. for the faithful performance of his duties under a contract to sell beer for plaintiff and account for the proceeds, inquired of plaintiff, by letter, whether M., whose duty it was under the contract to pay for all beer sold within 80 days after delivery, was keeping his accounts square, and plaintiff replied that M. then owed only for last shipment and a shipment gone forward that day, giving amount of each, and added: "The above is statement in full to date, and we feel that everything is O. K.,"—the fact being that M. had about a month before that time fallen behind in a large sum, which he had secured by the assignment of a life insurance policy,—the sureties were released by the concealment of that fact.

2. A stipulation in the contract that plaintiff was to have the exclusive right to determine the amount of credit that should be extended to M. was not intended to modify a previous stipulation requiring payment at the end of every 30 days, but even if it was so intended it was the duty of plaintiff, in answering the surety's letter, not to conceal the facts.

Appeal from circuit court, Daviess county.
"Not to be officially reported."

Action by Frank Fehr Brewing Company against J. S. Mullican and J. A. Lyddane on a bond. Judgment for defendants, and plaintiff appeals. Affirmed.

Birkhead & Clements, for appellant.
Walker & Slack, for appellees.

HOBSON, J. This was an ordinary action brought by appellant against appellees on a bond signed by them as sureties for L. T. Mullican. The case was tried before the

court, who filed the following findings of fact: "The court finds from the record and evidence in this action that on the 12th of July, 1898, the plaintiff entered into a contract with L. T. Mullican to furnish beer at a stipulated price, etc., which he was to sell and account for. He, among other things, was to pay for all beer sold at the prices stipulated thirty days after delivery, and sooner if the relations between them should terminate. The contract contained divers other stipulations, and the defendants, J. S. Mullican and J. A. Lyddane, became the sureties of L. T. Mullican for the faithful performance of his contract. I find from the evidence that L. T. Mullican failed from the very beginning of his contract to pay as stipulated, and proceeded to violate that part of his undertaking to pay for all beer sold him at the end of thirty days; and that on the 17th of November, 1898, four months after entering into the contract, he had fallen behind in the sum of \$1,661.36, and that plaintiff, without notification to the sureties of L. T. Mullican, entered into an arrangement with him by which he obtained from him a nearly paid up life policy for \$3,000, and entered into a writing, a copy of which is filed with the answer of J. S. Mullican and J. A. Lyddane. I find from the evidence that as part inducement to this contract of November 17th and the transfer of the policy plaintiff agreed with L. T. Mullican that his sureties were to be released from further liability. I find that, on the 28th day of December, J. A. Lyddane, becoming uneasy, wrote plaintiff for information as to how L. T. Mullican was getting on with them; and on the next day, the 29th of December, received an answer from plaintiff that he was O. K., making no reference to his previous indebtedness, and disclosing nothing of the transaction of November 17th." On these facts the court found, as a matter of law, that the sureties were released by the concealment on the part of plaintiff of the default of the principal, although he had arranged and paid out of his own means, on the ground, as stated by the court, that they would not likely "have continued on his bond, or been willing to any further risk after November 17th, had they known of the large sum in which the principal had fallen behind, and a disclosure became a positive duty when Lyddane wrote to inquire." The letters on which this finding is based are as follows:

"Owensboro, Ky., Dec. 28th, 1898. Frank Fehr Brewing Co., Louisville, Ky.—Gentlemen: I write you confidentially to inquire whether L. T. Mullican is keeping his accounts square with you. I am on his bond to your company, and have a right to ask this information. Please send me a statement of his accounts, so that I may be advised as to his standing with you. This letter is confidential between your company and me, and by furnishing me the information de-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

sired you will greatly oblige. Yours truly, J. A. Lyddane."

"Louisville, Ky., Dec. 29th, 1898. Mr. J. A. Lyddane, Owensboro, Ky.—Dear Sir: Replying to yours of the 28th instant, beg to state that at the present writing Mr. L. T. Mullican owes us only for last shipment, which amounts to \$291.50, and shipment gone forward to-day, amounting to \$167.00. The above is statement in full to date, and we feel that everything is O. K. Yours truly, Frank Fehr Brewing Co., by G. W. Kremer, Treas."

Lyddane showed this letter to his co-surety and they both testify that they were misled by it, and induced to take no steps to protect themselves, supposing that the principal was faithfully performing his contract. It is insisted for appellant that the letter showed on its face that the principal was in debt to it in the sum of \$458.50, and that at the termination of the agency the indebtedness was only \$632.34; that the principal had then the same property as in December; and that in fact the prior indebtedness had been settled, and there was no misrepresentation. But the fact is appellant concealed from the sureties the large amount that the principal had fallen behind,—a fact sufficient to show that he had violated his contract, and to induce them to take steps to protect themselves. Had they known that the principal had not made his monthly payments, but had used the money, and had covered the deficiency by an assignment of his life policy, it is but reasonable that they would be unwilling to remain longer on his bond, when they were already uneasy from information they had received that his habits were not good. In Story, Eq. Jur. § 324, it is said: "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish sufficient ground to invalidate the contract." These principles were followed by this court in *Burks v. Wonerline*, 69 Ky. 20; *Graves v. Bank*, 78 Ky. 23, 19 Am. Rep. 50; *Insurance Co. v. Scott*, 81 Ky. 540; *Bank v. Mattingly*, 92 Ky. 650, 18 S. W. 940; *Association v. Jeckel*, 104 Ky. 159, 46 S. W. 482. Upon the principles settled in these cases, the court properly held the sureties not liable.

Counsel for appellant rely on the following stipulation in the contract: "It is further agreed that the said brewing company is to have the exclusive right at all times during the existence of this contract to determine the amount of credit that shall be extended by it to the said Mullican for beer ordered or purchased by him, and at any time to refuse to sell or deliver to said Mullican, if at said time the said Mullican has failed to

pay any bill or account due by him." It is urged that this clause gave the appellant discretion to extend credit for an unlimited time. But we do not so understand it. It relates alone to the amount of credit. It was not intended to modify the previous stipulation, requiring payment at the end of every 30 days; and, even if it was susceptible of this meaning, it was the duty of appellant, in answering Lyddane's letter, not to conceal the facts from him, but to apprise him fairly of the situation.

Judgment affirmed.

LOUISVILLE RY. CO. v. WILL'S ADM'X.¹

(Court of Appeals of Kentucky. Feb. 13, 1902.)

ACTION FOR CAUSING DEATH—RECOVERY FOR PAIN AND SUFFERING—ELECTION—HARMLESS ERRORS IN ADMITTING EVIDENCE AND GIVING INSTRUCTIONS—STREET RAILROADS—NEGLECT OF MOTORMAN.

1. A cause of action for pain and suffering cannot be joined with the statutory cause of action for death, and plaintiff must elect which he will prosecute.

2. Where plaintiff sought to recover both for pain and suffering and for death, and the court, without requiring him to elect, required the action to be tried as an action for death, a new trial having been granted, plaintiff was not concluded on the second trial by the election made by the court on the former trial, but had the right to elect to sue for the pain and suffering.

3. Though plaintiff elected to sue for pain and suffering, she was not prejudiced by the admission of evidence as to the earning capacity of her intestate, or as to his age and condition of health.

4. The failure of the court to confine the jury by its instructions to the acts of negligence alleged was not prejudicial, as the evidence was thus confined, and there were no other negligent acts to which the instructions could be referred.

5. As the general charge of negligence causing the injury was alleged, it was not necessary to repeat it in an amended petition charging the failure to give proper signals of the approach of the street car which struck plaintiff's intestate.

6. While the motorman was not required to stop his car until, from the circumstances, he had reason to believe that plaintiff's intestate would be endangered unless it was stopped, an instruction asked by defendant on that subject was properly refused, as it was argumentative, and, besides, there was proof from which the jury might have inferred that, if the car had not been running too fast, it might have been stopped, or checked sufficiently, before reaching the intestate, to avoid the injury to him, after the motorman perceived the danger.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by the administratrix of C. P. Will against the Louisville Railway Company to recover damages for the death of plaintiff's intestate and for pain and suffering. Judgment for plaintiff, and defendant appeals. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Fairleigh, Straus & Eagles, Kohn, Baird & Spindle, and Hazelrigg & Chenault, for appellant. Caruth, Chatterson & Blitz, for appellee.

HOBSON, J. Appellee's intestate, C. P. Will, was run over by one of appellant's electric cars at the crossing of Jefferson street and Lower Twentieth street in Louisville, Ky., and this action was filed by appellee to recover therefor. The petition was so drawn as to sustain an action either for pain and suffering or for the death of the intestate, he having survived the injury for some hours. There was no motion for an election as to which cause of action the plaintiff would prosecute. On the first trial the court required the case to be tried as an action to recover for death, and on this trial there was a verdict in favor of appellee for \$5,500. On the next trial the court allowed appellee to recover for pain and suffering, and not for death, and there was a verdict for \$6,000, on which judgment was entered.

It is insisted for appellant that, the action having been treated by the court on the first trial as an action under the statute to recover for the death of the intestate, appellee should not have been allowed on the second trial to recover for pain and suffering. It is settled that a cause of action for pain and suffering cannot be united with the statutory action to recover for death, and that the plaintiff must elect which he will prosecute. The defendant might have put the plaintiff to a final election in this case by the proper motion; but, as the granting of the new trial placed the parties where they stood before the first trial was had, it cannot be given the effect of cutting off the plaintiff from an election which he had not finally made. On the second trial he elected to sue for the pain and suffering of his intestate, and we do not see that appellant was substantially prejudiced thereby. It is true some evidence was admitted on the last trial without objection as to the earning capacity of the deceased, his age and condition of health, and it is said that this was not objected to because the action was regarded by appellant as an action to recover for death. But we do not see that this evidence could have been substantially prejudicial under the issue submitted to the jury. The evidence is very conflicting as to how the injury occurred. The proof for appellee showed that his intestate was passing over the crossing, and stopped for an east-bound car to pass him, and as he went on after this car passed was struck by a west-bound car going at a faster rate than allowed by the rules, and without any signal of its approach to the crossing. The proof for appellant showed that the two cars passed at Nineteenth street; that the intestate was drunk, and staggered on the track just in front of the car, but too late for the motorman to arrest it. The jury on two trials

have found in favor of appellee's version of the transaction, and the proof is not such as to warrant us in interfering with their finding on the facts.

Complaint is made that the instructions of the court submitted to the jury in general terms the question of negligence on the part of appellant's servants, and did not confine it to the acts of negligence specifically alleged in the petition. This might be prejudicial if there was any view of the case under which the verdict could be sustained without the jury's finding in favor of appellee on the acts alleged in the petition as negligence. But the evidence was confined to the negligent acts set out in the petition, and there was nothing in the case to which the instructions could be referred except them. We are therefore of the opinion that the case was fairly presented to the jury by the instructions, and that a new hearing should not be granted for this reason.

There was sufficient evidence to go to the jury on the question whether the motorman, after perceiving the danger of the deceased, could have avoided the injury to him by the exercise of proper care. The failure to give proper signals of the approach of the car is alleged in the amended petition, and, as this is a part of the petition, in which the general charge of negligence causing the injury is made, it was unnecessary to repeat this allegation in the amendment. It is true the motorman was not required to stop his car until, from the circumstances, he had reason to believe that the intestate would be endangered unless it was stopped. The instruction asked by appellant on this subject was properly refused, because the latter part of it is argumentative, and there was proof from which the jury might have inferred that, if the car had not been running too fast, it might have been stopped or checked sufficiently before reaching the intestate to avoid the injury to him, after the motorman, according to his own testimony, perceived the danger in which the intestate was placed.

The real issue in the case was fairly submitted to the jury by the instructions that were given, and on the whole record we do not think that the ends of justice permit a reversal. The finding is not excessive.

Judgment affirmed.

LOUISVILLE & N. R. CO. et al. v. SCHMIDT et al.¹

(Court of Appeals of Kentucky. Feb. 13, 1902.)

RAILROADS—MORTGAGE AND LEASE—SEVERAL WRITINGS CONSTRUED TOGETHER AS ONE CONTRACT—FAILURE OF LESSEE TO SURRENDER ROAD IN GOOD REPAIR—LIABILITY TO MORTGAGE BONDHOLDERS.

1. Where one railroad company executed to another a lease of its unfinished road, and

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

executed, also, a mortgage thereon to secure bonds which it delivered to the lessee for sale to raise money to complete the road, the lessee executing a mortgage on earnings to the trustee for bondholders, the three writings, which were executed simultaneously, are to be read together as one contract.

2. The trustee for bondholders may sue the lessee to recover damages for breach of its covenant to restore the leased premises to the lessor in good repair, the undertaking being for the benefit of bondholders.

3. Though the undertaking to restore the premises to the lessor in good repair at the termination of the lease was qualified by the addition of the words, "unless prevented by unavoidable casualty, legal proceedings or operation of law," the lease is not susceptible of the construction that the lessee was not to turn over the property in good repair in case the lease was terminated by the sale of the property under foreclosure proceedings.

4. The fact that the lessor fell in debt to the lessee does not exclude the latter from liability to the bondholders; the covenant being for their benefit, and the trustee for them being a party to the contract.

5. A judgment in favor of the lessee against the lessor, rendered about five years before the property was restored to the lessor, by which it was, in effect, determined that the lessee had not then failed to keep the property in repair, constitutes no defense to the action for failure to turn over the property in good repair.

Appeal from circuit court, Shelby county.

"To be officially reported."

Action by A. L. Schmidt, trustee, and others, against the Louisville & Nashville Railroad Company and the Northern Division of the Cumberland & Ohio Railroad, to recover damages for breach of a covenant in a lease. Judgment for plaintiffs, and defendants appeal. Affirmed.

H. W. Bruce and Helm, Bruce & Helm, for appellants. W. S. Pryor, Simrall & Doolan, and J. C. Beckham & Son, for appellees.

HOBSON, J. In the year 1879 an arrangement was made by which the Louisville, Cincinnati & Lexington Railway Company took a lease for 30 years upon the Northern Division of the Cumberland & Ohio Railroad, which was then unfinished, and the latter company executed a mortgage to secure \$250,000 of bonds. The bonds were delivered by the Cumberland & Ohio Railroad Company to the Louisville, Cincinnati & Lexington Railway Company for sale, and the proceeds of the sale were to be used by it in the construction of the railroad. It was stipulated in the lease to the Louisville, Cincinnati & Lexington Railway Company that it should take all the property of the Cumberland & Ohio Company, and operate the road for 30 years; and, as additional security for the bonds, it mortgaged to the trustee for the bondholders certain earnings on its own lines from business coming to it from the leased line. The lease from the Cumberland & Ohio, the mortgage made by it, and the mortgage made by the Louisville, Cincinnati & Lexington Company to the trustee for the bondholders, were all executed for the same purpose, and were delivered

simultaneously. It has been held by this court several times that these three papers, executed contemporaneously, not only for the benefit of the lessor and the lessee, but also for the benefit of the bondholders, must be read together, as one contract. *Schmidt v. Railroad Co.*, 93 Ky. 290, 25 S. W. 404, 26 S. W. 547; *Schmidt v. Same*, 101 Ky. 441, 41 S. W. 1015; *Railroad Co. v. Schmidt*, 52 S. W. 835; *Louisville & N. R. Co. v. Northern Division of Cumberland & O. R. Co.*, 54 S. W. 5. The three papers are copied in full in the case of *Schmidt v. Railroad Co.*, 101 Ky. 441, 41 S. W. 1015, and need not, therefore, be set out here.

After the contract was made, the Louisville & Nashville Railroad Company bought out the Louisville, Cincinnati & Lexington Railroad Company, and so succeeded to all its rights under it.

By the fourth clause of the lease the road is to be constructed a first-class, single-track railway. See 101 Ky. 445, 41 S. W. 1016. By the sixth clause of the lease (101 Ky. 446, 41 S. W. 1016) it is stipulated that the lessee will make to the lessor quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping the roadbed in order; and the net profits arising therefrom shall be applied to the payment of interest, and the creation of a sinking fund for retiring the mortgage bonds. 101 Ky. 446, 41 S. W. 1016. By the tenth clause, at the termination of the lease the leased premises were required to be restored to the lessor in good repair, unless prevented by unavoidable casualty, legal proceedings, or operation of law. See 101 Ky. 448, 41 S. W. 1017. By previous clauses of the lease, the issue of the bonds, the making of the mortgages, and the purpose for which the money was to be used, are specifically set out.

It has been held in the cases above referred to that the bondholders might maintain an action against the lessee to recover the net earnings under the lease which had not been paid over pursuant to its terms. This action was brought by them against appellant, the Louisville & Nashville Railroad Company, the successor of the original lessee, to recover damages for the failure by it to turn over the property in good condition at the termination of the lease. Judgment was recovered in the trial court for \$25,000. It is not insisted that the verdict is excessive, nor is there any complaint of any of the instructions of the court, if the action can be maintained. It is insisted that a peremptory instruction should have been given the jury to find for the defendant on the ground that the tenant is not liable to the mortgagee for damages for noncompliance with his contract to repair contained in the lease between him and his landlord. The same point was made on demurrer to the petition, and numerous authorities are cited to sustain the rule relied on. *Teal v. Walker*, 111 U. S. 248, 4

Sup. Ct. 420, 28 L. Ed. 415; Price v. Smith, 2 N. J. Eq. 516; McKircher v. Hawley, 16 Johns. 289; Patton v. Robinson, 4 Ky. 285. The rule is undoubtedly sound. The only question to be decided is whether the case comes within it. The three contracts referred to have been called by this court a "tripartite agreement." The object was to raise money to complete the road. To do this, the bonds must be so secured as to be salable in the market. For the security of the bonds the tripartite contract pledged, in the first place, the net earnings of the road in the hands of the lessee; also the net earnings of the lessee's own road from business coming over the mortgaged road. These, it was assumed, would meet the interest, and create a sinking fund for the payment of the principal, of the bonds. But as a further security to the bonds it was important that the corpus of the property which was leased for 30 years should be kept in repair, and that at the termination of the lease it should be restored to the lessor in good repair. No stipulation of the tripartite contract was more essentially for the benefit of the bondholders than the clauses which provided for the preservation of the mortgaged property. For, if the corpus of the property was wrecked or ruined, the security upon which the bonds were sold might be in a great measure destroyed. The rule in this state is that a party may sue upon a contract made with another for his benefit. Garvin v. Mobley, 1 Bush, 48; Allen v. Thomas, 3 Metc. 198, 77 Am. Dec. 169; Smith v. Smith, 5 Bush, 625; Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536. The bondholders were allowed to sue for the profits which had been earned and not paid over, on the ground that these covenants were for their benefit, and, being for their benefit, they should be allowed to enforce the contract by action. The covenant to repair stands on the same ground; the mortgage to the bondholders and the lease being all one transaction, and the lease being as much for their security as the mortgage. We do not think the lease is properly susceptible of the construction that the lessee was not to turn over the property in good repair in case the lease was terminated by the sale of the property under foreclosure proceedings. For the foreclosure proceedings were provided for in the tripartite agreement, and the sale of the property thereunder would be a termination of the lease, within the meaning of its provisions. The covenant being for the benefit of the bondholders, the fact that the Cumberland & Ohio Railroad Company fell in debt to the lessee does not exclude it from liability to them, for the injury to them is in the destruction of the security on the faith of which their money was borrowed. The insolvency of the mortgagor makes the preservation of the mortgaged property the more

important to the mortgagee. If the contract to turn over the mortgaged property in good repair was purely between the lessor and lessee, then the action for the nonperformance of the contract would have to be brought in the name of the lessor, and a set-off against him would be available. But where the mortgagee is a party to the contract between the lessor and lessee, and the stipulation is made for his benefit, and his money has been obtained upon the faith of it, a different rule must apply; for in such a case he is not a stranger to the contract, and the lessor and lessee cannot, after his rights have been acquired, destroy his security without his consent.

It is shown for appellant that in January, 1895, it obtained a judgment against the Cumberland & Ohio Railroad Company by which it was, in effect, adjudged that it had not, up to that time, failed to keep the property in repair. This is no defense to the action, which is for failure to turn over the property in good repair at the termination of the lease in March, 1900. The question is not in what repair the property was in the year 1895, or in any previous year. The only question is, was it in proper repair when turned over in March, 1900? The action is not for failure to keep in repair during the running of the lease, but for failure to turn over the property in repair at its termination.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. RICHARDSON.¹

(Court of Appeals of Kentucky. Feb. 13, 1902.)

MASTER AND SERVANT—NEGLIGENCE IN USING WOODEN FULCRUM—SUFFICIENCY OF PETITION—SERVANT'S OPPORTUNITY TO KNOW OF DEFECT—VARIANCE.

1. Where plaintiff, while employed in defendant railroad company's machine shops in repairing an engine, was injured by the displacement of a wooden fulcrum, the allegation in the petition that it was gross negligence to use a wooden fulcrum was sufficient without any allegation that a defective piece of wood was used, or that an iron or steel fulcrum would have been safer, though it was unnecessarily alleged that an iron or steel fulcrum should have been used.

2. The rule requiring plaintiff to allege that he could not, by the exercise of ordinary care, have known, or that he did not have an equal opportunity with the master to know, that the appliance was defective or unsafe, and that the master knew, or could by the exercise of ordinary care have known, that the appliance was defective or unsafe, does not apply, as plaintiff had the right to rely upon the judgment of the master as to the kind of fulcrum to be used.

3. Proof which authorized the jury to conclude that the fulcrum either split or slipped was sufficient to sustain an averment that the block of wood was "displaced," and therefore there was no variance.

4. While the master is not bound to furnish appliances which are absolutely safe, but only

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

those which are reasonably safe, the jury was authorized to conclude there was negligence where the master furnished an iron or steel fulcrum to raise a heavy engine, and the foreman, contrary to his own judgment, used a wooden one.

Appeal from circuit court, Warren county. "Not to be officially reported."

Action by W. W. Richardson against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

J. A. Mitchell and Edward W. Hines, for appellant. B. F. Proctor, Hazelrigg & Chenuault, and G. H. Herdman, for appellee.

PAYNTER, J. The appellee, W. W. Richardson, instituted this action against appellant to recover damages for injury which he received while acting as a helper in its shops at Bowling Green. It is averred in the petition that, whilst he was assisting in making repairs on one of its engines, the defendant, by its agent's gross negligence, caused him to be struck by a heavy piece of iron, with which he was assisting in raising an engine. By an amended petition, it was averred that Lee Huddlestone was the foreman; that the foreman ordered him to assist in making repairs on the engine; that in order to raise it it was necessary to put a fulcrum under the end of a long iron bar used as a lever; that the foreman used a wooden block as a fulcrum; that he placed it between the end of the bar and the frame of the engine, and then ordered him and several servants to pull down upon the bar, which he did, and while so doing the fulcrum was displaced, and the bar struck him, and caused his injury. It is averred that the fulcrum should have been of steel or iron, and that he did not know until after his injury that a wooden block had been used. The trial resulted in a verdict and judgment for \$1,600 against appellant.

Several grounds are urged for a reversal, and we will consider them in the order discussed by counsel for appellant. The petition stated the cause of action, and it was unnecessary to file an amendment. The amendment sets out the circumstances under which the injury was inflicted, and, from the averments made, the injury was inflicted by a bar of iron used as a lever; that the displacement of the wooden fulcrum was the cause of him being struck by the iron bar. It is true the petition does not allege that the wooden fulcrum was defective or unsafe, but it is averred that it was gross negligence to have used it at all. It is suggested that it is not averred that the use of the wooden fulcrum involved any greater danger than the use of an iron or steel fulcrum would have involved. It is true that this averment is not made. The plaintiff simply made an unnecessary averment that a steel or iron fulcrum should

have been used. By the averment the plaintiff unnecessarily advised the defendant that, in his effort to show that the use of the wooden fulcrum was gross negligence, he would prove that a steel or iron one should have been used in its stead. The plaintiff does not aver that the negligence consisted in using a defective piece of wood, but in the use of a wooden one at all.

Again, it is claimed that the petition is defective because there is no allegation that the plaintiff could not by the exercise of ordinary care have known, or that he did not have an equal opportunity with the foreman to know, that the appliance was defective or unsafe, and that defendant or its foreman knew, or could by the exercise of ordinary care have known, that the appliance was unsafe. It is claimed that under the doctrine of *Bogenschutz v. Smith*, 84 Ky. 339, 1 S. W. 578, these averments should have been made in the petition. In that case the court stated a general rule, and applied it to the facts of that case; but the court said: "We do not mean to decide that there may not be cases where the servant has a right to rely upon the judgment of the master as to the safety of the premises or the material to be used, or that the servant is bound to inform himself as to them." We are of the opinion that the general rule stated in that case is not applicable to this case. This case belongs to the class which the court in that case recognized as being an exception to the rule. The plaintiff had the right to rely upon the judgment of the master as to the kind of fulcrum should be used. It was not the duty of the servant to see or examine the fulcrum before it was used. It was the business of the foreman to select and put the fulcrum in use. Besides, the plaintiff averred that he did not even know that a wooden fulcrum was used until after his injury.

It is urged that a peremptory instruction should have been given. There was testimony offered by the plaintiff which tended to show that it was not safe to use a wooden fulcrum. The evidence fails to show whether the block of wood was displaced by slipping or splitting; therefore it is urged that there was a fatal variance, in view of the fact that it was averred in the petition that the block of wood was "displaced." It seems to us that the averment of the petition that it was displaced was sustained by proof which authorized the jury to infer that it either split or slipped. There is some conflict in the testimony as to whether it was safer to use a wooden or metal fulcrum. The testimony all tended to show that a metal fulcrum was generally used. While they were looking for a fulcrum to use, the car inspector picked up the wooden block which was used; whereupon Huddlestone at first declined to use it, because he feared it was not safe to do so, but he did use it with the result stated. When the fulcrum

was displaced, the end of the iron lever struck plaintiff in the breast, inflicting an injury which resulted in consumption, and the probable loss of his life.

The question as to whether the appellee was guilty of negligence except for which the accident would not have happened was fully submitted to the jury. The instructions in no part were prejudicial to appellant, but in some respects they were more favorable to it than it was entitled to have given the jury.

We recognize that a master is not bound to furnish appliances which are absolutely safe, but is only required to furnish those which are reasonably safe. *Lawrence v. C. C. Hagemeyer & Co.*, 93 Ky. 594, 20 S. W. 704. In this case a ponderous piece of machinery was to be raised. The appellant recognized that it was necessary to use iron or steel fulcrum in doing so; hence provided them. Notwithstanding this, the foreman of the appellee, contrary to his own judgment, used a wooden one, which resulted in the injury to appellee. We think, under these circumstances, that it cannot be said that the verdict of the jury is flagrantly against the weight of the evidence.

The judgment is affirmed.

JONES v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 12, 1902.)

ROBBERY—WHAT CONSTITUTES TAKING BY VIOLENCE.

Where defendant snatched a pocketbook from the hand of another so quickly that he had no chance to actively resist, there was such a taking by violence as authorized a conviction under an indictment for robbery.

Appeal from circuit court, Harrison county.

"To be officially reported."

Mat Jones was convicted of the offense of robbery, and he appeals. Affirmed.

W. T. Lafferty, for appellant. Morrison Breckinridge, for the Commonwealth.

GUFFY, C. J. The appellant was indicted, tried, and convicted in the Harrison circuit court under an indictment for robbery. The specifications in the indictment are as follows: "Did feloniously take a pocketbook and seven dollars in money, the personal property of Esaw Eckler, from his presence, and against his will, by violence, and putting him in fear of some immediate injury to his person." A jury trial resulted in a verdict and judgment sentencing the appellant to the penitentiary for 2½ years. The verdict reads as follows: "We, the jury, find the defendant guilty, and fix his punishment at two and one-half years in the penitentiary. Dow Holten, Foreman."

The grounds relied upon for a new trial are because the court misinstructed the jury, or refused to properly instruct the jury, and because the verdict was against the law and evidence. At the conclusion of the testimony for the commonwealth the appellant asked for peremptory instruction, which was refused by the court. No evidence was offered by the defendant. The court, in its first instruction, substantially instructed the jury that "If, from all the evidence, they believed beyond a reasonable doubt that the defendant, before the finding of the indictment, and prior to March 1, 1901, did feloniously take a pocketbook and seven dollars in money, or any part thereof, the personal property of Esaw Eckler, from his presence, and against the will of said Eckler, by violence or putting said Eckler in fear of some immediate injury to his person, they should find the defendant guilty, and fix his punishment at confinement in the penitentiary for not less than two years nor more than ten years, in their discretion, governed by the proof." The second instruction was in regard to petit larceny. The third instruction was to the effect that, if the jury believed the defendant guilty beyond a reasonable doubt, but entertained a reasonable doubt as to the degree of his guilt, they should find him guilty of petit larceny only. The fifth instruction was to the effect that if, upon the whole case, the jury entertained a reasonable doubt of the guilt of the defendant having been proven, they should acquit him. The contention of appellant is that there was no evidence tending to prove that the appellant committed the offense of robbery. The evidence as to the taking of the pocketbook in question was given by Esaw Eckler, and is in words as follows: "I am acquainted with Mat Jones, the defendant. I have known him for several years. Some time in December, 1900, shortly before Christmas,—I think it was on court day,—Mat Jones came up to me at the corner of Main and Pike streets, in Cynthiana, Harrison county, Kentucky, about four o'clock in the afternoon. I think it was about that time, for the four o'clock train was just blowing. I asked Jones if he had seen my son James Eckler. He said that he had, and that he knew right where he was, and he would take me to him if I would go. I told him I would, as I wanted to get him, and go home. We then walked north on Main street a short distance below where the new church was being built, and to the head of the alley. Jones then asked me if I would change a quarter for him, and I told him I thought I could, and took my pocketbook from my pocket, which was a leather pouch, or 'ridicule,' as I called it, closing by means of a draw string. I held the book in my left hand, and put my right hand into it and drew out a dime, and just as I was putting my hand in the book a second time Jones reached over and took the

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

book from my hand, and ran up the alley. I called to him to stop with my pocketbook, but he didn't stop. I had about \$7.00 in the book and my tax receipt. I had paid my taxes that day." On cross-examination Eckler testified as follows: "I was holding my pocketbook in my left hand, and had my right hand in it, and Jones grabbed it out of my hand, and ran up the alley." There was other testimony tending to show that the appellant really had the pocketbook in his possession, but no witness testified about the transaction of taking except Eckler. Counsel for appellant cites many authorities showing that there must be some force used in the taking of the property, or that the injured party must have been put in some fear. It may be conceded that the authorities sustain this contention of appellant, but it is the contention of appellee that the facts and circumstances proven in this case sustain the verdict, and that the jury were authorized under the evidence to find the defendant guilty of the charge of robbery, and cites several decisions of this court in support of his contention. In *Williams v. Com.*, 50 S. W. 240, the court had under consideration the law governing the offense of robbery. The injured party in this case testified as follows: "I was standing with my back to this colored man, and he got behind me and wrenched the pocketbook out of this [left] hand; and, of course, he being stronger than I, I had to give way to him, and let him have it." On cross-examination she said: "No, because you do not know more than just take it from your hand. That man took it by main force from my hand." The court, in discussing the testimony, said: "The crime of robbery in this state is the same as at common law. The statute does not attempt to define the crime; only provides the penalty. We are clearly of the opinion that the testimony of the commonwealth, if true, showed that the crime of robbery had been committed." In *Davis v. Com.*, 54 S. W. 959, this court again had under consideration the offense in question. In discussing the case it said: "It will be observed that the snatching of the money from Barton's hand was excluded from the jury by the second instruction, as evidence of actual violence. We think this fact was evidence to go to the jury, and they should have been instructed to convict if the money was taken against Barton's will by actual force." In *Blanton v. Com.*, 58 S. W. 422, the court, in discussing the offense of robbery, said: "The taking must be by violence, or by putting the owner in fear; but both of these circumstances need not concur. *Williams v. Com.*, 50 S. W. 240. Under the rule announced in this case and the authorities cited therein the indictment is sufficient. It was held in

the same case that to snatch a pocketbook from another's hand was robbery, and in *Snyder v. Com.*, 55 S. W. 679, it was held that, if the victim was pushed or shoved about by the pickpocket or his associate for the purpose of diverting his attention, and the crime is then accomplished, it is robbery, even if the victim is at the time unaware of his loss." This court, in the recent case of *Com. v. Davis* (filed Jan. 10, 1902) 66 S. W. 27, had under consideration the crime of robbery. After stating the case, the court said: "The prosecuting witness testified that she was walking along Fourth street about one o'clock in the daytime; that she saw two boys in a yard of an empty house; that, after she passed beyond, one of them slipped up behind her, grabbed her purse, which she was carrying in her hand, and that she resisted with all her force, but that he slipped one of his hands over her wrist, and wrenched her pocketbook out of her hand with his other hand; and that it contained \$10; and that the boy ran off with it, she pursuing." The court then proceeded to refer to the facts which in law constitute robbery, which are stated substantially as contended for by appellant. The court then said: "It is not so much the extent and degree of violence which makes the crime as the success thereof. Any force which is sufficient to take the property against the owner's will is all that is necessary to make up the crime of robbery." Under the Civil Code of Practice this court cannot reverse a judgment of conviction if there be any evidence tending to establish the guilt of the accused. In this case it must be conceded that the snatching of the pocketbook from the hand of Eckler required some force or violence, and the jury might perhaps infer from all the statements of the witness that he was put in some fear, else he would have made greater effort to recapture his money; hence it seems to us that, taking all the testimony introduced in this case, there was evidence tending to show that the appellant took the pocketbook and money by violence, and probably put the witness in some fear. It is true that the witness did not state that he was put in fear, nor that he tried to hold onto the pocketbook; he does not appear to have been asked specifically on these points; in fact, the snatching or grabbing and jerking of pocketbook out of the witness' hand was probably done so quickly that he had no chance to actively resist; and, if this be true, we think such taking or snatching must be construed as taking by violence or force. It results from the foregoing that the court did not err in respect to the giving or refusing of instructions.

For the reasons indicated, the judgment is affirmed.

SANDERS v. BOND et al.¹

(Court of Appeals of Kentucky. Feb. 12, 1902.)

SALES OF LIVE STOCK—RIGHT OF BUYER TO GRADE—CONCLUSIVENESS OF REJECTION BY BUYER—MEASURE OF DAMAGES.

1. Where a contract for the sale of lambs provided that the lambs were to be "top" or "prime" lambs, and should be graded by the buyer, but not "harder" than a former shipment, the question of whether the lambs delivered were or not "top" lambs was not left solely to the buyer, as that would have given him the absolute power of rejection, and the contract would thus not have been mutually binding.

2. Upon the buyer's rejection in open market of lambs which the evidence shows were "top" lambs, the seller had the right to resell them then and there at the best price obtainable that day in that market; and, the price which they brought being the best test of the market price of those particular lambs, the difference between that price and the contract price is the measure of damages.

Appeal from circuit court, Anderson county.

"Not to be officially reported."

Action by Bond & Crossfield against Andrew Sanders to recover damages for breach of contract. Judgment for plaintiffs, and defendant appeals. Affirmed.

McCandless & James and Gaither & Vansardall, for appellant. L. W. McKee, for appellees.

O'REAR, J. Appellees contracted to sell, and did deliver, to appellant, a lot of lambs, for the market of June 26, 1900, at Bourbon Stock Yards, Louisville. Appellees tendered at the place and time mentioned 671 lambs, as compliance with the contract. Appellant received only 338 of them. The remainder rejected were then sold by appellees on the open market, and at that place, and on that day. They realized some \$600 less than they would have brought had they been received under the contract at the contract price. This suit was to recover this difference, as damages for the alleged breach of contract. The jury returned a verdict for \$450. Two grounds for a new trial were relied on, and are here urged for a reversal: (1) That the verdict is not sustained by sufficient evidence; (2) that the verdict is excessive.

The agreement was not in writing. Appellees contended that appellant agreed to take all the lambs they would ship him on the 26th day of June for that day's market at the Bourbon Stock Yards, Louisville; it being understood that the probable number would be two or three car loads; one or two of the cars to be "double deckers." The lambs were to be graded by appellant, but no "harder" than a similar lot shipped and sold on that market by appellees on June 20, 1900; and the lambs to be shipped were to be equal in quality to those of the 20th, and to be similarly graded, which was not exceeding 14 rejections to the car. For these

lambs appellant was to pay seven cents per pound, which had been the market price for "top" or "prime" lambs on the 20th. Appellant's firm were to have the commission of five cents per head for this sale. Appellant claims that the contract was that appellees were to ship not exceeding two car loads for that day's market,—one to be a double-deck car, and one single,—and that they were to be all top or prime lambs, but all subject to appellant's grading. For them he was to pay seven cents per pound, taking five cents per head commission to his firm for the sale. The lambs shipped and sold on the 20th were graded as top lambs, with the rejections stated. Evidence was introduced on the trial as to what constituted "top" or "prime" lambs. From it we gather that ewes or wethers weighing from 60 to 80 pounds, fat and smooth, filled this description, though a few bucks were allowed, other conditions being present. The market on June 20th was shown to have been strong and "booming." This was the day the contract was made. On the 26th the conditions had completely changed. They are very graphically shown in a circular letter issued to the trade by appellant's firm on that day, and which was written by appellant. We quote from it: "The New York market was flooded with lambs yesterday and to-day, and was completely demoralized, with prices \$1.50 to \$2.00 per cwt. lower than Saturday. This morning's reports from there quoted top lambs at \$5.50. Louisville speculators had about fifteen loads on the Jersey City market this week, which lost from \$200.00 to \$400.00 per load. They were out of the market to-day, and refused to bid on anything. On account of the demoralized condition of the dressed-meat trade in the East, the Chicago packers wanted but few lambs, and wanted them cheap. Some of the buyers never raised their bids above \$5.50. The bulk of the top lambs that crossed the scales went at \$5.75 to \$6.00; good seconds, \$4.00 to \$4.25; and the culls at \$2.50 to \$3.75. About fifteen decks carried over to-night unsold. Prospects unfavorable for immediate future." The evidence further shows that, in the matter of grading lambs, it made a very material difference as to the state of the market. If strong, they were graded liberally; if weak, they were graded "hard." And herein, in our opinion, was much of the difficulty in this transaction. Three witnesses testified to appellees' version of what the contract was; two to appellant's version. They all appeared, so far as we can see from the record, equally intelligent, and to have had about the same opportunities for knowing the facts about which they deposed. We could not say that the jury was unauthorized in believing appellees' evidence. Some half dozen witnesses testify for appellees to having seen the lambs of the 20th and those of the 26th. The sum of their testimony is that those of the 26th were at least

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the equal in quality and grade with those of the 20th. Two witnesses for appellant say that the last shipment was of inferior quality to those of the 20th, and, anyhow, were not top lambs; that is, those rejected were not. We could scarcely be expected, in this character of case, to say that the jury were not authorized in believing the greater number of witnesses. Furthermore, we are convinced, from our reading of the testimony, that the weight of the evidence on this point was decidedly for appellees.

The main stress of the appellant's argument seems to be, though, on the point that appellant was to grade the lambs; they were to be subject to his inspection and acceptance; and that his rejection of the 338 was within the terms of the contract, and conclusive. We think not. Even had the contract been as contended by appellant,—viz., that the lambs were to be top or prime lambs, and to be graded by him,—the question of whether they were or were not top lambs would not, in case of dispute, be left solely to appellant. A contract between competent parties must be mutually binding. If appellant had the privilege he claims, it is obvious that he would not be bound at all. It would be merely an open offer by appellees to sell, with the uncontrollable right of total rejection by appellant. Such could not have been the intention of the parties. Both must be bound,—one to deliver the thing sold; the other, to accept it. The question is, is the thing delivered that which was agreed to be? If so, the buyer must accept, or answer for the damages. There may be a point of legitimate advantage to a buyer having the right to grade the quality of property purchased by him. For example, in questions of honest difference of opinion, when the dividing line is so indistinct as to well leave the true quality on either side, the buyer's grading would probably be acquiesced in by the other party. But if the difference is marked and irreconcilable, if the agreement is a contract of sale, neither party to it can be said to have the exclusive right of determining the controverted point. Human nature is not so constituted as to fulfill the requirements of such test.

The jury found, and the evidence, in our opinion, authorized them to find, that the contract was that the lambs were to be top, and graded by appellant as were those of the 20th of June; that those delivered the 26th were "tops"; and that they had been much more strictly graded than those of the 20th. This brings us to consider whether the damages found were too much, under the facts. It is ingeniously argued for appellant that, if appellees are correct in their contention that the rejected lambs were in fact top lambs, appellees' damages must necessarily be covered by the difference in price for that grade of lambs in that market on that day and the contract price of

7 cents, and that, as the evidence shows the market for top lambs on June 26th was \$6, \$1 per hundred weight is the exact damage sustained; that the proof shows the rejected lambs weighed about 24,000 pounds, less weight of those that were subject to rejection under the conditions of the 20th (i. e., 7 to the deck, whose weight was 2,555 pounds), leaving 21,520 pounds. Thus it is said \$215.20 was the maximum verdict allowable. Had appellees not sold the lambs, and had they incurred no other expense because of the breach of the contract, appellant's figures and argument would have been irresistible. But they did not keep them; nor were they, in law, bound to do so. On the contrary, upon appellant's rejecting them, appellees had the right to resell then and there, in open market, at fair sale. Indeed, it was probably their duty to appellant in this case to have done so. If the sale was not a fair one, then a different rule to the one contended for by appellees would probably apply. The facts shown in this case illustrate well the justice of the rule here stated. While the nominal market price—the highest point—for top lambs on that day in that market was quoted at \$6, and was such in fact, yet all top lambs did not fetch that price that day in that market; nor could all the lambs on hand find buyers then at the highest price. Appellees were not bound to carry the lambs over, risking other and possibly worse markets, with added expenses and risks. They were authorized to sell for the best price obtainable that day in that market. The sales being admittedly fair, the best test of the market for these particular lambs was not what others brought, but what these brought. The jury's verdict was not excessive.

There is no error in the matters complained of. Judgment affirmed.

YANCY et al. v. TOWN OF FAIRVIEW et al.¹

(Court of Appeals of Kentucky. Feb. 12, 1902.)

MUNICIPAL CORPORATIONS—EXTENSION OF BOUNDARY—TOWN LYING IN TWO COUNTIES—JURISDICTION TO APPOINT TRUSTEES.

1. Ky. St. § 3713, restricting the boundary of towns when created, does not apply to a sixth-class town organized by special charter and then in existence, the boundary of which may be extended any reasonable distance.

2. Where a town lies in two counties, the county judge of either may appoint trustees; the jurisdiction continuing in the one first exercising the authority.

3. The acts of persons acting and recognized as town trustees are valid, they being de facto officers.

4. Where every lot in a town, save three, had been built upon at the time an ordinance annexing territory was passed, and much of the annexed territory was used by citizens of the town as pasture lots, the court was justified in concluding that the proposed territory was

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

necessary for the growth of the town, and that the annexation of the territory would cause no serious injury to the persons owning real estate therein.

Appeal from circuit court, Todd county.
"Not to be officially reported."

Proceeding by John W. Yancy and others against the town of Fairview and others to prevent the annexation of territory to the town. Judgment for defendants, and plaintiffs appeal. Affirmed.

Perkins & Trimble, for appellants. W. L. Reeves, for appellees.

WHITE, J. This was a proceeding begun by appellants in the circuit court of Todd county to prevent the annexation of certain territory to the town of Fairview, and to prevent cutting off a part of the boundary as it existed. It appears that Fairview was established by special charter in 1846, and that its boundary was in both Christian and Todd counties, and was originally divided into 20 lots; 10 being on either side of the turnpike; the major portion being in Christian county. In June, 1898, the town trustees, who, it seems, had been appointed by the county judge or county court of Todd county, passed an ordinance at a regular meeting changing the boundary of the town by cutting off a small strip on the west or Christian county side, and by annexing other territory so as to make the town a rectangle, 142 by 192 poles in dimensions. The appellants filed their petition in equity under the statute, objecting to the proposed change, in the proposed annexation of the territory. There seems to be no objection to that part of the ordinance cutting off territory. The objections presented are (1) that the proposed boundary exceeds one-fourth of a mile in each direction, necessary to form a square; (2) that the board of trustees acting when the ordinance was enacted was illegal, as it is contended the county judge or county court of Todd county had no authority to appoint trustees for the town, as it lay partly in Christian county; (3) the right of the petitioners, citizens and freeholders in the territory, to object to being annexed to the town. It is insisted that the opponents compose 75 per cent. of the resident freeholders of the territory sought to be annexed. The court sustained a demurrer to the first and second grounds, and issue was made by pleadings as to the third, and on this proof was heard. On final hearing the court refused relief and dismissed the petition, and hence this appeal is prosecuted.

We are of opinion that the demurrer to the petition; or the part pleading that the boundary lines are more than one-fourth of a mile, was properly sustained. We know of no statute restricting the boundaries of sixth-class towns to one-fourth of a mile each way, forming a square, except section 3713, Ky. St., which is a part of the act of July 3, 1893, for the creation and organization of

towns. That section applies only to the creation and organization of towns in the first instance. Both the minimum population and the maximum territory are prescribed for the first organization of towns under that act. That act has no application to such towns as Fairview, organized by special charter, and then in existence. By section 3663, Ky. St.,—a part of the charter of the sixth-class towns,—it is provided, "The boundaries of the several towns of this class shall, until changed as herein provided, remain as now established by law." The charter of the sixth-class towns was passed July 1, 1893; and the act of July 3, 1893, providing for the creation and organization of towns, is no part of, nor amendatory to, the charter of sixth-class towns. So far as boundary is concerned, the sixth-class towns in existence July 1, 1893, might have been of any size, which they retained, or they might, under the provisions of the charter, be extended any reasonable distance.

The second objection—that the county court or county judge of Todd county had no power or authority to appoint trustees of the town, because the town lay partly in Christian county—is also unsound. If the county judge of Todd county could not act, for the identical same reason the county judge of Christian could not act; and then, by the position of appellants, there is no authority in either to act. The power to appoint could not be joint. If it exists at all, it must exist in one or the other. It cannot exist as a joint power. We hold that the power and jurisdiction to appoint, in proper cases, is concurrent in the two authorities. The first exercising has authority. This is like the concurrent jurisdiction of two courts. Either may act, but not both. Nor is it a joint power. That court first taking jurisdiction holds to the final determination of the case. The appointments had been made by the Todd county judge, and as he exercised the right, concurrent in him, his appointment was legal, and the trustees so appointed had authority to enact the ordinance in question. Besides this question, the acts of the trustees, acting and recognized as such, are valid and binding. They were de facto officers, as was expressly held in the case of Pence v. City of Frankfort (Ky.) 41 S. W. 1011.

Upon the issue presented, we are of the opinion from the proof that less than 75 per cent. of the freeholders of the territory to be annexed have remonstrated against the annexation. The proof very clearly establishes the fact that every lot in the town, save three, had been built upon and was occupied when the ordinance was enacted. It would seem, therefore, necessary, if the town was to grow at all, that there must be territory added. It is also shown that much of the annexed territory was owned by citizens of the town, and used as pasture lots for their horses and milch cows. We con-

clude from the proof (1) that less than 75 per cent. have remonstrated; (2) that the proposed territory is necessary for the growth of the town; and (3) that the annexation will cause no serious injury to the persons owning real estate therein. True, the annexation of this territory will subject this property to taxation for municipal purposes; but this fact must always be. The outlying territory brought in is owned largely by residents, who must pay the expenses of the town corporation anyway; and in others they receive the benefit of the town organization, and it cannot be said that they are materially injured by being compelled to contribute to pay for the benefits received.

Upon the whole case, we decline to disturb the judgment of the court below. Judgment affirmed.

BERTRAM v. ROSS.¹

(Court of Appeals of Kentucky. Feb. 11, 1902.)

DEED TO EXECUTOR—MORTGAGE BY EXECUTOR FOR INDIVIDUAL DEBT—PURCHASE AT JUDICIAL SALE WITH NOTICE OF TRUST—CANCELLATION OF DEED TO VENDOR—RENTS AND IMPROVEMENTS.

1. Where one to whom land was conveyed as executor mortgaged it to secure his individual debt, the purchaser at a sale made to enforce the mortgage lien was charged with notice of the trust; and, the deed to the executor having been canceled, the purchaser must restore the possession to the executor's grantor.

2. The purchaser is entitled to be reimbursed for moneys expended by him for valuable and lasting improvements, to the extent they add to the salable value of the land, to be set off by the reasonable rental value of the land from the time the owner was entitled to possession.

Appeal from circuit court, Barren county. "Not to be officially reported."

Action by W. L. Ross against W. D. Bertram to recover land. Judgment for plaintiff, and defendant appeals. Reversed.

V. H. Baird and Herman Morris, for appellant. Basil Richardson and R. L. Stith, for appellee.

BURNAM, J. In March, 1895, W. H. Barr, of Warren county, as executor of his father, Thomas Barr, sold and conveyed to W. L. Ross a tract of land owned by his father, lying in Hardin county, at the agreed price of \$4,500. Eight hundred dollars was paid by the transfer of a tract of 100 acres of land owned by Ross in Barren county to W. H. Barr as executor of his father. For the remainder of the purchase price, he executed seven notes for \$500 each, and one for \$200, one due each year until all were paid; and it was stipulated that, if any one of the notes was not paid at maturity, all were to become due. W. H. Barr mortgaged this land in his individual capacity to one Watson as security for money borrowed. And in a suit instituted by his administrator to

enforce the payment of the money so borrowed, a judgment was entered decreeing its sale, at which sale appellant became the purchaser. In the meantime Ross defaulted in the payment of two of the notes executed by him, and suit was thereupon instituted to enforce the purchase-money lien for all the notes, to which Ross filed an answer and cross petition, asking a rescission of the contract upon the ground that Barr in the sale of the land had exceeded his authority under his father's will, and that for this reason the sale was void. The circuit judge decided against his contention, and an appeal to this court resulted in a reversal, and direction to cancel both of the deeds and restore to each party the land theretofore conveyed. See *Ross v. Barr's Ex'r*, 53 S. W. 658. Upon the entry of the mandate, judgment was entered by the circuit court in conformity thereto. Thereupon appellee, Ross, instituted this suit against Bertram, in which he set out all the foregoing facts, and alleged that the mortgage from Barr to Watson was given to secure the individual indebtedness of Barr to Watson, and that appellant was apprised of this fact by the record at the time of his purchase and acceptance of the commissioner's deed, and that he acquired no title by reason thereof, and prayed that he be adjudged possession of the land, and damages for withholding it. The defendant interposed a general and special demurrer, both of which were overruled; and he then filed an answer, in which he pleaded that plaintiff was estopped from claiming to be the owner and entitled to the possession of the land sued for—First, by reason of the deed executed by him to Barr as executor; second, because he had negligently failed to file in the office of the clerk of the Barren county court a statement showing that he was attempting in the proceeding in the Hardin circuit court to procure a rescission and cancellation of the deed made by him to Barr, thereby inducing the defendant to purchase and pay for the land. Appellant also claims that he has expended several hundred dollars for lasting and valuable improvements, which materially enhanced the salable value of the land, and for which he asked judgment upon his counterclaim. A general demurrer was sustained to each paragraph of the answer, and judgment given in favor of the plaintiff, which is now here for review.

It was apparent from the deed of appellee to Barr that he did not hold the property in his individual capacity, but as executor of the estate of his father, Thomas Barr; and "a purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect of the property, and is bound in the same manner as the original trustee from whom he purchased." See *Pom. Eq. Jur.* (2d Ed.) § 688. And the same author, in section 1043, says: "Wherever property, real or person-

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

al, is impressed with or subject to a trust of any kind, express or by operation of law, and is conveyed or transferred by the trustee, not in course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such purchaser with notice acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. Equity impresses the trust upon the property in the hands of the purchaser, and compels him to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such purchaser should be guilty of fraud, or actually intended a violation of the trust obligation. It is sufficient that he acquires the property upon which a trust is in fact impressed, and that he is not a bona fide purchaser for a valuable consideration, without notice." And this rule has been repeatedly recognized by this court. See *Morrison v. Page*, 9 Dana, 429; *Miller v. Edwards*, 7 Bush, 394; *Prather v. Weissiger*, 10 Bush, 130. Appellant was bound to take notice of the limitation contained in the deed to Barr's executor from appellant, and acquired by his purchase no better title to the property, as against the rightful owner, than Barr himself had. A cancellation of the deeds was decreed in *Ross v. Barr's Ex'r*, supra, and we are of the opinion that appellee was entitled to be restored to the possession of his land.

But we think appellant is entitled to be reimbursed for moneys expended by him for valuable and lasting improvements, to the extent that they add to the salable value of the land,—to be set off, however, by the reasonable rental value of the land from the time appellee was entitled to the possession thereof. For this reason alone the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

HOBSON, J., not sitting; WHITE, J., sitting in his stead.

ILLINOIS CENT. R. CO. v. GHEEN.*

(Court of Appeals of Kentucky. Feb. 12, 1902.)

RAILROADS—HOSPITAL MAINTAINED BY CONTRIBUTION OF EMPLOYEES—LIABILITY FOR REFUSAL TO GIVE CERTIFICATE OF ADMISSION—MEASURE OF DAMAGES.

1. Where each employé of a railroad company on a certain division employed as much as four days in a month was required by the company to contribute to the maintenance and support of a hospital, the sum assessed against him according to his wages being withheld by

the company's paymaster out of his wages and turned into the hospital fund, which was held by the company's treasurer, and the employés making the payments had no voice in the management or control of the hospital except that superior employés gave to subordinates certificates of admission when they were sick or injured, plaintiff, an employé who was injured after being employed more than four days, was entitled to admission to the hospital, and for injury resulting from the refusal of his foreman to give him a certificate entitling him to transportation and entrance to the hospital the company is liable.

2. If plaintiff was entitled to admission to the hospital, he was entitled to the skilled surgical treatment and accommodations he would have received there, and also to board and transportation, and if the company refused to furnish these things it is liable for the cost thereof.

3. Where plaintiff, instead of employing medical attention, contented himself to accept the services of the local surgeon of the company, the company is not liable for any aggravation of his injury by the failure of that surgeon to give him proper and necessary treatment, as he should have procured such treatment elsewhere; it being his duty to do all that he could to keep down the damage.

Appeal from circuit court, Livingston county.

"To be officially reported."

Action by T. W. Gheen against the Illinois Central Railroad Company to recover damages for defendant's refusal to admit plaintiff to a hospital. Judgment for plaintiff, and defendant appeals. Reversed.

Quigley & Quigley and Pirtle & Trabue, for appellant. J. W. Bush, C. C. Grassham, and Molloy & Utley, for appellee.

WHITE, J. The appellee brought this action for damages for refusal to admit him into the hospital at Paducah after he had received an injury to his hand, and, as is alleged, he was deprived of prompt and proper medical treatment, and by reason of the failure to have such proper treatment amputation of three fingers of his hand became necessary. It is alleged that the hospital at Paducah is kept by appellant, under its supervision and control, and the cost of maintenance thereof is deducted from the wages of the railroad employés according to a fixed scale, each employé contributing by the deduction and withholding of such part of the wages due him. Appellant by answer denied that it conducted or controlled the hospital, but alleged that it was a voluntary association, composed of the railroad employés of the division from Louisville to Memphis, and that the appellant company only acted in a friendly way toward the institution, and rendered friendly and gratuitous services to it and the employés, in collecting and disbursing the funds necessary to maintain the hospital, and, further, that the appellant furnished transportation to the hospital for any employé entitled to treatment therein. Appellant denied all responsibility for the hospital management or liabilities. Further answering, the appellant denied that appellee was entitled to admission

* Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

to the hospital, or that he was injured or damaged by reason of not being admitted to the hospital earlier than he was. It appears that appellee was finally admitted and treated, and it was in the hospital that his fingers were amputated. There is no claim of liability of appellant by reason of the injury originally. That is expressly disclaimed in the petition. The claim is for increased injury by reason of not being admitted to the hospital for treatment in time to prevent the loss of the fingers and the suffering occasioned thereby.

Upon the issues presented the case was tried, and a verdict and judgment resulted in favor of appellee for \$1,000. The case is here upon appeal from that judgment. The reasons and motion for new trial assign as error the action of the court in sustaining a demurrer to the plea to the jurisdiction of the Livingston circuit court, error in instructions given, and that the amount of the judgment is excessive.

The plea to the jurisdiction presents the fact that at the time the suit was brought appellant had a chief officer and agent residing in this state in Jefferson county, to wit, a division superintendent. It appears from the petition that appellee was employed and injured in Livingston county, and was refused a certificate entitling him to admission into the hospital by his foreman in Livingston county. The line of railroad runs through Livingston county. The hospital is in McCracken county. In our opinion, the Livingston circuit court had jurisdiction of the action. If wrong was done appellee at all, it was in Livingston county. His cause of action, if he had any, accrued wholly in that county.

The court on the trial gave three instructions, as follows:

"(1) The court says to the jury if they believe from the evidence that plaintiff was employed and labored for the defendant, and while thus engaged he received an injury to his hand, then he has the right to admission at once into said hospital for treatment; and if the jury further believe from the evidence that defendant, by its officers and agents governing said hospital, and that plaintiff was refused a certificate of admission to said hospital, and if plaintiff suffered any additional pain or injury by reason thereof, then the law is for the plaintiff, and the jury will so find for him as in instruction No. 8.

"(2) If the jury believe from the evidence that said hospital was governed and controlled by the laborers of the defendant, and not by the officers of defendant, or that plaintiff was not injured or damaged by reason of defendant's agent in refusing him admission to said hospital, then, in either case, the jury will find for defendant.

"(3) The court says to the jury if, under the evidence and instructions, they find for plaintiff, they will find only such damages

as will compensate him for any additional pain and suffering endured by him, if any, from the time he made application for admission and the time he was admitted into said hospital; that is, the excess of pain and suffering, if any, that he endured over that which he would have endured if he had been treated in the hospital, and for the loss of his fingers and power to earn money, and mental and physical suffering by reason thereof, provided the jury believe from the evidence that his fingers could and would have been saved if he had been permitted to enter said hospital when he first applied for admission; but in no event can the jury allow him more than two thousand dollars, the amount claimed in his petition."

There was objection and exception to each of these instructions by appellant. It is earnestly insisted that these instructions are prejudicial to appellant, and are not correct statements of the law applicable to the case. The testimony as to the formation, conduct, and management of the hospital presents no material disagreement as to the facts. These appear to be that each employé on the Louisville & Memphis division, who is employed as much as four days in a month, contributes to the maintenance and support of the hospital. The sum payable is fixed by a scale according to wages earned per month, and the amount payable is withheld by the paymaster of appellant out of the wages due the employé and turned into the hospital fund, which is held by the treasurer of appellant. The hospital association is not incorporated, nor, on the other hand, is it purely voluntary. If the fact that an employé has no option about paying out of his earnings the fixed assessment for the support of the hospital could be termed a voluntary payment, then the hospital association might be termed a voluntary association. It has a board of directors, but these are such, save two, by reason of the official position with appellant's road. The two exceptions are a conductor and engineer, who are selected by the other members. The surgeon in charge is practically appointed by the chief surgeon of appellant. The men who contribute the monthly assessment to pay the hospital expenses have in fact no voice in the management or control of the hospital, save and except that of giving certificates of admission thereto to subordinate employés when sick or injured. Employés of the class of appellee have no rights or powers in regard to the hospital, save that of paying the monthly assessments, which in fact they never see, and the right of treatment in case of injury or sickness. As to the ownership of the hospital grounds and buildings and equipment, there is no proof. We are of opinion that these facts, proven without serious, if any, contradiction, would have authorized the court to instruct the jury peremptorily that, if appellee had been engaged more than four days, he was entitled

to admission into the hospital, and if he was refused permission to enter, or certificate entitling him to transportation and entrance to the hospital, and was injured by such refusal, he was entitled to recover. It is clear that if appellant corporation ceased to exist, or should attempt to withdraw from the hospital, the hospital would cease to be of any service. The appellant is the very life of the hospital association. Its funds, management, control, and service are all furnished by appellant. In fact, the hospital association is the Illinois Central Railroad. In this view, instructions 1 and 2, given, are more favorable to appellant than it was entitled to have.

However, we are of opinion that instruction No. 3, as to the measure of damage or criterion of recovery, is error. The general and universal rule of law in regard to damages is that every person must do all that can reasonably be done to render the damage for any act or omission as light as possible. Under this rule, the appellee, when he was refused admission to the hospital, if such be the case, was bound to do all that he could to keep the consequent injury and damage as light as possible. To do so, he should have employed medical and surgical attention to cure his hand, or, at least, to arrest other or further injury. For such services and attention, or the cost thereof, the appellant, if liable at all, would be required to pay. This is the reasonable requirement of the law. That course would be expected of any person, that he would use all means to prevent further injury to himself. By the proof herein appellee failed to do this, but contented himself to accept the services and treatment of the local surgeon of appellant, who seems to have pursued the same treatment given at the hospital. If that surgeon was unable for any reason to give appellee proper and necessary treatment to his wounds, it was the duty of appellee to procure elsewhere such attention. If he failed to do so, he cannot charge appellant with the consequent loss, suffering, or injury he received by his own failure to procure medical and surgical attention. But he can recover the reasonable cost of such medical and surgical attention that would have equaled the medical and surgical attention he would have received at the hospital if he had been admitted. Appellee was entitled, if at all, to the skilled surgical attention he would have received at the hospital of appellant, including board, transportation, and such accommodations and charges that the hospital would furnish its patients. If appellant refused to furnish such, and was bound to do so, the appellee could and should have sought such attention elsewhere, and for the reasonable cost thereof appellant would be liable. The science of medicine and surgery has not so far advanced that it could be said as a certain fact that if appellee had been admitted into

the hospital, and had received the very best attention there to be had, he would not have suffered pain and mental anxiety, and that surely he would not have lost his fingers. By the establishment of the hospital, the appellant did not assume or undertake to cure disease, or in all cases relieve from injuries. The undertaking was to furnish medical and surgical attention, and to nurse and care for the patient who is admitted therein. If appellant be liable under the proof, its liability is for failure to furnish these things, and the damage for such failure is the reasonable cost at which such care and attention, board, and medical and surgical skill could have been obtained, as well as cost of transportation to the nearest suitable place where such attention could be had.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial, and for further proceedings consistent herewith. Whole court sitting.

MORTON'S EX'RS v. MORTON'S EX'R.¹
(Court of Appeals of Kentucky. Feb. 12, 1902.)

DESCENT AND DISTRIBUTION—TAXES PAID BY EXECUTORS—LIABILITY OF WIDOW—COMPENSATION OF EXECUTORS—PROBATE AND CONSTRUCTION OF WILL—COSTS OF LITIGATION—WIDOW'S LIABILITY—RENTS BEFORE ASSIGNMENT OF DOWER—RIGHT OF WIDOW.

1. A widow who renounced under her husband's will was not chargeable with any part of the amount paid by the executors as taxes on personal estate, in the absence of anything to show that the only item of personalty of any magnitude in which she had any interest for the years represented by the taxes was embraced in the assessment.

2. Where the executors distributed \$50,000 of the capital stock of a corporation, and about \$30,000 of railroad bonds belonging to the estate, having new certificates of stock issued, one half to the widow, and the other half to the distributees under the will, and dividing the bonds in a similar way, the action of the chancellor in refusing to allow the executors more than \$200 for that service will not be disturbed; it appearing that they were allowed on the remainder of the estate the customary rate of 5 per cent. for their services.

3. The widow, having renounced the will, is not liable for any part of the costs incurred in litigation over its construction and probate, as her interest in the estate could not be in any way affected by that litigation.

4. Where one of the executors who kept a set of books for the accounts of the estate was allowed \$50 per month for that service in addition to his other allowances up to the date of the last settlement, he cannot complain of the refusal to make him a similar allowance for the subsequent years of the trust, as comparatively few accounts were then left open.

5. Under Ky. St. § 2138, providing that "the wife shall be entitled to one-third of the rents and profits of her husband's dowerable real estate, from his death till dower is assigned," the widow is entitled to the gross rents during that time, without any deduction for taxes, insurance, or repairs.

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Jefferson county, common pleas division.

"To be officially reported."

Exceptions by Harriet G. Morton's executor to certain charges against her estate in a report of settlement of the estate of John P. Morton. Judgment sustaining exceptions, and John P. Morton's executors appeal. Affirmed.

Barnett & Barnett, for appellants. R. C. Kinkadee, for appellee.

O'REAR, J. In the suit to settle the estate of John P. Morton, deceased, the following questions have arisen, and are presented by this appeal for decision:

The testator, Jno. P. Morton, died childless and testate. His widow renounced the provisions of the will. Litigations involving first the probate of the will, and then its construction, ensued; each, of course, creating certain necessary legal expenses. Each of the litigations was here for settlement. 20 S. W. 287; 99 Ky. 317, 36 S. W. 2. The widow received the greater portion of her part of the personal estate in or prior to 1894. In the settlement now in question, certain taxes were paid by the executors, assessed against its personality, but no part was charged to the widow's share of the estate. It does not appear what personal estate was included in these assessments. There was but one personal asset of any magnitude in which the widow is shown to have had any interest for the years represented by the tax paid. It is not shown that this item of personality (the Jno. P. Morton & Co. note of \$32,000) was embraced in these assessments, or any of them. The record, so far as it shows anything on the subject, seems to show that it was not. One of the executors, who had had special charge of the books of the estate, and the one most familiar with its affairs, when on the witness stand before the commissioner, failed, though several times requested, to make such explanations of his settlement as would show clearly what assets were included in this assessment. It was not proper, therefore, to charge any of this item against the widow.

The executors distributed \$50,000 of the capital stock of Jno. P. Morton & Co., corporation, and \$29,698.39 of railroad bonds belonging to the estate, having new certificates of stock issued, one half to the widow, and the other retained for the distributees under the will, and the bonds divided similarly. They asked for an allowance of 2½ per cent. on this sum (\$79,698.39) for their services concerning these two items. The court refused it. Instead, there was allowed them \$200. On the remainder of the estate, which was large, the executors appear to have been allowed and paid the customary rate of 5 per cent. for their services. Under the facts of this case, we are not inclined to

disturb the chancellor's judgment in making this allowance. He had exceptional opportunity for justly valuing the executors' services to this estate in each particular.

The executors complain that certain costs incurred in the litigations over the probate of the will and for its construction should have been paid out of the estate before distribution to the widow. We think not. She was in no wise interested in either of those litigations, nor could her interest in her husband's estate be enhanced or decreased by them in any event. *Miller's Ex'r v. Simpson* (Ky.) 2 S. W. 171.

One of the executors kept a set of books for the accounts of the estate. For the first few years of this trust, and before the estate's affairs had been reduced to a more settled condition,—leaving open, indeed, but comparatively few accounts,—this executor was allowed and paid \$50 per month for this service, in addition to his other allowances. He asked for an allowance at the same rate since the date of the last settlement. It was his duty to so keep his accounts that the condition of the estate, and of the standing of the executors' accounts with it, could be readily and accurately ascertained at any reasonable time. Not to have done so would, in an estate like this, have been culpable neglect of duty. After the estate had been so nearly settled as this one is, we cannot say that the chancellor in any wise abused a sound discretion in refusing this additional salary. The sum asked for on this account and refused was \$1,250.

A more troublesome question is presented by the trial court's ruling that the widow was entitled to one-third of the gross rents of all real estate until dower was assigned to her. Section 2138, Ky. St., is as follows: "The wife shall be entitled to one-third of the rents and profits of her husband's dowerable real estate, from his death till dower is assigned, and she shall hold the mansion house, yard, garden, the stable and lot in which it stands, and an orchard, if there is one adjoining any of the premises aforesaid, without charge therefor, until dower is assigned her." This provision of our law is in lieu of, and is derived from, the ancient rights of quarantine and estover, granted to the widow from the earliest times. Co. Litt. 32b; King John's Magna Charta, c. 7; 2 Inst. 17. It is not an "estate," strictly speaking, but, rather, an arbitrary and temporary provision for the widow's shelter, and the support due her from her part of her husband's realty in possession till such time as dower can be assigned her. It has never been deemed subject to execution, even against her goods and estate. 2 Scrib. Dower, 65. It is the continuing temporarily of that providence due one in distress and bereft of her natural provider,—an arrangement suggested originally, it may well be supposed, by a tender regard for her condition. The statute of 1797 (1 Morehead & B. Ky.

St. p. 573) made this provision: "A widow, after the death of her husband, shall tarry in the mansion-house of her husband, and the plantation thereto belonging rent free, until her dower shall be assigned her; and if she be thereof in the meantime deforced, she shall have a vicontiel writ, in the nature of a writ de quarentina habenda, directed to the sheriff, whereupon such proceedings and speed shall be used as hath or might have been used on the said writ of quarentina." Such remained the law in this state till the adoption of the Revised Statutes (Driskell v. Hanks, 18 B. Mon. 804), when the present law was first enacted, and substantially in the language now used. It is to be observed that this temporary provision is made without much reference to the widow's final interest when assigned. Under the former statute she had the use of the farm on which was the family residence till dower was assigned, even if that farm was the only estate left by the husband. Now she has, in lieu of that, the mansion house and curtilage, and one-third of the rents and profits of all his other dowerable estate. The law does not restrict her to net rents; nor does it, by any term used, subject this provision for support to any burden or charge. The use of the word "profits" cannot be deemed to be a limitation upon, or qualification of, the preceding word, "rents." A study of this subject shows that the tendency has been from the date of the Great Charter of King John, in 1215, wherein the widow was given the right to remain 40 days, only, in the mansion house of the husband, "within which time her dower shall be assigned," to enlarge, rather than curtail, this privilege of the widow. So conditions occasionally arose where the dowerable estate included a ferry or a mill, or such like. *Stevens' Heirs v. Stevens*, 3 Dana, 373. Their operation included more than the use of the realty to which they pertained. They included the labor of the heir or his servant, and other expenses. So provision was made for sharing of profits, allowing for the deduction of such expenses. The letter of the statute in this case is imperative, and admits of no conditions. The history and trend of such legislation, too, point to the same conclusion. The widow was entitled to one-third of the rents—gross rents—until the allotment of her dower. Taxes and repairs were debts against the estate, to which her quarantine right was not subject. In no event could she have been liable for one-third of the insurance. In the first place, it does not appear to have issued for her benefit; nor did she authorize it, so far as the record discloses. One cannot be made an involuntary party to such a contract. Even had the policies been written so as to cover her interest, at her advanced age, one-third of the costs, compared to the great disproportion of advantage, could not have been allowed. We have not overlooked *Anderson*

v. Fitzpatrick (Ky.) 49 S. W. 786. The opinion in that case was based upon a distinctly different statute from the one now under consideration. Nor does the opinion show all the facts in that case that may have made it peculiarly proper to subject the widow's claim for rents to the charge of taxes, insurance, and repairs.

The judgment, in every particular, is affirmed.

LELL v. HARDESTY.¹

(Court of Appeals of Kentucky. Feb. 11, 1902.)

PARTNERSHIP—RIGHT OF PARTNER TO COMPENSATION FOR SERVICES.

Where services performed by one partner for another were not performed in relation to the partnership business, the rule that one partner cannot recover for services performed for the firm, in the absence of an agreement that compensation is to be made therefor, does not apply.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Action by D. L. Hardesty against John W. Lell to recover compensation for services. Judgment for plaintiff, and defendant appeals. Affirmed.

Z. Gibbons and Falconer & Falconer, for appellant. W. G. Dunlap, for appellee.

PAYNTER, J. The appellee instituted this action to recover a considerable amount of money from the appellant for alleged services performed for him, for commissions, etc. The appellant denied his liability for the claims in suit, pleaded the statute of limitations, and asserted a counterclaim for an amount alleged to be due growing out of a partnership venture. The court gave the appellee a judgment for \$800. We are of the opinion that the court did not err to the prejudice of the appellant in asserting and adjudging the amount due appellee. The judgment does not show for what part of the account the judgment was given. From the brief of counsel, it seems to be for services the appellee performed for appellant. The evidence we think establishes the fact that he performed the services under a written contract, for a stipulated sum per month. It is not probable that a written contract would have been entered into, if they were to be performed gratuitously. They were not performed in relation to the partnership business of the appellant and appellee. Therefore the rule that one partner cannot recover for services performed for the firm, in the absence of an agreement that compensation is to be made therefor, does not apply.

It is urged that the court erred in not finding that there was something due appellant on the partnership account. Neither party asked to have the case sent to a commissioner. The court disposed of the case prepared

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

by the parties for its judgment, and we do not think it erred.

The judgment is affirmed.

LOUISVILLE TRUST CO. v. WARREN et al.¹

(Court of Appeals of Kentucky. Feb. 18, 1902.)

TRUSTS AND TRUSTEES—COMPENSATION OF TRUSTEE.

Where a trust company agreed, in advance of its appointment as trustee under a will, that its compensation should be "three per cent. on income from stocks and bonds, and the same on rent of real estate," if managed and collected by the cestui que trust, and 5 per cent. if managed and collected by the company, the chancellor was authorized to conclude, under the evidence, that the commission stipulated was to be the entire compensation of the trustee during the entire continuance of the trust.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by the Louisville Trust Company, trustee of Esther Barnett Warren, against Esther Barnett Warren and others, for a settlement of its accounts as trustee. Judgment settling trust, and plaintiff appeals. Affirmed.

Simrall & Doolan, for appellant. Samuel B. Kirby, for appellees.

GUFFY, C. J. The appellant, which had qualified as trustee under the will of Esther Ann Barnett, instituted this action for settlement of its accounts, and for the purpose of resigning the trust, and, among other things, claimed that it should be allowed \$1,110, to be paid out of the trust estate in plaintiff's hands; this in addition to the commissions it had been allowed on account of rents and income. It is claimed that the total amount of principal that went into its hands was a sum in excess of \$25,000, and that it collected on account of the income of said estate various sums, aggregating more than \$31,000. The answer of appellees may be treated as a denial of appellant's right to any part of the \$1,110. Other denials are made to various averments in the petition, but the only question in dispute between the parties on the original appeal is as to the amount claimed by the plaintiff, —\$1,110 additional commission as pay for its services. The appellees obtained a cross appeal, and insisted that the court had no right to have allowed appellant its attorney's fee of \$250, or to adjudge any costs to be paid out of the trust estate. After the issues were fully made up and the evidence taken, the court adjudged that the appellant was not entitled to any part of the item of \$1,110 for commission upon the principal or labor of the trust estate in its hands under the will of Esther Ann Barnett. All

the other claims and statements of the accounts of appellant were ratified and confirmed by the judgment. The court further adjudged to the said appellant \$1,156.31 as commission upon the income account, and also the further sum of \$27.26 upon the income account, as referred to in supplementary settlement. The court further adjudged that the appellant was entitled to have allowed and paid all of its costs and expenses in this action, and adjudged that said costs and expenses of this action, with attorney's fees of \$250 allowed to Simrall & Doolan, attorneys for the plaintiff, be paid out of the funds on hand of said trust estate. The appellant was also allowed to resign the trust.

It is insisted for appellant that it is entitled to a commission upon the corpus of the estate which came to its hands, as well as commission on the income received and disbursed. It is the contention of appellees that the appellant, as a matter of law, was not entitled in this case to a commission upon the corpus of the estate,—at any rate, not now, inasmuch as it had resigned the trust. It is further earnestly insisted that the appellant agreed prior to its appointment to attend to the business at a specified rate, which is claimed to be 3 per cent. on income from stocks and bonds, and the same on rent of real estate managed and collected by Miss Barnett, and 5 per cent. if collected by the company. It is shown that the following memorandum was made by the company, and by it, or some of its employes, entered upon the books of the appellant: "December 18th, 1885. Accept trust on behalf of Miss Esther Barnett under the will of Esther A. Barnett. Embraces stocks and bonds of the market value of \$25,030.00. Also one piece of real estate in the city of Louisville, Ky., situated northeast corner Jefferson & Eighth Sts. For list of stocks and bonds, see register of the company; also judgment of the Louisville chancery court, of this city, entered in action No. 39,736. By agreement, the compensation to the company is to be three per cent. on income from stocks and bonds, and the same on rent of real estate, if managed and collected by Miss Barnett, and five per cent. if collected by the company." This agreement, it is claimed, was entered into before the appellant undertook the performance of the trust; and it is contended for appellees that this was to be the entire compensation of the appellant during the entire continuance of the trust, which would continue during the lifetime of the said Esther Barnett. The contention of appellant is that the agreement had reference to nothing except the commissions to be charged upon the income of the trust estate. It is not contended by appellant that, if it had made the contract claimed by the appellees, it would be entitled to any compensation other than that referred to in the memorandum heretofore copied; but it is strenuously insisted that said agreement referred only

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to the commission upon the income received as aforesaid, and that it is entitled to commission upon the corpus of the estate remaining in its hands at the time of its resignation. Without attempting to recite the testimony introduced, we have reached the conclusion, taking all the facts and circumstances into consideration, as well as the direct testimony, that the judgment of the court below upon the question of fact should not be disturbed. This being true, it is unnecessary to discuss the law applicable to compensation of trustees.

As to the contention of appellees on their cross petition, it is sufficient to say that, taking into consideration the services rendered, and all other circumstances in the case, we are not disposed to reverse on the cross appeal.

For the reasons indicated, the judgment on the original and on the cross appeal is affirmed.

KEETON v. STATE.

(Supreme Court of Arkansas. Feb. 8, 1902.)

ROBBERY—INDICTMENT—ALLEGATIONS—SUFFICIENCY.

An indictment for robbery, which alleges that accused did feloniously take from the person of the prosecutor certain property, is sufficient to charge the crime, without an allegation that the accused did steal, take, and carry away the property.

Appeal from circuit court, Newton county; Elbridge G. Mitchell, Judge.

Ed Keeton was convicted of robbery, and he appeals. Affirmed.

The appellant, Ed Keeton, was indicted for robbery at the July term, 1901, of the Newton circuit court, charged to have been committed by feloniously and violently taking \$35 from the person of Frank Carleton. The indictment is in the following language: "The grand jury of Newton county, in the name and by the authority of the state of Arkansas, accuse Ed Keeton of the crime of robbery, committed as follows, to wit: The said Ed Keeton, in the county and state aforesaid, feloniously and violently from Frank Carleton, by putting him, the said Frank Carleton, in fear, did take \$30 silver coin, of the value of thirty dollars, five dollars paper money, of the value of five dollars, from the person of him, the said Frank Carleton, and against his will, the same being the property of Joe Villines and Frank Carleton, partners under the firm name of Villines and Carleton, against the peace and dignity of the state of Arkansas." Defendant demurred to the indictment, his demurrer was overruled, and he was put on trial, convicted, and sentenced to the penitentiary for four years. The defendant moved the court for a new trial, and assigned as error the overruling of his demurrer to the indictment, the admission of certain evidence, and the court's instructions to the jury. His

motion for a new trial was denied, and proper exceptions were saved. Defendant appealed to this court.

Chew & Fitzhugh, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

HUGHES, J. It is conceded by the appellant that there was no error in the court's instructions, and that the evidence in the case is sufficient to support the verdict. He objects because he says the indictment is insufficient in this: that it does not charge that defendant "did steal, take, and carry away." He contends that the language of the indictment does not charge a robbery, but only a trespass. Robbery is larceny, with the aggravating circumstances of taking by force and putting in fear from the person of another, and an indictment for robbery must charge larceny. "Larceny, by the common law, is the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another." 3 Inst. 107. "The felonious taking and carrying away of the personal goods of another." 4 Bl. Comm. 229. If one take from another personal goods, and carry them away, without the felonious intent, it would not be larceny. But when done feloniously, or with felonious intent, what else can it be but larceny? Under our law, a felony is a crime punishable by death or imprisonment in the penitentiary. Sand. & H. Dig. c. 48. We think the words, "feloniously did take from the person," etc., as used in the indictment, import stealing *lucri causa*, and an asportation, with intent to deprive the person in the lawful possession of the property in the goods. It is true that "the formal allegation in an indictment for larceny should be that the defendant did steal, take, and carry or drive away the property," as held in *Walker v. State*, 50 Ark. 532, 8 S. W. 939. But this is not saying that there can be no good indictment for larceny without these formal words. If the indictment charges, in effect, the same thing in other apt words, it is the same charge. In robbery there must be the same felonious intent as in larceny. "Felonious intent is always essential, and an instruction ignoring that element is ground for reversing a conviction." *Com. v. White*, 133 Pa. 182, 19 Atl. 350, 19 Am. St. Rep. 628. In this indictment that element is directly charged to have existed at the time of the commission of the crime. In the case of *Boles v. State*, 58 Ark. 35, 22 S. W. 887, the indictment charged that the said Lee Boles and Berle Terry, in the said county of Carroll, in the state of Arkansas, on the 10th day of July, 1892, unlawfully, forcibly, violently, and by putting in fear, did take from the person and possession of one R. A. Martin one United States treasury note, of the denomination and value of \$5.00, current and lawful money of the United States of America, * * * and the grand jury do accuse

the said Lee Boles and Berle Terry of the crime of robbery, against," etc. The judgment in this case was reversed on demurrer to the indictment, on the ground that it did not charge the ownership of the property. There was also a motion in arrest of judgment in the case, and the failure to mention in the indictment the ownership of the property was the only ground in the opinion of the court on which the indictment was held insufficient. It can hardly be supposed that if there had been other defects in the indictment the court would have passed them without mention on demurrer and motion in arrest. The indictment in that case was certainly no better than the indictment in this case. It did not have the word "steal," or "feloniously take" even, in it, but it was impliedly held sufficient, save for the omission of the allegation of the ownership of the property alleged to have been unlawfully, violently, and by putting in fear taken from the person, etc. In our opinion, it would be a technicality tending to defeat the ends of justice to hold this indictment insufficient because the word "steal" is not used in it, when it does charge that the defendant feloniously and violently, and by putting in fear, did take \$30, etc., from the person, etc. We think this was a good charge of robbery.

The judgment is affirmed.

BORDWELL et al. v. DILLS et al.

(Supreme Court of Arkansas. Feb. 8, 1902.)
INTOXICATING LIQUORS—PETITION FOR PROHIBITION—WITHDRAWING SIGNATURES.

A person signing a petition to prohibit the sale of liquor has no right to withdraw his name from the petition, without leave of court, after it has been filed.

Appeal from circuit court, Jackson county; Frederick D. Fulkerson, Judge.

Petition to prohibit the sale of liquor within three miles from a certain school house, by Laura J. Dills and others against Henry Bordwell and others. From a judgment of the circuit court affirming the judgment of the county court making the order prayed for, defendants appeal. Affirmed.

This was a local option proceeding, under section 4877, Sand. & H. Dig., as amended by subsequent acts. On appeal to the circuit court from the judgment of the county court making the order prayed for in the petition, the petitioners and those who had been made defendants agreed as follows: "That the findings of the county court of the matter and things herein stated are true, and are based upon testimony introduced at the trial of this cause as follows: (1) That there are 2,407 resident adult inhabitants within three miles of said school house; (2) that 1,400 names appear on the petition asking for prohibition; (3) that, of this 1,400 names, 80 persons are nonresidents of said district; (4) that seven persons

whose names appear on said petition died before the presentation thereof; (5) that 32 persons whose names appear on said petition signed more than once; (6) that 18 persons on said petition are minors; (7) that, excluding nonresidents, those who died before filing of said petition, those who signed more than once and minors, there remained on said petition 1,353 names." Defendants then undertook the burden of overthrowing the petitioners' majority of 149 appearing from the agreed statement of facts by showing that 317 of the persons whose names appear on the petition should be deducted therefrom by reason of an alleged notice given before the filing of the petition that they desired their names omitted therefrom.

After hearing the evidence, the court found as follows:

"(1) The petitioners have a majority of 149.

"(2) After petitioners had presented their petition, defendants filed application of 287 persons whose names appear upon the prohibition petition, asking that their names be withdrawn from such petition, and not counted herein. That the petition for prohibition was presented to the county court on December 31, 1900, and said applications were filed January 1, 1901, and after the petitioners had presented their petition and rested their case.

"(3) Defendants' attorneys caused notices, which are on file in this cause, to be delivered to Hillhouse, one of the attorneys for plaintiffs, and also to the judge of the county court, in vacation, and same were delivered at the times noted on the back. The notices delivered prior to the filing of the petition on the 24th of December did not contain exceeding 138 names of persons who appeared on the application to withdraw.

"(4) That of the 287 persons whose names appeared on the application of withdrawal, not exceeding 100 of such persons did of themselves give notice for them, or make demand upon Hillhouse or upon any other person to have their names erased therefrom, or to request any person having a petition for prohibition in his possession to erase his name from such petition, or otherwise indicate a desire not to have such name counted.

"(5) The attorneys for defendants had no authority to represent any more than 100 persons mentioned in the foregoing paragraph, No. 4.

"(6) That the applications filed January 1, 1901, to have names removed from the prohibition petition, were heard and denied by the chancery court, and in this court the defendants asked that such names on said application be removed from said petition as a matter of right, only."

Thereupon the court declared the law to be as follows:

"(1) A person signing a petition for prohibition has the right to have his name erased

from such petition at any time before the same is presented to the court.

"(2) The time of presentation mentioned in the foregoing declaration means the time the court begins a judicial investigation of the matter prayed for in such petition, and not the time of the mere filing of such petition.

"(3) Before presentation, any one desiring to have his name removed or omitted from the prohibition petition, after signing the same, may do so, by requesting the person having possession and control thereof to permit him to erase his name therefrom, and if, upon such request, he be not permitted to have such petition for such purpose, such request, although refused, will be sufficient to entitle him to have his name omitted from such petition as a matter of right.

"(4) This may be done by the person asking to have his name erased, or one may do so at his request.

"(5) The notices given in this case were sufficient, in form and substance, to entitle the persons whose names appeared thereon to have their names omitted from such petition, where each notice was given by them, or some one at their request, before the presentation of the petition.

"(6) Where an attorney has not been requested by a person to represent him in a matter, the attorney cannot assume such authority. The fact that defendants employed agents to go out among petitioners and request them to withdraw their names from such petition, of itself, will not prevent such petitioners from withdrawing their names, if they, in good faith, desire it."

Stuckey & Stuckey, Gustave Jones, Jos. M. Stayton, J. M. Bell, and Rose, Hemingway & Rose, for appellants. J. W. Phillips, G. A. Hillhouse, and S. D. Campbell, for appellees.

WOOD, J. (after stating the facts). Appellants contend that one who has signed a petition against license may change his opinion at any time before the final order of the court, without giving any reason for so doing, and that, if he notifies the court of his change of mind and dissents from the petition before the final order, it is sufficient, however informal the notice may be. Appellees contend, on the other hand, that no petitioner has the right to withdraw his or her name from the petition after it has been filed in the county court, unless his or her signature was obtained by fraud, or through ignorance on the part of the signer.

The first, third, and fourth propositions of law, as declared by the learned trial judge, are correct. The second is not the law. In *Williams v. Citizens*, 40 Ark. 290, it is said: "If the original signatures were obtained intelligently and without fraud, and have not been erased before presentation, or afterwards, by leave of the court, for cause, they

fulfill the requirements of the statute." In *McCullough v. Blackwell*, 51 Ark. 164, 10 S. W. 261, it is said: "The presentation of the petition is in the nature of an election. When the county court has acted, the votes have been cast and the election returns made." The word "presentation," as used in these decisions, should be construed to mean the filing of the petition. Treating the proceeding as analogous to that of an election, as is done in *McCullough v. Blackwell*, supra, the ballots are cast when the petition containing the signatures is filed with the clerk of the county court. Continuing the analogy, when the county court begins the investigation to determine the result the polls are closed and the count of the ballots has begun, and when the order is entered the returns are made. Before the filing with the clerk, where petitioners adopt that method of presentation to the judge, the petition is in the power of the signers. Each signer may control his signature. It is not yet a petition in which the public is interested. The matter is as yet in fieri, so to speak. But when the petition has been filed with the county court, it has been then delivered, presented to the court, made a court record. The public has now become interested in it. The jurisdiction of the subject-matter has now attached. In the absence of something in the statute permitting it, no individual signer, nor, indeed, all the signers, could thereafter withdraw or erase their names from the petition without leave of the court. And the court should not grant such leave without some good cause shown therefor. He who voluntarily sets on foot a proceeding for the enforcement of a salutary police regulation in any community should not be permitted to capriciously undo his work. He should not be allowed to play fast and loose with the interests of society. The law makes no provision for protests and remonstrances, for signing and countersigning. It only provides for the petition. See the following authorities: *Williams v. Citizens*, supra; *McCullough v. Blackwell*, supra; *Wilson v. Thompson*, 56 Ark. 110, 19 S. W. 321; *State v. Gerhardt* (Ind. Sup.) 44 N. E. 469, 33 L. R. A. 325; *Carr v. Boone*, 108 Ind. 241, 9 N. E. 110; *Sutherland v. McKinney*, 146 Ind. 611, 45 N. E. 1048; *Orcutt v. Reingardt*, 48 N. J. Law, 337; *Grinnell v. Adams*, 34 Ohio St. 44; 17 Am. & Eng. Enc. Law (New Ed.) p. 248.

The judgment of the court was correct, on the facts, even if the law were as favorable to appellants as the circuit court declared in its second proposition. Affirm.

MURRELL v. HENRY et al.

(Supreme Court of Arkansas. Feb. 8, 1902.)

SUBROGATION—PLEADING—DEMURRER.

1. The secretary of a building association was bound by bond to save it harmless against

mistakes made by her in payment of money. Her complaint showed that while so acting she, by mistake, overpaid a defendant \$45 on a loan; that the sum was secured by mortgage, etc.; that, in performance of her bond, she paid the sum named to the association. Held to clearly entitle her to be subrogated to the rights of the association under the note and mortgage as to the \$45.

2. Where a good cause of action is defectively stated, the defect cannot be reached by demurrer, though a motion to make it more definite and certain would be proper.

Appeal from Pulaski chancery court; Thomas B. Martin, Chancellor.

Action by Mary B. Murrell against T. Frank Henry and others. Judgment sustaining a demurrer to the complaint, and plaintiff appeals. Reversed.

Blackwood & Williams, for appellant.

BATTLE, J. Appellant's cause of action was defectively stated in her complaint. Construing the complaint liberally, as our statutes provide, we think it may be said to state facts showing that appellant was entitled to be subrogated to the rights of the Ladies' Building Association, Perpetual, under the note made to T. F. Henry, and under the mortgage executed by the appellees. She was secretary of the building association, and was bound by a bond in the sum of \$10,000 to hold and save the building association harmless against all mistakes made by her in the payment of money. It appears from the complaint that while she was such secretary, and acting as such, she paid of the moneys of the association, on the amount secured by the mortgage, \$45.45, by mistake, more than appellees, or either of them, were entitled to, and that this sum was secured by the mortgage, and that, in performance of her bond, she paid to her principal the sum so paid by mistake. In paying the same she was no volunteer, but was acting in the discharge of an assumed obligation, and is clearly entitled to be subrogated to the rights of the building association under the note and mortgage, as to the amount and the interest thereon.

The defects in the complaint could have been reached by motion to make it more definite and certain, but not by demurrer. *Bushey v. Reynolds*, 31 Ark. 657; *Bush v. Cella*, 52 Ark. 378, 12 S. W. 783; *Sweet v. Lumber Co.*, 56 Ark. 629, 20 S. W. 514.

So much of the decree of the chancery court as sustains the demurrer of appellees to the complaint is therefore reversed, and the cause is remanded, with instructions to the court to overrule the demurrer, and for other proceedings.

CASTLE v. HILLMAN.

(Supreme Court of Arkansas. Feb. 8, 1902.)

QUIETING TITLE—REMOVAL OF CLOUD—EQUITABLE RELIEF—TRANSFER OF CAUSE.

Where defendant, in an action for realty, denies plaintiff's ownership, and seeks to re-

move cloud cast on his title by certain fraudulent conveyances, the relief being exclusively equitable, it is error to refuse to transfer the cause to the chancery court.

Appeal from circuit court, Arkansas county; George M. Chapline, Judge.

Action by C. M. Hillman against A. B. Castle. From a judgment for plaintiff, defendant appeals. Reversed.

Jas. A. Gibson and John F. Park, for appellant. Hill & Auten, for appellee.

BATTLE, J. On the 7th day of May, 1897, C. M. Hillman brought an action in the Arkansas circuit court against A. B. Castle to recover possession of block 103, in the town of Almyra, in Arkansas county, in this state. He alleged in his complaint that he was the owner of the block and entitled to the possession of it. He traces the chain of his title to F. H. Leslie, the common source of title to both parties to this action, and alleges that Leslie, on the 28th of October, 1891, conveyed the block to the Central Town Site Company; that it, on the 26th of December, 1894, conveyed the block to Sallie L. Price, and that she conveyed it to the plaintiff on the 30th day of January, 1896; and further alleged that the defendant was in unlawful possession of the same.

On the 3d day of November, 1897, the defendant answered; and on the 3d day of April, 1899, filed an amended answer and cross complaint, in which he denied that plaintiff was the owner of the block sued for, or entitled to its possession, and that he was in unlawful possession of the same; and alleged that Thomas H. Leslie, being the owner thereof, for a valuable consideration sold and conveyed it, on the 5th day of January, 1892, to W. H. Garrett; that, the block being improved, Leslie placed Garrett in the actual possession of the same; and he so remained until the 24th day of November, 1894, when he sold and conveyed it to the defendant.

And he further alleged as follows: "Defendant says it may be true that the block here in controversy is contained in a deed from the said Thomas H. Leslie to the Central Town Site Company along with 400 or 500 other lots and blocks, but defendant alleges that, if same is contained in said deed as alleged by the complaint, it was inserted surreptitiously by the draftsman of the deed, and the said Leslie signed the same without the knowledge that the block in controversy was contained in said deed; that said Leslie will so testify on the trial of this cause. Defendant says that it may be true that said block is contained in the conveyance from the said Central Town Site Company to Sallie L. Price, but, if so, same was the result of the fraudulent insertion of the same in the deed from the Central Town Site Company as aforesaid.

"Defendant admits that the said plaintiff holds a deed from the said Sallie L. Price

for the S. W. $\frac{1}{4}$ section 26, township 8 S., range 4 W.; but defendant avers that at the time of the purchase of the said land it was distinctly understood and agreed by and between the said Thomas H. Leslie and the Central Town Site Company, and the Central Town Site Company and Sallie L. Price, and the said Sallie L. Price and the said plaintiff, Hillman, that no lot or block that had been sold or disposed of in any manner whatever, or that was occupied by any bona fide holder, and situated in the said S. W. $\frac{1}{4}$ section 26, township 8 S., range 4 W., was to be included in said sale, and the block in controversy was expressly omitted from said deed; that before the signing of the said deed the plaintiff, under the pretext of wanting to examine said deed, asked permission to look over same, and carried same away, and had a new deed drafted, in which he inserted the whole of the S. W. $\frac{1}{4}$ of section 26, including defendant's block, and represented to the said Sallie L. Price that the deed he returned was the same he had carried away, or that it contained the same land only; that, not expecting the plaintiff to practice any fraud or imposition on her, without examining the same, she signed said deed, not knowing or suspecting that said block was contained in said deed. Defendant alleges that he believes that the said plaintiff perpetrated the fraud aforesaid on his said vendor for the purpose of trying to obtain an unconscionable advantage over this defendant."

Other allegations were made in the answer. The defendant asked "that T. H. Leslie, the Central Town Site Company, and Sallie L. Price be made parties to this suit; that the amended answer be taken as a cross bill against plaintiff, C. M. Hillman, and the parties aforesaid; that they be required to answer the same; that this cause be transferred to the chancery court for hearing; that plaintiff's pretended title to the block aforesaid be canceled, set aside, and held for naught, and the cloud cast thereby on defendant's title be removed, and his title to said block 103 be quieted, and for all other relief."

On the motion of the defendant, the cause was transferred to the Arkansas chancery court. Thereafter the plaintiff filed an amended answer to the defendant's cross complaint in the chancery court, and denied the allegations therein as to fraud, and moved that the cause be remanded to the circuit court, which the court sustained, and the defendant excepted. Afterwards, on the 13th day of November, 1899, defendant filed a motion to transfer the cause to the chancery court, alleging that the answer and cross bill tendered an issue that was cognizable alone in the chancery court, and also that a court of law could not grant the relief prayed for, either by the amended answer and cross bill or by the plaintiff's answer to defendant's cross bill. This motion was

overruled by the circuit court, and the defendant excepted.

"The cause was then submitted to the court, sitting as a jury, and he rendered judgment for plaintiff, awarding him the possession of the block in controversy. Defendant excepted, filed his motion for a new trial, because the findings of the court were contrary to both the law and the evidence, and also because the court erred in overruling his motion to transfer to equity; which motion for a new trial the court overruled, to which the defendant excepted, asked and obtained sixty days in which to prepare and file his bill of exceptions, which he did, and appealed to this court."

Appellant sought to remove clouds from his title to the block in controversy. According to the allegations of his cross bill, the legal title to the block was conveyed by T. H. Leslie to the Central Town Site Company, and by it to Sallie L. Price, and by her to the appellee; yet no one of the parties sold or intended to convey the same to the grantees, the conveyance thereof being procured by fraud, without the knowledge or consent of the grantors. He asked that these parties be made parties to the action, and sought to remove the cloud cast upon his title by the fraudulent conveyances. This relief is purely and exclusively equitable, and the motion to transfer the cause to the chancery court should have been granted. A careful examination of the evidence adduced at the trial in the circuit court confirms us in this opinion.

The judgment of the circuit court is therefore reversed, and the cause is remanded, with instructions to the court to transfer the cause to the chancery court.

WOOD, J., did not participate.

HAYS et al. v. COMSTOCK-CASTLE STOVE CO. et al.

(Supreme Court of Arkansas. Feb. 1, 1902.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—
ASSIGNEE'S BOND—ACTION—JURISDICTION—
JUDGMENT—APPEAL—ABSTRACT.

1. The bond of an assignee for the benefit of creditors, conditioned for the proper performance of his duties, is joint and several, and any one of the parties thereto may be sued alone.

2. A cause of action for the breach of a bond of an assignee for the benefit of creditors is transitory, and not local; and an action against a surety may be brought in the state in which he is found, though it is not the state in which the bond was given.

3. Where an appeal requires a consideration of the evidence, and no abstract thereof is filed in accordance with Sup. Ct. Rule 9, requiring the abstract to set out the material facts, the appeal may be dismissed.

4. A judgment in an action on the bond of an assignee for the benefit of creditors, in which only a portion of the creditors accepting the assignment are parties plaintiff, should only be for the damages suffered by the creditors who are parties, and not for the damages

to all the creditors, even though the action is on behalf of the plaintiffs named and all other creditors who may join in the action.

Bunn, C. J., dissenting.

Appeal from circuit court, Miller county, in chancery; Joel D. Conway, Judge.

Action on a bond by the Comstock-Castle Stove Company and others against G. A. Hays, as administrator of the estate of W. H. McCartney, deceased, and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

This action was brought by complaint in equity in the Miller county circuit court, in the state of Arkansas, by the appellees, accepting creditors, against the appellants, as sureties upon the bond of S. B. Andrews as assignee of J. C. Whitener, executed in the state of Texas. The complaint charges that their claims were proven as required by law against the estate of Whitener in the hands of the said assignee; that they accepted the terms of the assignment, and are entitled to their pro rata share of said estate; and that not all the creditors proved their claims against said estate, but some refused to accept said assignment; that the claims of these creditors who did accept and are entitled to share benefits under said assignment amount to \$24,200; that a large amount of assets (about \$43,000) came to the hands of said assignee; that, instead of the assignee administering the estate according to law, the assignee sold the same, and squandered the proceeds, and failed to account to any of the creditors for the proceeds of any of said property; and that he converted the proceeds to his own use,—stating they were damaged by the failure of the assignee to properly handle, manage, and administer the proceeds of said estate according to law in 50 per cent. of their claims. "Plaintiffs further state that it is provided by the statute laws of the state of Texas, among other things, that there may be a general assignment of all his real and personal estate that is not by law exempt from execution, made by an insolvent debtor, or one in contemplation of insolvency, for the benefit of such creditors only as will consent to accept their proportion of shares of his estate and discharge him from their respective claims. In such case, benefits of the assignment shall be limited and restricted to the creditors consenting thereto, and such debtors shall thereupon stand discharged from all other liabilities to such creditors on account of their respective claims, provided that such debtor shall not be discharged from liability to the creditor who does not receive as much as one-third of the amount due and allowed in his favor as a valid claim against the estate of such debtor. It is further provided by the statute laws of said state that the creditors of the assignor consenting to said assignment shall make known to the assignee their consent to accept under said assignment within four months after the assignee shall

have published the notice required by the laws of the state of Texas of his appointment. The said statute laws of the state of Texas further require said assignee to execute a bond with sureties to be approved by the judge of the county court of the county in which said assignee resides, or by the judge of the district court of the judicial district in which said county is situated. Conditioned that he will faithfully discharge his duties as such assignee, and that he will make proper distribution of the net proceeds of the assigned estate among the creditors thereto, which bond shall be payable to the state of Texas, and shall be filed with the clerk of the county in which said assignee resides, and shall accrue to the benefit of the assignor and the creditor or creditors, who may maintain action thereon against the said assignee and sureties in his own or their own names, jointly or severally, for any violation of said law by reason of which such assignor or creditors shall sustain damages, as the statute laws of the state of Texas fully set out in the Revised Statutes of Texas of 1895, published by authority of said state, entitled: "Title 8. Assignment for Creditors." Pages 48, 49, 50, 51, and 52 are hereby referred to and pleaded as part of the complaint. The said statutes of the state of Texas were in full force and effect in the state of Texas at the time of making this assignment hereinbefore mentioned, and said laws have never been amended or repealed."

The assets, as assigned by the said J. C. Whitener, and delivered to the said S. B. Andrews as assignee, were as follows:

Merchandise, hardware, furniture, undertaking goods, etc.....	\$18,765 15
Livery stable stock, horses, carriages, harness	4,162 50
Sundry book accounts, notes, etc..	12,287 35
Real estate	6,800 00
	<hr/>
	\$43,185 00

The liabilities of the said J. C. Whitener were as follows:

Sundry accounts and notes.....	\$38,604 14
Mortgages on real estate.....	5,580 00
Mortgages on livery stock.....	3,000 00
	<hr/>
	\$43,184 14

The assignment and the bond were made exhibits to the complaint.

The complaint further alleged that by reason of the failure of said assignee to settle with them, as stated, they had been damaged 50 per cent. of their respective claims; that said J. C. Whitener and the said defendants have thereby become indebted to them (the plaintiffs), and have become jointly and severally liable to pay them the amount of their damage, respectively. It further stated that said S. B. Andrews is a resident of the state of New Hampshire, and cannot be served with process either in this state or the state of Texas.

The defendants filed a demurrer to the complaint on the grounds: "That said plain-

tiffs do not state facts sufficient to constitute a cause of action: First, that fraud is not specifically set out and charged therein; second, that said complaint is directed against the sureties on principal's bond, without including Andrews himself, the principal in said bond; third, that said Andrews was an officer, qualified, and acting as such, under the law of the state of Texas, and resided in said state at the time, and has never qualified and acted as such under the laws of the state of Arkansas, nor resided in said state as such; fourth, that said bond is executed to the state of Texas, and said complaint fails to make said state a party, or bring said suit in the name of said state for the use of plaintiffs; fifth, that said cause is instituted and prosecuted by individuals out of the jurisdiction of the courts of the state of Texas, and this court has no jurisdiction thereof." The demurrer was overruled, and they excepted.

Defendants then filed the following motion, which was overruled, to which they excepted:

"Come the defendant G. A. Hays, as administrator of the estate of W. H. McCartney, deceased; B. M. Foreman, as administrator of the estate of J. Deutschman, deceased; H. R. Webster; H. F. Briley; and W. B. Kizer,—and move the court for an order on plaintiffs to make their complaint more definite and certain: First, because said plaintiffs charge fraud and misconduct on the part of these defendants' principal, S. B. Andrews, in general terms; second, because said plaintiffs do not allege any particular act of misconduct upon which defendants can make specific answer or denial; third, because said charges are too general, vague, and uncertain for defendants to answer to, or take proof upon. J. D. Cook, Attorney for Defendants.

"Filed before answer, this 18th day of March, 1896. J. D. Sanderson, Clerk."

Defendants then made answer, the gravamen of which is that an action on the bond was a local action, and that the court in Arkansas had no jurisdiction; that courts in Texas only had jurisdiction; that only part of the creditors had joined in the action, and that no final judgment could be rendered in this case without jurisdiction of the bond, and creditors' claims filed were in a foreign jurisdiction. They deny that the assets had not been properly handled owing to the neglect and default of Andrews, the assignee, and deny their liability, and allege that Andrews made full report and settlement of his accounts as assignee to the court in Texas, where he was required by laws of that state to report, and that all balances in his hands were turned over to the clerk, and his receipt taken therefor, and that no exceptions were filed to his final settlement. The court gave judgment for the appellees for the full amount of what it found to be the default of the assignee, and the damages sustained by

all the creditors by reason thereof. The case comes here by appeal.

J. D. Cook, for appellants. Oscar D. Scott and W. H. Arnold, for appellees.

HUGHES, J. (after stating the facts). The court is of opinion that the bond was a joint and several obligation and contract, and that the plaintiffs had the right to sue thereon without joining others. The provisions of the bond warrant this construction of it.

The action was transitory, and not local. It could be brought here or in Texas, in the proper forum. Its obligation was a contract, and its breach gave a right of action against the defendants, wherever they might be found. The court was not in error on the question of jurisdiction, and the right of the appellees to sue in the court in Miller county, in Arkansas.

There is no abstract of the evidence in the case by the appellants, and for this reason the judgment should be affirmed, under rule 9 of this court; but we have discovered that the judgment for the appellees is for the whole amount of damages suffered by all the creditors, whereas only part of the creditors are plaintiffs. The judgment, therefore, should have been for their pro rata share of what all the accepting creditors were entitled to recover, if they were plaintiffs. Some of the creditors have not been made parties. Though the suit was brought in behalf of the plaintiffs named and all creditors who might join in it, still it is not like a suit to uncover property fraudulently conveyed, where the filing of the bill gives a lien to the plaintiffs because of their diligence. This was a fund in court to be equally distributed pro rata between creditors, and plaintiffs were entitled to no more than their share of it.

For this error the judgment is reversed, and the cause is remanded, with instructions to decree for plaintiffs for their pro rata share of the damages in accordance herewith.

BUNN, C. J., dissents.

MATTHEWS et al. v. KIMBALL et al.,
Com'rs.

(Supreme Court of Arkansas. Feb. 1, 1902.)
MUNICIPAL PARKS—SPECIAL ASSESSMENTS—
AUTHORITY TO LEVY—PROPERTY SUBJECT—
SPECIAL BENEFITS—IMPROVEMENT DISTRICTS—ESTOPPEL.

1. Sand. & H. Dig. § 5321, authorizing any city of the first or second class or any incorporated town to assess all real property within such city, or any district thereof, for grading or otherwise improving streets and alleys, constructing sewers, or making any local improvements of a public nature, authorizes an assessment for park improvements, as the language is broad enough to include any class of improvements which will enhance the value of the real estate in the city or district assessed therefor.

2. Const. art. 19, § 27, authorizing special assessments for local improvements in cities and towns, under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected, does not limit the power of the municipality to make a special assessment for park purposes to the property which actually touches the park grounds.

3. The inclusion of real estate in an improvement district by city ordinance is prima facie evidence that the property will be benefited by the improvement for which the district is created, and an assessment thereof will not be set aside for want of benefit, in the absence of evidence to establish such fact.

4. A city or incorporated town which, under Sand. & H. Dig. § 5321, is authorized to assess all real property within such city, or within any district thereof, for improving streets and alleys and the construction of sewers, or the making of any local improvements of a public nature, may include the whole area of the city in one improvement district; the organization of such districts being in the sound discretion of the city.

5. A property owner joining in the petition of 10 asking the organization of a park improvement district, or who is one of the majority petitioning for an assessment for such improvement, is estopped from questioning the organization of the district or the validity of the assessment.

Battle and Riddick, JJ., dissenting.

Appeal from Pulaski chancery court; E. B. Pierce, Special Chancellor.

Injunction by E. D. Matthews and others against E. W. Kimball and others, as commissioners of the city park improvement district of Little Rock, to restrain the collection of certain special assessments. From a decree in favor of the defendants, the plaintiffs appeal. Affirmed.

Rose & Coleman and Ratcliffe & Fletcher, for appellants. Whipple & Whipple and E. W. Kimball, for appellees.

BUNN, C. J. The appellants by this proceeding seek to enjoin the defendants, as commissioners of the city park improvement district of Little Rock, from proceeding further to collect certain assessments levied upon their real property in said district,—among them, the last assessment made under the ordinance of the city council. It appears to be admitted in the agreed statement of facts that the district was properly organized on the petition of 10 resident landowners, and that, within proper time after due notice given, the district was formed and commissioners were appointed, and that they in due time qualified and made the necessary plans and specifications and estimates of the costs of the improvement, and that the city council, upon the petition of a majority in value of the owners of property in the district, passed the necessary ordinance assessing the real property as required by law, and that in fact the district was properly organized and the assessments made. The Honorable E. B. Pierce, sitting as special chancellor, heard the cause, and decreed against the appellants on all the controverted points, and they appealed to this court.

One of the more serious questions raised by the proceedings in the case is whether or not the statute includes public parks, and such like, as improvements for which assessments upon the real estate of a district may be made by the city council in the manner provided for local improvements. The appellants contend that under the familiar rule of construction, which confines the meaning of additional descriptive expressions to the class to which preceding specific terms and names belong, the improvements contemplated by the act are only streets, alleys, sewers, and such like, or similar improvements. This is the doctrine of ejusdem generis. It would be difficult to say what other like improvements there are or can be in a town, than streets, alleys, and sewers; and the contention of appellees that these descriptive names exhaust the particular class we think is well founded, and that public parks are not of that class. While it is true parks contain streets and drives, yet these are not to be used for all purposes for which ordinary streets are intended and may be used; and still more might be said to distinguish parks from sewers, and take them out of the class to which the latter belong. The statute on the subject, digested as section 5321, Sand. & H. Dig., is as follows, to wit: "The council of any city of the first or second class, or any incorporated town, may assess all real property within such city or within any district thereof for the grading or otherwise improving streets and alleys, constructing sewers or making any local improvements of a public nature, in the manner hereinafter set forth." This language is certainly broad enough to include any kind and class of improvements which will enhance the value of the real estate of the particular district; that is, benefit it. In construing this statute, this court said in *Crane v. City of Siloam Springs*, 67 Ark. 36, 55 S. W. 956: "Provisions for local convenience, like water, light, public parks for recreation, and other public accommodations of the same kind, are some of the matters which are furnished or provided for by municipal corporations in their quasi private capacity, in which they act not as agencies of the state, but exclusively for the benefit of their own inhabitants. It is in respect to such matters of local concern that the largest freedom of action has been allowed municipal corporations. The case, says Judge Cooley, must be extraordinary and clearly exceptive to warrant any court in declaring that the discretion has been abused and the legislative authority exceeded."—citing *Cooley, Tax'n* (2d Ed.) §§ 145, 688, 689; *State v. Williams*, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047. The only limitation as to the character of the improvement is that it must be a local improvement and of a public nature; that is, local to the city and the inhabitants thereof, and public to the extent

that it shall be free to the public under such proper regulations as may be adopted for its control, management, and preservation by the city council. The text-books and their citations sustain the doctrine that public parks are proper subjects of city taxation; and it is even held that it is proper to call into exercise the right of eminent domain, in order to acquire the necessary ground for the same. 2 Dill. Mun. Corp. (2d Ed.) § 598. The proper exercise of discretion by the council is conclusive upon the courts to that extent. 2 Dill. Mun. Corp. (2d Ed.) § 600.

The next very important question arising from the pleadings is whether or not the property of complainants, which does not actually adjoin the grounds included in the park, is assessable under the provisions of section 27, art. 19, of the constitution of the state, which reads as follows, to wit: "Nothing in this constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements, in towns and cities, under such regulations as may be prescribed by law; to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. But such assessments shall be ad valorem and uniform." It is evident that this section confers no new powers upon the legislature, but the first clause of it is simply a recognition of power already existing; that is, inherent under the grant of general municipal powers. Section 255, Tied. Mun. Corp. The second and last clause contains restrictions which, of course, must be observed, notwithstanding the inherent powers under the general grant of municipal power. In the discussion of this provision of the constitution, the word "adjoining" is made the controlling word, in the endeavor to determine whether or not any real property in the district is assessable, except that which absolutely touches the park grounds. Such is the contention of the appellants. On the contrary, the appellees contend that all the property in the district is adjoining, in one sense, the locality to be affected, and is therefore assessable. The etymological meaning of "adjoining" is "touching or contiguous to"; and there does not seem to be any other meaning to the word, when used in this sense. But what effect, in the practical affairs of life, the close relationship or connection of associate words or attendant circumstances may have upon its meaning, to give it a different shade of meaning, we cannot say. It is sufficient for us to say, however, that the lexicographical meaning of the word "adjoining" is "close to," "near to," "contiguous." See Worcester's Dictionary. It is thus given the same meaning as "adjacent," which is more elastic than "adjoining," where used in its etymological sense. In the case of *Vestal v. City of Little Rock*, 54 Ark. 825, 15 S. W. 892, 11 L. R. A. 778, in construing the word

"contiguous" (which, all must agree, is, as nearly as may be, synonymous with "adjoining") in its employment to define what land may or may not be annexed to a city or town, the court said: "To sustain their first ground for reversal, appellants rely on the fact that the city is on one side, and a part of the lands included in the order is on the other side, of the Arkansas river. But we do not think this fact conclusive that the lands are not contiguous, within the meaning of the act. The river is included in the land annexed, and is therefore not a break in the contiguity, nor an insuperable barrier to a complete amalgamation of the communities upon its opposite banks,"—citing authorities. Again, in the case of *City of Little Rock v. Katzenstein*, 52 Ark. 107, 12 S. W. 198, where a lot did not at all touch the locality of the improvement itself, but separated from it by another assessable lot, this court said: "The action of the city council in including property in an improvement district is, except when attacked for fraud or demonstrable mistake, conclusive of the fact that such property is 'adjoining' the locality to be affected by the improvement, within the meaning of the constitution,"—citing the section now under consideration. In the case at bar there is no break in the continuity of the assessable lots or parcels of ground from the park grounds to the outermost boundaries of the district, which is the city. Therefore, according to *City of Little Rock v. Katzenstein*, supra, all is adjoining the locality to be affected. Again, it is undoubtedly true that, by the erection of buildings, the planting and training of trees, the sowing and setting of grasses and flowers, and the like, upon the park grounds, the park itself is affected in a merely physical way, and in that sense the park may be the "locality to be affected." But that is not, perhaps, the effect spoken of in the law on the subject, in connection with the levying of assessments for local improvements on the property outside the park, belonging to private individuals or corporations liable to such assessments under the law. It is the locality formed by the assessable property, in all probability, which is to be enhanced in value by the making of the improvement, that constitutes the locality to be affected; and this, of course, is all the property in the district which is otherwise assessable for such purposes. Such is the property "affected," or may be, within the meaning of the constitution, because it is the property benefited, and that alone can justify the assessments. Now, it is evident that, under the doctrine contended for by the appellants, no park could be built; for the revenue arising from an annual assessment for 20 years of 1 per cent. would be, in all conceivable cases, utterly inadequate to purchase the necessary grounds and improve them into a park. The legislature, in authorizing the formation of improvement districts for the purpose of

making public parks, doubtless took into consideration all the meanings that might be given to words and phrases used in the constitution, and in order to make its action of practical use, and not utterly futile, probably ignored the theory contended for by the appellants, and acted upon some one of those referred to above, or some other that we may not have named. That being the case, and it being purely a legislative matter, the doubts that may arise as to the constitutionality of its action, under a familiar rule, must be resolved in favor of the validity of the same. Neither is it clear how the city council, in conforming its acts to the act of the legislature, could be guilty of proceeding without the authority of law, in view of the construction this court has put upon the constitution and the statutes. We conclude that the property of appellants was properly assessable, and that there is a lien on the same for the assessments.

There is another question raised by the appellants which we will consider, and that is whether or not their property was benefited by the contemplated improvement. This contention doubtless has for its origin the decision of the supreme court of the United States in the recent case of *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. That was a peculiar case, indeed,—involving a mixture of questions arising both from an exercise of the right of eminent domain, and the law imposing local assessments for the purpose of not only paying the expenses of street improvement, but for paying for the ground condemned for a street. The condemned property and all the property assessed was the property of a woman, and she was thus made to pay not only for the improvement of the street, but to pay herself for the street itself. The case was reversed, of course; but, in assigning grounds for the reversal, many things were said that gave rise to the greatest confusion. It was not long, of course, before the soundness of the opinion in that case began to be called in question, and the opinion sharply criticised, not only in the state courts, but also in the federal courts; and a half dozen or more of these cases have since been appealed to the supreme court of the United States, and the decision of *Village of Norwood v. Baker*, supra, has been so weakened that it is really of little practical force, as the law now stands, except in so far as it may be determined therefrom that in the enactment of state laws it must appear somehow, it matters little how, that the benefits to accrue to the property owner must be considered. This leaves the method of our constitution—the assessment according to value, and uniform—intact. Now, it goes without question that the inclusion of a piece of real property in an improvement district by city ordinance is at least *prima facie* proof that it will be benefited by the proposed improvement; and,

there being no attempt to show to the contrary in this case, the finding must be that the property is assessable. In fact, it is manifest, from the universal opinion in favor of the proposition that such property is always benefited by such improvement, the attempt to show to the contrary would be useless in all instances; for all men concur that such things add to the health, comfort, pleasure, and convenience of a town or city, and the inhabitants thereof. We need not repeat here what has been so often recently said by this court,—that the whole area of a city may be included in one improvement district; nor need we say that such is the plain meaning of the language of the legislative enactment from which we have quoted. The organization of districts is left to the sound discretion of the city or town council in every instance.

This, of course, affirms the decree in this cause, and makes it unnecessary, in the determination of this appeal, to say that, in our opinion, when it is found that one has joined in the petition of ten asking the organization of the district, or has become one of the majority in petitioning for the assessment to be made, that one is estopped from calling in question the organization of the district or the validity of the assessments. As to whether one who has paid voluntarily one or more of the assessments is thereby precluded from resenting the payment of the others, we do not say. As covering the whole ground, we adopt the decision of the special chancellor as our own, in addition to what we have said.

"Opinion of Special Chancellor.

"These cases were consolidated, and have been submitted together. It is agreed that the issues in each case shall be identical, and that any amendment to the pleadings necessary to effectuate this agreement shall be treated and considered as made. The cases were submitted upon the pleadings and an agreed statement of facts.

"It appears: That on the 24th day of May, 1892, ten resident owners of real property in the city of Little Rock, and within the district to be affected, petitioned the city council to take the necessary steps toward the making of local improvements therein in the way of acquiring, improving, and maintaining a city park to be located in the said city and to be commonly known as 'Arsenal Grounds,' and bounded, etc., and within the limits of the proposed district. On the same day, and in accordance with said petition, the city council passed an ordinance laying off the 'whole of the territory comprised in the city of Little Rock' into an improvement district, and designated the same as the 'City Park District.' That within five days after the passage of the ordinance it was published as required by law. That within three months after the publication of said ordinance a majority in value of the owners of

real property within the district presented a petition praying that such improvements be made, designating the improvements, and that the costs thereof be assessed and charged upon the real property situated therein. That commissioners were duly appointed and qualified, and immediately formed plans for the improvements within the designated district, and reported their plans to the council. Upon the receipt of said report the council passed an ordinance assessing the cost of acquiring, purchasing, and improving the grounds mentioned in said report as a public park upon the real property in said district. That said ordinance was duly and within proper time published after its passage. That there has been realized from said assessment about the sum of \$75,000, of which sum \$35,000 was used in purchasing 1,150 acres of ground in Pulaski county, situated on what is known as 'Big Rock,' and adjacent to said city, which lands were given in exchange to the United States government for the park grounds, and that this method of acquiring the title to said park was contemplated and so understood at the time the petition for the assessment was signed, and \$40,000 has been expended in improving and maintaining said park, removing useless structures, grading, laying out drives and walks, planting trees and shrubs, ornamental trees and flowers, making an artificial lake, constructing a stable and band stand, and otherwise improving, beautifying, and benefiting the park. There was also introduced in evidence a statement showing the exact distance of each piece of property involved in this suit from the park, and showing, also, the assessed valuation of the same for the years 1891, 1893, and 1895. This statement was objected to as incompetent.

"On the 5th day of May, 1900, E. D. Matthews, on behalf of himself and such others as might see fit to join him, filed in this court his bill in equity seeking to enjoin the commissioners from collecting any further assessments under the ordinance. On the 4th day of December, 1900, the board of commissioners filed separate suits against J. E. England, Edward Fitzgerald, and F. M. Fulk et al., for the purpose of enforcing the collection of the assessments then in arrears on the property owned by them. These defendants filed their answers, denying the right to collect the assessment mentioned in the complaint, and in these answers and in the bill in equity to enjoin the commissioners the following reasons were urged against the validity of the assessments: First, that the ordinance was not published within five days of its passage, as required by law; second, said improvements were not beneficial to the property, nor contiguous or adjoining thereto; third, the object of said ordinance was to raise money to purchase a tract of land far beyond the limits of the district, and in a manner not provided by law; fourth, because said park has been fully

paid for, and there is no authority in the law to collect a further tax; fifth, because the district was not duly created and organized under the laws of Arkansas and the ordinances of the city of Little Rock, and for the further reason that there was no legal ordinance making the assessment; sixth, because the city of Little Rock had no power or authority, under the constitution and laws of Arkansas, to pass any such ordinance; seventh, it was also urged and argued, though not specifically set up anywhere, that the assessment was in violation of the fifth and fourteenth amendments to the federal constitution.

"The first and third objections to the validity of the ordinance were abandoned, and I am therefore relieved of the necessity of advertng to them. All the other questions, however, were presented with great force, and are earnestly insisted upon as being valid objections to the validity of the assessments in question.

"The case of *Village of Norwood v. Baker*, 172 U. S. 260, 19 Sup. Ct. 137, 43 L. Ed. 443, seems to have invited a wholesale and vigorous attack upon the validity of assessments of the character now under consideration. Several of these cases, from various sections of the country, found their way almost simultaneously into the supreme court of the United States; and on the 20th day of April of this year that tribunal made its deliverance in all of these cases, and in each one the validity of the assessments, in so far as it was contended that they were in violation of the federal constitution, was upheld, and the assessments were enforced. Under the authority of these cases, it is unnecessary for me to advert to the constitutional objections which have been urged to the assessments in question, for these decisions, to my mind, conclude the whole question. *French v. Paving Co.*, 181 U. S. 824, 21 Sup. Ct. 625, 45 L. Ed. 879, and other cases decided at the same time, reported in 181 U. S., 21 Sup. Ct., and 45 L. Ed.

"It has been decided that the act of 1881 authorizing these improvement districts is valid, so far as our state constitution is concerned. *City of Little Rock v. Board of Improvements*, 42 Ark. 161; *Ahern v. Board* (Ark.) 61 S. W. 577.

"Likewise, I am of the opinion that the position that the said improvements were not beneficial to the property, nor contiguous or adjoining thereto, is not established. In the case of *City of Little Rock v. Katzenstein*, 52 Ark. 107, 12 S. W. 108, the court said: 'Two questions are presented for determination: First. What is property adjoining the locality to be affected? Second. To what extent is the action of the city council in placing lands in an improvement district conclusive of the fact that it is "property adjoining the locality to be affected?"' After discussing these two propositions, the court answered them as follows: 'We can-

clude, therefore, in answer to the two queries originally propounded: First, that property adjoining the locality to be affected is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect upon the property in the city generally; second, that the action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake.' It is claimed that the statement introduced showing the exact distance of each piece of property involved in this suit from the park, and also showing the assessed value of the same for the years 1891, 1893, and 1895, is sufficient evidence of the fact that the property was not benefited by the improvement, nor adjoining the locality to be affected. I am unable to agree with this position. There is no charge of fraud, and, from the very nature of the benefits to be derived from a public park, it certainly does not show that there was a demonstrable mistake in including the property in the district. It proves nothing as to benefits, because the beneficial effects from the establishment of the park may have offset other depressing defects existing during the same period, and it does not even tend to show that no benefits will accrue. I do not think the statement is competent, but, admitting it for what it is worth, it does not establish either fact which was intended to be shown by it. I think it would require strong evidence to show that a park like this one was not beneficial to the whole property in the city, and surely no court can say, as a matter of law, that the public park is not or will not be beneficial to the city. In the case of *Wilson v. Lambert*, 166 U. S. 611, 18 Sup. Ct. 217, 42 L. Ed. 599, Justice Shiras, in speaking of the value of a park to Washington City, says: 'Whatever tends to increase the attractiveness of the city of Washington as a place of permanent or temporary residence will operate to enhance the value of the private property situated therein and adjacent thereto.' Without enumerating any of the beneficial effects of a park to a city, it suffices to say, in a general way, that there is no character of public improvement the benefits of which are so widely and generally diffused throughout the whole city as a public park; and, as the burden of proof rests upon those attacking the assessments, I am clear that this statement is not sufficient to overcome it. *Kansas City, P. & G. R. Co. v. Board of Waterworks Imp. Dist. No. 1* (Ark.) 59 S. W. 248.

'The fourth objection urged to the validity of the ordinance is that the park has been fully paid for, and there is no authority in the law to collect a further tax. In support of this proposition I am referred to the case of *Pine Bluff Water Co. v. Sewer Dist.*, 56

Ark. 205, 19 S. W. 576. The case does not support that contention. The object of the organization of that district was the construction of sewers, and paying for the same. After the board had done that, it seems that it, in addition thereto, undertook to make a contract for the sewer district for water furnished for flushing the sewers, which was clearly outside of the purpose for which the district was formed. In this case the petition praying for the formation of the district was to acquire, purchase, and improve a city park. The petition asking that the assessment be made asked the council to make an assessment for the purpose of acquiring, purchasing, and improving the grounds into a public park. The statement of facts shows that the arsenal grounds were not in a condition to be used as a public park when first acquired, and the improvement of the same after the purchase was just as essential to the establishment of a park as was the purchase of the ground itself. The petitioners asked that an assessment not to exceed one per cent. of the assessed value of the property be levied upon all the real property within the district for the purpose of making the improvements, and it was estimated (and it was as easy for any person to make the calculation before the assessment, as the data were accessible to all) that an assessment of one per cent. upon the assessed value of the property would yield about \$80,000. So that the commissioners, the city council, and the property owners themselves were of the opinion at the time of the assessment that at least \$80,000 would be necessary to purchase and improve these grounds into a public park, and the mere fact that the commissioners may have handled the funds judiciously, and made a much better showing, up to this time, than was anticipated, does not, in my opinion, entitle those who are objecting to the assessment to now say that they think the park is improved as much as it ought to be improved. The question of the amount of improvement is largely a matter of taste. Some persons, perhaps, would be content with its present condition. Others, perhaps, will not be content with it unless twice \$80,000 is spent on it in further improving and beautifying it. But I think that under the ordinance the commissioners have a right to collect and expend at least \$80,000, or as much as the assessment will yield, in the way of purchasing and improving the park.

'The fifth and sixth objections, I think, can properly be considered together; and these go to the question as to whether the city of Little Rock had any authority in the first instance to create an improvement district for the purpose of acquiring and improving a park. In other words, it is contended that a public park is not a local improvement of a public nature, contemplated by section 5321, Sand. & H. Dig., which reads as follows: "Section 5321. The council of any city of the first class or second class, or any

incorporated town, may assess all real property within such city, or within any district thereof, for the purpose of grading or otherwise improving the streets, alleys, constructing sewers or making local improvements of a public nature, in the manner hereinafter set forth.' It is contended that the specific words, 'streets,' 'alleys,' and 'sewers,' used in that section, must limit and control the meaning that is to be given to the general expression, 'making any local improvements of a public nature.' As a general proposition, the rule of construction contended for is correct, but it is not universal or without exception. An examination of the general powers conferred upon cities of the first class, as found in *Sandels & Hill's Digest*, shows that they had authority conferred upon them, among other things, to lay off, open, widen, straighten, and establish, to improve, keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places, and market places; to open and construct and keep in order and repair sewers and drains; to provide a supply of water by the construction of wells, pumps, cisterns, reservoirs, and waterworks; and to provide for lighting the streets and alleys of the city by gas or otherwise. To make these improvements, cities were authorized to use the general revenue of the city. In 1874 a new constitution was adopted in this state. That constitution so limited and restricted the right of municipal corporations to levy and collect taxes that it is a matter of common knowledge that the five-mill tax has not been at all adequate to make any improvements of any extensive character. Indeed, the general revenue has hardly been sufficient to meet the current running expenses of our municipal corporations. After the adoption of this constitution, and up to this time, it was and is a much-mooted question as to how municipal corporations could and can devise ways and means, not in conflict with our constitution, to raise the necessary revenue to provide such conveniences and make such improvements as are required by the growth and development of our municipal corporations. In 1881 the legislature passed the act under which the park district was formed. My opinion is that it was the purpose of that act to afford municipal corporations some relief, in the way of assisting them to make improvements authorized under the general powers, which they were unable to make from the general revenue of the city. If we give effect to the contention made against the ordinance in this respect, the general words following the specific words would not mean anything, because the specific words, 'streets,' 'alleys,' and 'sewers,' exhausted the whole genus, and there are no improvements of the same general character or class which cities could make which would fall within the general term following the specific words. In other words, they left nothing which could be called *ejusdem generis*.

End. Interp. St. § 409, says: 'Further, the general principle in question [referring to the principle here involved] applies only where they are different genera. The meaning of the general word remains unaffected by its connection with them.' Proceeding, then, he gives an illustration, and concludes: 'Here the several particular words exhausted the whole genera. The last general words must be understood therefrom, as referring to other genera.' Black, in his work on Interpretation of Laws (page 143), in speaking on this same subject, says: 'The general object of an act sometimes requires that the final general terms shall not be restricted in their meaning by its more specific predecessors.' *Suth. St. Const. p. 360*, says: 'The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called *ejusdem generis*. If the particular words exhaust the whole genus, the general words must refer to some genus.' This view is further supported by the fact that the supreme court upheld the validity of two ordinances of the city of Siloam Springs, which formed the whole city into improvement districts for the purpose of establishing waterworks and an electric light plant. It is true that in the decision they say that the situation is relieved of doubt by the fact that the legislature in the act of 1893 specifically used the words 'electric lights and waterworks.' But an examination of that act will show that the legislature did not extend or enlarge the original authority conferred upon cities and towns to make these improvements, but simply said, 'in case of the construction of waterworks or gas or electric light works by an improvement district,' the city should have power to operate, etc. It will thus be seen that this act amounted to nothing more nor less than a legislative interpretation of the act of 1881 to mean that the general words used in section 5321 included electric lights and waterworks, which construction of the act, though not binding upon the supreme court, was accepted and approved by them; and, if the general terms were broad enough to include electric lights and waterworks, then the whole contention that these general words are to be limited by the specific ones which precede must fall. And I am unable to see why a public park would not be just as much authorized by the act as an electric light plant or waterworks. Section 5141, *Sand. & H. Dig.*, specifically authorizes municipal corporations to establish, improve, and keep in order and repair public grounds. Our supreme court, in *Crane v. City of Siloam Springs*, 67 Ark. 30, 55 S. W. 955, used the following language: 'Provisions for local conveniences, like water, light, public parks for recreation, and other public accommodations of the same kind, are some of the matters which are furnished or provided for by municipal corporations in their quasi private capacity, in which they act not as an agency

of the state, but exclusively for the benefit of their own inhabitants. It is in respect to such matters of local concern that the largest freedom of action has been allowed municipal corporations.' In the Siloam Springs Case the contention was made, and is made here, that, as the power to provide a supply of water from the general taxes has been expressly conferred on cities, it is said that this, by implication, forbids them from making special assessments for that purpose. The court there said that the argument would be strong if the legislature had not specifically used the words 'waterworks and electric lights.' They then proceeded to state that that was one of the reasons upon which the decision of Village of Morgan Park v. Wiswall, 155 Ill. 262, 40 N. E. 611, was based, which held an ordinance invalid which attempted to form the whole city into an improvement district to establish waterworks. But an examination of that case discloses that under the laws of Illinois municipal corporations were, in addition to the authority conferred upon them to collect a general revenue for general purposes, also authorized to collect a special tax to be used exclusively for the establishment of waterworks. And in that case it also appears that the same court held that a local improvement could not be coextensive with the city limits, but must be confined to some particular locality of the city; but our court, in the Siloam Springs Case, holds that a 'local improvement' may be coextensive with the city limits. So that I am of the opinion that the case of Crane v. City of Siloam Springs, taken as a whole, is an authority in favor of, and not against, the proposition that a park is a local improvement contemplated by section 5321, Sand. & H. Dig.

"The agreed statement of facts states that the tax to be collected is to be used 'wholly for maintenance and improvement of the park,' and it was contended that no part of the tax could be used for the maintenance, and therefore the assessments could not be enforced. Granting that to use the money for maintenance would be wholly illegal, that does not affect the validity of the assessment. The commissioners will be liable for any misappropriation or misuse of the funds, and, in any event, the status of these cases before the court at this time does not warrant any relief in that respect.' The result is, therefore, that a decree will be entered denying the petition for an injunction in the case of Matthews et al. against the commissioners, and in the other cases a decree will be entered condemning the lands; and, to pay the assessment, costs, and penalty, they will be sold for that purpose upon twenty days' notice; said notice to be given in the same manner as notices of sales under execution."

The decree is affirmed.

BATTLE and RIDDICK, JJ., dissenting.

YOUNG v. STATE.

(Supreme Court of Arkansas. Feb. 1, 1902.)
HOMICIDE—DYING DECLARATIONS—OPINIONS
—ADMISSIBILITY.

1. A conviction for manslaughter will not be disturbed because of the exclusion of a physician's testimony as to an opinion expressed to him by deceased after he was shot that the shot was accidental, where it is not disclosed that the foundation was properly laid for the admission of the statement as a dying declaration.

2. Such testimony being only a matter of opinion of deceased, and corroborative of the other witnesses for accused, its exclusion was not erroneous.

Appeal from circuit court, Drew county; Zachariah T. Wood, Judge.

Charley Young was convicted of manslaughter, and he appeals. Affirmed.

Geo. W. Murphy, Atty. Gen., for the State.

BUNN, C. J. This is an indictment for murder in the first degree, and judgment for involuntary manslaughter, and sentence for one year in the state penitentiary, and defendant appealed to this court.

The defendant moved the court for a new trial, but on what grounds it nowhere appears, as the motion does not seem to have been reduced to writing. On a close inspection of the record, we find only one objection made by the defendant, and that was as to the court's refusal to admit the testimony of Dr. Young, grandfather of the defendant, as to the opinion expressed to him by the deceased, after he was shot, that the shot was accidentally fired. The record does not show that the foundation was properly laid to make this statement of the deceased admissible as a dying declaration; and, besides, it was only a matter of opinion of deceased, and corroborative of what other witnesses for the defendant had said on the stand.

The evidence was amply sufficient to convict the defendant of involuntary manslaughter, if not of a higher degree of homicide.

Upon the whole case, there being no objection to the instructions, we are of the opinion that the judgment should be affirmed; and it is so ordered.

GRAYSON et al. v. BOWLIN et al.

(Supreme Court of Arkansas. Feb. 1, 1902.)
RESULTING TRUSTS—STATUTE OF FRAUDS—
—EQUITY—LACHES.

1. A minor son, emancipated by his father, purchased land, but the deed thereto was executed to the father; the parties supposing that the son was incapable of taking title, by reason of his minority. The son paid the price, entered into possession, and continued therein for over 20 years, when he sold the property to defendant. Held, in an action by the heirs of the father to recover the property, that there was a resulting trust in the property in favor of the son and his grantee, and not an express trust, void under the statute of frauds.

2. Where a son, having a resulting trust in

lands conveyed to his father, goes into possession and continues therein for over 20 years, when he sells and conveys the property, and the father has never denied the rights of the son, there is a sufficient assertion of the trust to prevent the right of the son or his grantee from becoming stale, and it may be enforced against the heirs of the father.

Appeal from chancery court, Greene county; Edward D. Robertson, Chancellor.

Consolidated actions by M. L. Grayson and another against W. P. Bowlin and others, and by T. D. Henderson against the same defendants, to recover real estate. From a judgment in favor of the defendants, the plaintiffs appeal. Affirmed.

Appellants, pro se. B. H. Crowley and M. P. Huddleston, for appellees.

BATTLE, J. M. L. Grayson and her husband, A. D. Grayson, instituted an action in the Greene circuit court against W. P. Bowlin to recover one undivided sixth interest in certain lands described in their complaint. At the same time, and in the same court, T. D. Henderson, Jr., by his next friend, brought an action against the same defendant to recover an undivided one-twelfth interest in the same land. These two actions were afterwards, by a consent order of the court, consolidated; and William T. Francis and Melville Francis were, on their motion, made defendants.

Plaintiffs, respectively, alleged in their complaints that John Francis departed this life intestate, seised and possessed of the lands described in their complaints, and left Elizabeth Francis, his widow, and William T. Francis, Melville Francis, and W. M. Henderson, O. E. Henderson, T. D. Henderson, and M. L. Grayson, in right of their mother, Elizabeth Henderson (born Francis), his only heirs, him surviving; that T. D. Henderson died, leaving T. D. Henderson, Jr., his only heir; that W. M. Henderson conveyed his interest in said lands to M. L. Grayson; and that the defendant Bowlin was in unlawful possession of the lands.

The defendants answered, and denied that John Francis died seised and possessed of said land, but alleged that the defendants William T. and Melville Francis purchased and paid for the same, and their vendors conveyed it to William T. and John Francis, and that John Francis held one undivided half of it in trust for Melville; and the defendants asked that the court so declare, and that all the right, title, and interests "which the plaintiffs, or either of them, may have or claim in or to said lands, be devested out of them, and vested in the said Melville Francis," and for other relief.

The plaintiffs replied, and denied the foregoing allegations of the defendants, and alleged that, if any trust in Melville's favor ever existed, it was an express trust, and is void because it was not in writing and is stale.

The court, on motion of the defendants,

transferred the cause to its equity docket, and, after hearing the evidence, found in favor of the defendants, dismissed the complaints of the plaintiffs, and decreed that the title to the lands vest in the defendant Bowlin; and the plaintiffs appealed.

The facts, as we find them, according to the preponderance of the evidence adduced at the hearing, were substantially as follows: William T. and Melville Francis were the sons of John Francis. Melville being a minor, his father emancipated him at the age of 17 years, and allowed him after that to receive and use the wages and products of his labor as his own property. After this, in the month of December, 1867, William T., for himself and Melville, during the minority of his brother, purchased an undivided three-sixth interest in the lands in controversy, on a credit of one and two years. John Francis, the father, wrote the notes for the purchase money, and the bond of the vendors for title. Believing that Melville was incapable, on account of his minority, of making a valid contract and acquiring real estate, he signed the notes with his own name for Melville, and William T. signed for himself. The bond, as written, obligated the vendors to convey the three-sixths interest to John and William T. Francis when the purchase money was fully paid. William T. and Melville afterwards paid the purchase money. Their father paid no part of it. Thereafter, on the 24th of February, 1870, Melville still being a minor, the vendors conveyed the lands to John and William T. Francis for the same reason the bond for title was executed to them. In the month of November, 1869, William T. purchased, for himself and his brother, another sixth interest in the same land, on a credit of two and three years. John and William T. Francis executed their promissory notes for the purchase money, and the vendor executed his bond for title to them, for the same reason the other notes and bond were executed. At the maturity of the last notes, William T. and Melville paid them, each paying one-half. On the 25th day of May, 1872, Melville being a minor, the vendor conveyed the one-sixth interest to John and William T. Francis. After this, Melville, being 21 years old, purchased the remaining two-sixths interest in the land for himself and William T., and took a deed for the same to himself and brother. After each purchase William T. and Melville took possession of the interests thereby acquired, and controlled and managed the same as their own property. The father admitted that he held one-half in trust for Melville, and, so far as the evidence discloses, never denied that he so held. The brothers held and controlled the land as their own until some time in September, 1891, when Melville, having acquired the interest of his brother, sold and conveyed the land to the defendant W. P. Bowlin, who took possession and placed valuable improve-

ments on the same. The actions brought against him to recover the land were commenced on the 18th of August, 1897.

"That the father," said Chief Justice English in *Fairhurst v. Lewis*, 23 Ark. 438, "had the right to permit his son, during his minority, to labor for himself, and appropriate his wages according to his own inclinations, is well settled." In the case at bar the father permitted his son, Melville, to labor for himself, and to enjoy and appropriate the product of the same to the purchase of one undivided half of the land in controversy. Believing that Melville was incapable of acquiring real estate during his minority, four-sixths of the land in controversy were conveyed to the father and his brother, William, notwithstanding it had been purchased by him and his brother, and one-half of the purchase money had been paid by him according to the agreement and understanding entered into at the time of the purchase. Did John Francis hold one-half of the land in trust for Melville?

In *Milner v. Freeman*, 40 Ark. 62, 68, Justice Smith, delivering the opinion of the court, said: "A further objection was that the plaintiff did not pay the purchase money at the time of the purchase. The evidence conduced to show that he bargained for the lots before he paid for them, the payments not being completed until the deeds were made. This court, in *Sale v. McLean*, 29 Ark. 612, and in *Du Val v. Marshall*, 30 Ark. 230, said, in effect, that, in order to create a trust of this nature [resulting trust], payment of the purchase money must be made at the time of the purchase. By this it was meant that the trust must arise, if at all, from the original transaction, at the time it takes place, and at no other time, and it cannot be mingled with any subsequent dealings. Some of the cases use the language, 'at the date of the payment of the purchase money'; others, 'at the time of the execution of the conveyance.' But all of them mean the same thing, namely, that it is impossible to raise a resulting trust so as to divest the legal estate of the grantee or his heirs by the subsequent application of the funds of a third person to the satisfaction of the unpaid purchase money. *Botsford v. Burr*, 2 Johns. Ch. 406; *Rogers v. Murray*, 3 Paige, 390; 2 *White & T. Lead. Cas. Eq.* 338. The trust arises out of the circumstance that the money of the real purchaser, and not of the grantee in the deed, formed the consideration of the purchase, and became converted into land."

According to the opinion in *Milner v. Freeman*, John Francis held one-half of the land conveyed to him and William T. Francis in trust for Melville.

In *Bland v. Talley*, 50 Ark. 71, 6 S. W. 234, cited by appellant, the court found that according to the evidence adduced by the plaintiff, who sought to establish a resulting trust, three brothers, William H. Talley,

Frank Talley, and John L. Talley, agreed to purchase, and William H. purchased in his own name, furnished all the money, and took the title to himself. The court said in reference to this state of facts: "Now, a parol agreement that another shall be interested in the purchase of lands, or a parol declaration by a purchaser that he buys for another, without an advance of money by that other, falls within the statute of frauds, and cannot give birth to a resulting trust."

The facts in the case before us are entirely different. Two brothers, William T. and Melville Francis, purchased the land for themselves; and, according to an agreement made at the time, each one paid one-half of the purchase money before the conveyance of the land was executed.

It is contended that, if any trust in favor of Melville Francis existed, it was an express trust, and is void under the statute of frauds. But the trust is based upon the purchase of the land by the two brothers for themselves; and the payment by each of them, in pursuance of the agreement at the time of the sale, of one-half of the purchase money, before the execution of the deed, of itself, created it. "It cannot be that the consent of the trustee to hold the title for the benefit of the cestui que trust, or an agreement so to do, in case of a resulting trust, will change its character. By the agreement the trustee simply assents to an obligation imposed by the law. The trust would exist without the agreement by operation of law. The agreement cannot destroy the effect of the conditions under which the law presumes the estate is held by the trustee." *Robinson v. Leflore*, 59 Miss. 148; *Barrows v. Bohan*, 41 Conn. 278; *Cotton v. Wood*, 25 Iowa, 43.

We do not think that the trust in favor of Melville is stale. His father admitted it. The evidence does not show that he ever denied it. On the contrary, when he and his brother, William, purchased, they took possession of the land in their own right, and controlled and managed it as their own property, paid taxes on it, and improved it; their father never objecting. This management, control, and ownership over it continued for 20 years or more, and until Melville sold and conveyed to Bowlin. Their claim was never allowed to grow stale, but was always asserted and maintained.

Judgment affirmed.

SPEARS v. STATE.

(Supreme Court of Arkansas. Feb. 1, 1902.)

LARCENY—INDICTMENT—VARIANCE.

Proof that stolen property, alleged in an indictment for larceny to have belonged to John Houston, was the property of John F. Hamilton, constitutes a fatal variance.

Appeal from circuit court, Poinsett county; Felix G. Taylor, Judge.

William Spears was convicted of larceny, and he appeals. Reversed.

L. C. Going, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

BATTLE, J. William Spears was accused and convicted of larceny, committed by feloniously taking, stealing, and carrying away three hogs, the property of John Houston; and he appealed.

The evidence adduced at the trial showed that the three hogs alleged to have been stolen were the property of John F. Hamilton. The allegation in the indictment was that they belonged to John Houston. The ownership should have been proved as alleged. The variance is fatal. *Blankenship v. State*, 55 Ark. 244, 18 S. W. 54. In other respects the evidence of the defendant's guilt, as it appears in the record before us, is weak and unsatisfactory.

Reversed, and remanded for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. WILSON.
(Supreme Court of Arkansas. Jan. 25, 1902.)

CARRIERS—CARRIAGE OF PASSENGERS—DEPOTS—DUTY IN PROTECTING INTENDING PASSENGERS—INSTRUCTIONS—PREJUDICIAL—PUNITIVE DAMAGES—WHEN RECOVERABLE—APPEAL—VERDICT—REVIEW.

1. An alleged failure to observe the preponderance of the evidence cannot be reviewed on appeal.

2. A failure of a railway company to properly heat its depot waiting rooms in midwinter for the comfort of prospective passengers is *prima facie* evidence of negligence.

3. In an action by a prospective passenger against a railway company for its failure in midwinter to properly heat its waiting room at a station, an instruction making the company liable if it failed to keep a fire in its depot waiting room at a time when the weather required a fire there to make it comfortable, and a person waiting to become a passenger was in consequence injured, was not erroneous as eliminating the question of defendant's negligence, and making it an insurer, where it maintained that the waiting room was properly heated, and where it requested no instruction on the subject.

4. A railway company is liable for its agent's knowingly permitting its waiting room at a station to be and remain locked, against the protest of a prospective passenger in the room, when, by the exercise of ordinary care, such agent could have prevented its being locked, or could have opened it.

5. In an action by a prospective passenger against a railway company for its permitting its waiting room at a station to be locked, an instruction that if plaintiff went to the company's depot to take passage on its train, and it knowingly permitted such depot to be or remain locked after notice that it was locked, the verdict should be for plaintiff, was not prejudicial where defendant denied all knowledge of the depot being locked.

6. A railway company is liable for injuries sustained by a prospective passenger at its depot waiting room through its failure to exercise ordinary care to protect him from annoyance and insults from disorderly persons congregating at such waiting rooms, where the agent in charge knew or might have known

of the threatened injury, and could have prevented or lessened it.

7. In an action by a prospective passenger against a railway company for injuries sustained at its depot waiting room by reason of annoyances and insults from persons at such depot, an instruction that it was the duty of a railroad company to protect prospective passengers at its stations from annoyance and abuse, and if the company's agent used toward, about, or in the hearing of the plaintiff any profane, obscene, or boisterous language, thereby injuring plaintiff's feelings, defendant was liable, though making the duty of the company in this respect absolute, was not prejudicial, since it was limited in its application to the conduct of the company's agent.

8. Such instruction is erroneous in the absence of evidence of any improper language used by the agent toward plaintiff, or of what the language addressed to a third person was, and that the language was used with the intent of insulting plaintiff.

9. In an action by a prospective passenger against a railway company for injuries for its failure to properly heat its waiting room at a depot, for permitting such room to be and remain locked, and for annoyances and insults, an instruction that plaintiff's damages should be such a sum of money as would compensate her for the pain and anguish of body and mind suffered on account of the injuries sustained, was prejudicial, as warranting damages for mental suffering for profane and boisterous language of the company's agent in the absence of sufficient proof of such language.

10. In an action by a prospective passenger against a railway company for injuries for its failure to properly heat its waiting room at a depot, for permitting such room to be and remain locked, and for annoyances and insults, an instruction allowing punitive damages in addition to the actual damages was prejudicial, as permitting the jury to award punitive damages for the profane and boisterous language of defendant's agent in the absence of sufficient proof of such language.

11. Though a defendant may be liable to compensatory damages for the act of a servant, the jury are not warranted in finding punitive damages without finding that the wrong complained of was in the line of the servant's employment, and was willful, wanton, or malicious.

Appeal from circuit court, Saline county; Alexander M. Duffie, Judge.

Action by Dilsa Wilson, by her next friend, H. L. Wilson, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Dilsa Wilson, a colored girl under 18 years of age, by her next friend, charged in her complaint that on the 29th day of December, 1898, about 9 o'clock a. m., she went to the depot at Benton, Ark., for the purpose of taking the train to Traskwood; that the weather was cold and disagreeable; that she went into the colored waiting room, and was compelled to remain in the cold, without any fire, for about one hour, until the train arrived, in consequence whereof she was caused to have a chill, and was very sick during the remainder of that day, and during two weeks thereafter. The complaint further charged that shortly after she went into the waiting room defendant's servants

wrongfully, wilfully, and knowingly imprisoned her therein by locking or causing to be locked the only door to the colored waiting room, wrongfully depriving her of her liberty, and preventing her from peaceable egress from said room. It further charged that she was grievously insulted and offended and affrightened by profane and abusive language, and vile and insulting signs, directed to her by persons who were outside and in the adjoining white people's waiting room; that, notwithstanding oft-repeated demands and entreaties to defendant's servants for protection and for a fire, defendant's servants willfully refused and neglected to unlock said door, to build a fire in the room, or to protect her from said insulting remarks, to her damage in the sum of \$1,500. The answer denied explicitly and particularly each of the charges made in the complaint. The testimony on behalf of appellee tended to show that on the morning of December 29, 1898, she and two other negro girls and a negro man went to appellant's depot at Benton to take passage on one of its passenger trains. When they reached the depot they found the colored waiting room locked, but upon request the door was opened, and they went in. There was no fire in the waiting room, and it was cold. They requested the agent several times to make a fire, or have one made. The agent cursed, and told the one making the request to "go on, the train would be there in five or ten minutes." They remained in the waiting room about an hour and a half or two hours before the train came. A short while after they went into the waiting room one Walter McMann, a white boy, locked the door, and they remained locked in until the train came. They told the agent several times that they wanted a fire made and the door unlocked. They told the agent as soon as the door was locked. He gave no heed to their request to have the door unlocked or to make a fire. The door was unlocked when the train came. While they remained in the waiting room, some "white fellows" came to the door, "licked out their tongues," "made faces at them," and were "swearing and cursing," calling them damn bitches, and using "other words." They did not know whether Rainey, the agent, heard this cursing and swearing or not. He was in his office, and they supposed he could have heard it had he been listening. Appellee was a little negro girl. She got "awful cold," as one witness expressed it, while she was in the waiting room; and after she left the train at Traskwood she got sick, and was sick about two weeks. She had not been sick before she went to the depot at Benton. The testimony for appellant tended to negative all the material facts which appellee's testimony tended to prove. The verdict was for \$300 compensatory and \$200 punitive damages.

Dodge & Johnson and J. E. Williams, for appellant. Murphy & Mehaffy, for appellee.

WOOD, J. (after stating the facts). We will consider the questions in the order presented by appellant's counsel.

1. It is contended that the cause should have been reversed because the jury failed to observe the rule of preponderance of the testimony. When the cause reaches this forum it is no longer a question of preponderance, but only of the legal sufficiency of the evidence to support the verdict. *Railroad Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971; *Catlett v. Railway Co.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254.

2. Appellant objects to the following instruction: "If plaintiff went to defendant's depot on the day mentioned in the complaint, to take passage on defendant's train, and at that time the weather was such as to require a fire in the waiting room to make it comfortable, it was defendant's duty to build and keep a fire in said waiting room; and, if it failed to do so, and plaintiff suffered in consequence of defendant's failure to build and keep such fire, your verdict will be for the plaintiff." It was the duty of railroads, independent of the statute of March 31, 1899, to provide reasonable accommodations for passengers at their stations. *McDonald v. Railroad Co.*, 26 Iowa, 138, 95 Am. Dec. 114. This duty requires the exercise of ordinary care to see that station houses are provided with reasonable appointments for the safety and essential comfort of passengers, or those intending to become passengers, while they are waiting for trains. *Caterham R. Co. v. London, B. & S. O. Ry. Co.*, 87 E. C. L. 410; 1 *Fet. Carr.* §§ 249, 250; *Railway Co. v. Cornelius* (Tex. Civ. App.) 80 S. W. 720; *Hutch. Carr.* §§ 516-521, inclusive; 2 *Wood, Ry. Law*, § 1838; *Elliott, R. R.* § 1590. By the exercise of such care as ordinary prudence would suggest for reasonable comfort, it could hardly occur that a waiting room, in midwinter, would be devoid of the means necessary to make it comfortably warm at the times when such rooms are needed to accommodate those intending to become passengers. A failure to provide such means is, therefore, at least prima facie evidence of negligence. It is insisted that the instruction "eliminated all question of diligence and negligence," and made the company an "insurer against the consequences of not having a fire in the waiting room." But the company maintains that it was not negligent, because it built the fire in the waiting room as requested. It is not complaining of any latent defect or unforeseen exigency which ordinary care could not have anticipated and prevented. It could not have been prejudiced, therefore, by the instruction in the form given. Moreover, it did not request the court to declare the law to meet the objection it urges here to the in-

struction. Giving it as requested was not reversible error. *Railway Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550.

3. The court also gave the following: "If plaintiff went to defendant's depot to take passage on defendant's train, and defendant's agent knowingly permitted it to be locked, or knowingly permitted it to remain locked after being notified that it was locked, so that plaintiff was restrained from going in and out, your verdict will be for the plaintiff." "A person," says Mr. Wood, "who is put in charge of a station by a railway company, has apparently all the power and authority requisite to do and effectuate the business of the company at that station. He has control over the depot, and authority to exclude persons therefrom who persist in violating the reasonable regulations prescribed for their conduct." 1 Wood, Ry. Law, § 165. The authority of railroads to make and carry into execution all reasonable regulations for the conduct of all persons resorting to its depots, so as to protect those who are or intend to become its passengers from unreasonable annoyances, insults, and injuries cannot be questioned. 1 Fet. Carr. § 247; *Com. v. Power*, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; *Elliott, R. R.* § 303. This authority is the necessary correlate of the duty to provide reasonable accommodations, for a station house to which drunken, profane, obscene, abusive, riotous, and otherwise disorderly persons could resort with impunity would not be either comfortable or safe. The willful or negligent failure of railroads to make and enforce such reasonable regulations would render them liable in damages for any injuries directly resultant to those who repaired to their stations for the purpose of becoming passengers. If appellant's station agent, against the protest of appellee, knowingly permitted the only means of ingress and egress to the waiting room, where appellee was properly in waiting to become its passenger, to be locked, and to be so continued for any length of time, when same by the exercise of ordinary care could have been prevented or discontinued, he was guilty of a tort, and for the wrong thus inflicted upon appellee appellant was liable in damages. For in the unlawful imprisonment of the person of appellee and the deprivation of her personal liberty, even though for a moment, without her consent, there was an actionable wrong, an injury to her person, however slight. *Field, Dam.* § 679; *Cooley, Torts*, p. 195, § 169; 3 *Suth. Dam.* § 1257. Appellant does not contend that its agent exercised ordinary care to prevent the locking of the door, or to have it unlocked after being notified. Its defense on this point is confined to a denial of all knowledge of any such occurrence. The instruction, in the form given, was therefore not prejudicial.

4. Appellant insists that the court erred in giving the following: "(3) You are instructed

that it is the duty of a railroad company to protect all persons who are at its stations for the purpose of taking passage on its trains from annoyances, insults, and abuse, and if defendant's agent used toward or about the plaintiff, or in plaintiff's hearing, any profane, obscene, or boisterous language, which language insulted or injured plaintiff's feelings, your verdict should be for the plaintiff." "(6) If you find for the plaintiff in this case, her actual damages will be such sum of money as will be a just and fair compensation for all the pain and anguish, if any, both of body and mind, suffered by plaintiff on account of the injuries received. (7) If you find for the plaintiff, you may, in addition to actual damages, award punitive damages as a punishment of the defendant." What we have already said sufficiently indicates the duty of railroads to those intending to become passengers at their stations. While it is their duty to exercise ordinary care to protect them from unreasonable annoyances, and from insults and injuries from turbulent, riotous, or disorderly persons, yet to make them liable in damages it must be shown that there was an injury, that the agent in charge of the station "had knowledge or opportunity to know that the injury was threatened, and that by his prompt intervention he could have prevented or mitigated it." *Sira v. Railroad Co.*, 115 Mo. 127, 21 S. W. 906, 87 Am. St. Rep. 386; *Spohn v. Railway Co.*, 87 Mo. 74, and authorities cited; *Elliott, R. R.* The duty of railroads in this respect is therefore not absolute, as the first part of the third instruction assumes. This part of the instruction, however, could not be said to be prejudicial, for the latter part limits the application of the doctrine to "profane," "obscene," or boisterous language used only by appellant's agent. But the latter part of the instruction is abstract, erroneous, and prejudicial. We have searched the record in vain for evidence that appellant's agent used profane, obscene, or boisterous language toward or about appellee. The only evidence in the record of any improper language used by the agent at all was that he "began to swear a little at Dick," the boy who requested him to make a fire. *Dick Canady*, the boy who requested the agent to make a fire, said the agent "cussed," and told him to go on. There is no proof that he cursed appellee, or what he said to *Dick Canady* in her hearing was calculated to and did insult her feelings. There is no proof of what the language was. It is not shown to have been said for the purpose of insulting appellee. As the language was not addressed to appellee, in the absence of any evidence as to what the language was, the inference that it was said for the purpose of insulting appellee was not warranted. There is no proof of any connection between the cursing and the acts resulting in physical injury to appellee. *Wheth-*

er the use of profane, obscene, and abusive language by station agents, when uttered about or in the presence and hearing of those intending to become passengers while at stations, and for the purpose of insulting them, or injuring their feelings, would alone make the railroads liable for the mental suffering thereby produced, we need not decide; for that state of facts is not presented by the proof in this record. It is certain there could be no recovery for mental anguish unaccompanied by personal injury, where there was no willful, wanton, or malicious wrong done. Whether there could be recovery for mental suffering alone where there was willful, wanton, or malicious wrong done, we reserve for decision.

5. The complaint alleges three separate grounds for recovery, to wit, the failure to build a fire, the failure to prevent the locking of the door, and the failure to protect appellee from insulting remarks. The sixth instruction, on the measure of damages, allows the jury to find for all the pain and anguish of both body and mind without discrimination or designation of the specific grounds upon which the cause of action is based. This instruction, in view of what we have just said in reference to the third, is erroneous; for under it, in connection with the third, *supra*, the jury were warranted in finding for mental suffering on account of profane, obscene, and boisterous language of the station agent. The jury might have found such damages. Whether or not they did so, and, if so, what amount, on this account, entered into the verdict, it is impossible for us to tell. The instruction was erroneous and prejudicial.

6. It follows also that it was error to give the seventh, as to punitive damages, since the jury may have included punitive damages in their verdict for the use of profane, obscene, or boisterous language used by the station agent. Furthermore, under the proof it did not follow as matter of law that the jury might find punitive damages if they found for the appellee. The jury may have found that appellant was liable for compensatory damages on one of the alleged grounds of liability, but it did not follow that because they so found they should also find punitive damages on said ground, unless they should further find that the tort or wrong of the servant in the particular alleged was in the line of his employment, and was willful, wanton, or malicious. The instruction should have been framed so as to leave the jury to determine whether or not the elements essential to punitive damages existed, in connection with any or all of the alleged grounds of liability set forth in the complaint, to justify actual or compensatory damages. We find no other reversible error.

The other questions may not again arise. For the errors indicated, the judgment is reversed, and the cause is remanded for new trial.

McCURDY et al. v. CONNER et al.

(Supreme Court of Texas. Feb. 17, 1902.)

COURTS OF CIVIL APPEALS—CONFLICTING DECISIONS—CERTIFYING QUESTIONS TO SUPREME COURT—MANDAMUS—POWER TO ISSUE—TIME FOR SUING OUT.

1. Under Laws 1899, p. 170, making it the duty of a court of civil appeals to certify a question to the supreme court when there is a conflict between its decision and that of another court of civil appeals upon such question, to require the question to be so certified the conflict of decisions must be well defined.

2. In trespass to try title, wherein plaintiff claimed that the land in controversy was, when appropriated by him, unappropriated public domain lying between two appropriated surveys, and defendants claimed that it was within the boundary of one of the appropriated surveys, owned by them, the court instructed that the fact that defendants' survey, as originally run, included a greater or less quantity of land than was included in the field notes of the patent, was wholly immaterial further than as a circumstance to be considered in fixing the boundary as originally located; and upon the ground that this instruction was erroneous the court of civil appeals reversed the judgment. *Held*, that the decision was in sharp conflict with a decision of another court of civil appeals in a similar case, affirming an instruction that, if there was any excess in quantity of land in a survey, such excess was not to be considered unless it assisted in determining the true location of the disputed boundary; and hence, under Laws 1899, p. 170, the question as to which decision was correct should have been certified to the supreme court.

3. Where there were two decisions of two court of civil appeals, one apparently in conflict with, and the other conforming to, a prior decision of the supreme court, it should be presumed either that the supreme court's decision was capable of two constructions, or that some subsequent decision of such court had thrown some doubt upon its correctness, and should be certified to the supreme court.

4. Const. art. 5, § 3, provides that the legislature may confer original jurisdiction on the supreme court to issue writs of mandamus in such cases as may be specified by the legislature; and Rev. St. art. 946, prescribes that the supreme court may issue writs of mandamus. *Held* that, although the statute did not confer upon the supreme court jurisdiction to grant a writ of error in a case concerning boundaries to lands, where a court of civil appeals, after making a decision of a question arising in such case, in conflict with the decision of another court of civil appeals, refused to certify such question to the supreme court, as required by Laws 1899, p. 170, the supreme court had power to enforce its jurisdiction to determine such question by mandamus to the court of civil appeals compelling it to certify the question.

5. Although no statute prescribed in express terms any limitation as to the time in which a writ of mandamus may be sued out in such case, it should be sued out in a reasonable time, and before the mandate from the court of civil appeals has issued, or while it is within the power of that court to recall the mandate in case it has been sent down.

6. The answer to the petition for the mandamus not alleging that the court of civil appeals had lost control of its mandate, the supreme court would not hold that the mandamus was not applied for in a reasonable time.

Petition for mandamus, on the relation of McCurdy & Daniels, to compel T. H. Conner,

judge of a court of civil appeals, to certify a question to the supreme court. Granted.

The following is the answer to the petition for mandamus:

"Now come the respondents and demur to the petition for mandamus upon the ground that there is no conflict between the decision of the court of civil appeals for the First district in the case, referred to, of *Branch v. Simons*, 48 S. W. 40, and the decision rendered by the court of civil appeals for the Second district in the case of *Yoacham v. McCurdy*, 65 S. W. 213, for that it was held in *Branch v. Simons* that in 'no view of that case admissible under the evidence,' could the instruction there complained of 'operate harmfully.' But if mistaken in this, and there be conflict between the two decisions, then they demur to the petition upon the ground that the very question involved in this conflict has already been decided by the supreme court in the cases of *Scott v. Pettigrew*, 72 Tex. 321, 12 S. W. 161, and *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768, as will be seen from an examination of the opinions in these cases, in the first of which a charge substantially identical with that passed upon in *Yoacham v. McCurdy* was held to be erroneous, and to require a reversal of the judgment, and to the extent that such charge was held to be erroneous the decision rendered in *Scott v. Pettigrew* was impliedly, if not expressly, approved in *Ayers v. Harris*; but in the latter case the charge was held, under the peculiar circumstances and attitude of the parties complaining in that case, not to require a reversal of the judgment. They further demur to that part of the petition which sets up a conflict between the decision of the court of civil appeals of the Second district and the supreme court, because that is not made a ground by the act approved May 9, 1899, for certifying any question to the supreme court. But, if these demurrers should be overruled, then they answer further, and say, denying the alleged conflict or conflicts of decision, that if there should be conflict between the decisions of the courts of civil appeals, as alleged, that that conflict has already been settled by the decision of the supreme court in *Scott v. Pettigrew*, 72 Tex. 321, 12 S. W. 161, and *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768, and that it was upon this ground that the motion to certify was refused, as will be seen from the opinion of this court, a certified copy of which is hereto attached and marked 'Exhibit A.' The view was then entertained and expressed, and is here reiterated, that it could not have been the purpose of the legislature, in passing the law of 1899, to require any court of civil appeals to certify to the supreme court of Texas for decision a question which had already been expressly decided by the court of final jurisdiction. This view is strengthened when the statutes affecting the jurisdiction of the supreme court and appellate courts are examined, for we find in article 941 of the Re-

vised Statutes that provision is made for a writ of error in cases in which the decisions of the courts of civil appeals may be in conflict, and also where the decision of the court of civil appeals is in conflict with a decision of the supreme court, the purpose of which evidently was to correct the errors of the courts of civil appeals in the class or classes of cases of which it was intended the supreme court should have jurisdiction by writ of error, while the act of 1899, without intending to change the general rule on the subject of the jurisdiction of the supreme court in such cases, in order to prevent the confusion arising from conflicts among the decisions of the courts of civil appeals, went a step further and provided a method of settling such conflicts; but evidently, if a decision of the supreme court could be found covering the question of conflict, we respectfully submit there would be no good reason for requiring that court to repeat its decision. We consequently concluded, in disposing of the motion to certify, that it was not only our duty to refuse to grant the motion, but that we would subject ourselves to the just criticism of the supreme court by doing so, in thus holding that it required two or more decisions of the supreme court to settle one conflict among the courts of civil appeals. But if these views should be overruled, and your honors should hold that we should certify the question involved, we are both ready and willing to do so."

Wm. M. Knight, for relators N. R. Morgan, for respondent Yoacham.

GAINES, O. J. This is a petition for writ of mandamus to compel the court of civil appeals for the Second supreme judicial district to certify for the decision of this court a question determined by them in the case of *Yoacham v. McCurdy* (Tex. Civ. App.) 65 S. W. 213. The decision was adverse to the appellees, who are the relators in this proceeding. The judges of the court of civil appeals and the appellant are made the parties defendant. The proceedings were instituted under the act of May 9, 1899 (Laws 1899, p. 170), which makes it the duty of the courts of civil appeals to certify a question to this court when there is a conflict between the decision of the court and another court of civil appeals upon the point.

We will state the substance of the allegations in the petition. Yoacham, the appellant in the court of civil appeals and one of the defendants in this court, brought an action of trespass to try title against the appellees therein, the relators here, to recover a tract of land. The appellant's claim was that the land had been vacant, unappropriated public domain lying between two appropriated surveys, namely, the C. O'Connor on the west and the Henry Billings on the east, and that he had acquired title thereto under the homestead laws of the state. The appellees, defendants in the district court,

claimed, on the other hand, that there was no vacancy, but that the land in controversy lay within the true boundary lines of the O'Connor survey, which was owned by them. The cause was tried with a jury, and the court, among others, gave the following charge: "That the fact that the lines and corners of the O'Connor survey, as originally run and marked upon the ground, include a greater or less quantity of land than is included in the field notes of the patent, becomes wholly immaterial further than as a circumstance to be considered by you for what you may deem the same worth to aid you, if it does so, in connection with all the evidence in the case, in following the footsteps of the original surveyor, and in fixing the eastern boundary of said survey as originally located." The jury having found in favor of the defendants, and plaintiffs having appealed, the court of civil appeals for the Second district held that this charge was reversible error, and reversed the judgment and remanded the cause. Thereupon the appellees filed a motion for a rehearing, pointed out that the decision of the court upon the point was in conflict with that of the court of civil appeals for the First supreme judicial district in the case of *Branch v. Simons* (48 S. W. 40), and prayed the court to certify the question for the decision of this court. The motion was overruled. The respondents demurred to the petition, and, answering, denied that there was any conflict between their decision and that of the court of civil appeals for the First district in the case of *Branch v. Simons*, and claimed that, if such conflict existed, it had been settled by the cases of *Scott v. Pettigrew*, 72 Tex. 821, 12 S. W. 161, and *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768. The act of May 9, 1899, under which the relators claim the right to have the question certified, is in part as follows: "That if, in any cause that is now pending or may hereafter be pending in any of the courts of civil appeals of the several supreme judicial districts of the state of Texas, any one of said courts may arrive at an opinion in the decision of any of said causes that may be in conflict with the opinion heretofore rendered, or hereafter rendered, by some other court of civil appeals in this state on any question of law, and said court of civil appeals refuses to concur with the opinion so rendered by said other court of civil appeals, it shall be the duty of said court failing to concur with the opinion in conflict with the opinion so arrived at by said court, through its clerk, to transmit the question of law, duly certified to, involved in the case wherein said conflict of opinion has arisen, together with the record in said cause, to the supreme court of the state of Texas for adjudication by said supreme court." So much of the act as is omitted merely prescribes the procedure in the supreme court and in the court of civil appeals

after the decision of the former court has been certified, and it is unnecessary to quote it. The charge which was held not to be reversible error in *Branch v. Simons* reads as follows: "You are instructed that, if there is any excess in quantity of land in the B. J. White survey, such excess is not to be considered by the jury, whether the same be great or small, unless it enables or assists you to determine the true location of the south boundary line of the B. J. White survey. You are required to find the true location of the line of the survey as originally run and located on the ground, retracing the footsteps of the original surveyor; and it does not matter whether a greater or less quantity of land than called for in the grant be included within the lines as originally run." Is there a conflict between the ruling in the case out of which this proceeding arose and that of the court of civil appeals of the First district in the case just named? The charges in the two cases indicate, as do the opinions of the two courts, that practically the same issue of fact was presented upon the trial of each of the cases. It appears that in each there were such discrepancies in the calls of the survey that, when applied to the ground, it became questionable whether the calls for distance were correct, or whether certain lines should be so projected as to conform to one or more other calls of the survey; and that, if the line as contended for by one party was correct, there would be an excess in the survey, whereas, if that contended for by the other was the true boundary, there would be none. The issue in the two cases being practically the same, the question of conflict of decision must depend upon the further question whether or not each of the two charges embodies substantially the same proposition of law. We think this latter question must be answered in the affirmative. A careful comparison of the two charges satisfies us that there is no substantial reason for distinguishing them, and that they mean the same thing. In the one the jury are told not to consider the excess unless it enabled or assisted them in determining the true location of the line. In the other they are instructed that the matter of the excess is wholly immaterial further than as a circumstance to aid them, if it does so, in following the footsteps of the surveyor, etc. Evidently these instructions announce the same proposition of law; and since in the one case the charge was held correct and in the other erroneous, there is a conflict in the two decisions. We have held that, in order to give this court jurisdiction of a reversed and remanded case on the ground of a conflict of decisions, there must be a well-defined conflict (*Bassett v. Sherrod*, 90 Tex. 32, 36 S. W. 400), and we think the same rule should apply to the construction of the statute which requires a court of civil appeals to certify a question upon which its opinion conflicts with that

of another court of civil appeals. But it appears from what we have already said that the opinions in the case out of which this controversy arose and that in the case decided by the court of civil appeals for the First district are not merely inharmonious, but are sharply in conflict. But it is urged that the conflict has been settled by the supreme court in the case of *Scott v. Pettigrew*, supra. In the case of *Sullivan v. Insurance Co.*, 89 Tex. 665, 36 S. W. 73, it was held that the supreme court was without jurisdiction to grant a writ of error in a remanded case upon the ground that the decision of the court of civil appeals had overruled the decision of another court of civil appeals, where the decision of such other court had itself been overruled by a subsequent decision of the supreme court. The purpose of the law which gives jurisdiction to the supreme court in case the decision of one court of civil appeals overrules another was to settle the conflict, and therefore it was held that the statute did not apply when the supreme court had already overruled the first decision, and had settled the question. Here we have a different case. The decision in *Scott v. Pettigrew*, supra, relied upon as settling the conflict, was rendered long before that in *Branch v. Simons*, which is claimed to be, and which seems to be, in conflict with it; and we do not think it would do to say that a decision of this court had settled a conflict which arose after it was rendered. It is not to be presumed that a court of civil appeals will lightly disregard a ruling of this court; and where there is a subsequent decision of two courts of civil appeals, the one apparently in conflict with such ruling and the other conforming to it, it ought to be presumed either that the opinion in which such ruling is announced was capable of two constructions, or that some subsequent decision of the court which rendered it had thrown doubt upon its correctness. We are therefore of opinion that the same reason exists for settling a conflict in such a case as would exist in a case where the supreme court had never ruled upon the point. Besides, it is difficult to reconcile the decision in *Ayers v. Harris*, supra, with that of the same court in *Scott v. Pettigrew*. At all events, as it seems to us, they so involve the question as to leave the courts in doubt as to the proper rule.

It is contended in a written argument on behalf of the defendant Yoacham that we are without power to grant a writ of mandamus in this case. The constitution, as amended in 1891, provides that "the legislature may confer original jurisdiction on the supreme court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the governor of the

state." Article 5, § 3. In pursuance of this provision, article 946 of the Revised Statutes prescribes that "the supreme court, or any justice thereof, shall have power to issue writs of habeas corpus as may be prescribed by law; and the said court, or the justices thereof, may issue writs of mandamus, procedendo, certiorari and all writs necessary to enforce the jurisdiction of said court; and in term time or vacation, may issue writs of quo warranto or mandamus against any district judge or officer of the state government, except the governor of the state." It is true, as contended, that the legislature has not conferred power upon us to grant a writ of error in the original case,—it being a "boundary case." We so held when a writ of error to the court of civil appeals was applied for to this court, and was dismissed by us for want of jurisdiction. But the act of May 9, 1899, does confer upon us jurisdiction to determine a question properly certified under that act, and makes it the duty of the court of civil appeals to certify the question, provided there be a conflict between its decisions and that of another court of civil appeals. If the court of civil appeals decline to certify, then the only method by which we can enforce the jurisdiction of this court to decide the point is to compel the performance of that duty by the writ of mandamus. Being a writ necessary to enforce our jurisdiction, we have the power to grant it.

It is also urged in argument on behalf of defendant Yoacham that the petition for the writ of mandamus comes too late. But there is no statute which prescribes in express terms any limitation as to the time in which a writ in such case may be sued out. However, we are of opinion that of necessity there must be some limitation as to the time in which the writ should issue. It should be sued out in a reasonable time, and also before the mandate from the court of civil appeals has issued, or while it is within the power of that court to recall the mandate in case it has been sent down. We are not prepared to hold that the writ in this case was not applied for in a reasonable time; and if, for any reason, the court of civil appeals has lost control of the mandate, the fact is not alleged in the answer.

Our conclusion is that the writ as prayed for should be awarded. But the respondents have expressed a willingness to certify the question in case we should hold that it is their duty to do so. The learned court has merely reached a different conclusion from that reached by us upon a difficult question, and we do not think they should be taxed with any part of the costs of the suit.

Mandamus awarded, defendant Yoacham to pay the costs of the suit.

HUDSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 5, 1902.)

MANSLAUGHTER—INSULTING CONDUCT TOWARDS DAUGHTER—CONSPIRACY—EVIDENCE—INSTRUCTIONS.

1. Where it is sought to reduce homicide to manslaughter because of insulting conduct of deceased towards defendant's daughter, the charge should state that mere lapse of time between the formation of the design to kill and the killing, which was on the first meeting with deceased of defendant after being told of the insulting conduct, does not, of itself, show defendant was not actuated by passion rendering him incapable of reflection at the time of the killing.

2. Where N. states that she intends to kill M., and in pursuance of that intent secures the aid of H., the declarations of N. prior to the conspiracy are admissible against H. to illustrate the intent, and show the purpose, object, and motive, of the conspiracy, and the animus actuating the parties in the commission of the crime.

3. In case of conspiracy, it is not necessary to prove an absolute expressed consent of the conspirators, and the intent of each in getting up the conspiracy, but by the circumstances it may be shown that the conspirators adopted the animus, intent, and purpose of the chief conspirator, as made manifest by her declarations prior to the conspiracy.

4. A charge is on the weight of evidence where it states the acts and declarations of N. were admitted on the idea that she was a conspirator with defendant, and that admission of the evidence means only that sufficient evidence of the conspiracy was offered to permit the case to go to the jury, to determine from all the evidence whether there was such conspiracy.

Appeal from district court, Fannin county; Ben H. Denton, Judge.

R. D. Hudson was convicted of murder, and appeals. Reversed.

Taylor & McGrady, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life.

The following are substantially the facts adduced upon the trial: Deceased and his wife, Nannie Martin, and four children, lived on a farm south of Honey Grove, in Fannin county. Deceased's wife for two or three years prior to the homicide had complained bitterly to divers and sundry parties of cruel conduct towards her on the part of deceased, and in many instances coupled with said complaints was the hope that deceased would die; that he ought to be killed; that she would kill him, and tried to hire parties to kill him, and tried to get parties to buy 38-caliber cartridges for her. Cruel conduct towards the wife on the part of deceased was also testified to by his children. The state controverted the accusations of cruelty by showing the general reputation of deceased as being a quiet and inoffensive citizen. Among other accusations made by the wife of deceased was that he had cursed her.

The state controverts this by showing, through various witnesses, that deceased did not use profane language. Some three or four weeks prior to the homicide defendant, the father of Nannie Martin (deceased's wife), at the instance of deceased, was invited and brought to his home to live. Defendant testified that upon reaching their home deceased told him of the misconduct of his wife, and appellant proceeded to watch her, and found that her conduct was entirely blameless. About 2 o'clock on the evening of the homicide deceased and his oldest son went to Honey Grove in a wagon, and returned about 8 o'clock in the evening, deceased bringing dresses for his twin daughters. While deceased was at Honey Grove, Mrs. Carter was washing clothes at the house of deceased, and she testified that Mrs. Martin approached witness, and told her that she and her father were going to take a nap, intimating that she did not desire to be disturbed; and they remained in the house for some time alone. When deceased returned from Honey Grove, he came from the lot, went into his bedroom (the house consisting of three rooms), and lay down on a cot. Appellant testified that he went out of the room he was in, through the kitchen, and approached the cot where deceased was lying, through the door from the kitchen, and shot deceased in the head. He then went out into the yard a few moments, and, thinking perhaps deceased was not dead, returned, secured another pistol, and shot deceased again in the head. Defendant then returned to the yard, where deceased's wife and children were, and was seen there by parties passing a short while after the homicide. He then left, and some time thereafter was arrested. Upon being warned, he stated he killed deceased because he had imposed upon his wife, mistreated her in various ways, accused her of infidelity, etc.; that this was the sole cause of the killing; that other than that he had nothing against deceased; that after deceased left for Honey Grove deceased's wife proceeded to tell appellant of the ill treatment by deceased of her; that the statement so narrated so enraged appellant that he then and there resolved to kill deceased for said slander and mistreatment of his wife; that this resolution was not communicated to the wife of deceased. The state proved that blood was found on the lamp chimney, on the wall of the room where deceased was killed, and also that blood was upon the dress the wife was wearing, which was stored away in an outhouse. The dress was identified by several witnesses as being the one that the wife wore the evening of the homicide. It is also in evidence that the wife manifested no grief, showed no anxiety or regret, over the death of her husband, nor did her children manifest any. She remained out of the house nearly all the night in the yard. There are other circumstances in the record

going to show the complicity and consent of the wife to the killing, but we do not deem it necessary to detail them in order to properly discuss the questions raised.

Appellant objects to the action of the court refusing his special charge No. 8, as follows: "If you believe from the evidence that defendant killed deceased on account of having been told and informed of insulting conduct and words by deceased towards and concerning defendant's daughter, and that such killing took place upon the first meeting of defendant with deceased after defendant was informed of such insulting words and conduct, then you are instructed that, in considering the question of manslaughter, the time which may have intervened between the time when defendant received such information and the time he killed deceased would not be a material consideration, nor in such case would it be material that defendant during such intervening time may have prepared to take the life of deceased, if he did so prepare." We do not think the court erred in refusing this charge. However, in view of another trial, we think the court should charge the jury the law as laid down in the Eanes Case, 10 Tex. App. 421. There we held, under the statute authorizing the defense of insulting conduct toward a female relative, that four issues of fact are presented: First, the occurrence of insulting words or conduct on the part of deceased towards the female relative of accused; second, whether that was the real provocation which induced the killing; third, whether the killing took place immediately on the happening of the insult, or as soon thereafter as the accused, having been apprised thereof, met with deceased; and, fourth, whether accused when he killed deceased was affected by such a degree of anger, rage, resentment, or terror as would commonly, in a person of ordinary temper, render the mind incapable of cool reflection. And we take it that the court should have further charged the jury that the mere lapse of time between the formation of the design to kill and the killing would not of itself show that appellant was not actuated by such passion as rendered his mind incapable of cool reflection at the time of the killing. While the trial judge substantially gave the above-quoted charge in the main charge, still, in view of the fact that the evidence presents manslaughter upon sudden passion, under another clause of the manslaughter statute, and in view of the further fact that the trial court charged upon said phase, we think the distinction between the two grades of homicide should have been clearly and explicitly defined. And in this connection the charge should explicitly state whether deceased had offered the insults to appellant's daughter, or whether he had slandered her or not, would be immaterial, if the jury believed from the evidence that appellant thought deceased had slandered his daughter;

in other words, the statements of appellant's daughter to him would be a predicate to reduce the killing from murder to manslaughter, whether his daughter's statements were true or false, if believing them he acted upon said statements. For a full discussion of the law relative to this matter, see *Jones v. State*, 33 Tex. Cr. R. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; *Messer v. Same*, 63 S. W. 643, 2 Tex. Ct. Rep. 904.

Appellant also insists that the court erred in charging on the law of conspiracy. We have detailed substantially the evidence adduced. However, viewing the whole record, and considering all the circumstances adduced, those stated above as well as others, we are of opinion that it was proper to charge on the law of conspiracy.

By bills of exception appellant complains that the court erred in admitting in evidence various acts and declarations of Nannie Martin made long before the homicide, and in the absence of the defendant. Appellant cites us to *Cox v. State*, 8 Tex. App. 256, 34 Am. Rep. 746, in which the court used the following language: "If two or more act together, with unlawful intent, in the perpetration of a crime, they are co-conspirators and principal offenders by reason of their common design and co-operation, and, whether they be tried and indicted jointly or separately, the antecedent acts or declarations of each, pending and in pursuance of the common design, and tending to throw light upon its execution or upon the motive or intent of its perpetrators, are competent evidence against each and all of them." A casual reading of this opinion appears to sustain appellant's contention that only acts and declarations made during the pendency and in pursuance of the common design can be proved, as indicated in the above excerpt. However, we believe that a careful perusal of the opinion will show that the converse of appellant's contention is the rule laid down. The court quote the following language of Mr. Greenleaf with approval: "The same principles apply to the acts and declarations of one of a party of conspirators in regard to the common design as affecting his fellows. Here a foundation must first be laid by proof sufficient, in the opinion of the judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy in pursuance of the original concerted plan and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed in law a party to every act which

has before been done by the others, and to every act which may afterwards be done by any of the others, in furtherance of such common design. Sometimes, for the sake of convenience, the acts and declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this rests in the discretion of the judge, and is not permitted except under particular and urgent circumstances, lest the jury should be misled to infer the fact itself of the conspiracy from the declarations of strangers." 1 Greenl. Ev. § 111. And the court also quote from the case of *People v. Brotherton*, 47 Cal. 388, as follows: "Where two are jointly indicted, the prosecution may on the trial prove the declarations and acts of one done in the absence of the other, before proving the conspiracy between the defendants, provided proof of such conspiracy is afterwards made." In *Stevens v. State*, 59 S. W. 548, we say: "We think the testimony established the fact that appellant was a co-conspirator in the triple murder of the Humphreys, and, being such, whether he entered at the beginning of the conspiracy or subsequently, the acts and declarations of Joe Wilkerson would be admissible as illustrating the common design, purpose, and intent with which they all acted, and would be whether the acts or declarations of Joe Wilkerson were made before or after the formation of the conspiracy." We therefore hold that the court did not err in admitting the acts and declarations, threats, animus, and conduct of Mrs. Nannie Martin towards the deceased, although said acts, threats, and conduct covered a period of two or three years, since they tend to illustrate and make manifest the common design, purpose, and intent that actuated appellant at the time of the commission of the offense. We take it to be clearly in consonance with law as well as reason that, if a party threatens to take the life and forms the design to take the life of another, and subsequent to said formed design secures the services of a co-conspirator, such subsequent procurement of the services would not render inadmissible the acts, threats, and formed design of the party so securing said services.

The sixteenth ground of the motion for new trial insists that the court erred in giving the following charge: "The court has admitted evidence before you of the acts and declarations of Mrs. Nannie Martin, upon the idea and theory that she was a co-conspirator with the defendant; but my action in admitting this evidence means only that sufficient evidence of the conspiracy was offered to permit the testimony to go to you, for you to determine from all the evidence whether or not there was in fact such conspiracy. If two or more persons enter into an agreement to kill any reasonable creature or being within this state, this, in

law, constitutes a conspiracy to commit the crime of murder, and all parties to such agreement are conspirators. In order to constitute a conspiracy, there must be a positive agreement to commit the crime; that is, to do the act of killing. It is not necessary for the state to prove that the parties actually met together and made the agreement to kill. It is sufficient if the evidence shows that they performed different parts or acts, all contributing to the accomplishment of the common design, and the agreement to commit the crime may be proved by circumstantial evidence. The fact of conspiracy cannot be proved by the declarations of any of the conspirators,—that is, except as to the one making the declarations; but, when the fact of conspiracy to commit a crime has been established by competent and satisfactory evidence, the declarations and acts of any one of the co-conspirators are admissible in evidence against any of the parties to the agreement for the purpose of establishing the commission of the crime. But, to be admissible for such purpose, such acts must have been done and such declarations made during the pendency of the conspiracy, and in the furtherance of the accomplishment of the common purpose; that is, such acts must have been performed and declarations made after the agreement to commit the crime was entered into, and before the crime was committed." It will be seen that the latter portion of the charge, on the law of conspiracy, limits the acts and declarations of a co-conspirator to those acts and declarations made during the pendency of the conspiracy, and that said acts and declarations must be made after the agreement to commit the crime was entered into. This is not correct, since we have held that the acts and declarations of a co-conspirator may be admitted, not as the court states, for the purpose of proving the conspiracy against another party other than the one making them, but that such acts and declarations may be admitted to illustrate and make manifest the intention with which the parties subsequently acted in carrying out the conspiracy. In other words, where A. states he intends to kill B., and in pursuance of that intent he secures the aid of C., A.'s previous declarations may be admitted to illustrate the intent, and to show the purpose, object, and motive, of the conspiracy, and the animus actuating the parties in the commission of the crime. We take it that it is not necessary for the state to prove an absolute expressed consent of conspirators, and the intent that actuated each of the conspirators in getting up the conspiracy; but the state may rely upon the circumstances surrounding the matter to show that the conspirators, by implication at least, adopted the animus and intent and purpose of the chief conspirator, as made manifest by his declarations prior to the formation of the conspiracy. Clearly, acts and declarations of

conspirators made during and in pursuance of the conspiracy are admissible. Then, if the acts and declarations of a conspirator are admissible under these circumstances, we take it that it follows, by logical sequence, that the acts and declarations made prior to the formation of the conspiracy make manifest the purpose of the same, and are admissible in the trial. So, it will appear that appellant could not complain of the latter clause of the charge, since it restricted the evidence introduced upon the trial hereof in a manner favorable to appellant's interests; but we take it that he has just cause to complain of the first clause in the charge. The court there tells the jury that he admitted the acts and declarations of Mrs. Nannie Martin upon the idea and rule that she was a conspirator with the defendant, and then states that his action in admitting this evidence means only that sufficient evidence of the conspiracy was offered to permit the testimony to go to the jury, for them to determine from all the evidence whether or not there was in fact such conspiracy. We take it that this charge is clearly a charge upon the weight of the evidence, and is a direct statement by the court to the jury that the court in its opinion thought sufficient evidence of the conspiracy was offered to permit the testimony to go before the jury. The court should have charged the jury, instead of this, that the jury should not consider the acts and declarations of Nannie Martin for any purpose whatsoever, unless they should first decide from the evidence beyond a reasonable doubt that appellant conspired with Nannie Martin to kill deceased, and, if they should find that said conspiracy was so formed, then the acts and declarations of Nannie Martin could then be considered by the jury in passing upon the animus and intent and purpose of the appellant in committing the crime, if he did commit it, and for no other purpose. The rule in reference to charges upon the weight of the evidence is sufficiently declared in *Stuckey v. State*, 7 Tex. App. 174.

We do not deem it necessary to discuss the other assignments of error; but, for the errors discussed, the judgment is reversed, and the cause remanded.

ALLEN v. STATE

(Court of Criminal Appeals of Texas. Jan. 22, 1902.)

HOMICIDE — INSTRUCTION — SELF-DEFENSE — PROTECTION OF DWELLING — ABSTRACT INSTRUCTIONS — PEACE OFFICERS — POWER TO ARREST WITHOUT WARRANT — THREAT TO TAKE LIFE.

1. On prosecution for murder, accused claimed that the shot which killed deceased was fired by accused through the walls of his own dwelling to frighten away persons who were trying to enter the dwelling for the purpose, he believed, of injuring accused, and had shot

through the walls. The court charged that any person can defend himself from unlawful attack reasonably threatening injury to his person, and may use all necessary force, and that homicide is justifiable when committed in defense of one's person. *Held*, that the charge, though a correct definition of accused's rights, was insufficient, because failing to instruct specifically that if accused was assaulted by persons shooting into the house, and, acting on appearances, he fired to save his life or his person from serious harm, he was not guilty.

2. Under Code Cr. Proc. arts. 107-112; empowering peace officers to prevent threatened injuries, by the means to which the person about to be injured might resort, and providing that if, within the hearing of a magistrate, one person shall threaten to take the life of another he shall issue a warrant for the arrest of the person making the threat, a city marshal has no right to arrest without warrant a person threatening to take the life of another.

3. In a prosecution for murder, where deceased was killed by a shot which accused fired through the walls of his dwelling to frighten intruders whom he believed were attempting to enter his dwelling for the purpose of injuring him, and accused testified that he did not know who the intruders were and there was no contradictory evidence, a charge that if accused knew that the parties were peace officers, etc., was erroneous, because without foundation in the evidence.

4. A person in preventing an injury to his person may use whatever force is necessary, without first resorting to all other means within his power, as required by Pen. Code, art. 677, referring to the protection of property.

5. In a prosecution for murder, where it appeared that deceased was killed while he and others were attempting to enter defendant's dwelling against his will, a charge that defendant was justified in killing deceased if he had reasonable ground to believe that deceased was attempting to enter his dwelling, or had so attempted, and would renew such attempt, was properly refused, since the killing might, even under these circumstances, have been the result of sudden rage, resentment, or terror.

6. If deceased and the other parties were making an unlawful assault on defendant's dwelling for the purpose of injuring defendant, and he shot deceased, believing it necessary to protect himself from serious injury, he was justified.

Appeal from district court, Walker county; J. M. Smither, Judge.

Granderson Allen was convicted of murder, and appeals. Reversed.

John C. Williams, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life.

The following is, in substance, the evidence adduced upon the trial: Rountree, city marshal of Huntsville, testified: Deceased, Cates, was deputy marshal. On the evening deceased was killed witness, with John Josey, was driving in a buggy, and, going around the depot, met defendant driving a pair of large mules to a wagon. "Our horse had to run off in a ditch to keep defendant from running into our buggy." Witness hallooed to him, and he looked back and grinned, and went on to the cotton

wharf. Witness drove back there, jumped out, struck defendant two or three times with a loaded whip, broke the whip over defendant, then drew a pistol, and struck him over the head once or twice. Defendant got behind a bale of cotton. Witness then struck him two or three times, and left. Later in the evening a negro told witness defendant said he was going to burn witness' house that night, and shoot witness and his wife as they ran out. Witness paid no attention to it at the time, and thought nothing more about it until Keeland came to witness' house, and told him if defendant had made such threats witness had better look out, as he was a very dangerous negro. Witness then thought it best to make an investigation of the matter, and started to see deceased, and on the way Session joined him. "Stewart was with Keeland, and offered to show us where defendant lived." Witness went to defendant's for the purpose of investigating the threats, and, if he found them to be true, to arrest defendant, and turn him over the next morning to the sheriff. If defendant had denied the statements, that would have settled it. In looking for defendant they went to the wrong house, and some one passed and told witness where defendant was. When we got to the house, deceased, who knocked on the door, called defendant to come out, saying he wanted to talk with him. He did not knock unusually loud. The door was fastened by a chain run through it, and the chain was locked. The chain rattled pretty loud. When deceased called no one answered. "We then went around to the south window, and deceased knocked on the window, and called to defendant again to come out, that he wanted to talk with him." Deceased then stepped back, standing just west of the window. Another witness testified that he saw the curtain of the window move, and just at that instant a gun was discharged in the house. The load came through the wall, and struck deceased. Witness further states he heard another shot fired, but does not know where it was fired from, and heard some one strike a match inside the house, and after this all the parties left the premises. He returned, and found deceased lying near the house. He was taken away, and subsequently died. The shot that struck deceased was the first shot fired. It was a bright moonlight night, the sky was clear, and the moon was nearly full. Witness and parties with him went to the house between 9 and 10 o'clock at night. It is shown by another witness that defendant had made serious threats against the life of deceased. However, this was denied by defendant. The sheriff testified that after proper warning defendant confessed he shot deceased, but did not intend to do so; that he just fired his gun to scare them away. Defendant testified substantially as did Rountree, the marshal, with reference to their meeting, except he denies having laughed at

the marshal's buggy going into the ditch. He states that during the time the marshal was beating him defendant was trying to get away from him; that he lived with Nancy McGuire, where deceased was shot; had lived with her nearly three years; that he ate supper, and, being tired, laid down and went to sleep. "The next thing I knew I was awakened by some one at the door, banging at it. There seemed like there were several. One says, 'Kick the damn door in, and I will blow his brains out when he runs out.' Another one says, 'No; do not break the door in.' I could hear these men then walk off the gallery, and come around to the side door on the south. They tried to break that door in, but it was nailed up. I reached and got my gun. They then came to the south window, and I could see the shadow of three men on the green window shade. The moon was bright, and their shadows were very plain. I could have shot either one of them. I did not know who they were. They prized the window up. It would raise about two inches, and there was a large nail driven above it. They put a stick under it, and prized it up, and broke the nail. I then fired through the wall. I did not shoot to hit any of them. I wanted to scare them away until I could get out and run. When I fired they ran off. I could hear them run. I then jumped out the back window, and ran off. I went out to my father's, about two miles from town, and did not know I had shot any one till the sheriff arrested me. I never made a threat again deceased in my life, or Rountree or his wife, nor that I would burn his house. When I heard the voice of men at my door at that time in the night I thought they had come perhaps to take me out and whip me. I knew they had been whipping negroes of late pretty badly. When a negro in any way offended a white man in this community he surely got a whipping for it, usually after night. This has been common. I did not want to be whipped, and thought I would shoot and scare them off for a few minutes, then jump out, and run off. There were three shots fired. Some one shot through my door, then I shot, and after they ran off a little way some of them shot back. I did not know who any of the parties were when I shot." There are some other facts detailed by witnesses going to show that defendant, and three other parties with whom he was jointly indicted, a short while prior to the homicide shot off their guns and acted in a boisterous manner, swearing vengeance upon the white people.

Appellant in his second bill of exceptions complains of the following portion of the court's charge: "Every person is permitted by law to defend himself against any unlawful attack, reasonably threatening injury to his person, and is justified in using all the necessary and reasonable force to defend himself, but no more than the circumstances

reasonably indicate to be necessary. Homicide is justified by law when committed in defense of one's person against any unlawful and violent attack, made in such a manner as to produce a reasonable expectation or fear of death or some serious bodily injury." Appellant contends this charge is not applicable to the facts proven. We are of opinion the foregoing charge is correct, in so far as it defines appellant's rights; but it is not sufficient with reference to the defensive issues made by the evidence in the case. In addition to the above, the jury should have been told that if appellant was assaulted by the parties shooting into the house, and his life was thereby endangered, and, acting on appearances, he fired to save his life or his person from serious bodily injury, he would not be guilty of any offense against the laws of this state. In firing appellant would have the right to act upon the appearances as they suggest themselves to his mind, viewed from his standpoint alone, and taking into consideration the circumstances surrounding him at the time of firing the gun.

The fourth bill of exceptions complains of the following portion of the court's charge: "You are instructed that the law provides that it is the duty of every peace officer, when he may be informed in any manner that a threat has been made by any person to do some injury to the person or property of another, to prevent the threatened injury if within his power, and, in order to do this, he may call in aid any number of citizens in his county; and if you shall believe from the evidence in this case, beyond a reasonable doubt, that deceased, as deputy marshal, and T. H. Rountree, as marshal, of the city of Huntsville, had been informed that defendant, Granderson Allen, had seriously threatened to take the lives of T. H. Rountree and his wife, and to burn their house, then the deceased and said Rountree, as peace officers, had a right to go to the house where he and Rountree had been informed said Allen could or might be found to investigate the truth or falsity of said information, as to such threats, and, if found to be true, to prevent the threatened injury, if within their power, to the extent of arresting said Allen to prevent the accomplishment of said threats, and to summons other persons to their aid; and if the defendant Granderson Allen knew that deceased and Rountree and other parties with them were peace officers, and a posse summoned to their aid, and were there for a lawful purpose, and that said parties were doing no violence or attempting to do any violence to defendant's person, or attempting to effect any unlawful or violent entrance into said house, and that said defendant shot and killed deceased, then said defendant would be guilty of murder, if you should believe from the evidence beyond a reasonable doubt the existence of malice upon the part of said defendant, or of man-

slaughter, as you may find the existence of sudden passion aroused by adequate cause upon the part of said defendant." This charge is not the law. It seems to have been predicated on a construction of article 107 et seq., Code Cr. Proc. Article 107 reads: "It is the duty of every magistrate when he may have heard, in any manner, that a threat has been made by one person to do some injury to the person or property of another, immediately to give notice to some peace officer, in order that such peace officer may use lawful means to prevent the injury." Article 108: "Whenever, in the presence or within the observation of a magistrate, an attempt is made by one person to inflict an injury upon the person or property of another, it is his duty to use all lawful means to prevent the injury. This may be done either by verbal order to a peace officer to interfere and prevent the injury, or by the issuance of an order of arrest against the offender, or by arresting the offender; for which purpose he may call upon all persons present to assist in making the arrest." Article 109: "If, within the hearing of a magistrate, one person shall threaten to take the life of another, he shall issue a warrant for the arrest of the person making the threat, or in case of emergency, he may himself immediately arrest such person." Article 111: "It is the duty of every peace officer when he may have been informed in any manner that a threat has been made by one person to do some injury to the person or property of another, to prevent the threatened injury, if within his power, and in order to do this he may call in aid any number of citizens in his county. He may take such measures as the person about to be injured might for the prevention of the offense." Article 112: "Whenever in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another it is his duty to prevent it, and for this purpose he may summon any number of citizens of his county to his aid. He must use the amount of force necessary to prevent the commission of the offense, and no greater."

The city marshal of a city is a peace officer, and under the latter clauses, as the court indicates in his charge, could prevent injury to the person or property of another. Article 109 authorizes the magistrate, in case of emergency, to arrest a person making a threat to take the life of another, if such threat is made in the hearing of the magistrate; but a peace officer is not a magistrate, and, under the provisions of article 111, he can only take such measures for the prevention of the execution of a threat against the person of another as the person about to be injured might take for the prevention of the offense himself. This statute clearly does not authorize a peace officer to seek out a citizen whom he has understood has made

threat against his life or some one else's life, and arrest him. The statute merely contemplates the prevention of a crime then being attempted, and does not contemplate an arrest without warrant, or when he contemplates at some future time consummating the serious threat to take life. Article 962, Pen. Code, makes it a penal offense to threaten to take the life of a human being, or to inflict upon any human being any serious bodily injury, and the punishment therefor shall not be less than \$100 nor more than \$2,000, and in addition he may be imprisoned in the county jail not exceeding one year. If the city marshal had been told, as he testified, that defendant had made serious threats against the life of himself and his wife, he could have had an affidavit filed against defendant, and upon the filing of the same the magistrate could have issued a warrant for the arrest of defendant on said charge. Without such warrant, the marshal would have no more right to go to the house of defendant and intrude upon his premises than any other citizen. For a full discussion of the rights of a peace officer to arrest without warrant, see *Montgomery v. State*, 15 S. W. 537, 3 Tex. Ct. Rep. 497. In that case we held that if a felony is committed in the presence of a peace officer, or an offense against the public peace, he may arrest without warrant. Article 342, Pen. Code, authorizes a peace officer to arrest without warrant a party for carrying a pistol, where such fact is known of his own knowledge, or upon information of some credible person. But these three are the only instances we are aware of that the Code authorizes the arrest of a person without warrant. It follows, therefore, that the court should not have submitted the question as to whether Rountree was marshal and peace officer to the jury, since he had no more rights in the premises than any other citizen.

Appellant also excepts to the charge because it tells the jury if defendant knew that deceased and Rountree and the other parties with him were peace officers, and were there for the lawful purpose, etc. There is no testimony showing that defendant knew for what purpose they were there, nor is there any testimony showing that he knew who the parties were. He testified that he did not. There is no testimony on this question except his. Hence this portion of the charge is erroneous.

The fifth bill of exceptions complains of the following portion of the charge: "But if you shall believe that deceased and Rountree had gone to the house where defendant, Granderson Allen, was staying, not for the purpose of investigating such threats reported to have been made by said defendant, and preventing, by lawful means, the carrying out of such threats, but for the purpose of doing unlawful violence to said Allen, and had made an unlawful and violent

attack on said house, then defendant had the right to defend himself from such an unlawful and violent attack, either upon himself or in preventing or interrupting such unlawful intrusion upon such premises, but would be required to resort to all other means within his power to prevent such unlawful violence upon his person, or unlawful intrusion on said premises, except to retreat; and if defendant, Granderson Allen, in shooting and killing deceased, resorted to all the means within his power, or from all the facts and circumstances surrounding him at the time, and viewed from his standpoint at the time, reasonably appeared to him was within his power, to protect himself from such unlawful violence, or preventing or interrupting such unlawful intrusion upon such premises before shooting deceased, and that defendant in shooting deceased used no more force than was necessary, or from all the facts and circumstances surrounding him at the time, and viewed from his standpoint at the time, reasonably appeared to him was necessary, to protect himself from such unlawful violence, reasonably apprehended by him, or to prevent or to interrupt such unlawful intrusion upon such premises, then defendant, Granderson Allen, would be justified, and you will acquit him, and also in such case you will acquit the other defendants. And in this connection you are instructed that, even if you should believe that deceased and Rountree went to the house in question for a lawful purpose, concerning which you have hereinbefore been instructed, but that defendant did not know of such lawful purpose on their part, and that the acts and conduct of deceased and Rountree were such as to create in the mind of defendant a reasonable apprehension that deceased and Rountree were there to make an unlawful and violent attack on him, or were making an unlawful intrusion on said premises, then defendant had the right to defend against such apparent intrusion to do violence to him, or such apparent intrusion on said premises, the same as if the same was real, and in considering these matters you will consider same from the standpoint of defendant, and from no other standpoint." It follows from what has been said with reference to the preceding bill of exceptions that this charge is also erroneous. If appellant was defending his person from unlawful assault, he had the right to use whatever force was necessary, as indicated above, viewed from his standpoint, that might be necessary to protect his life or person from serious bodily injury. Article 677, Pen. Code, contemplates that, if he is trying to protect his property, then he must resort to all other means to do so before slaying the party injuring or intruding upon his property. This distinction is clearly made in the statute and laid down by the authorities construing it.

Appellant's fourth requested special in-

struction is as follows: "If you shall believe from the evidence beyond a reasonable doubt that defendant, either by himself or acting with the other defendants, killed deceased, Hill Cates; but if you further believe that, at the time of said killing, deceased, or others acting with him, was attempting to enter the house where defendant resided, without the consent of defendant; or that just before the killing he, or others acting with him, had so attempted to enter said house, or that defendant had reasonable grounds to believe that deceased, or others acting with him, had so attempted, or was so attempting, to enter said house, and would renew said attempt,—then defendant would be justified in killing deceased, and you will acquit him; unless you shall further believe that in so doing defendant used more force than was necessary, or than might reasonably appear to them necessary, to prevent said entrance; and, in determining whether more force was used than was necessary, you should view said act or acts from the standpoint of defendant alone; but in no event, if you so believe, could you find defendant guilty of a higher grade of offense than manslaughter." We do not think the court erred in failing to give this charge. If appellant shot deceased upon sudden impulse aroused from an adequate cause, which cause had produced sudden rage, resentment, or terror in his mind, thereby rendering the same incapable of cool reflection, and this last condition existed at the time of the shooting, then appellant would be guilty of manslaughter. If appellant shot deceased while deceased and other parties were making unlawful assaults upon his house, trying to break into the same for the purpose of inflicting death or serious bodily injury upon defendant, and he thought it necessary, viewing the surroundings from his standpoint, to shoot to protect himself from serious bodily injury at the hands of the deceased and the other parties, and, so believing, he shot and killed deceased, then, under the law, he would not be guilty of any offense. As indicated in the charge of the court, if appellant shot merely to scare the parties away, and with no thought or expectation of injuring either one of them, he would not be guilty of any offense.

We do not deem it necessary to review appellant's other assignments.

The judgment is reversed, and the cause remanded.

grantee, are pending against numerous defendants, neither of the causes are ready for trial, all parties to each of the suits are proper parties to both, though the number of parties in one are more than in the other; and the conflicting interests may be determined in a single suit,—mandamus will not lie to vacate an order consolidating them.

Original application for mandamus by S. P. Halliburton and others against J. D. Martin, judge of the Twenty-Eighth judicial district, to compel the vacation of an order consolidating certain causes. Denied.

Crawford & Lipscomb, for complainants. Watts, Chester & Ellison and F. C. Proctor, for respondent.

GARRETT, C. J. S. P. Halliburton and others have applied to this court for a writ of mandamus to the Honorable J. D. Martin, judge of the district court of Jefferson county for the Fifty-Eighth judicial district, showing: That the complainants are the owners of an undivided interest of about 3,000 acres in the Pelham Humphries league of land situated in Jefferson county, and that W. P. H. McFadden, V. Weiss, W. W. Kyle, Dan Lewis, and the J. M. Guffy Petroleum Company are in possession of the said league of land, enjoying the fruits and benefits thereof. That said land is oil-bearing land, and that the said McFadden and others, above named, denying the rights of the complainants, and excluding them from said land, are drilling wells, and extracting the oil therefrom. That heretofore, on June 14, 1901, the said McFadden, Weiss, Kyle, Lewis, and J. M. Guffy Company brought a suit in the district court of Jefferson county (No. 2,906) against the complainants and others, to the number of about six, for said land. That on July 24, 1901, the complainants filed their answer in said suit, and a plea in reconvention against the plaintiffs for the recovery of their interest therein. That the questions in said cause are simple, and only relate to the family history of Pelham Humphries, the grantee of the league, the forgery of two deeds, and possession by McFadden as affecting limitation; and that preparation for a trial of said cause is so far advanced that it is reasonably probable that it will be ready for trial on March 1, 1902, at which time it will be subject to call as a nonjury case on the docket of said court. That the value of the land is more than \$1,000,000, and that complainants are ousted of their rightful possession thereof by the said McFadden, Weiss, Kyle, Lewis, and J. M. Guffy Company, and are poor, and would not be able under any circumstances to give the bond necessary to obtain a sequestration thereof; and that the said parties in possession have not, within the knowledge of complainants, the means from which the complainants could be compensated for the probable waste and damage that will be done by them to said land. That there are also pending in said court and in the dis-

HALLIBURTON et al. v. MARTIN, Judge.
(Court of Civil Appeals of Texas. Feb. 8, 1902.)

MANDAMUS—CONSOLIDATING CAUSES—VACATION OF ORDER.

Under Rev. St. art. 1454, authorizing the court in its discretion to consolidate pending causes, where suits involving the title to realty, and depending on the identity of the original

trict court of Angelina county and the United States circuit court for the Eastern district of Texas other suits involving the same land, to which the complainants and a great number of other persons are parties. That among said suits is the suit No. 2,817, Thomas Anderson against A. F. Lucas et al., in the district court of Jefferson county, involving a claim of 1,500 acres undivided interest therein. That there are about 200 defendants in said suit, only a small number of whom have been served with process; and of those served only a small number had answered. That a great variety of issues were involved in said suit. That probably not more than 10 of the 200 defendants were in possession of any portion of the Humphries league, and that the plaintiffs were out of possession. That the other defendants were asserting some claim constituting an equitable cloud upon the title; and that none of the parties except said McFadden, Weiss, Kyle, Lewis, and J. M. Guffy Company, and probably four or five vendees of McFadden, who purchased while cause No. 2,906 was pending, are necessary parties to a suit for the possession of said land. That in said cause 2,817 the plaintiff claims as one of the heirs of William Humphries, and is seeking to set aside the deed of a guardian ad litem to said McFadden, and contending that William Humphries was identical with the original grantee of the league, and claims an undivided 1,500 acres thereof as his heir. That the defendant McFadden urges as defenses in said cause that the deed was regular, and has since been ratified. Since the institution of said cause 2,817 T. E. Buford had intervened therein, setting up that he has bought the interest of the plaintiff. That Charles J. Chaison and the American Oil & Refining Company, also defendants in said suit, claim a specific parcel of 475 acres of the league under a deed from McFadden, and assert title by limitations under a possession differing in character from that asserted by McFadden to the entire league. That some of the defendants claim to derive their title through a Pelham Humphries of Georgia, others through a Pelham Humphries of Tennessee, and the claims of others of said defendants depend upon supposed irregularities in the chain of transfers from William Humphries down to W. P. H. McFadden; and that these contentions became innumerable, some of them probably depending on questions of the forgery of certain instruments in such chain of transfers. That some of the defendants claim title to parcels as small as one acre by purchase from McFadden, and others of an undivided interest, and would have interminable equities to adjust with their vendors. That a great many of the defendants who know of no claim they have to the land, and have none, on account of its great value will refuse to disclaim as long as there remains any uncertainty about their

rights. That it is very nearly impracticable to try said cause No. 2,817. That the enormous expense and trouble will render the taking of depositions impracticable. That on account of the great number of issues involved no trial judge can probably submit them correctly to a jury, and that complainants believe that said cause will not be finally disposed of during their lives. That heretofore, to wit, on December 12, 1901, after having sought to dismiss the cause No. 2,906, and having been refused permission to do so because of complainants' plea in reconvention and their objections to the dismissal, the said McFadden and the other plaintiffs in the said cause No. 2,906 filed a motion in said district court to consolidate said cause with the said cause No. 2,817. That complainants resisted said motion before the court, but that on December 15, 1901, the court made an order consolidating said causes. That the complainants excepted to said order, and afterwards filed a motion to have the court reconsider its action, setting out in said motion all the facts herein set out, and having the same sworn to by the complainant Halliburton, and urged said motion before the court, but the court, after having taken the motion under advisement until December 31, 1901, overruled the same, and refused to make an order that upon either of the said causes being ready for trial it should not be delayed by the other, to which action of the court the complainants excepted. Complainants say that the action of the court in consolidating said causes was beyond the discretionary power of the court; that the same was, in effect, a denial to complainants of a prompt trial of their cause, which was practically ready for trial, but is by said order obliterated from the docket, and complainants are denied the right to be heard upon their plea in reconvention; that there exists no reason why the said judge should not proceed with the trial of said cause No. 2,906; and that the effect of delay is to work an inexcusable hardship upon complainants to the advantage of said McFadden and others.

The district judge has filed an answer to the complaint, in which he shows that the docket of the court is crowded with cases, and that there are more than 300 cases on the nonjury docket; that in the disposition of the docket made in accordance with the rules of the court the nonjury cases cannot be reached until the first Monday in March next, the first day of the next term. He shows: That the cause No. 2,817, Thomas Anderson et al. against A. F. Lucas et al., was filed May 14, 1901, and is an action of trespass to try title for an undivided one-third interest in said Pelham Humphries' league against numerous defendants, among whom were the said complainants S. P. Halliburton and others, and the said W. P. H. McFadden and others, who are the plaintiffs in the cause No. 2,906; that a part of

the defendants in No. 2,817 claim the entire league, and a part of them, to wit, the defendants in cause No. 2,906, S. P. Halliburton and others, claim only an undivided part thereof. That on August 27, 1901, the complainants filed their answer and cross bill in No. 2,817 against the plaintiffs and their codefendants, pleading specially their title to an undivided interest in said league of land through Pelham Humphries, the original grantee, and prayed for partition and the appointment of a receiver. The defendants McFadden, Weiss, Kyle, and the J. M. Guffy Company also answered in said cause No. 2,817, and pleaded in reconvention against the complainants and the other parties to the suit a claim to the entire league except a small portion thereof, conveyed by them to other defendants. That on June 14, 1901, the said W. P. H. McFadden and others filed in said court the said suit No. 2,906 against the said complainants and others as an action of trespass to try title for the recovery of said league; and that on July 24, 1901, the complainants filed their answer and cross bill in said cause No. 2,906, and pleaded their title specifically, and raised substantially, as between them and the plaintiffs, all the issues that were made in suit No. 2,817. That there are numerous defendants in both of said suits, but that it is now impossible for respondent to determine who are necessary parties. It is shown that neither of said causes has ever been reached or called for trial, nor has any objection been made to the disposition in passing them as nonjury cases to the first Monday in March; and the respondent avers that he has been guilty of no delay in the disposition of said causes, nor manifested any refusal to try either of them. The respondent then sets out the matter of the filing of the motion for the consolidation of the causes, and says that, "after hearing fully the argument of counsel upon the motion, and after considering the issues involved in the two suits, your respondent, in the exercise of what he deemed sound judicial discretion, concluded that it was to the interest of all parties, and that it would sooner settle the litigation with reference to this league of land, to consolidate, and the order consolidating the two suits was accordingly made"; that a motion for reconsideration was made, which, after mature reflection, the respondent overruled. Respondent took into consideration the fact that the issues between the complainants and the plaintiffs in cause No. 2,906 are precisely the same in both suits, and that, so far as a trial is concerned, very little preparation had as yet been made by either party to the suit; and that, in order to settle the title to the land in controversy, it is necessary to try and settle the issues involved in cause No. 2,817. Respondent has no reason to believe that any obstruction will be thrown in the way of a speedy trial of the

consolidated cause. It is further shown that on December 31, 1901, the complainants filed in said cause No. 2,906 a motion to modify the order of consolidation, among other things, so that said causes may be tried together as one cause, provided that all could be ready for trial at the same time, and providing that a continuance of one of said causes shall not operate as a continuance of the other, and also that the depositions taken in one cause may be used in the other; and that said motion has not been disposed of, and is still pending. Respondent denies that he has at any time refused to proceed to a trial of said cause No. 2,906 agreeably to the principles and usages of law, and says that he does not intend in the future to refuse to proceed to a trial and judgment of said cause when it is reached upon the docket. Respondent does not know of any reason why the parties cannot make their preparation for trial long before either of said causes can be reached for trial; and says that if it should be made to appear to his satisfaction in the future preparation and conduct of said case that the parties are being unduly delayed, or put to unnecessary trouble and expense, by reason of the consolidation, he would promptly make such other and further orders in the matter as would, in the exercise of his best discretion, subserve the ends of justice. And, having fully answered, the respondent prays that the alternative writ of mandamus against him be vacated, and that the application be denied, and that the respondent be discharged, with his costs.

The complainants have replied to the answer of the respondent, and reiterate their complaint that they have been denied the right to proceed with the trial of said cause No. 2,906, and show that, while said cause No. 2,817 may have originally been only a suit of trespass to try title, yet by the amendments filed therein its character has been changed. They deny that the answer shows any reason why the judge should not proceed with the trial of said cause. Other matters are set out in the supplemental complaint, but they are not deemed material.

The power of this court to issue the mandamus sought by the complainants depends upon the question of whether or not the judge of the district court has refused to proceed to the trial of cause No. 2,906 agreeably to the principles and usages of law. Rev. St. art. 1000. It has no power to control by the writ of mandamus the discretion of the judge in matters relating to the trial of causes, or to direct what judgment he shall render. *Ewing v. Cohen*, 63 Tex. 482. It can compel him to act by proceeding to try the case agreeably to the principles and usages of law, but cannot control his discretion. This principle is well settled, and has been frequently announced by our supreme court, and it is unnecessary to cite au-

thorities in support thereof. An analysis of the cases would only serve to emphasize the strictness of the rule. Nor will the writ of mandamus issue unless the right has been denied, and the complainant has no other legal remedy. Neither of the causes the consolidation of which is complained of has ever been called for trial, nor in fact are ready for trial, but it is contended that by the order of consolidation the cause No. 2,906 is stricken from the docket, and merged into cause No. 2,817, and it may be said that the application is to have the cause restored to the docket, so that the parties may proceed with their preparation for trial. This involves a review of the order of the court consolidating cause No. 2,906 with cause No. 2,817. The respondent answers that these causes involve the same issues, and that he ordered their consolidation in the exercise of a sound discretion vested in him by law; that he does not propose to delay the trial of either cause for the other, but will proceed with the trial of No. 2,906 when it is ready; and that there is now pending on the docket of the court, undisposed of, a motion made by the complainants to so modify the order of consolidation. In view of the pendency of such motion and the answer of the judge, it may be doubted, on that account alone, whether the writ should issue, because there has been no final disposition of the motion to modify, although, as counsel states, the judge had already repeatedly denied the right to proceed without consolidation. If, however, the action of the judge should be regarded as final, the writ should not issue unless this court can say that there has been a clear abuse of the discretion confided to him by the law. If he has plainly erred on a point of practice by disregarding a plain rule of law, mandamus will lie to correct and remedy such erroneous exercise of discretion. 19 Am. & Eng. Enc. Law, 835. The consolidation of cases is a rule of practice which a trial court frequently is called upon to exercise. Provision is made for it by the Revised Statutes as follows: article 1454. "Whenever several suits may be pending in the same court, by the same plaintiff, against the same defendant, for causes of action which may be joined, or where several suits are pending in the same court, by the same plaintiff, against several defendants which may be joined, the court in which the same are pending may, in its discretion, order such suits to be consolidated." It is also within the equitable discretion of the court, and may be exercised, as one of its inherent powers, independently of the statute, the identity of the parties not being essential; and in such case is said to rest entirely within the discretion of the court. 4 Enc. Pl. & Prac. 676-692. There is much reason for the contention. Since the complainants, by their pleas in reconvention, become plaintiffs in both cases against all the other parties for the recovery of the un-

divided interests claimed by them in the entire league, that the cases furnish cause for the exercise of the discretion of the judge within the statutory rule for their consolidation; but, when the causes of action are both analyzed and considered as presented by the pleadings of the parties, the essential controversy is over the ownership of the league, and springs out of the disputed identity of the original grantee with the ancestor of each set of claimants. Such being the issue, although the parties are much more numerous in the cause with which the other is consolidated, they being proper parties, and so far as they are not proper parties they can be dismissed from the cause, it does not appear that there was any abuse of the discretion of the judge in consolidating the causes. There have been frequent instances of the exercise of such power by the courts of this state, and it has in almost every instance been upheld. *Harle v. Langdon's Heirs*, 60 Tex. 560; *Harring v. Herring* (Tex. Civ. App.) 51 S. W. 865; *Spencer v. James* (Tex. Civ. App.) 31 S. W. 540; *Mills v. Paul* (Tex. Civ. App.) 30 S. W. 244, and cases cited. In the case first cited the court said the consolidation was only technically irregular, and, no prejudice having been shown, was not ground for reversal. Judicial discretion is to be guided by the spirit and principles and analogies of the law. It is not an arbitrary discretion. Applying this definition of judicial discretion to the action of the respondent, it appears in support thereof that there are two causes upon the docket of his court which affect the title to the same league of land; that the main controversy over the title grows out of a single issue,—the disputed identity of the original grantee of the league; that there are numerous parties to each of the suits, although in the one first in order in the docket the parties are much more numerous than in the other; that the complainants in both suits, though originally defendants, have become plaintiffs therein, pleading in reconvention specially in both cases the same title by inheritance from one whom they claim is the original grantee; that these conflicting titles may be adjusted in one suit; that the interests sued for are undivided, for which partition is sought; that neither of said causes are ready for trial. His docket is crowded, and, as both of the causes involve the same issues, the trial of one may dispose of both; and, all the parties to each of the suits being proper parties to both of them, business will be not only expedited, but a multiplicity of suits will be avoided. It does not appear that in the consolidation of said causes the district judge abused the sound judicial discretion with which he was vested, or that he plainly erred in a matter of practice, nor can it be assumed in advance that the trial court will not be able to try the cause without errors.

It is therefore ordered that the alterna-

tive writ of mandamus heretofore granted be vacated, and that the application of complainants be denied, and the respondent discharged, with his costs.

SHAW v. GILMER.¹

(Court of Civil Appeals of Texas. Jan. 22, 1902.)

SALES—PROMISE TO PAY FOR ANOTHER—PROOF—AGENCY—EVIDENCE—VERDICT.

1. Where, in an action to recover the value of goods and money delivered and charged to another than defendant, plaintiff alleges an original undertaking by defendant to pay therefor, which defendant denies, and pleads the statute of frauds, the burden of plaintiff to establish his claim is not met by an affidavit to the account, under Rev. St. art. 2323, providing that where an action is founded on an open account, supported by the affidavit of the party that such account is just and true, it shall be taken as prima facie evidence thereof, unless a sworn denial thereof is filed.

2. Where, in an action to recover the value of goods and money delivered and charged to an employé of defendant, which plaintiff claims were in fact for defendant, and so charged merely for his convenience, a verdict which includes items which were clearly shown to be for such employé's own use should be set aside.

3. Where defendant denies that the goods or money were for him or received for or used by him, the admission of testimony of a witness as to his understanding of how the account was to run is error.

Appeal from district court, Dimmit county; M. F. Lowe, Judge.

Action by R. A. Gilmer against F. M. Shaw. From a judgment for plaintiff, defendant appeals. Reversed.

C. A. Davies and F. Vandervoort, for appellant. C. O. Thomas and Geo. M. Martin, for appellee.

NEILL, J. This suit was brought by appellee against appellant to recover \$386.36, a balance alleged due on an open account for goods, wares, merchandise, moneys, etc., entered on appellee's books against one W. N. Terry, the appellee's contention being that the goods, etc., were in fact sold and furnished to appellant upon his original undertaking to pay for them; that Terry in obtaining them merely acted as Shaw's agent; and that they were charged on the books to the former for the latter's convenience. The appellant denied (1) any original undertaking on his part to pay for the goods; (2) that they were purchased for him; (3) that he ever received the goods or obtained any benefit from their sale. He then pleaded the statute of frauds and the two-years statute of limitations. The case was tried by the court without a jury, and judgment rendered in Gilmer's favor for the amount sued for.

The testimony upon the issues as to whether the goods, etc., charged in the account, were sold and furnished upon the original undertaking of the appellant to pay for them,

or were purchased for him by Terry as his agent and for his benefit, is conflicting. As the account stands on appellee's books in the name of Terry, and the goods, moneys, etc., were received by him, the burden of establishing the affirmative of these issues was upon the appellee; and this could not be done by an affidavit to the account made under article 2323, Rev. St. But evidence sufficient, to establish either an express or implied contract of an original purchase of the goods and procurement of the money by the appellant would have to be produced; otherwise, the presumption arising from the goods being charged to Terry, and the items in the account having been received by him, that the debt was Terry's, would be undisturbed.

Unless there was such an original contract of purchase by Shaw, or the goods were bought by him, either directly, or by an agent authorized either expressly or by the nature and scope of his agency, he would not be liable for their price, the statute of frauds having been pleaded, in the absence of a promise in writing to pay it. There is no evidence of such a promise, nor is it contended that any such was ever made. Therefore the judgment must depend for affirmance upon evidence of a purchase by Shaw, either by himself or by Terry as his authorized agent. The goods, money, etc., were procured and received by Terry; but there was some evidence tending to show that he, as agent of Shaw, was authorized, by the nature and scope of his employment, to procure them on Shaw's credit, for the use and payment of expenses in the management and conduct of his ranch, upon which Terry was employed when the goods were sold and the money sued for was obtained. Without commenting on this evidence, we will remark, notwithstanding it may seem that the preponderance of the testimony is the other way, that we would not be inclined to disturb the finding of the trial court, were it not apparent from the undisputed evidence that some of the items charged in the account sued on were for medicines, medical attention, and funeral expenses of Terry's mother. Money furnished him by the appellee to pay these bills, which could not from their nature be ranch expenses, could not, in the absence of an original undertaking or promise in writing by Shaw to pay it, be chargeable to him. It does not appear how much money was furnished by the appellee to Terry and expended by him in this way, else we might require a remittitur of the amount, and affirm the judgment for the balance.

Inasmuch as we will have to reverse the judgment for the reason just stated, we deem it proper to say that if the cause had been tried before a jury the admission of the testimony of Cotulla, complained of in the second assignment of error, as to his understanding of how the account should run, was such an error as would require a reversal of the judgment. Such testimony was

¹ Rehearing denied February 19, 1902.

simply a conclusion of the witness. His testimony should have been limited to facts within his knowledge, and as to what conclusions should be drawn from them would be for the jury.

On account of the error indicated, the judgment is reversed, and the cause remanded.

SULLIVAN et al. v. SKINNER et al.
(Court of Civil Appeals of Texas. Jan. 22, 1902.)

SEPARATE PROPERTY OF WIFE—LIABILITY FOR HUSBAND'S DEBTS.

Where property is devised to a woman for life, with power "to receive for her sole and separate use, and no other," the rents and profits thereunder, it is her separate property; and, though the statute gives her husband power to control and manage it, he has no interest therein, so that the rents are not liable for his individual debts.

Error from district court, Bexar county; J. L. Camp, Judge.

Garnishment proceedings by D. Sullivan & Co. against H. O. Skinner and another. From an adverse judgment, plaintiffs bring error. Affirmed.

J. C. Sullivan and Wm. Aubrey, for plaintiffs in error. W. W. King, for defendants in error.

NEILL, J. The appellants as judgment creditors in the sum of \$1,228.13 of H. O. Skinner, on the 31st day of December, 1900, sued out a writ of garnishment against Frank Bros., a firm composed of Sol. G. B., and Aaron Frank, who, on the 8th of February, 1901, answered that they held as tenants of Ida V., wife of H. O. Skinner, a certain building of her separate estate, situated on Alamo Plaza, in the city of San Antonio, under a verbal lease from month to month, at a monthly rental of \$100, payable monthly in advance, and that when the writ was served on them they were indebted to her in the sum of \$200 for rent on said building for the months of January and February, 1901; that when they were garnished Ida V. and her husband were indebted to their firm in the sum of \$178, and, prior to the service of the writ of garnishment, it was mutually agreed between the parties that they (Frank Bros.) were to deduct \$60 from January rent, and \$100 from the February rent, and apply the sums so to be deducted as credits upon the account of said indebtedness of \$178 due them by the Skinners; that after making such application they were, when the writ was served, indebted to Ida V. Skinner in the sum of \$40; and that they were not then, nor at any time since, indebted to H. O. Skinner in any sum whatever. They further answered that prior to the garnishment they were served with a copy of the instrument bearing date December 1,

1899, which is copied in our conclusions of fact. They prayed that Skinner and wife be made parties defendant; that they (garnishees) be protected by the judgment to be rendered against the claim of Skinner and wife; and that they have judgment for costs and attorney's fees. Mrs. Skinner, joined by her husband, answered that, prior to her marriage to H. O. Skinner, her father, William Vance, bequeathed to her, for her sole and separate use, a life estate in the property rented to the garnishees, Frank Bros., with the right to collect the rents and profits of the same, and that the fee in the estate was by said will devised to her children; that the rent of the property owing by the garnishees, if any, is her separate estate, and forms no part of the community property of herself and husband, and not subject to the debts of the community nor the separate debts of her husband. She further answered that, if H. O. Skinner ever owned any interest in the rents of said building owing by Frank Bros., the same was by him transferred and assigned to her on the 1st of December, 1899, and plaintiffs as well as the garnishees had due notice of such assignment prior to the issuance and service of the writ. The appellants (plaintiffs below) controverted the answer of Frank Bros. by alleging it incorrect, in that they were indebted to H. O. Skinner for rents for the month of February, 1901, for a part of the premises on Alamo Plaza, known as the "Hub," and that the alleged assignment by Skinner to his wife, if made at all, was for the purpose of defeating the rights of existing creditors. In reply to the answer of Mrs. Skinner, the plaintiffs excepted to the alleged assignment by H. O. Skinner to her upon the ground that it shows upon its face that it is void. They then plead (1) that the rent owed by Frank Bros. is of the community estate of H. O. and Ida V. Skinner, and subject to their community debts; and (2) that the alleged assignment, if ever made, was for the purpose of defrauding creditors. The case was tried without a jury, and judgment rendered against the plaintiffs, from which they have appealed.

There is no statement of facts in the record, and we must necessarily adopt the following conclusions found by the trial court: "Conclusions of Fact. (1) That on the 31st day of December, 1900, and on the 8th day of February, 1901, defendant H. O. Skinner was justly indebted to plaintiff in the sum of eleven hundred and thirty (\$1,130) dollars and twenty (20) cents, evidenced by a judgment recovered by said D. Sullivan & Co., October 2, 1900, in this court, in cause No. 12,105, entitled 'D. Sullivan & Co. vs. H. O. Skinner et al.,' said judgment being founded upon an indebtedness incurred by said H. O. Skinner during his marriage with Harriet Ida Skinner. (2) That on said 31st day of December, 1900, and on the 8th day of February, 1901, Frank Bros., a firm composed of

¹ Rehearing denied February 19, 1902, and writ of error denied by supreme court.

Sol., G. B., and Aaron Frank, occupied a storehouse in said county and state, under a verbal lease from H. O. and Harriet Ida Skinner, by the terms whereof they were tenants of said premises by the month, and that there was due and owing at the said last-mentioned dates by them as such tenants, as rents for said premises, forty (\$40.00) dollars. (3) That said premises so occupied by Frank Bros. was the separate property of Harriet Ida Skinner, who derived the same under the will of her deceased father, and by virtue of a clause of said will as follows, to wit: 'For the term of her natural life, with full power to receive for her sole and separate use, and no other, the rents and profits of the same, and on her death the same to belong to any child or children of the said Harriet Ida Vance (Skinner). Should no child or children survive her, then the said store and lot to pass to the next of kin, as provided by law.' Under this will special bequests of other real estate were made to two other children of the testator, and he thereby bequeathed the residue of his real estate, one half to his widow, and the other half to his three children. Under the foregoing will, defendant Ida Skinner acquired seventeen lots on East Commerce street, and two lots on Tobin Hill, in the city of San Antonio, and a tract of land in Atascosa county. These properties were sold by defendant Skinner and wife long prior to the 1st day of December, 1899, and from the sale thereof they realized ten thousand (\$10,000) dollars, forty-five hundred (\$4,500) dollars of which were used for adding another story to the premises on Alamo Plaza occupied by said Frank Bros., and the remainder was used by H. O. Skinner in supporting his family and paying his own and community debts, \$2,500 of which were surety debts. (4) Defendants H. O. Skinner and Harriet Ida Skinner were married the 11th day of November, 1891, and since that time have lived together as man and wife; H. O. Skinner during that time exercising the sole control and management of and over the separate estate of his said wife, as well as over their community property. (5) On December 1, 1899, defendant H. O. Skinner made, executed, and delivered to his wife the following assignment: 'San Antonio, Texas, Dec. 1, 1899. For and in consideration of my having used separate money belonging to my wife, Ida V. Skinner, I hereby assign and transfer to her all my right, title, and interest in and to any and all rents now due, and to become due, from the building on Alamo Plaza, in the city of San Antonio, known as the "Hub." [Signed] H. O. Skinner,—being the said premises occupied by Frank Bros. A copy of the foregoing instrument was delivered to plaintiffs and to defendant Frank Bros. before the issuance of the writs of garnishment in this cause. (6) That on the 1st day of December, 1899, and prior thereto, defend-

ant H. O. Skinner was insolvent, and unable to pay his debts, and, among other persons, was indebted to plaintiffs in the amount of their said judgment. (7) That since the date of the said assignment defendant H. O. Skinner has continued in the sole management and control over said premises, and to collect the rents payable therefor."

The first and second conclusions of law, based upon these facts found by the trial court, are as follows: "(1) The provisions of the will of William Vance, under which Harriet Ida Skinner claims the premises occupied by Frank Bros. as well as the rent derived from said premises, in law constituted not only said premises the separate property of Harriet Ida Vance, but also segregated the rents of said premises arising and to arise in the future, and constituted said future rents the sole and separate property of Harriet Ida Vance, so that the same were thenceforward not to be and are now not subject to the individual debts of her husband, H. O. Skinner, or to the debts of the community of the said H. O. Skinner and wife, Harriet Ida Skinner. (2) If the husband had any interest in such rent, the assignment dated December 1, 1899, from H. O. Skinner to his wife, Harriet Ida Skinner, is valid to the extent of the husband's indebtedness to the wife due at the date of the said assignment; but after such indebtedness is discharged said assignment would be invalid as against the claims of then existing creditors." Each of the conclusions is complained of by appellants as being erroneous. If we decide that the first is correct, the judgment will be supported, and it will become unnecessary to consider the second.

It is seen from the conclusions of fact that Mrs. Skinner derived the property from which the rents issued which are involved in this suit under a clause in her father's will which is as follows: "For the term of her natural life, with full power to receive, for her sole and separate use and no other, the rents and profits of the same, and on her death the same to belong to any child or children of the said Harriet Ida Vance (Skinner). Should no child or children survive her, then the store and lot to pass to the next of kin, as provided by law." From this it is apparent that Harriet Ida Vance, now Skinner, took only a life estate in the property, and the remainder went to her children in fee simple. In other words, the rents and profits issuing from the property during her life was all she could get out of it, unless she should sell her life estate therein. These "rents and profits" she was empowered by the will "to receive for her sole and separate use and no other." This use excluded the right of her husband to any interest in the rents and profits, and made them her separate property. The fact that the statute gives to the husband the control and management of his wife's separate property gives him no interest in it. In this in-

stance, in exercising his authority under the statute, he could only act as his wife's agent. If he contracted for or collected any rents on the property, it was for his wife's "sole and separate use and no other." If he had failed to discharge the duties of this trust by collecting and appropriating the rents to his own or any other use than that for which they were bequeathed, a court of equity, upon a proper application and showing, would have taken the property from his control, and placed it in the hands of a trustee, with power to manage it, and collect the rents and profits for the sole and separate use, and no other, of Mrs. Skinner. Therefore the plaintiffs were not entitled to a judgment, the effect of which would be to deprive Mrs. Skinner of the "sole and separate use" of the rents and profits expressly bequeathed to her use by her father.

The court below did not err in its first conclusion of law, and it is affirmed.

BROTHERTON et al. v. ANDERSON et al.¹
(Court of Civil Appeals of Texas. Jan. 16, 1902.)

VENDOR'S LIEN—NOTES—NOTICE OF LIEN—RESCISSON OF SALE—FORECLOSURE OF LIEN—BONA FIDE PURCHASERS—RECORD—ESTOPPEL.

1. On an issue whether a sale of land had been rescinded, it appeared that the vendee sought rescission, and that the vendor agreed to redeem the vendor's lien notes, which had been pledged as collateral, and surrender them, in consideration of a reconveyance; and the vendor took possession of the land, and subsequently, on a sale of the notes to others, possession was given them. *Held*, that the agreement to rescind was never consummated.

2. Where the vendor of land transfers the vendor's lien notes, he becomes the holder of the legal title as trustee for the holder of the notes, and has no interest in the land subject to sale under execution.

3. One acquiring title to vendor's lien notes for value, and without notice of any rescission of the sale, is entitled to a foreclosure for the amount of the notes, notwithstanding any rescission by the vendor and vendee.

4. When a recorded deed shows the execution of notes for the purchase money of the land, and the maker of the notes is in possession, one purchasing the land at execution sale has full constructive notice of the lien, though the notes are not recorded.

5. Where a sale of land is rescinded, one holding as collateral security the notes given for the purchase price can only enforce the note to the amount of the principal debt.

6. The owner of vendor's lien notes is not estopped to set up his claim as against one purchasing the land on execution sale; it not appearing that the owner of the notes was present at the sale, or had any reason to believe that the execution purchaser did not know of his claim.

Appeal from district court, Leon county; J. M. Smither, Judge.

Action by one Anderson and others against A. J. Brotherton and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Dean & Dean, for appellants. Thos. B. Greenwood and Wm. Watson, for appellees.

GARRETT, O. J. This action was brought by the appellees against the appellants for recovery upon two promissory notes given to one H. Levy in part consideration for land, and for foreclosure of the vendor's lien. The appellants A. J. Brotherton and G. W. Reynolds were sued as the makers of the notes, and the others as asserting some claim to the land. The appellant Allen Mills claimed the land as a purchaser at a sale under an execution against Levy, contending that the sale by Levy to Brotherton and Reynolds had been rescinded; and the other appellants were the tenants of Mills. Trial was had before the court without a jury, and the judge filed conclusions of fact, and from them and the statements of facts the following statement is made: On July 21, 1893, H. Levy sold to the appellants Brotherton and Reynolds 213 acres of land, for which he executed to them a deed, with general warranty of title. The consideration was \$1,000, evidenced by four notes, for \$250 each, due, respectively, December 1, 1894, December 1, 1895, December 1, 1896, and December 1, 1897, which were mentioned in the deed; the two last being the ones sued on. The vendor's lien was not reserved in the deed, but it was expressly reserved in each of the notes. On March 12, 1895, Levy indorsed the four notes in blank, and delivered them to one L. A. Beddingfield, together with other notes, as collateral security for his note to Beddingfield for \$1,800, and on March 12, 1896, renewed his note to Beddingfield, and the collateral remained with him. In October, 1896, Levy, who was a general merchant in Jewett, failed in business, and executed a deed of trust to L. D. Waltman, conveying his stock of goods, notes, accounts, etc., for the benefit of certain preferred creditors, among whom were Beddingfield and E. Goodman, a sister. No mention of the note of Brotherton and Reynolds given for the land, or of the land, was made in the deed of trust, which contained a list of notes and accounts and property transferred by it. Early in 1897 the trustee conveyed the assets of Levy to E. Goodman, and on March 12, 1897, she took up the note of Levy to Beddingfield for \$1,800 by the execution of her note for the same amount, due one year after date, and the notes of Brotherton and Reynolds remained in Beddingfield's hands as collateral security; E. Goodman making a written transfer thereof upon a list of the notes left for that purpose. In March, 1898, E. Goodman renewed her note to Beddingfield as in 1897. In January, 1899, E. Goodman sold out to Anderson, Evans & Ward; and, as a part of the transaction, they paid her note to Beddingfield, and bought all of the collaterals held by him, including the Brotherton and Reynolds notes. In January, 1898,

¹ Rehearing denied February 13, 1902, and writ of error denied by supreme court.

Brotherton went to Waltman, who was acting as the agent of E. Goodman, and proposed to surrender the land for the notes. Waltman informed him that the notes had been transferred to Beddingfield as collateral security, but promised to redeem and surrender them, and take a conveyance of the land in satisfaction thereof. Waltman then took possession of the land, and, when the appellees got the notes from Beddingfield, possession was given to them. The trial judge found that there had been merely an agreement, never consummated, for a rescission, conditioned upon the surrender of the notes, and that there had been no rescission of the sale of the land. The finding is approved, as supported by the evidence. The deed from Levy to Brotherton and Reynolds was filed for record October 26, 1896, and duly recorded. Anderson, Evans & Ward acquired the four notes in good faith, without knowledge of any attempt to rescind the sale of the land or to cancel the notes, and without knowledge of any infirmity in them. The notes were never out of the hands of Beddingfield from March 12, 1895, to March 30, 1899, when he delivered them to appellees, and he had no knowledge of any attempt to rescind the sale, and never assented to any cancellation or surrender of the notes. The appellant Allen Mills claims title to the land, as above stated, through a sheriff's sale under an execution against Levy. On November 11, 1898, L. Puster & Co. recovered a judgment in the district court of Leon county against H. Levy for \$677.91, of which an abstract was duly filed in the office of the county clerk of Leon county on January 13, 1899, and was duly recorded and indexed. Execution was issued on said judgment, and on the first Tuesday in November, 1899, the land in controversy was regularly sold by the sheriff of Leon county, and purchased by the appellant Allen Mills for \$282.50, which he paid; and a deed was executed to him therefor by the sheriff, on November 7, 1899, conveying all the title held by Levy on January 13, 1899. Anderson, Evans & Ward were in possession of the land at the time of the sale. On the day of the sale, Evans was in the town of Centerville, the county seat, but it does not appear that he was present at the sale. Mills sent Evans a message on that day, prior to the sale, which Evans received, that he would give him \$25 not to bid, provided no one else bid against him. It does not appear that Evans sent any reply to the proposition. Mills had no actual knowledge of any claim of the appellants upon the land until he had bought and paid for it.

There having been no rescission of the sale of the land by Levy to Brotherton and Reynolds, and Levy having transferred the notes to Beddingfield, he became merely the holder of the legal title as trustee for the benefit of the holder of the notes, and had no interest in the land subject to the lien

of the judgment in favor of L. Puster & Co. against him, or subject to sale under execution. The beneficial title subject to sale under execution was in the vendees, and not in the vendor with a lien reserved. *P. J. Willis & Bro. v. Sommerville*, 3 Tex. Civ. App. 509, 22 S. W. 781; *Id.*, 93 Tex. 677, 29 S. W. xx.; *Catlin v. Bennett*, 47 Tex. 165; *McCamly v. Waterhouse*, 80 Tex. 340, 16 S. W. 19; *Stephens v. Motl*, 82 Tex. 81, 18 S. W. 90. As the appellant Mills must recover upon the strength of his own title, the decision of the case might be rested upon the fact that there was no rescission of the sale; but it further appears that the appellees acquired title to the notes without knowledge of any rescission, of any attempt or intention to rescind, and were the owners thereof in good faith, for a valuable consideration. Such being the case, no rescission could have been made that would have defeated the right of the appellees to have a vendor's lien foreclosed for their payment. *Russell v. Kirkbride*, 62 Tex. 455. When the abstract of judgment was recorded, the deed from Levy to Brotherton and Reynolds was of record, showing that the notes had been executed for the purchase money of the land, and at the time of the sale the appellants were in possession. So there was full constructive notice to Mills of the lien of the purchase-money notes, and it was not necessary that the notes and the transfer thereof should have been recorded.

As above stated, the finding of the trial judge, as a question of fact, that the sale had not been rescinded, is sustained by the evidence, and will not be disturbed.

The notes remained with Beddingfield as security for the note first of Levy, and afterwards of Goodman, for which Levy's note was surrendered, and were never out of his hands until they were sold to the appellees, and were never discharged by a rescission of the sale; hence the second assignment of error must be overruled. Even if there had been a rescission, the appellees would be entitled to have their lien foreclosed for the full amount of the note, since they are purchasers and owners thereof in good faith, and are not seeking to enforce them as collateral security, in which event, in case a rescission had been made, they could only enforce them for the amount of the principal debt. The facts do not show an estoppel against the appellees. It does not appear that Evans was present at the sale, or that he had any reason to believe that Mills did not know that his firm was claiming an interest in the land, or that he was about to purchase it without such knowledge.

Affirmed.

On Motion for Rehearing.

(Feb. 13, 1902.)

The expression in the opinion, "As the appellant Mills must recover upon the

strength of his own title," etc., as pointed out by appellants in their motion for a rehearing, is not technically correct, and was inadvertently used. But it does not affect the decision of the case. The idea to be expressed was that appellees, as the holders of the notes, would be entitled to recover unless Mills could show that a lien had been fixed upon the property by the record of the abstract of the Puster & Co. judgment.

While the questions raised by the appellants are difficult and not free from doubt, we believe that we have decided them correctly, and so overrule the motion for a rehearing. Overruled.

PUSTER et al. v. ANDERSON et al.¹

(Court of Civil Appeals of Texas. Jan. 17, 1902.)

EXECUTION SALE—LIENS—NOTICE—PRESUMPTION.

1. H. conveyed land to P., retaining vendor's lien to secure the four notes given in payment. H. assigned three of the notes to L., and then gave L. a deed of the land, which was not recorded, and which was intended only to preserve the security. L. transferred the three notes as collateral, the transferee having no knowledge of the deed from H. to L.; and, under such transfer, defendants obtained title to such notes. After such transfer by L., without any sale being really made, but as additional security for payment of said three notes, P. and L. made a contract reciting sale of the land by L. to P., and retention of lien to secure payment of purchase money. Thereafter plaintiffs had judgment against L., and recorded abstract thereof. After this, in consideration of the four notes, defendants having obtained the fourth one from H., the land was conveyed by P. to defendants. Subsequently plaintiffs issued execution on said judgment, levied on the land, and bought it at the execution sale. *Held*, that L. having no title in the land subject to execution, and plaintiffs having notice of the lien of the notes before record of the abstract of judgment, they acquired no title as against defendants.

2. In support of a judgment, though there is no special finding of fact that plaintiffs had notice of defendants' lien of notes on land, it will be presumed they had; they having served defendants with notice of execution sale of the land, because their attorney had heard of the assertion of some claim by them, and such attorney, though a witness, not having testified that he had no notice of defendants' claim.

Appeal from district court, Leon county; J. M. Smither, Judge.

Action by L. Puster & Co. against Anderson, Evans & Ward. Judgment for defendants. Plaintiffs appeal. Affirmed.

Dean & Dean, for appellants. Thos. B. Greenwood and Wm. Watson, for appellees.

GARRETT, C. J. This was an action of trespass to try title, brought by the appellants against the appellees for the recovery of 160 acres of land of the D. G. Burleson

survey, in Leon county. Appellants claimed the land through an execution sale against H. Levy, the assignee of certain vendor's lien notes executed by Andy Perkins to Jeff Haynes, and to whom Haynes had subsequently conveyed the land. Appellees claim under a deed from Perkins given in settlement of the notes which were held by them through a transfer from Levy. The trial below was without a jury, and from the conclusions filed by the court the following facts appear: On November 22, 1887, Jeff Haynes, who was the owner of the land, conveyed it to Andy Perkins by his deed of that date, which was never recorded, for a consideration of \$1,600, evidenced by four notes, for \$400 each, three of which were due December 1, 1888, December 1, 1889, and December 1, 1890, respectively, executed to him by Perkins. The deed retained a vendor's lien on the land to secure the payment of the notes. On the date of their execution Haynes transferred the three notes, whose due dates are given, by his indorsement in blank to H. Levy, in consideration of a credit of \$1,000 on his account with Levy for merchandise. Perkins took immediate possession of the land, and held possession under his purchase from Haynes until April 10, 1890, when he conveyed it to the appellees in cancellation of the purchase-money notes, and has since held it as their tenant. On February 11, 1893, Jeff Haynes executed a deed for the land to H. Levy for a recited consideration of blank dollars. At the time of this conveyance, which was never acknowledged for record, \$100 had been paid on the fourth note, which had been retained by Haynes; and Levy subsequently, and after January, 1896, made collections on the notes held by him. On March 12, 1895, Levy borrowed from L. A. Beddingfield the sum of \$1,890, and gave him his note for that amount, and transferred and delivered to him as collateral security therefor, along with others, the three Perkins notes held by him. This note was renewed by Levy March 12, 1896, and the collateral notes remained with Beddingfield. Mrs. E. Goodman took up the Levy note March 12, 1897, by executing her note to Beddingfield for the amount thereof, and left with him as collateral security the Perkins notes already in his hands. She renewed this note, with the collaterals, March 12, 1898. On January 10, 1899, Anderson, Evans & Ward, the appellees, purchased from E. Goodman certain real estate, merchandise, and other property which had formerly belonged to H. Levy, and in the transaction agreed to pay her note to Beddingfield for \$1,890 and interest, in consideration, among other things, of the transfer and delivery to them of the three Perkins notes held by Beddingfield as collateral security for the debt. Appellees paid the note March 30, 1899, and Beddingfield made them a written transfer of the Perkins and other notes. None of the transfers of these

¹ Rehearing denied, and writ of error denied by supreme court.

notes were ever recorded. On the 23d day of January, 1896, H. Levy entered into a written contract with Andy Perkins, Kinch Perkins, and John Perkins, reciting the sale of the land sued for by H. Levy to Andy, Kinch, John and Walter Perkins on January 1, 1896, for \$1,200 and interest, and that the landlord's lien was retained to secure the payment of the purchase money, and that, if same was not paid as it matured, then a rental was to be paid of six bales of cotton per annum, and if the parties paid more than rents, etc., then the payments were to go on the premises, and failure to comply with the contract was to render it void, and the premises were to revert to Levy. It was undisputed that no sale was really made on January 23, 1896, and that the purpose of this contract was to secure the payment of Perkins' purchase-money notes that Haynes transferred to Levy. Neither Beddingfield nor the appellees ever had any knowledge of the above-mentioned contract, or of any attempt to rescind the sale or cancel the notes prior to their delivery to the appellees. On April 10, 1898, in consideration of the cancellation and delivery to him of his notes given therefor,—Jeff Haynes having transferred the fourth note to them without consideration; the land being worth less than the other three notes,—Andy Perkins conveyed the land to the appellees, and thereafter held the same as their tenant. L. Puster & Co. recovered a judgment against H. Levy in the district court of Leon county on November 11, 1898, for the sum of \$677.91, and on January 13, 1899, caused an abstract of it to be recorded and indexed in the office of the county clerk of Leon county. An execution was issued on this judgment, and levied upon the land in controversy, and it was regularly sold at sheriff's sale May 2, 1899, and bought by L. Puster & Co., the plaintiffs in execution, and a deed was executed to them therefor by the sheriff, conveying all the title held by H. Levy on January 13, 1899; their bid being credited on the judgment after payment of costs. The trial judge found as a fact that Perkins had told the attorney for appellants that he held the land as the tenant of H. Levy, and had been so holding it for 14 years prior to the record of the abstract of the judgment of L. Puster & Co. against H. Levy. There is no testimony in the statement of facts to support the conclusion, but there was no objection made to it by the appellees in the court below, nor is there any cross assignment of error against it in this court.

The conveyance of the land by Jeff Haynes to H. Levy was not a rescission of the sale made by him to Andy Perkins, but was a transfer of the superior title held by him for the enforcement of the contract. One note had been reserved by Haynes, upon which he collected the sum of \$100, and the other three were retained by Levy, and

collections made thereon; and they were afterwards transferred by him to Beddingfield as collateral security for his debt and note for \$1,890, and remained with him as such security until they were sold to the appellees. It appears that the intention of the parties was not to rescind the sale, but to preserve the security; and the court below is sustained by the evidence in the conclusion that Levy had no interest in the land subject to execution. *Brotherton v. Anderson* (decided this day by this court) 66 S. W. 682. The contract entered into on January 23, 1896, between H. Levy and Andy Perkins and his sons, as interpreted by the other evidence in the case in explanation thereof, appears to have been intended as additional security for the payment of the purchase money of the land, and is not conclusive evidence that the sale had been rescinded. When it was entered into, Levy had already transferred the notes to Beddingfield, and it could not affect the title of the appellees to the notes acquired by them in good faith.

Appellants objected to the testimony of Waltman introduced by the appellees, to the effect that it was agreed by the parties when the contract was entered into that, whenever 10 bales of cotton were paid in on one of the notes executed by Perkins to Haynes, it should be surrendered and canceled, on the ground that the written contract could not be varied by parol evidence. If this evidence should be rejected, the judgment of the court should not be reversed, because there was sufficient evidence admitted without objection to show the nature of the contract; and even if there were not sufficient evidence to show that the contract was for additional security, only, as above stated, the appellees could not be affected by it. Levy having no title in the land subject to execution, even if it should be conceded that the lien of the appellants could be fixed upon the land by reason of the legal title being vested in Levy by the unrecorded deed from Haynes to him, it not appearing that the appellants, when they recorded the abstract of their judgment, had no notice of the lien of the notes, it will be presumed in support of the judgment that they had such notice, although no special finding of the fact was made. Perkins was in possession of the land, and appellants caused appellees to be served with a notice of the sale because their attorney had heard of the assertion of some claim by them; and, although a witness in the case, the attorney did not testify that he had no notice of the claim before the abstract of the judgment was recorded, though it appears from the finding of the court that Perkins told that he was a tenant of Levy. These facts support the implied conclusion of the court that appellants had notice of the claim of appellees when they recorded the abstract of their judgment, and, having notice that Levy's title was not such as was subject to execution, the record

of the abstract of their judgment did not fix a lien on the land.

The judgment of the court below will be affirmed. Affirmed.

FIDELITY & DEPOSIT CO. OF MARYLAND v. SEYMOUR.¹

(Court of Civil Appeals of Texas. Jan. 17, 1902.)

GARNISHMENT—GENERAL WRITS—CAUSES NOT JOINT—CONSOLIDATION—JUDGMENT.

1. Where an application for garnishment alleged that two persons held moneys belonging to defendant, and prayed the issuance of writs to each of them,—no joint indebtedness to defendant being alleged,—the clerk of the court had no authority to docket the causes as one suit.

2. Where, in garnishment, causes of action are asserted in the application against a corporation and against its agent individually which are such that they might be consolidated, but the agent does not answer individually, and cannot be compelled to, because not a resident of the county when the writ was served, that the clerk places the agent's name on the docket as a party does not render a judgment against the corporation alone invalid, as not disposing of the cause as to all parties.

Error from district court, Colorado county; James C. Wilson, Judge.

Garnishment proceedings by S. K. Seymour against the Fidelity & Deposit Company of Maryland and others. From a judgment in favor of plaintiff, the Fidelity & Deposit Company brings error. Affirmed.

Bullitt & Louis, for plaintiff in error. W. L. Adkins and Geo. McCormick, for defendant in error.

PLEASANTS, J. This is a garnishment proceeding. The defendant in error, being a judgment creditor of the firm of Buffington & Coverdill, in the sum of \$1,816.80, applied for and procured the issuance of a writ of garnishment against the plaintiff in error and against A. G. Robb. The application for garnishment is in usual form, and alleges that the applicant "has reason to believe, and does believe, that A. G. Robb and the Fidelity & Deposit Company of Maryland are both indebted to said Buffington & Coverdill, or have in their hands effects belonging to said defendants," and asks that a writ of garnishment be issued to each of said parties. The writs were issued as prayed for, and served upon Robb individually and as agent of plaintiff in error. The district clerk entered the proceedings on the docket of the court as one suit under the style, "S. K. Seymour vs. A. G. Robb and the Fidelity and Deposit Company of Maryland." At the term of the court to which the writs were returnable, plaintiff in error answered, denying that it was indebted to said Buffington & Coverdill, or had any effects of said firm in its possession. This answer was

controverted by the defendant in error, and upon the issue thus made the cause was tried, and judgment rendered for defendant in error for the amount due him on his judgment against Buffington & Coverdill. A. G. Robb, not being a resident of Colorado county when the writ was served upon him, and not being required to answer thereto, filed no answer, and defendant in error made no application for a commission to require him to answer said writ, and did nothing indicating any intention to further proceed against said Robb; but no motion was made to have his name stricken from the style of the cause as it appeared upon the docket of the court.

Briefly stated, the material facts proven on the trial are as follows: The defendant in error had obtained a judgment in the district court of Colorado county against Buffington & Coverdill, from which the said Buffington & Coverdill had appealed, and in order to secure the plaintiff in error, who was security on said appeal bond, had turned over to A. G. Robb, agent of plaintiff in error, \$735 in cash, besides a lot of notes and accounts and certain property, consisting in part of a stock of lumber situated in a lumber yard owned and operated by said Buffington & Coverdill, in the town of Rock Island, in Colorado county. This lumber and the lots on which the yard was situated were sold by said Robb, and the proceeds of same amounted to the sum of \$3,118.47. The judgment against Buffington & Coverdill was affirmed on appeal, and there was due defendant in error on said judgment the amount adjudged by the court below against plaintiff in error. A. G. Robb, as general agent of the plaintiff in error, at the time the writ of garnishment was served on him as such agent, had in his hands, of the proceeds of the sale of said lumber, a sum largely in excess of the amount due defendant in error on said judgment against Buffington & Coverdill. Robb testified that the lumber was not turned over to him as agent of plaintiff in error, but that he took charge of and sold same in his individual capacity, and now holds the proceeds of said sale in such capacity, and not as agent of the plaintiff in error. This testimony is contradicted by all the other evidence in the case, and the trial court is abundantly sustained in his finding that it is not true.

Plaintiff in error presents but two assignments. The first assignment is as follows: "The court erred in rendering and entering final judgment in the above cause against plaintiff in error, because A. G. Robb was a party defendant in said cause, and the same was in no way disposed of as to said A. G. Robb, and only one final judgment could be rendered therein." The application for garnishment does not allege that A. G. Robb and plaintiff in error are jointly indebted to the said Buffington & Coverdill, or that they are jointly in possession of property belong-

¹ Rehearing denied.

ing to said defendants. Writs of garnishment are asked to issue to each of them. There being no cause of action asserted against said garnishees jointly, the clerk had no authority to docket the two separate causes asserted in the application for garnishment as one suit. Conceding that the separate causes of action asserted against each of said parties were such that the separate suits might have been consolidated and tried as one, the record shows that this was not done, nor attempted to be done, and could not have been done, for the reason that A. G. Robb was not required to answer, and did not answer, the writ served upon him in his individual capacity. The controverting affidavit filed by the defendant in error asserts no claim against said Robb in his individual capacity, and the whole record abundantly shows that said Robb, in his individual capacity, was not a party to this proceeding as same was presented and tried in the court below; and the mere fact that the clerk had erroneously placed his name on the docket as one of the parties will not vitiate the judgment because no disposition of the cause is made as to him. The judgment is a final judgment, and disposes of all the actual parties to the cause before the court.

The second assignment complains of the judgment as being unsupported by the evidence. It is unnecessary to discuss this assignment, as the facts above found by us, as disclosed in the record, fully support the judgment of the court below. We are of opinion that the overwhelming preponderance of the evidence sustains the findings of the trial court, and the judgment of said court should be in all things affirmed, and it is so ordered.

Affirmed.

SIMMONS v. RICHARDS et al.

(Court of Civil Appeals of Texas. Jan. 11, 1902.)

BANKRUPTCY—POWERS OF TRUSTEE—ASSIGNMENT BY BANKRUPT—FRAUD—ESTOPPEL—JUDGMENT—COLLATERAL ATTACK.

1. A corporation sued to recover a half interest in a certain business which it had purchased at execution sale from a party who subsequently became bankrupt. The bankrupt disclaimed any interest in the subject-matter, claiming that the entire business was owned by the owner of the other half interest, who was a defendant in the original suit. The trustee in bankruptcy intervened, and agreed with the company that in case it recovered the property it should be entitled to a certain sum and the trustee to the remainder. *Held*, that such agreement was not fraudulent as to the bankrupt or a party claiming under a subsequent transfer from him, so as to vitiate the judgment, it appearing that the sum agreed on as belonging to the company was less than it was entitled to under its execution.

2. Such agreement was not beyond the authority of the trustee.

3. The bankrupt having disclaimed, one claiming under him could not afterwards assert title.

4. Where facts vitiating a judgment are known at the time of a motion for a new trial, and not then urged, such facts cannot afterwards be set up collaterally to impeach the judgment.

5. A trustee in bankruptcy cannot be compelled to account in a collateral proceeding involving title to the bankrupt's property for funds he has received as trustee, but such relief must be obtained through the court appointing him.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by D. A. Simmons against Burton Richards and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Barrett, Simmons & Freeman and Gallo-way & Templeton, for appellant. L. B. Epstein, A. H. Culver, and A. G. Moseley, for appellees.

RAINEY, C. J. The appellant, Simmons, sued the appellees, Meyer Bros. Drug Company, J. L. Jones as receiver, Burton Richards, trustee of J. A. De Gaugh, bankrupt, and Claud Arnold, clerk of the district court of Grayson county, Tex., to set aside a judgment rendered by the district court of said Grayson county, wherein Meyer Bros. Drug Company was plaintiff, and Jones, Simmons, and De Gaugh were defendants, and Burton Richards, trustee, was intervener, the judgment being in favor of the plaintiff and intervener. A writ of injunction against all said parties was prayed for to prevent the paying out of moneys in the hands of said clerk and said receiver; and, further, that they account for same, and pay same to plaintiff. Upon a hearing before the court without a jury, judgment was rendered for defendants.

The suit of Meyer Bros. Drug Company against Jones et al., aforesaid, arose out of a controversy as to the ownership of the property here in suit. The facts of that controversy are, in substance, that Jones and De Gaugh were conducting a drug business under the style of Jones & Simmons. De Gaugh was a judgment debtor of Meyer Bros. Drug Company. Said company caused an execution to be levied upon De Gaugh's undivided half interest, a sale was had, and said company became the purchaser thereof of said interest. Subsequently said company sued Jones, Simmons, appellant herein, and De Gaugh to recover said interest. Burton Richards intervened, claiming the property as trustee of De Gaugh, bankrupt. Simmons claimed to be the owner of said undivided interest, and De Gaugh disclaimed any title thereto, but claimed the title to be in Simmons. The main issue in this case was whether the title to the property was in Simmons or De Gaugh. An agreement therein was had between the Meyer Bros. Drug Company and Burton Richards, trustee, in effect, that, in the event the property was established to be De Gaugh's, Meyer Bros. Drug Company would be entitled to \$3,750, and Rich-

ards, as trustee, to the remainder. Plaintiff and intervener recovered, and judgment was entered for them, respectively, in accord with said agreement. After judgment Jones was appointed receiver, and took charge of said business. An appeal was prosecuted to this court, where the judgment was affirmed, and a writ of error denied by the supreme court. See *Jones v. Drug Co.*, 61 S. W. 553. After the rendition of said judgment, De Gaugh transferred to appellant, Simmons, all his interest in the property, and the ground urged by Simmons for setting aside said judgment is that in the former suit *Meyer Bros. Drug Company* failed to show the amount of interest, if any, it had in the property, and that the trustee had no authority to make the said agreement with said company allowing it a portion thereof, but that the same was made without consideration, and for the purpose of depriving De Gaugh of any interest he might have therein, and in disregard of his rights. The judgment sought to be set aside determined the interest of the parties, and is conclusive, unless it can be reformed for the reasons assigned. The rule in cases of this character is that "relief will not be granted unless the party seeking it can show that he was prevented from making a valid defense to the action in which the judgment has been rendered against him by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part. He must be able to impeach the justice and equity of the verdict of which he complains, and to show also that there is good grounds to suppose that a different result would be obtained by a new trial." *Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254. The evidence in this case not only fails to show that a different result would probably be attained, but it shows that De Gaugh's interest in the property was decidedly greater at the time of the sale under the *Meyer Bros. Company's* execution, and would support a judgment larger than the amount recovered by said company. The evidence does not show that any fraud was perpetrated upon appellant or De Gaugh in making the agreement between the drug company and Burton Richards, the trustee. De Gaugh in that suit claimed no interest in the property. Richards, as trustee, was entitled to recover all the interest of De Gaugh therein, over and above that to which the drug company was entitled. The evidence shows that Richards and his attorney were doubtful as to his being entitled to any thing. The agreement did not give the drug company more than the evidence in this case shows it was entitled to recover.

Under these circumstances, it cannot be held that said agreement was fraudulent. Besides, appellant is claiming through De Gaugh. De Gaugh in that suit disclaimed any interest in the property, and cannot now be heard to impeach that judgment, and Simmons occupies no better position than he. Again, when the motion for a new trial was

made in that suit, they knew of the agreement, and no sufficient excuse is shown why the grounds here urged were not then urged in support of that motion. *Bomar v. Parker*, 68 Tex. 435, 4 S. W. 599.

On the appeal of that suit it was urged that said agreement was void for the want of authority on the part of Richards to make it. That contention was not sustained. It was also urged on that appeal that the evidence failed to show what interest the drug company had in the property. This court held that, under the circumstances, that fact would not cause a reversal, and the judgment was affirmed. That decision left the judgment of the district court standing, giving to the drug company \$3,750, and it will not be disturbed in the absence of proof of fraud, and that a different result would probably be reached on another trial.

The drug company is entitled to have its judgment satisfied out of the proceeds of said property, and Richards, as trustee, is entitled to the remainder, if any. Richards cannot be required in this proceeding to account to plaintiff for any funds he may receive as trustee. He is responsible to the bankrupt court appointing him, and any relief appellant may be entitled to against him must be obtained through that court.

The judgment is affirmed. Affirmed.

OGE et al., School Trustees, v. FROBOESE et al.¹

(Court of Civil Appeals of Texas. Jan. 22, 1902.)

COUNTY TREASURER—PAYING OUT SCHOOL FUNDS.

Though, under Rev. St. art. 8934, it is the duty of the county superintendent to apportion the county school fund to all the school districts, including independent districts, a county treasurer, who is also treasurer of the school fund, and required to give bond to disburse such fund according to law, and to pay such warrants as may be drawn thereon by competent authority, and is inhibited by article 3935d from paying any of it without approval of the county superintendent, is not liable to an independent school district, though he paid all the county school fund to the other districts, as apportioned by the county superintendent, on his warrants; he having no authority to inquire into the legality of apportionments by the county superintendent; *Sayles' Ann. Civ. St. art. 930*, empowering the treasurer to pass on the legality of any order or warrant presented to him for payment, and directing him, in case of doubt as to such legality, to report to the commissioners' court for their direction, which article was enacted before the school law, having no connection with it; and the commissioners' court having no control over the available county school fund.

Error from district court, Bexar county; J. L. Camp, Judge.

Action by Louis Oge and others, school trustees, against Maria Froboese, executrix, and others. Judgment for defendants. Plaintiffs bring error. Affirmed.

¹ Writ of error denied by supreme court.

R. B. Minor, for plaintiffs in error. Shook & Vander-Hoeven and Jeff D. Childs, for defendants in error.

FLY, J. This suit was instituted by Louis Oge, W. W. Sloan, F. Groos, Michael Goggan, F. A. Chapa, J. S. Carr, and J. E. Pancoast, as school trustees of the independent school district of the city of San Antonio, against Maria Froboese, independent executrix of the will of Ed Froboese, deceased, Dorothea Hoefling, administratrix of the estate of William Hoefling, deceased, Albert Meyer, Thos. P. McCall, and J. E. Muegge, on the official bond of Ed Froboese as treasurer of Bexar county. The appellees are the widow of Ed Froboese and the sureties on his bond, Mrs. Hoefling being the widow of one of the sureties. The petition, in substance, alleged that the city of San Antonio is an independent school district, and that appellants constituted its board of trustees; that Ed Froboese had been elected treasurer of Bexar county, and on November 17, 1894, had given bond as treasurer of the school fund, with William Hoefling and Albert Meyer, Thos. P. McCall, and J. E. Muegge as sureties; that the bond was approved by the county judge, and said Froboese took the required oath of office, and continued to fill the office for the two years ending in November, 1896; that while so acting there came into his hands the sum of \$4,800, being the amount of income arising from the county-school funds of the county of Bexar, which the law required to be apportioned to all the school districts in the county, including the independent school district of the city of San Antonio; and that certain enumerated sums should each year have been paid to the school district of the city of San Antonio. It was further alleged that "the whole of said income accruing for each of said scholastic years was by the county superintendent of public instruction of said county unlawfully apportioned, not to all of the school districts of said county, including the said independent school district, as required by law, but to all of the school districts of said county except the said independent school district," which was omitted from the apportionment. It further charged knowledge upon the part of the treasurer of the illegal apportionment, and the payment by him of the fund as it was apportioned by the county superintendent. The death of Froboese was alleged, and the appointment of his wife as executrix of his will. The cause was tried by the court, and judgment rendered for appellees.

The facts established that all the money which belonged to the county school fund had been apportioned to the school districts of Bexar county, with the exception of the independent school district of the city of San Antonio, and that the same had been paid out, on legal and proper vouchers, by the treasurer of Bexar county. No part of the income arising from the county school funds

of Bexar county for any of the years mentioned was ever apportioned or paid to the independent school district of the city of San Antonio, but all of it was apportioned and paid to the districts in the county outside the city. It seems that a report of the treasurer was made that \$500 of the "second-class fund" was transferred to the "available school fund," but there was no entry of the amount on the available school fund. Still it was agreed by the parties that all the income arising from the county school fund was apportioned to the outside districts by the county superintendent, and all of it paid out, as apportioned, upon warrants of the county superintendent of public instruction, or the county judge acting as such.

By the provisions of article 3934, Rev. St. Tex., it is made the duty of the county superintendent to apportion the state school fund to the several school districts, not including the independent school districts, and "at the same time apportion the income arising from the county school funds to all the school districts, including the independent school districts of the county, making a pro rata distribution as per scholastic census." It was his duty, undoubtedly, under the above law, to apportion a pro rata share of the income arising from the county school fund to the independent school district of the city of San Antonio, and, when he failed and refused to so apportion such income, he could, in a proper proceeding by the proper parties, have been compelled to comply with the law. This was not done by parties interested, and the income of the county school fund was apportioned by the superintendent to the outside district to the exclusion of the city district. As thus apportioned, the fund came into the hands of the county treasurer. Under the law, the county treasurer is the treasurer of the available public free school fund, and also of the permanent county school fund of his county; and he is required to give a bond in double the amount of such school fund, conditioned that he will safely keep and faithfully disburse the school fund according to law, and pay such warrants as may be drawn on said fund by competent authority. In article 3935, subd. "d," it is provided that the county treasurer shall not pay out any part of the school fund without the approval of the county superintendent. To sustain this suit, it must necessarily be held that the county treasurer, in his disbursement of the available county school fund, is clothed with the power and authority to inquire not only into the legality and validity of every warrant or voucher drawn on him by the school superintendent, but to go back of it, and inquire into and decide upon the legality of any apportionment made by such superintendent. This would be an extraordinary power to invest in any officer, involving, as it would, the power to discontinue for a time, at least, the machinery provided for the education of the children of the state, by withholding the

money necessary for carrying on such machinery. To invest a county officer with such weighty authority, there should be some express statutory warrant or sanction. Grants of power to public officers are subjected to a strict interpretation, and are construed as conferring those powers only which are expressly imposed or necessarily implied. *Mechem, Pub. Off. § 511.* The enforcement of this rule is necessary for the protection of public interest, and must be kept in view in the consideration of the acts of public officers. In the case of *Nowell v. Wright, 3 Allen, 166, 80 Am. Dec. 62*, it was said: "It may be a delicate, if not a difficult, task, to mark with precision the line of discrimination between the various classes of public officers or agents created by statute, who may be held responsible to individuals, in an action on the case, for injuries resulting from the improper execution of their official duties. That many such officers and agents have been so held responsible, the adjudged cases abundantly show. While admitting the general principle, Chancellor Kent, in *Bartlett v. Crozier, 17 Johns. 450, 8 Am. Dec. 428*, would confine the right of action to cases where the services of the officer are not gratuitous or coerced, but voluntary and attended with compensation, and also where the duty to be performed is entire, absolute, and perfect. To this we may add that the duty should be a personal one, and not only one which he is under obligation, but clothed with ability, to perform, both in the means furnished to him, and the legal authority to act irrespective of superior officers." There is no authority conferred by statute on the county treasurer to inquire into the legality of an apportionment, and no discretion is vested in him in regard to the payment of warrants or vouchers drawn by the county superintendent. It is true that by the provisions of article 930, *Sayles' Ann. Civ. St.*, the treasurer is empowered to pass upon the legality or propriety of any order, decree, certificate, or warrant presented to him for payment; and it is provided that, if he has doubts in regard to such legality or propriety, he shall not pay the same, but shall make report thereof to the commissioners' court for their consideration and direction. That provision was enacted long before the existence of the present school law, and, we think, has no connection with it whatever. The commissioners' court has no control over the available school fund of the county, but to the county judge or county superintendent, under the direction of the state superintendent, is confided the immediate supervision of all matters pertaining to public education in his county. The income arising from the county school fund is apportioned by the superintendent, and on his order alone can it be disbursed. It follows that, if the legislature had desired to make the provisions of article 930 applicable to the available school fund, it would, in case of doubt, have required

ed the treasurer to report to the authority drawing the warrant,—the county superintendent or his superior, the state superintendent. The commissioners' court having no power to review or revise the acts of the county superintendent, it would be absurd to report to that court matters of doubt as to school vouchers for its consideration or direction. In the absence of statutory enactment empowering the treasurer, before paying the warrants or vouchers drawn on him by the county superintendent, to inquire into the legality of the apportionment of the school fund, and, in case he is not satisfied with such apportionment, to block the course of education of the children, by withholding the necessary funds, the courts cannot invest him with such power or authority. Without he is clothed with such authority, he cannot be held responsible for paying out the school money intrusted to his care and keeping, in the express manner in which the statute provides he shall do it.

The judgment is affirmed.

On Motion for Rehearing.

(Feb. 19, 1902.)

The original petition was filed on April 7, 1900, and appellees interposed a plea of four years' limitation. The uncontradicted testimony established that all of the money, with the exception of \$500, was paid out more than four years before the institution of the suit, and we hold the action was barred by limitation as to all the amounts claimed except that sum. The proof established that the account of the treasurer, made to the commissioners' court, showed that \$500 of the second-class school fund was paid to the available school fund, but the entry was not made on the last-named fund. If this were all the testimony, we might conclude that a conversion of the \$500 had been established, but, in the face of this proof, appellants admitted (and the admission is made a part of the statement of facts) that "no part of the income arising from the county school funds of Bexar county for any of the scholastic years mentioned in the petition were ever apportioned to or paid to or for the use and benefit of the independent school district of the city of San Antonio, but that it was all apportioned to and paid out for the other school districts and other purposes (the apportionment having been made by the county superintendent of public instruction); and the payments were made upon warrants approved by the county superintendent of public instruction, or the county judge acting as such." We presume that if there had not been evidence showing the disposition of the \$500, although not found on the account, appellants would never have agreed that all of the fund for which they were suing had been paid out on warrants approved by the proper officer. It is said by appellants, in the motion for re-

hearing, that the income arising from the county school fund was, as a rule, paid out for the other school districts; but the statement of facts goes further, and states that all of it was paid out on proper warrants.

Appellants contend that, under the law, the county treasurer has the authority not only to pass upon the validity of warrants drawn by a county school superintendent, but to sit in judgment upon the validity of an apportionment made of the school fund; and article 980, Sayles' Ann. Civ. St., especially, is relied upon as a basis for such contention. We adhere to the ruling that the article in question has no application to the school fund. In the recent case of Webb Co. v. Board of School Trustees of Laredo, 65 S. W. 878, it was said by the supreme court: "We will first inquire as to the duty devolved upon the respective counties with reference to their special school funds by section 6, art. 7, of the constitution. As we have said, they hold these lands and the principal of the proceeds of these sales in trust for the benefit of the state schools in the counties; and it may be that they are bound to make good any loss which may result from an investment of such proceeds. As to what they shall do with the available proceeds of such fund, the constitution does not prescribe. This was left for the determination of the legislature; and it is manifest from article 3935, Rev. St., that it was the intention of the lawmakers that the income of the fund should be paid to the county treasurer for the maintenance of the schools for the current year. In our opinion, when the commissioners' court, who are made by the organic law the executive board for administering the affairs of the county, have done this, they have discharged the liability of the county for that fund. It is expressly made the duty of the county superintendent, whenever there is one, to make the apportionment among the school districts and communities of the county. In the performance of that duty, he is not subject to the control of the commissioners' court. On the contrary, his administration of "all matters pertaining to public education of his county" is expressly made subject to "the direction of the state superintendent." If the county superintendent is not subject to the control of the commissioners' court, to what end should a county treasurer report his doubts to such court as to the acts of the county superintendent? If the commissioners' court cannot exercise control over the county superintendent, there can certainly be no authority for a county treasurer attempting to do so; and when it is considered that, in the decision cited, it is held that the county superintendent "is in fact the officer and agent of the state," the absurdity of a county officer endeavoring to supervise his action becomes more apparent.

The motion for rehearing is overruled.

SCHUWIRTH v. THUMMA.

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

SALES—GUARANTY—ACTION FOR PURCHASE PRICE—EVIDENCE—INSTRUCTIONS—DAMAGES.

1. In an action for the price of an engine, an expert's testimony that at the time the engine was shipped it had been tested, and was "in perfect condition, and, with proper management, would develop 6.45 horse power," was not objectionable as a conclusion of the witnesses.

2. An objection to the admission of evidence not contained in the statement of facts will not be considered on appeal.

3. In an action for the price of an engine, where defendant, by his pleadings and evidence, raised the issue that the engine was worth less than the price for which it was sold, evidence was admissible on plaintiff's part to show that it was worth more.

4. In an action for the price of an engine sold to third persons, and transferred to defendant with the seller's consent, where the seller tested the engine at defendant's request, testimony was admissible that the agent, on making the test, stated that "it would not be a fair test when made in the condition it then was," for the purpose of showing that the seller was not to be bound by the test if unfavorable.

5. Where an issue was submitted in the main charge, a special charge on the same issue was properly refused.

6. Where an engine sold defendant failed to develop the agreed capacity, but he did not offer to return it, the measure of damages, if any, was the difference between the contract price and the market value at the time of sale.

7. A third person who assumes an account for purchase money of personal property due from the purchaser to the seller is liable thereon, where the account bears date of the time of the sale and delivery, in the same manner and to the same extent as the original purchaser.

8. Where the price of goods is due at the date of sale, the seller is entitled to legal interest from that time.

On Motion for Rehearing.

Where property sold accords with the seller's guaranty at the date of sale, he is entitled to recover the price, notwithstanding it afterwards fails to accord therewith.

Appeal from Bexar county court; R. B. Green, Judge.

Action by Emanuel Thumma against Eugene A. Holmgreen and others, in which plaintiff dismissed his suit against all the defendants except William G. Schuwirth. Judgment for plaintiff against Schuwirth, and the latter appeals. Affirmed.

C. A. Keller and Mason Williams, for appellant. Denman, Franklin & McGown, for appellee.

NEILL, J. This suit was brought by the appellee, Emanuel Thumma, against Eugene H. Holmgreen, Julius H. Holmgreen, and the appellant, William G. Schuwirth, to recover the sum of \$250, alleged to be due for the purchase money of a gasoline engine sold on the 17th day of October, 1898, by the Garrett Engine, Boiler & Machine Works to the Alamo Iron Works, a partnership, the members of which are the above-named Holmgreens.

for the stipulated price sued for. The appellee alleged in his petition that after the sale, by some arrangement between the Alamo Iron Works and William G. Schuwirth, the engine was delivered to appellant, who assumed payment of the money sued for, and that thereafter the Garrett Engine, Boiler & Machine Works assigned its claim against defendants to plaintiff, who by virtue of such transfer is the owner of the same. The defendant William G. Schuwirth answered that the engine was purchased by the Holmgreens from the Garrett Engine, Boiler & Machine Works under a guaranty that it was a six-horse power engine; that he sold the engine to Lindhim & Co. for the purpose of running an electric light plant of 50 incandescent lights; that the engine would not develop nor do the work of a six-horse power engine; that it would not do more work than one of three-horse power, and was not sufficient for the purpose for which he purchased it; that the engine did not come up to the guaranty under which it was sold, and is worthless to defendant. In his pleadings he tendered the engine to plaintiff, stating that it was at the shop of the Alamo Iron Works, in the city of San Antonio, Tex. The plaintiff dismissed his suit as to the Holmgreens, and the case between him and Schuwirth was tried before a jury, upon whose verdict a judgment for \$250, with interest at the rate of 6 per cent. per annum from the 17th day of October, 1898, was entered against him.

Conclusions of Fact.

The undisputed evidence shows that J. H. and E. H. Holmgreen purchased the engine in question on the 17th day of October, 1898, from the Garrett Engine, Boiler & Machine Works, at an agreed price of \$250. The Holmgreens afterwards delivered the engine to William G. Schuwirth, who agreed to pay the Garrett Engine, Boiler & Machine Works the purchase price of \$250 therefor. The machine works at the time agreed to the transfer, and charged the engine to Schuwirth, and gave the Holmgreens credit for it. It was agreed by the parties upon the trial that appellant owed said amount of money to appellee, unless the debt was defeated in whole or in part by the defenses urged by the defendant. It seems to be conceded by the parties that the engine was sold by the Garrett, etc., Works upon a guaranty that it would, under proper and reasonable conditions, develop a capacity of six-horse power. As to whether, under such conditions, it would develop that power, was the principal issue in the case. This issue was submitted to the jury, and decided in the affirmative. We believe the evidence is reasonably sufficient to support the verdict.

Conclusions of Law.

1. The third, fourth, and twentieth assignments of error are copied one after the other, and are followed by the proposition, "Wit-

nesses will not be permitted to give their conclusions." The statement subjoined is that the witness testified, "The engine was tested thoroughly in our shops before it was shipped to the Alamo Iron Works, and when delivered on board cars at Garrett, Indiana, for shipment, was in perfect condition, and, with proper management, would develop 6.45 horse power." It may be doubted whether, under the opinion in *Railway v. True* (Tex. Civ. App.) 57 S. W. 977, these assignments should be considered. However, it does not seem to us that the proposition is supported by the statement under it. The testimony as to testing of the engine and its condition when shipped is to facts, not conclusions. If, as it appears from the statement of facts, the witness were an expert, his opinion as to the power the engine, under proper conditions, would develop, was admissible as evidence.

2. The evidence, the admission of which is complained of in the sixth assignment, is not in the statement of facts, which must prevail in considering assignments relating to the introduction of evidence. *Railway Co. v. Knippa* (Tex. Civ. App.) 27 S. W. 731.

3. Had not the appellant, by his pleadings and evidence, raised the issue that the engine was worth much less than the price for which it was sold, the objection to evidence tending to show that it was worth more might be regarded as tenable. But when the issue was made by the appellant, such evidence was admissible in rebuttal of that introduced by him to show it was worth much less than the price stipulated in the contract.

4. We are not able to say from the bill of exceptions taken by appellant to the admission of the testimony complained of in the seventh assignment that such evidence was erroneously admitted. It may be that, in connection with and in explanation of other evidence introduced, it was properly admitted. It seems to us that it was. When appellant desired the Garrett Engine, Boiler & Machine Works to test the capacity of the engine, it was proper for the company's agent, before making the test, to "make it clear" to appellant "that it would not be a fair test when made in the condition the engine was." And the admission of such testimony was proper for the purpose of showing that it was not intended, when the test was agreed to be made, that appellee should be bound by it if it proved unfavorable.

5. The court did not err in refusing to give special charge No. 3 requested by appellant. The question as to whether the engine when sold would, under proper and reasonable use, develop a capacity of six-horse power, was submitted in the main charge. As there was no evidence tending to show that the engine was returned or offered to be returned either to the seller or appellee, the measure of damages, if any, was the difference between the contract price and its market value at the time of sale. And the court properly so instructed the jury.

6. The appellant having assumed the payment of the account for the purchase money due from the Holmgreens to the Garrett Engine, Boiler & Machine Works, by whom it was transferred to appellee, and as the account bore date 17th of October, 1898, which was when the sale was made and engine delivered, appellant was liable in the same manner and to the same extent that the Holmgreens would have been had not they been discharged of their liability by the agreement of appellant to pay their debt, and of the machine works to take him for it. This was properly, by the charge, made the test of appellant's liability.

7. The court properly instructed the jury, in event of a verdict for plaintiff, to find the legal rate of interest on the account from date of sale. *Howard v. Emerson*, 85 S. W. 382, 8 Tex. Ct. Rep. 451.

There is no error assigned which requires a reversal of the judgment, and it is affirmed.

On Rehearing.

(Feb. 19, 1902.)

The only question raised by this motion worthy of notice is the correctness of the following paragraph of the court's charge, viz.: "If you believe from the evidence that the gasoline engine delivered by the Garrett Boiler & Engine Company to Holmgreen & Sons on the 27th day of October, 1898, would, under proper and reasonable use, develop a capacity of six-horse power, then you will return a verdict for plaintiff for \$250, with 8 per cent. interest thereon from October 17, 1898, notwithstanding you may believe that thereafter the engine failed to develop a capacity of six-horse power." It will be observed from our conclusions of fact, the correctness of which cannot be denied, that on the 17th day of October, 1898, the Garrett Engine, Boiler & Machine Works sold the engine in question to J. H. and E. H. Holmgreen at an agreed price of \$250; that after the date of the purchase the Holmgreens delivered the engine to appellant, who agreed to pay the boiler and machine works the purchase price therefor. The machine works at the time agreed to the transfer, and charged the engine to Schuwirth, and gave the Holmgreens credit for it. The appellee afterwards became the owner of the claim for the purchase money. Under these facts, whatever right the engine, boiler and machine works had against the Holmgreens for the purchase money at the time they delivered the engine to Schuwirth it had against him, and such right at the time the case was tried was in appellee. What was this right of the engine, boiler and machine works against the Holmgreens? Clearly, it was to the purchase money of the engine, provided it met the guaranty of being one of six-horse power at the time it was purchased. That was on the 17th day of October, 1898. This was the time to determine whether it was an engine

with the power and capacity guaranteed. If it was then as guaranteed, it is immaterial what its power or capacity was afterwards; for the obligation of the Holmgreens to pay the purchase price was fixed, and their obligation was assumed by the appellant. This was what the jury were by the charge required to determine, and they by their verdict found that the engine when purchased by the Holmgreens fully met its guaranty. It is true, the evidence introduced by appellant as to the capacity and power of the engine after it was delivered to him tended to show that it did not fulfill its guaranty at the time it was sold to the Holmgreens. This was to be considered by the jury in connection with the other testimony in determining the issue. Certainly the charge did not withdraw its consideration from the jury; and, if appellant's counsel apprehended that the jury might so construe the charge as to believe it excluded from their consideration such evidence, they should have requested such a charge as would have required them to consider such evidence, in connection with the other testimony, in determining whether the engine met its guaranty at the time it was sold to the Holmgreens.

The motion is overruled.

McLANE v. MAURER et al.¹

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

CONTRACTS—SALE OF LAND—CONSTRUCTION—BREACH—EVIDENCE—CHARGE—MEASURE OF DAMAGES.

1. Where, in an action for breach of a contract, by which plaintiffs were authorized to sell defendant's land, a minimum price being fixed, and it being specified that an asking price for the several tracts should be agreed on, it is alleged that such price was agreed to, the complaint is not demurrable on the ground that the price is not stated in the contract.

2. Where a contract authorizing plaintiffs to sell land within certain time is extended with slight changes, by indorsement thereon, in an action for the breach before the extended time has expired it is proper to declare on both contracts.

3. In an action for breach of a contract by which plaintiffs were authorized to sell defendant's lands, and to have one-half the price received in excess of a certain sum, an allegation of what they would have realized from the sale forms a sufficient basis for the recovery of damages.

4. Where defendant violated a contract by which plaintiffs were authorized to sell his lands after such contract had been renewed, in an action for the breach evidence of plaintiffs' activity under the original contract could not injuriously affect defendant's interests.

5. Where a contract by which plaintiffs were authorized to sell defendant's lands within a certain time was renewed, and certain changes then made by erasures and interlineations, testimony explaining such changes was competent.

6. In an action for breach of a contract authorizing plaintiffs to sell defendant's lands, testimony that another person had said to third parties that he was agent of defendant to sell such lands was incompetent.

7. In an action for breach of a contract authorizing plaintiffs to sell defendant's lands, it

¹ For opinion on motion for rehearing, see 66 S. W. 1108.

was competent to show that defendant, knowing a certain person was in plaintiffs' employ, without their knowledge employed him at the same time to sell for defendant, thereby interfering with plaintiffs' sales.

8. In an action for breach of a contract authorizing plaintiffs to sell defendant's lands it was competent to examine witnesses as to the demand for such lands, and applications to purchase and offers therefor made, and the probable cost of selling the remaining lands.

9. Where, in an action for breach of a contract authorizing plaintiffs to sell defendants' lands, the law governing the facts was properly given in the charge of the court, a refusal to give special requested charges was proper.

10. Where uncontroverted evidence showed that defendant had revoked plaintiffs' authority to sell lands, it was not error for the court to assume such fact in the charge.

11. Where a contract authorizing plaintiffs to sell defendant's lands provided that they should devote their "business energies, time, and attention" to such business, a charge that they were not required to devote their entire time, but to exercise reasonable diligence in procuring purchasers, was proper.

12. Where a contract authorizing plaintiffs to sell defendant's lands within a certain period provided that defendant might sell all or any part of the land, such proviso did not authorize him to revoke their authority before the time expired, when they had excited an active demand, and were rapidly selling.

13. Where, in an action for breach of a contract authorizing plaintiffs to sell defendant's lands, a large quantity of the land had been sold by them, and there was no testimony that the remaining lands would have been sold for a higher average price, the damages should not be based on an estimate higher than such average.

On Motion for Rehearing.

1. A contract authorizing plaintiffs to sell a tract of 7,000 acres of defendant's land fixed a minimum price, and provided that the tract should be subdivided, and an asking price agreed on for the smaller tracts. A tract of 200 acres was reserved to go with the improvements. Plaintiffs were to have 5 per cent. for lands sold at the minimum price, and one-half of the excess for those sold above that price, but no commission on the value of the improvements. Plaintiffs sold, and defendant conveyed to the purchasers, large quantities of the land, but he revoked the contract before all the land had been surveyed or the time expired. *Held*, that it was not contemplated that the land should all be surveyed and subdivided before sales were made, and the fact that it had not all been surveyed did not authorize revoking the contract.

2. It appearing that plaintiffs would probably have sold all the land within the time limited, their damages should be computed at one-half the difference between what the lands would have brought at the average price of that already sold and the minimum price, excluding the 200 acres with the improvements, and deducting the probable expenses of selling and the amount already paid by defendant.

Appeal from district court, Bexar county; S. J. Brooks, Judge.

Action by E. F. Maurer and another against H. H. McLane. From a judgment for plaintiffs, defendant appeals. Modified.

T. J. McMinn and Ball & Fuller, for appellant. Denman, Franklin & McGown, for appellees.

FLY, J. This suit was instituted by E. F. Maurer and T. W. Woodruff to recover

damages in the sum of \$17,707.50, alleged to have accrued by reason of the breach of a certain contract under the terms of which a certain tract of land was placed in the hands of plaintiffs by defendant for sale. The trial resulted in a verdict and judgment for appellees in the sum of \$13,144. The contract upon which the suit is based provided that appellees should have the right to sell 7,000 acres of land owned by appellant in Karnes county, Tex., at a sum not less than \$8 per acre for upland and \$12 per acre for valley land; that appellees were "to devote their business energies, time, and attention to the hunting up of purchasers, visiting other and distant localities for that purpose," and that all expenses of every kind should be paid by them. The compensation was fixed, in case less than the whole was sold, at one-half of the price obtained in excess of \$8 an acre, but, if the whole was sold in a body at \$8 an acre, appellees were to receive 5 per cent. of the amount obtained. It was also provided that appellees should receive 5 per cent. of the purchase price whenever a sale was made, which should be deducted from their portion of the purchase money in excess of \$8 an acre. The sales were to be made at not less than one-fourth cash, the deferred payments to be secured by vendor's liens. It was provided that appellant should have the right to sell the whole or any portion of the land without compensating appellees for any interest therein, and that the value of certain improvements should be deducted from any amounts in which appellees might have an interest. The time limit fixed for the sale of one half the land was January 1, 1899, and for the other half January 1, 1900. These times were afterwards extended to 1901 and 1902 by an agreement in writing indorsed on the original contract. The date of this indorsement was June 21, 1900, and in it was the provision that, with the exception of certain immaterial erasures and additions, the parties should be "bound in all things by the terms and conditions of the contract as originally entered into." The petition set forth full compliance with the terms of the contract on the part of appellees and a breach upon the part of appellant after they had sold 1,988.4 acres of the land and had contracted for the sale of the other half, and we do not think it was subject to a general demurrer. It is alleged that under the terms of the contract the parties had fixed the prices that should be demanded for the land, and this made certain any uncertainty in the contract as to what the prices to be demanded should be. None of the special exceptions was well taken, and each was properly overruled. The new contract was but an extension and continuation of the original contract, and it was proper to declare on them both.

The allegations as to what appellees would have realized from the sale of the land re-

maining unsold at the time of the breach of the contract formed a sufficient basis for the recovery of damages. It may be a difficult matter to establish what the damages will be, but that burden is on the plaintiff; and if he can make it appear reasonably certain that he was damaged, and the probable amount of such damages, he can recover. *Fraser v. Smelting Co.*, 9 Tex. Civ. App. 210, 28 S. W. 714; *Joske v. Pleasants* (Tex. Civ. App.) 39 S. W. 586. The rule is thus clearly stated in an Oregon case,—*Blagen v. Thompson*, 31 Pac. 647,—and copied in the first case above cited: "The difficulty in the determination of the question thus presented lies not so much in the ascertainment of the law of the subject as in its application to the facts of the particular case. The broad general rule in such cases is that the plaintiff may recover such damages, including gains prevented as well as losses sustained, as may reasonably be supposed to have been within the contemplation of both parties at the time of making the contract as the proximate and natural consequence of a breach by defendant; and in determining what may reasonably be supposed to have been within the contemplation of the parties as a natural consequence of a breach all the facts surrounding the execution of the contract known to both parties may be considered, even if these be such as would not necessarily enter into it if known to the defendant." The only question that could arise in the matter of the benefits that would have accrued had the contract not been breached would be as to the proof. If appellees could make it appear reasonably certain that they would have sold the whole of the land but for the interference of appellant, they would be entitled to the interest in what they could show the land would have sold for. The charge of the court contains a full and explicit presentation to the jury of every issue raised by the pleadings and evidence, and the special charges requested by appellant were properly refused. The jury were confined in their consideration of the testimony to the labor put forth and the expenses incurred after the renewal of the contract on June 21, 1900, and instructed to ascertain the total amount that would have been realized prior to October 30, 1900, when the contract was breached, and those that would have been made thereafter before January 1, 1902, and from this total to deduct what all the lands would have brought at \$8 an acre and the sum of \$8,000 for the improvements, and to return a verdict for one-half of what remained, less the expenses that would reasonably have arisen in selling the land, and less any sums paid by appellant to appellees. This, we think, was the proper measure of damages. All other phases of the case suggested by the allegations and evidence were also presented to the jury.

The fifteenth assignment of error com-

plaints of the admission of evidence of efforts put forth by appellees prior to lapse of the contract by its time limit on January 1, 1900, and prior to the time of renewal on June 21, 1900. How this testimony, if inadmissible, could have injured appellant, is not made apparent by the assignment of error, various bills of exceptions, or argument of appellant. The issues as submitted by the court could not have been affected in any manner by the evidence. The questions were, had appellant breached the contract, and had appellees been injured by the breach? Under the terms of the contract they had until January 1, 1901, to sell one half the land, and until January 1, 1902, to sell the other half; and appellant, before the expiration of the time, breached the contract, and prevented them from selling. That appellant was not dissatisfied with the manner in which appellees had endeavored to effect a sale under the original contract is evidenced by the renewal of the contract, and evidence of their activity in the matter during the life of the original contract could not have injuriously affected the interests of appellant. The charge confined the investigation of the diligence of appellees in effecting sales to the time between June 21, 1900, and October 30, 1900.

The renewal clause affixed to the contract made the latter the new contract, and it was properly admitted in evidence, and when admitted it showed that the clause requiring appellees "to devote their entire time and attention" to the sale of the land was modified by erasing the word "entire" and inserting "business energies," so that the sentence read "that the said Maurer and Woodruff are to devote their business energies, time, and attention" to the business in hand. It was contended by appellant that appellees had breached the contract by not devoting their "entire time and attention," and it was proper to show that the contract did not so provide, and that it was changed as above indicated so that appellees would not be bound to give their entire time and attention to the subject-matter of the contract. The testimony did not change the contract. It merely explained an erasure and interlineation in it, and showed the intention of the parties and was admissible.

The evidence as to what W. J. Hall said to witnesses about being an agent of appellant to sell the land described in the contract was properly excluded. Under the terms of the contract it was not contemplated that appellant should appoint other agents than appellees to sell the land, and, if it had been, and it was necessary to prove the appointment of other agents, it could not be done by the declarations of such agents to third parties. Hall, it seems, had been employed by appellees to assist them in getting purchasers for the land, and while so employed he also entered the employment of appellant to sell the land, and it was admissible to allow

Woodruff, one of the appellees, to testify that he knew nothing about such employment of Hall by appellant, and that Hall told him nothing about it. It was also admissible to prove that appellees had told appellant that Hall had been employed by them to assist in the sale of the land. It brought home to appellant the fact that Hall was an agent of appellees, and tended to show that by his subsequent conduct in employing Hall he was endeavoring to interfere with them in executing their contract, and thereby bringing about a failure on their part. To say that appellant could knowingly hire the servants of appellees to work for him, and thereby break down appellees in their efforts to sell the land, would be to sustain conduct that cannot meet with countenance in any court.

It was permissible under the pleadings to show what the demand for land was in the fall of 1900, and what the probable expense would be to sell the land, and as to whether there were any applications for purchase; and it would seem that this could only be done by interrogating witnesses about the several matters. An estimate of the probable cost of selling the remaining land was not one permissible, but necessary to enable the jury to ascertain what the cost would be. The question as to the negotiations for sale of the land was not leading, and proof that a party had offered \$15 an acre for a part of the land was not hearsay. It was the narration of a fact. The conversation with Mayfield was in the presence of and with appellant, and was admissible. We think that testimony as to negotiations for purchase of the land were permissible as tending to show that the land was in demand, and would have probably been sold.

The court properly refused to give the special charges requested. The law covering the facts was given in the charge of the court. It was not error to assume that appellant had revoked the agency of appellees. The uncontroverted evidence shows that this was done. The contract did not require that the whole of the time and attention of appellees should be devoted to the sale of the land, and it was not erroneous to instruct the jury that reasonable diligence in procuring purchasers met the terms of the contract. It was the duty of the court to construe the language of the contract, and we think its construction correct.

The testimony in this case tends to establish that through the efforts of appellees interest had been aroused in the land placed in their hands by appellant, and that numerous purchasers were seeking to obtain a portion of it. At the time when the land was being rapidly disposed of appellant breached the contract, and discharged appellees from his service. He had, it is true, reserved the right to sell the whole or any portion of the land without compensating appellees for their efforts and expenses, but that harsh and rig-

orous section of the contract will not be extended so as to give the appellant the right, when a demand for the land has been created by the efforts of the appellees, to reap the benefits, without compensation, of their labor. He might, under the terms of his contract,—which were favorable in the highest degree to him,—sell any land that he saw proper, and not give any compensation to appellees for being the means of providing a customer, provided he did not act in bad faith in obtaining such purchaser; but he cannot at will abrogate the contract, and profit by his own wrongs in breaching the contract, and deprive appellees of the legitimate fruits of their labors. It does not matter, as contended by appellant, that appellees had not devoted their entire time and attention to selling the land. The facts indicate that they were selling it rapidly when they were interfered with by appellant, and render it reasonably certain that, but for such interference, the whole of the land would have been sold within the time limit fixed by the contract. It is possible that appellant might have sold the whole or a portion of the land during that time limit, but that possibility cannot relieve him from the full consequences of his unlawful act in abrogating the contract.

While viewing the matter as we do, and holding that the true measure of damages was given in charge to the jury, we are of the opinion that the verdict, under the facts, is excessive. In their petition appellees claimed, and it was shown by the proof, that the sum of \$3,307.60 was compensation for the sale of lands already consummated or contracted for before the contract was abrogated, admitting a credit thereon of \$956.10, paid by appellant. This would leave the amount \$2,351.50 due for such sales. It appears that after the sale of the 1,988 acres of land there remained 5,047 acres of land, as alleged in the petition, 3,708 acres of which was valley land and 1,339 acres was upland. We gather from the testimony that 661 acres of the 1,988 acres sold was upland and brought on an average the sum of \$9.25, and the remaining 1,327 acres was valley land, and brought on an average \$12.30 an acre. There is no testimony that establishes that these averages would have been increased on future sales, and they must form the basis for the calculation as to the remaining land. On this basis the 3,708 acres of valley land would have brought \$45,608.40, and the 1,339 acres of upland would have realized \$12,385.75; the aggregate sum being \$57,994.15. Deduct from this sum \$8 an acre, or \$40,376, and the \$3,000 for the improvements, and there remains \$9,618.15, one-half of which would be \$4,809.07, from which deduct the \$600 estimate for expenses, and there would be left for appellees the sum of \$4,209.07, which, added to the \$2,351, would give the sum of \$6,560.07.

We have endeavored to consider every

point presented by the numerous assignments of error, and find nothing requiring a reversal if the excessive verdict is cured by a remittitur, and, if this is done within 10 days, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded.

On Motion for Rehearing.

(Feb. 19, 1902.)

"It is the rule that a plaintiff may recover compensation for any gain which he can make it appear with reasonable certainty the defendant's wrongful act prevented him from acquiring, subject, of course, to the general principles as to remoteness, compensation, etc. His compensation will be measured by the most liberal scale which he can show to be a proper one." Sedg. Dam. § 177. Again, the same author says in section 192: "The benefits which would have accrued to plaintiff from a contract broken by the defendant may be recovered, though they are in a certain sense contingent." In the case of *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756, it was held that one partner may maintain an action at law against his copartner for a breach of the articles of copartnership in dissolving before the limited period. In that case an English case was cited approvingly, wherein it was held that, where an author failed to furnish a manuscript work he had promised to provide, the plaintiff could recover of him the amount of profit that would probably have been realized. These rules would apply to this case, and, when the amount of damages is made reasonably certain by the evidence, the plaintiff is entitled to a recovery. In the first clause of the contract it is provided that the valley land should not be sold for less than \$12 an acre, nor any portion of the elevated or upland for less than \$8 an acre, and that these minimum prices should not be taken until a reasonable effort had been made to obtain the higher fixed prices. In the first clause of the contract it was also provided that the lands should be platted on a map and surveyed, so that the shape, quantity, and description of each tract should be known; and each tract should be numbered, and the price agreed on by the parties to the contract, which should be the asking price. The following clause is also found in the contract: "And it is further expressly understood and agreed that the buildings and improvements on said tract of land are not to be a part, when sold, of the amount to be divided, but the whole amount for which the same shall be sold shall belong to the said McLane, and so much of said land, to the extent of not less than two hundred acres, upon which said buildings and improvements are situated, and contiguous thereto, shall be reserved, to be sold with the said buildings and improvements, and the value of the land alone shall be subject to a division, as above specified; and such

land and improvements shall not be sold without the express consent of the said McLane, and the fixing by him of the price of the improvements." The contention of appellant is that, because the evidence established that the central part of the tract had not been classified and priced, and no consent had been given to sell the land reserved with the improvements, the contract was not a completed one, and appellees could only recover 5 per cent. on sales actually made or contracted for by them. Appellant assumes that these points did not meet with any consideration at the hands of the court; but they were thoroughly considered in the first instance, and have again been considered, and the court is still of the opinion that the contention is without merit. We do not think that it was ever contemplated by the parties to the contract that, although nine-tenths of the land should be sold, appellant could breach the contract, and because the remaining tenth of the land had not been classified and priced, appellees should be entitled to only 5 per cent. on the sales. Such, however, would be the legitimate result of the interpretation put upon the contract by appellant. The testimony showed that appellees had surveyed and subdivided over half of the land, and were rapidly selling it off; and there can be no strength in the argument that the contract can be breached, and nothing but a 5 per cent. commission be recovered, because the whole of the land had not been surveyed. There is no clause in the contract that contemplates that the whole of the land shall be laid off, platted, and surveyed before any portion of it should be sold, and appellant did not so construe it, because he had time and again indorsed the acts of appellees by executing deeds and appropriating benefits arising from the sale of different tracts of land. The contract cannot be held to be incomplete because a portion of the land had not been classified and priced. Its minimum price had been fixed by the contract, and, while it is provided that the prices must be agreed to by all parties, it is clearly contemplated that the minimum price can be taken by appellees after a reasonable effort to get more, for it is provided: "But the minimum price shall not be taken until a reasonable effort has been made to obtain the agreed prices." In other words, the contract gives the least price that can be taken, and provides that an "asking price" shall be agreed on; but if, after reasonable effort, appellees fail to get such asking price, then they can take the minimum price. No complaint was ever made that all the land had not been surveyed and classified, but the excuses made for breaching the contract are on other grounds. We are of the opinion that, if no minimum price had been named, and the testimony made it reasonably certain that the remaining land would have been sold but for the breach, appellees are entitled to

receive their pro rata on the unsold land as well as on that sold and contracted to be sold. What has been said does not, we think, apply to the 200 acres reserved from sale, with the improvements, and that land, together with improvements, will be eliminated in arriving at the amount of damages; for, if the land and improvements were reserved from sale, as properly contended by appellant, they should not be considered in arriving at the proper sum to be given in the judgment. The basis of calculation would then be 3,568 acres of valley land instead of 3,708, and 1,830 acres of upland. The 3,568 acres at \$12.30 per acre would be \$43,148.40, and the 1,889 acres of upland at \$9.25 would be \$12,385.75, making in the aggregate \$55,534.15, from which deduct \$8 an acre or \$83,776. This leaves \$16,758.15, one-half of which, less \$600 expenses, is \$7,779.07, which, added to the \$2,351, would give the sum of \$10,130.07.

Appellees having indicated a willingness to remit the sum required by the court, our former judgment will be amended so as to deduct a sum sufficient to reduce the judgment to the sum above indicated, and, as reduced, will be affirmed.

WATTS v. DUBOIS et al.

(Court of Civil Appeals of Texas. Jan. 8, 1902.)

TRIAL—CHALLENGES—HARMLESS ERROR—EVIDENCE—DECLARATIONS—WHEN ADMISSIBLE—MORTGAGES—FACTS SHOWING FRAUD—VALIDITY—PARTNERSHIP—FIRM PROPERTY—RECEIVER OF A NATIONAL BANK—AGENT—ACTION IN STATE COURT.

1. On a trial of the right of property between a mortgagee and purchasers at an execution sale under a judgment against the mortgagor the purchasers should, as constituting a single party, be allowed only the number of peremptory challenges to which one party is entitled.

2. The error in permitting persons constituting in effect a single party to have more peremptory challenges than is allowed to a single party is harmless, unless the opposite party is thereby injured.

3. Where a defendant in an action for the foreclosure of a mortgage and for conversion of the mortgaged property pleads payment in money and property of the notes secured by the mortgage, a bill of sale conveying cattle and horses, the proceeds of which were to be credited on the notes, and the fact that the mortgagee had sold several hundred head of horses for a sum greatly less than their value, are admissible in evidence.

4. In an action by a receiver of a bank to foreclose a mortgage to secure an indebtedness to the bank and for conversion of the mortgaged property, the evidence of the statement of the mortgagor, after the execution of the notes, in the presence of the president of the bank, as agent of the receiver, that the debt shown by the notes was fictitious, was not objectionable as the declarations of a maker of a note after its execution impeaching the consideration.

5. In an action by a receiver of a bank to foreclose a mortgage to secure an indebtedness to the bank and for conversion of the mortgaged property, the testimony that a third person, employed by the agent of the receiver

to procure the mortgage, stated to one of the debtors that if his firm executed an assignment all their property would go to their creditors, but if they gave a mortgage they might pull through, the bank resume business, and they be enabled to sell their property, was admissible as tending to show a fraudulent purpose in executing the mortgage, and its knowledge by the receiver's agent.

6. A mortgage to secure a bona fide debt, executed by an insolvent mortgagor with the intent to hinder and defraud other creditors, though the mortgagee knew it, is valid, unless the mortgagee participated in the fraudulent intent.

7. A mortgage to secure a fictitious debt, executed by an insolvent mortgagor with the intent to hinder other creditors with the mortgagee's knowledge, is void as against the mortgagor's creditors.

8. A mortgage in good faith on firm property to secure a firm debt and an individual partner's debt is valid though the firm was insolvent when the mortgage was given, and known to be insolvent by the mortgagee.

9. A receiver of a national bank is bound by the acts and knowledge of his agent within the scope of the agency.

10. A receiver of a national bank coming into a state court to enforce a mortgage executed to him to secure a pre-existing indebtedness to the bank is subject to the laws of the state relating to mortgages executed in fraud of creditors.

On Motion for Rehearing.

1. In an action by a receiver to foreclose a mortgage and for conversion of the mortgaged property, the court's action in excluding from the evidence a document signed by the mortgagors, whereby they turned over to the mortgagee certain cattle, if error, was harmless, for other evidence showed the facts tended to be proven by it.

2. In an action by a receiver to foreclose a mortgage and for conversion of the mortgaged property, a document signed by the mortgagors, whereby they turned over to the mortgagee certain cattle, should be admitted in evidence where it appeared that the receiver took possession of the property by virtue of such instrument.

Error from district court, Brewster county; J. M. Goggin, Judge.

Action by John Watts, as receiver, against Dubois & Wentworth and others. Judgment for defendants, and plaintiff brings error. Reversed.

W. Van Sickle and Ball & Fuller, for plaintiff in error. Falvey & Davis, Patterson & Buckler, and Turney & Burges, for defendants in error.

FLY, J. This suit was instituted by appellant to recover of Dubois & Wentworth a certain debt, and to obtain a foreclosure of a mortgage on certain cattle as against all of the defendants, and to recover for the value of cattle alleged to have been converted as against all the defendants except Dubois & Wentworth. A trial by jury resulted in a verdict in favor of appellant for the amount sued for as against Dubois & Wentworth and in favor of the defendants C. H. Larkin, D. W. Gourley, A. B. Paschal, E. A. Kelley, L. B. Caruthers, S. R. Guthrie, J. D. Jackson, John Rooney, and S. D. Harman. The suit was dismissed by appellant as to the other two defendants, T. F. Swan and P.

W. Farrington. The cattle were claimed by appellees by virtue of an execution sale of the cattle under a judgment against Dubois & Wentworth.

The first and second assignments of error complain of the action of the court in permitting the defendants, except Dubois & Wentworth, who made no defense, to have more than six peremptory challenges in the selection of a jury. These assignments, we think, are well taken. Appellees were making common cause against appellant, as shown by the pleadings and facts, and they were, to all intents and purposes, one party. *Raby v. Frank* (Tex. Civ. App.) 34 S. W. 777; *Jones v. Ford*, 60 Tex. 127; *Railway Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670; *Wolf v. Perryman* (Tex. Sup.) 17 S. W. 772. This error would not necessarily cause a reversal, unless appellant had been injured by the action of the court, and it is referred to merely in view of another trial.

The third assignment presents as error the action of the court in excluding a written document, in which Dubois & Wentworth attempted to give to Hatch, receiver, of whom appellant was the successor, possession of the cattle on which the mortgage had been executed. The document had never been recorded, and appellees were not shown to have had any notice of it, and as to them it was properly excluded. It did not tend to establish that appellant was in possession of the cattle when they were seized under execution by appellees. If the cattle were delivered to appellant by Dubois & Wentworth, his possession was not strengthened by the contents of the rejected instrument. It added nothing to the terms of the mortgage, which authorized Hatch "to take possession of and convey for each in our names sufficient of said cattle to pay any and all of said notes now due and held by said American National Bank."

It was alleged in the answer of O. H. Larkin that, if the bank was the bona fide holder of the notes given by Dubois & Wentworth, the bank had been fully paid more in money and property than was sufficient to pay off and discharge said indebtedness, and this allegation rendered permissible the bill of sale given to Hatch, receiver, by A. A. Chapman, conveying certain cattle and horses, the proceeds of which were to be credited, by the terms of the bill of sale, on notes of Dubois & Wentworth, held by the American National Bank. For like reasons it was admissible to show by the witness Thwing that he had paid the receiver \$2,800 for 700 head of horses, which were worth largely in excess of that amount.

The court permitted W. W. Turney to testify to conversations had with Dubois in the presence of Thwing, the former president of the bank, after the execution of the notes sued on, and after the appointment of the receiver, to the effect that the debts evidenced by the notes were fictitious, and

that the notes were given to the bank. This testimony was objected to on the ground that the declarations took place after the execution of the notes, and that Dubois could not thus impeach the consideration of the notes, and because it was immaterial and prejudicial. After the bank had failed, and had been placed in the hands of a receiver, Thwing was sent to Texas as the agent and representative of the receiver to get Dubois & Wentworth to execute a mortgage to secure their indebtedness to the bank. While endeavoring to obtain this mortgage, the conversation to which the objections are urged took place, and, we think, it was properly admitted in evidence. The receiver was present in the person of Thwing, who was his agent, and the conversation as though addressed to him. The doctrine, as announced in the cases cited by appellant, that the declarations of a vendor made after a sale, and without the knowledge or presence of the vendee, cannot be received in evidence to defeat the vendee's title to the property, has no application to the facts of this case. During the conversation between Thwing and Dubois, A. A. Chapman, who had accompanied Thwing from Erath county to San Antonio, at the solicitation of Thwing, to persuade this relative Dubois to execute the mortgage, stated to Dubois that, if his firm executed an assignment, all their property would go to their creditors, but if they gave the mortgage they might pull through, the bank resume business, and they be enabled to sell their property. This conversation upon the part of one acting for Thwing was admissible as tending to show the fraudulent purpose in executing the mortgage, and its knowledge by the representative of the receiver.

The following charge was given by the trial court: "If you believe from a preponderance of the evidence that at the time of the execution of the mortgage by Dubois & Wentworth to Hatch, as trustee of the American National Bank of Arkansas City, the said Dubois & Wentworth were insolvent, and that the said Hatch, or his agent, H. H. Thwing, had notice of such insolvency, and that the purpose of the said Dubois & Wentworth in executing said mortgage was to hinder, delay, or defraud their creditors in the collection of their debts against them, and that the said Hatch or his agent, Thwing, knew of such purpose on the part of said Dubois & Wentworth, if such there was at the time of the execution of the said mortgage; and further believe from a preponderance of the evidence that any portion of the debts described in said mortgage as owing to said bank by Dubois & Wentworth, or as being the obligations of the said Dubois & Wentworth upon which said bank was liable as an indorser, was fictitious, and did not exist as a subsisting debt or obligation against said Dubois & Wentworth at the time of the execution of said

mortgage,—then you are instructed that in that event said mortgage would be fraudulent and void against the prior creditors of the said Dubois & Wentworth, and as against the debt of the said Dubois & Wentworth to the said Larkin upon which his execution issued; and if you so believe, you should find in favor of all the defendants except said Dubois & Wentworth, unless you should further believe from the evidence that such fictitious obligation or indebtedness (if any there was) was placed in the said mortgage by mistake of said receiver, Hatch, or his agent, Thwing." The charge is objected to on the ground that there was error in imputing to the receiver the knowledge of his agent, Thwing, and also in charging that the mortgage was void if a fictitious debt was included therein without reference to the intention of the parties in placing it there. The charge declares that the mortgage was void if three facts were established: First, if the mortgagors were insolvent, and the receiver, or his agent, Thwing, knew it; second, if the purpose of the mortgagors was to hinder or delay creditors, and the receiver or agent knew it; and, third, if any part of the debts described in the mortgage was fictitious, and did not exist. The law is well settled that an insolvent debtor may prefer creditors, and although, in giving a preference, he may have the intent to defraud other creditors, and such intent may be known to the preferred creditor, yet, if a sale or mortgage is given to him by the debtor, and the property is not more than reasonably sufficient in value to pay or secure the debt, the conveyance would not be fraudulent in case the sale was effected or the mortgage executed for the sole purpose on the part of the vendee or mortgagee of securing the debt. *Greenleve v. Blum*, 59 Tex. 124; *Schneider v. Sansom*, 62 Tex. 201, 50 Am. Rep. 521; *Haas v. Kraus*, 86 Tex. 687, 27 S. W. 256. In the last case cited it was said: "To have made the mortgage in question fraudulent, the secured creditor must have had some purpose other than the security and payment of the sum due. He may have known that the debtor would not have given him the security but for a desire even to defeat some other creditor in the collection of a sum due him, but this would not render it unlawful for him to take security for payment of a sum due." From this well-settled doctrine it follows that, although Dubois & Wentworth were insolvent when the mortgage was executed, and executed the same with the intent to hinder and delay other creditors, and these two facts were known to the receiver, the mortgage would not be void, unless no more property was conveyed than was necessary to pay the debt, unless he participated in the fraudulent intent, and the charge of the court declaring otherwise was erroneous. The foregoing details of what constitutes fraud being copulatively

conjoined with the necessity of finding that a fictitious debt was included in the mortgage, not placed there by mistake, and it being made necessary that insolvency, intent to defraud creditors, and knowledge of these facts should be associated with a fictitious debt knowingly inserted in order to constitute fraud, would perhaps render harmless the erroneous propositions of law mentioned. Finding that a fictitious debt was placed in the mortgage with the knowledge of the receiver or his agent, standing alone, would vitiate the mortgage. *Freybe v. Tiernan*, 76 Tex. 286, 13 S. W. 370.

At the request of appellees the following charge was given: "If you believe from the evidence that at the time of the execution of the instrument in evidence by Dubois & Wentworth to H. F. Hatch the firm of Dubois & Wentworth were insolvent, and did not have sufficient property to pay their firm debts, then you are instructed that they would have no right, as against the creditors of said firm, to mortgage their property to secure an individual debt of M. W. Dubois; and if you believe that at the time said instrument was executed to Hatch he knew that Dubois & Wentworth were insolvent, and did not have property sufficient to pay their debts, or could have known such facts by the exercise of reasonable diligence, said Hatch would have no right to include in such instrument the individual notes of M. W. Dubois; and if you believe that the notes of M. W. Dubois were included in said instrument for the fraudulent purpose of protecting the property of Dubois & Wentworth from other creditors, and hindering and delaying their other creditors; and if you find that Dubois & Wentworth were indebted to C. H. Larkin on January 24, 1891, on account of the debt for which he secured judgment in cause No. 89 on docket of this court,—you will find a verdict for all of these defendants." The charge, under the ruling in *Wiggins v. Blackshear*, 86 Tex. 665, 26 S. W. 939, is clearly erroneous. In that case it was held that one member of an insolvent partnership, all the members being insolvent, may transfer in good faith, with the concurrence of the other partners, his interest in the partnership property to an individual creditor. It was said: "As partnership creditors had no lien on firm property, no reason is perceived why each member might not lawfully permit the other to pay his individual debt out of his own share of the partnership property; and the same reasons which would make lawful such a payment would give validity to a mortgage given by both partners to secure debts of members of the firm." This was followed by this court in the case of *Sanchez v. Goldfrank*, 27 S. W. 204. There is much authority, however, in conflict with the doctrine announced in *Wiggins v. Blackshear*. *Bates, Partn.* § 566, and authorities cited. This court, in the *Wiggins-Black-*

shear Case is on record as opposed to the doctrine. 24 S. W. 920.

We have considered the questions involved in this case as though the receiver, like any one else, is bound by the acts of his agent, within the scope of the business with which he is intrusted, and that knowledge obtained by him while in the prosecution of such business was the knowledge of the receiver. We have been unable to obtain any authority bearing directly on the point, but have reached the conclusion that the receiver of a national bank, who is not the "arm of a court," but the appointee of a federal officer, is subject to the general rule as to agents. That rule is, "In seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent which would have had that effect if proceeding from himself." *Bank v. Cruger*, 91 Tex. 446, 44 S. W. 278. The receiver in this case was a mere trustee, whose powers are defined by a federal statute, and we do not think that because he occupies the position by virtue of appointment by the comptroller of currency that his fraud within the scope of the business placed in his hands would not vitiate a contract as it would with any other person. It is true that the receiver is practically the agent of the comptroller of the currency, who acts for the government; but this would not exempt him from the operation of the laws of Texas when he comes into her courts to ask that rights be enforced under a mortgage, which, if the contentions of appellees be well founded, is, under such laws, fraudulent and void.

We believe we have considered all matters necessary in view of another trial of the cause, and for the errors indicated the judgment will be reversed, and the cause remanded.

On Motions for Rehearing.

(Feb. 19, 1902.)

NEILL, J. Upon considering these motions we have concluded that we were correct in holding that the special charge set out in our original opinion, given at the request of defendants in error, is, under the ruling in *Wiggins v. Blackshear*, erroneous. In that case it is held that: "As every partner is liable for the debts of his firm, and owns its property in common with the other partners, it is his right to have common property applied to the payment of partnership debts, and that all the other partners, without his consent, cannot take this right from him. This right is sometimes said to give every partner an equitable lien on firm assets as will so secure him against several liability from debts to secure to him his proper share of firm assets on dissolutions; but creditors of a partnership have no lien or other claim on partnership assets which can prevent the members of the firm from

disposing of them in any manner or to whomsoever they may deem proper, provided such disposition is not fraudulent." As is said in *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370, which defines such rights as creditors have in firm property: "Their equity is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him." Such rights as creditors have, being merely equitable, are enforceable only when the property is within control of the court, and in course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. As a general rule, if either partner places himself in such a position that he has no right to insist that the partnership assets be applied to the discharge of its obligations in preference to those of individual creditors, then the partnership creditors also lose their right to insist upon such application. *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370; *Arnold v. Hagerman*, 45 N. J. Eq. 188, 17 Atl. 93, 14 Am. St. Rep. 712; *Holloway v. Turner*, 61 Md. 217; *Couchman's Adm'r v. Maupin*, 78 Ky. 33; *Goldsmith v. Elchold*, 94 Ala. 116, 10 South. 80, 33 Am. St. Rep. 97; *Farwell v. Huston*, 151 Ill. 239, 37 N. E. 864, 42 Am. St. Rep. 237; *Hapgood v. Cornwell*, 48 Ill. 64, 95 Am. Dec. 516. As the lien against partnership assets for the payment of firm obligations is in favor of the partners, and of each of them, and can only be derived or enforced through them by partnership creditors, it follows that when the members of the firm lose or voluntarily surrender such lien it can never attach in favor of partnership creditors. *Coover's Appeal*, 70 Am. Dec. 149; *Brown v. Miller*, 11 Colo. 431, 18 Pac. 617; *Scudder v. Delashmut*, 71 Am. Dec. 428; *Hanford v. Prouty*, 133 Ill. 339, 24 N. E. 565; *Wilson v. Soper*, 56 Am. Dec. 573. It is therefore held that a mortgage upon firm property, given by one of two failing partners, with the consent of the other, to his separate creditor, as security for a bona fide debt, is valid. *Hulskamp v. Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971; *Batchelor v. Sanger*, 15 Tex. Civ. App. 112, 38 S. W. 860; *Lackett v. Rumbaugh (C. C.)* 45 Fed. 33; *Grocery Co. v. McCune*, 122 Mo. 431; 25 S. W. 906, 29 L. R. A. 681; *Mill Co. v. Hanover*, 102 Wis. 317, 78 N. W. 740; *Sylvester v. Henrich (Iowa)* 61 N. W. 942. In the case first cited it is said: "A debtor in failing circumstances having the right to prefer a creditor, if the preferred creditor has a bona fide debt, and takes a mortgage with the intent to secure such debt, and not for the purpose of aiding the debtor to hinder and delay other creditors, the mortgage is valid, even though the mortgagee knows that the debtor is insolvent, and that the debtor's intention is to hinder and delay other cred-

iters." The cases we have cited are in accord with, support, and illustrate the principles announced in *Wiggins v. Blackshear*, and demonstrate the fallacy of the special charge under consideration. A proposition more in conflict with the law as announced in that case could hardly be asserted than the one announced by the charge in question. True, it is in effect held in *Wiggins v. Blackshear* that if the members of a firm convey or mortgage its entire property to secure the debt of one of the partners, for which neither the firm nor the other partner is liable, such conveyance would be fraudulent as to creditors of the firm and of the member not bound for the debt, because to the extent of his interest in the property the conveyance would be voluntary. But this is not what the court charged the jury, nor does it fit the facts in this case. All the firm property was not conveyed to secure the individual debts of M. W. Dubois. A part of the indebtedness secured by the mortgage was evidenced by notes signed by Dubois only; but there is evidence in the record strongly tending to show that the indebtedness so evidenced was that of the firm. Yet in the face of this the jury are told by the charge that Hatch, if he knew Dubois & Wentworth were insolvent, or could have known it by the exercise of reasonable diligence, would have no right to include in the mortgage the individual notes of M. W. Dubois. We do not wish, however, to be understood as holding that a mortgage given by the members of a partnership upon their common property to secure the individual indebtedness of a member of the firm as well as partnership liabilities may not be avoided by other firm creditors, or creditors of the member whose personal indebtedness is unsecured, for fraud. When the firm is in existence, and in full possession of its property, free from lien, with the right to dispose of the same with the consent of the partners for value, and without any intentional fraud, they may execute a note or mortgage for the assumption of the individual debt of a partner, and thereby waive the right to have the mortgage property first applied to the satisfaction of the debts of the partnership, if the security is received in good faith and for value; and, the rights being waived, they cannot be invoked on behalf of the creditors of the firm, and therefore such a mortgage will be good as against a subsequent attaching creditor of the firm, even though the firm may have been insolvent at the time of giving the mortgage. *Smith v. Smith*, 87 Iowa, 93, 54 N. W. 73, 43 Am. St. Rep. 359; *Purple v. Farrington*, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535. But we apprehend the rule to be that, if a firm is insolvent, and includes in a mortgage to secure its indebtedness a debt of one of its members, for which the firm nor the other members have received no consideration and are in

no way liable, for the purpose of hindering, delaying, or defrauding the creditors of the partnership or of its members other than the one whose individual debt is secured, and if the mortgagee with knowledge of such facts, or of such matters as would put him on inquiry which would lead to such knowledge, takes such mortgage for the purpose of aiding the firm or its members in their design to delay, hinder, or defraud their creditors, it should be held void at the instance of the creditors so intended to be defrauded.

We are asked by plaintiff in error to modify our original opinion in regard to the refusal of the trial court to admit in evidence the instrument bearing date February 6, 1892, which is as follows: "H. L. Hatch, Receiver, Arkansas City—Sir: We hereby turn over to you the entire brand cattle on our ranches in Texas, all to be found about Brewster and adjoining counties, Texas, to apply on our debts to the American National Bank; and you are hereby authorized to gather them, allowing prices as agreed upon heretofore, and which have been allowed for those turned over in December, 1891. [Signed] Dubois & Wentworth." We are still inclined to the opinion that, if the action of the court were erroneous in excluding this writing, such error was immaterial, for the reason that everything which the instrument would tend to prove was shown by other evidence. But if it should be shown upon another trial that possession was taken by the receiver of the property, and held by virtue of such writing, it, as characterizing such possession, should be admitted in evidence.

With this modification of our original opinion, the motions for rehearing are overruled.

CLAWSON et al. v. WILLIAMS et al.¹

(Court of Civil Appeals of Texas. Nov. 22, 1901.)

TRESPASS TO TRY TITLE—EVIDENCE—BURDEN OF PROOF—SUFFICIENCY—APPEAL—ABANDONMENT—QUESTIONS CONSIDERED.

1. The plaintiff in trespass to try title, who contends that lands claimed by defendant are included in plaintiff's location, has the burden of proving such fact.

2. Evidence in trespass to try title considered, and held to show that plaintiff's claim, derived under a certain land location, did not include lands claimed by defendant under another location, and that the locations were not conflicting.

3. Where a plaintiff in trespass to try title, involving conflicting land locations, does not appeal or file cross assignments of error against his co-appellees in an appeal taken by a defendant, the appellate court, on reversing the judgment, cannot render judgment for plaintiff, though such judgment is warranted by the evidence.

4. The failure to file assignments of error constitutes an abandonment of an appeal, though proper notice of appeal has been given.

¹ Rehearing denied February 13, 1902.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by J. L. Williams, as executor of the estate of Larissa Williams, deceased, and others, against John A. Clawson and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed. Motion for rehearing denied.

L. B. Moody, for appellants. Jacob C. Baldwin, D. F. Rowe, T. C. Rowe, C. E. Johnson, and Ross & Wood, for appellees.

PLEASANTS, J. This suit was instituted by appellee J. L. Williams, executor of the estate of Larissa Williams, deceased, and Emily Pudor, joined by her husband, O. M. Pudor, against the appellants, John A. Clawson, Joe Stasney, Joe Volcik, Jr., Stepan Volcik, W. R. Hollingsworth, and C. H. Kinney, and a large number of other defendants, none of whom have appealed. The suit was in the form of an action of trespass to try title to a tract of land patented to Addison Weld by virtue of certificate No. 183, and alleged in plaintiffs' petition to be described in the patent as follows: "Six hundred and forty acres of land, more or less, in Harris county, Texas, between the waters of Cedar bayou and San Jacinto river, west of and adjoining a survey made for land scrip No. 93, and about nine miles from Lynchburg. Beginning at the N. W. corner of land scrip 93, a stake and mound in the prairie in the W. boundary line of Scott's survey; thence S. 2,360 va., with the W. boundary line of a survey made for land scrip 93, to a stake and mound in the prairie in the N. boundary line of a survey made for land scrip No. 351; thence W. 1,190 va., with said line to its N. W. corner, a stake and mound in the prairie; then S. 920 varas, with the W. boundary line of said survey, to a stake; thence W. 200 varas to a stake; thence N. 3,338 varas to a stake and mound in the prairie; thence E. 1,385 varas to a stake and mound in the W. boundary line of Scott's league; thence S., 10 degrees E., 180 varas, with said Scott's line to the place of beginning; being abstract No. 816, patent No. 284." Plaintiffs further alleged that, as originally surveyed, plaintiffs were, as a matter of fact, the owners of more than 640 acres of land; that while the patent calls for 2,540 varas, being the entire east boundary line of said survey, yet, as a matter of fact, said east boundary line of said survey is 3,158 varas, and that the west boundary line of said survey is in fact 4,071 varas, and that the north and south boundary lines of said survey are much greater than called for in said patent. They then alleged the location of the northeast corner of the Reuben White league (an old survey), and alleged that their east boundary line is located 4,078 varas east of the east line of said R. White league, that their west boundary line is located 1,268 varas east of said east line of the R. White league, and that their north

boundary line is located 2,951 varas north of the northeast corner of the said R. White league, and prayed for the establishment of the true location of the boundary lines of said A. Weld survey, No. 183. Appellants answered separately, disclaiming as to any land sued for by plaintiffs, except so much thereof, if any, as might be included within the metes and bounds set forth in their respective answers, and as to the lands described in their answers they pleaded, "not guilty." The lands claimed by appellant C. H. Kinney are situated in W. C. R. R. Co.'s survey, No. 2, which is located in the southwest corner of the James Scott abandoned league survey. The lands claimed by the other appellants are all situated in the S. T. Champney survey, No. 93. The real controversy was the location of the Addison Weld, No. 183, survey. The case was tried by the court without a jury, and a judgment rendered whereby the west boundary line of plaintiffs' survey was placed 2,688 varas east of the northeast corner of the R. White, and their north boundary line was placed 1,358.8 varas north of said northeast corner. The metes for all its sides are the same as called for in the patent. This location places the west line of the survey only 65 varas west of the southwest corner of the James Scott, and places the north line 358.8 varas north of the southwest corner of said Scott, and places its east line 1,320 varas east of said southwest corner of the James Scott, the effect of which is that, as located by this judgment, the Addison Weld, No. 183, survey, belonging to plaintiffs, covers practically the entire S. T. Champney survey, claimed by appellants, which is located by its field notes and patent at the southwest corner of the James Scott, and covers about one-half of the land in the W. C. R. R. Co.'s survey, No. 2, situated in the southwest corner of the James Scott abandoned league, claimed by appellant C. H. Kinney.

The Addison Weld survey, the location of which is the question in controversy in this suit, was one of a body of 14 surveys known as the "Trott Surveys," none of which have any natural or known artificial boundaries, and all lie in the prairie between San Jacinto river and Cedar bayou. There is a body of older surveys between the Trott surveys and San Jacinto river, the exact location of which can be fixed from natural boundaries. These surveys are the Humphrey Jackson labor, the Humphrey Jackson league, the Reuben White league, and an old abandoned survey known as the Beardsley or Baldwin survey. On the east of the Trott survey, and lying along and across Cedar bayou, are the Hannah Nash and the Hugh Morgan surveys and the James Scott abandoned survey. The location of the Nash and Scott surveys is definitely fixed, but the exact location of the west line of the Morgan survey is uncertain. The Trott surveys were located by Trott, county surveyor of Harris

county, in April, 1839; the names of said surveys, and the order in which the field notes were made and recorded in the records of the office of the county surveyor of Harris county, being as follows:

A. Whitlock	Scip	Number	186,	page	42
A. Whitlock	"	"	187,	"	43
L. Hemmenway ...	"	"	196,	"	44
L. Hemmenway ...	"	"	351,	"	45
W. Gregory	"	"	41,	"	47
W. Gregory	"	"	42,	"	47
W. Gregory	"	"	43,	"	48
W. Gregory	"	"	44,	"	49
S. T. Champney...	"	"	93,	"	50
A. Weld	"	"	183,	"	51
A. Weld	"	"	184,	"	52
O. Ware	"	"	191,	"	53
S. T. Champney...	"	"	190,	"	54
L. Hemmenway ...	"	"	182,	"	55

Nos. 1, 2, and 3 of said surveys (viz., A. Whitlock, 186; A. Whitlock, 187; and L. Hemmenway, 196) form the southern tier of the Trott surveys. No. 1 begins on the Baldwin survey, and can be accurately located by its field notes; and so can No. 2, which begins on the east line of No. 1. No. 3 begins at the southeast corner of No. 2, and calls for the west line of the Hannah Nash survey. The evidence shows that the west line of the Nash is 1,200 varas west of where its location should be in accordance with the calls of said survey No. 3, and the larger part of the area of said survey is in conflict with the older Nash survey. Survey No. 4 begins at the northwest corner of No. 1, on the east line of the Baldwin, and No. 5 begins at the southeast corner of No. 4. Both of these surveys can be located as called for in their field notes. No. 6 begins at the northwest corner of No. 3, and its west line is the east line of No. 5. The same discrepancies in the calls for the Nash survey in the field notes of No. 6 exist as are shown in regard to the calls in No. 3, and the conflict with the Nash covers almost the whole of survey No. 6. These three surveys (Nos. 4, 5, and 6) compose the second tier of the 14 Trott surveys. The next survey, No. 7, begins at the northwest corner of No. 6, in the east boundary line of No. 5, and calls to run E. to Cedar bayou, thence N. up the bayou, thence W., and thence S. to the place of beginning. No. 8 begins at the northwest corner of No. 7, and calls to run S. to the northeast corner of No. 5; thence W. 616 varas; thence N. 1,950 varas, to Scott's south boundary line; thence N., 80° E., 2,760 varas, to Morgan's west boundary line, crossing Cedar bayou at 2,515 varas; thence S., 10° E., with Morgan's west boundary line, to the northeast corner of No. 7; thence with the north line of No. 7 to the place of beginning. As before stated, the location of the west line of the Morgan survey called for in the field notes of No. 8 is uncertain, and the calls for the bayou in the west line of survey No. 7 cannot be verified upon the ground if said survey is laid out from its beginning corner in accordance with the courses and distances called for in its field notes; but from the fact

that the beginning corner of survey No. 1 can be accurately fixed by the east line of the Baldwin survey, and each of the next succeeding eight surveys call to begin on the east line or at one of the east corners of the next preceding survey, the beginning corners and the west lines of both surveys, Nos. 7 and 8, can be definitely fixed. The field notes of survey No. 9, which is the S. T. Champney, No. 93, claimed by appellants, are as follows: "Beginning at the S. W. corner of Jas. Scott's league, at a stake and mound in the prairie; thence N., 10 E., with the south boundary line, 1,915 varas, to the N. W. corner of survey No. 44, a stake and mound on the said Scott's line; thence S. 1,950 varas to a stake and mound in the prairie; thence W. 2,070 varas to a stake and mound in the prairie on the N. boundary line of survey No. 351; thence 2,360 varas to a stake in the prairie on said Scott's W. boundary line; thence S., 10 E., 760 varas, to the place of beginning." Surveys Nos. 44 and 351 called for in these field notes are, as before shown, Nos. 8 and 4, in the order of location, of the Trott surveys. The north boundary line of No. 351 and the west line of No. 44, called for in the field notes of the Champney survey, can both be accurately located. As before stated, the southwest corner and the south boundary line of the Jas. Scott can be accurately fixed and located upon the ground; and the evidence is uncontradicted that the Champney survey, claimed by appellants, can be accurately located on the ground by its field notes without conflicting with any of the preceding Trott surveys. The patent to the S. T. Champney contains the field notes above set out, and was issued on May 8, 1841. The original field notes of the Addison Weld survey, claimed by appellants, were lost, and a new survey was ordered by the land office. The field notes of this survey from the land office, signed by Tipton Walker, surveyor of Harris county, purport to be the field notes of a resurvey made on May 1, 1845, and are the field notes contained in the patent to said survey which was issued on September 29, 1845. These field notes are the same as the original, except that they call for the Baldwin survey, where the Trott field notes call for the Beardsley, but the evidence shows that the Baldwin was first known as the Beardsley survey. The distance between the west line of the Champney survey, if that line is placed where called for in the field notes of said survey, and the east line of the Baldwin survey, is 1,200 varas less than the distance called for in the field notes of the Addison Weld, No. 183.

The trial court filed the following conclusions of fact and law:

"(1) That the fixed points in the neighborhood of the surveys in question, as shown by practically all the evidence, are the corner of the Humphrey Jackson labor, at the intersection of Jackson's bayou. The point is one

of mathematical certainty, and on the position of this point the position of the Humphrey Jackson league and the Reuben White league can be shown with certainty. The Reuben White league is laid off commencing on the lower corner, at the San Jacinto river, of the Jackson labor, and giving its upper line the distance called for in the field notes; thence according to its calls, extending the distance called for in its last line, till it reaches the natural object called for,—the San Jacinto river. The above are the fixed surveys on the San Jacinto river side, and may be called the 'San Jacinto River Surveys,' if to them are added several other surveys laid off adjacent to the Reuben White, and filling the space formerly occupied by the two old abandoned surveys, known as the 'Baldwin' and 'Shirley.' (2) On the Cedar bayou side the position of the Hannah Nash league is shown with substantial identity by all the surveys, by old marked lines in the timber. I adopt as the basis of my finding the position of said league as testified to by the surveyor, Hensholdt. There is practically no controversy on this point, though the position of the Hugh Morgan survey is very much a matter of mere conjecture. The evidence is wholly indeterminate on this point. The position of the James Scott (abandoned survey) can be laid off with accuracy by metes and bounds from the Juliana Malley league, whose south line is marked in the timber. I find it is correctly so laid off, as depicted on Hensholdt's map; and, so laid off, it is in conflict with some of the body of surveys known as the 'Trott Surveys.' The surveys above named (the Nash and the James Scott) may be called the 'Cedar Bayou Surveys.' (3) Between the Cedar Bayou surveys and the San Jacinto river surveys lies, wholly in the prairie, and without artificial or natural monuments, the body of fourteen surveys which are here called the 'Trott Surveys.' Trott, the county surveyor of Harris county, pretended to have surveyed these surveys in April, 1839; but there is not enough room in the prairie, by some 1,200 varas, between the Cedar Bayou surveys and the San Jacinto river surveys, to put in these fourteen Trott surveys. The field notes of all in the county surveyor's records of Harris county are all dated April, 1839. I conclude that these fourteen surveys by Trott were not actually run upon the ground, but are what is known as 'chimney-corner work'; for the excess and the discrepancies are too great to occur in work done on the ground, between surveys clearly fixed on the ground and tied to streams. The shortage in the lower line of the Reuben White does not explain the error, on the theory of actual survey, because the same defect of distance exists between the James Scott and the Hugh Jackson league, which could not be affected by the lower line of the Reuben White, one way or another. Finding that the work was 'chimney-corner work,' how, then, should the

Trott surveys be located? I understand the rule to be, in such a state of facts, to ascertain and follow the intent of the surveyor, as disclosed by his work. I find this intent to have been to fill up the gap between the Cedar Bayou surveys and the San Jacinto River surveys with the fourteen Trott surveys, and, to fill up this gap, start from the side of the San Jacinto River surveys. I reached this last conclusion because the field notes of the Trott surveys can be fitted in perfectly around the Humphrey Jackson, Reuben White, and Baldwin or Shirley surveys, and cannot be filled in, without very considerable discrepancies, to the Cedar Bayou surveys and to that bayou; and, further, Trott, a Harris county surveyor, was more likely to be acquainted with the surveys in Harris county than with those in Chambers county. Also, the order of the surveys, as they appear in the Surveyor's Book of Harris County, begin on the San Jacinto river side.

"Conclusions of Law. On the facts found, the court concludes the Trott surveys in controversy should be laid off in the prairie from the San Jacinto river side, according to course and distance. To which conclusions, both of law and fact, all parties except."

Conceding that the evidence sustains the trial court in his conclusion that the Trott surveys were not actually surveyed upon the ground, and that in such case the proper rule in determining the true location of said surveys is to follow the intent of the surveyor as disclosed by his work, we think there is no evidence in the record to sustain the conclusion that Trott, in locating the Addison Weld survey, intended to commence on the Baldwin survey, and locate said Weld according to the courses and distances called for in the field notes, regardless of the fact that such location conflicts with his own work in previously locating the Champney survey. The evidence shows that in locating the third tier of surveys, which includes the Weld and Champney surveys, the surveyor did not start on the San Jacinto river, but on the Cedar Bayou side. Judged by his solemn written declarations contained in the field notes prepared by him for the Champney and Weld surveys, it was clearly the intention of Trott to commence the Champney survey at the southwest corner of the Jas. Scott survey, and from such beginning corner to locate the lines of said survey in accordance with the calls for course and distance contained in said field notes, and to locate the Weld survey west of the west line of the Champney as thus fixed. It is equally clear that he thought there was room enough between the west line of the Champney, as located by his field notes, and east line of the Baldwin, to admit of the location of the Weld. What he would have done had he known that this space did not in fact exist is purely a matter of conjecture, about which it is idle to speculate, for we are only concerned with his intention as regards facts and conditions that

were known or appeared to him to exist. He must have known the location of the Scott survey, as the evidence shows that the distance from the southwest corner of the Scott along its south boundary line to Cedar bayou (the only natural object called for in any of the surveys), as called for in the field notes of the Champney and W. Gregory surveys, is approximately correct; and his intention to locate the Champney on the south line of the Scott, beginning at the southwest corner of said survey, is clear and unmistakable. It is unnecessary for us to determine the question as to whether the Champney may be considered the senior survey, since there is no conflict in the two surveys, and no question of priority is involved. We think it clearly appears from the evidence that no part of the land covered by the Champney patent is covered by the patent under which plaintiffs claim, and appellants, though they have shown no title to any part of the Champney survey, are entitled to be protected in their possession of same against plaintiffs, who also fail to show any title to any part of said survey.

The judgment of the court below, in so far as it adjudicates the matters in controversy between the several defendants and between the plaintiffs and the defendants who have not appealed, being not appealed from, is undisturbed; but said judgment, in so far as it attempts to fix the location of the Weld survey east of the west line of the Champney, as same is located in the field notes of said survey, is reversed, and judgment is here rendered fixing the east line of the Weld on the west boundary line of Champney, as said west line is located by beginning the said Champney survey at the southwest corner of the James Scott, and following the calls for course and distance contained in the field notes of said Champney survey.

Reversed and rendered.

On Motion for Rehearing.

(Feb. 5, 1902.)

After mature consideration of the motions for rehearing filed in this cause, and a careful re-examination of the record, we are convinced that our former judgment herein correctly disposed of the issues presented. Appellees are the plaintiffs in this cause, suing defendants in possession of the land in controversy, and the burden is upon them to show by some competent evidence that the land in controversy is within the boundaries described in the patent under which they claim. This burden is not met by the mere showing of discrepancies in some of the calls in the field notes of the survey claimed by appellants. Appellees contend very earnestly in their motions for rehearing that our conclusions of fact set out in our former opinion do not support the judgment of this court, but, on the contrary, sustain the judgment rendered in the court below. This conten-

tion is based upon the finding by us that "from the fact that the beginning corner of survey No. 1 can be accurately fixed by the east line of the Baldwin survey, and each of the next succeeding eight surveys call to begin on the east line, or at one of the east corners of the next preceding survey, the beginning corners and west lines of surveys Nos. 7 and 8 can be definitely fixed." If this finding be considered as locating the west lines of surveys Nos. 7 and 8, by giving controlling effect to the calls for the beginning corners of said surveys as fixed by running the lines of the preceding surveys, and disregarding the calls for Cedar bayou, the only natural object called for in the field notes of any of these surveys, the west line of No. 8 would be placed about 3,300 varas east of the southwest corner of the Scott survey. If the west line of No. 8 be thus fixed, there is sufficient territory between said west line and the east line of the Baldwin survey to admit of the location of both the Weld and Champney surveys in accordance with the judgment of the court below; and appellees insist that under the finding above quoted the judgment heretofore rendered in this cause by this court should be set aside, and the judgment of the court below affirmed. We do not think this contention is sound. Conceding, for the sake of argument, that the west line of No. 8 is fixed as claimed by appellees, and that there is room between this line and the east line of the Baldwin to admit the location of the two surveys in question, it does not follow that appellees are entitled to have the Weld survey located as claimed by them. We think it is perfectly clear that the surveyor who made these locations intended that the Champney survey should cover all the area between the southwest corner of the Scott and the west line of survey No. 8; and, if it be a fact that this area is largely in excess of the acreage called for in the field notes, this fact would not in itself authorize the location of the Weld on a part of said area, when the field notes of said survey clearly show that it was the intention of the surveyor to locate same west of the Scott survey. But we did not conclude in our former opinion that the west line of surveys Nos. 7 and 8 should be fixed alone by the calls for the beginning corners. We overlooked the discrepancies in distance in the calls from Cedar bayou to said west lines, and the actual distance from the bayou to said lines as fixed by the location of the beginning corners, and the finding before quoted is based upon the assumption that no such discrepancies existed. We think it clear, as stated in our former opinion, that the surveyor knew the location of the south line and the southwest corner of the Scott survey, and the actual distance between said corner and Cedar bayou; and we think it equally clear that he intended the space between said points should be occupied by surveys No. 8 and the survey claimed by appel-

lants. There is nothing in the evidence to authorize the crowding out of surveys Nos. 7 and 8 so as to admit the location of the Weld survey at a place different from that called for in its field notes. Appellees' petition shows that they have no definite idea as to where the land claimed by them is located. They sue for double the amount of land called for by their patent, and allege that the north and south lines of their survey are twice the length called for in the patent; the evident object of such allegations being to recover the amount of land called for in their patent, whether same should be found to be located over the Champney or the Baldwin surveys; and, in their motion for rehearing, appellees, who were plaintiffs below, ask that, in the event we adhere to our former opinion as to the location of the Champney survey, we render judgment locating the Weld survey over the old, abandoned Baldwin survey, and on the land claimed by their co-appellees. If the facts authorized the rendition of such judgment by us, we could not grant this relief, because the plaintiffs below have not appealed from the judgment, and have filed no cross assignments against their co-appellees. It is true, the plaintiff executor gave notice of appeal, but, having presented no assignments, his appeal must be considered abandoned.

We are of opinion that our former judgment in this case should not be set aside or modified in any way, and the motions for rehearing are overruled. Overruled.

GALVESTON, H. & S. A. RY. CO. v. HITZFELDER.

(Court of Civil Appeals of Texas. Oct. 10, 1900.)

RAILWAY EMPLOYE — PERSONAL INJURIES — COMPLAINT—SUFFICIENCY—EPILEPTIC FIT—AROUSING JURY'S SYMPATHY—ASSUMPTION OF RISK—INSTRUCTIONS.

1. In an action by a railroad employé for personal injuries, a complaint averring that by reason thereof plaintiff's "skull was crushed and his face and head badly cut and lacerated; that * * * his brain and mind have been violently affected, and his injuries have directly produced epilepsy"; that "plaintiff was compelled to submit to a dangerous operation, whereby a part of his skull was removed; * * * that, notwithstanding this, the epilepsy continues, and his mental and physical condition unfit him for performing any physical or mental labor, and will continue as long as plaintiff lives; * * * that he has, in mind and body, become so weakened as to be almost an invalid," etc.,—sufficiently shows the nature of the injuries sustained by the plaintiff.

2. Where there was evidence that shortly after the injury plaintiff had had violent epileptic convulsions, and that his condition was due to his injuries, the fact that during defendant's testimony plaintiff fell down in the court room in an epileptic convulsion, and caused some excitement, in the presence of the jury, was not ground for setting aside a verdict in his favor on the ground that his condition had aroused the jury's sympathy and prejudiced defendant's case, where only \$10,000 was awarded him.

3. The court, in charging the jury, is not re-

quired to make a brief presentation of the issues raised by the pleadings, as a preface to the law embodied in the charge, where the issues are sufficiently pointed out during its course.

4. In a suit by a railway employé for personal injuries, where plaintiff, a mere boy, testified that, while working under a tender at his foreman's order, the tender was moved, and the injury inflicted; that he had never done such work before, and did not know that there was any danger,—a charge that plaintiff had assumed the risk was properly refused, because ignoring the question of his lack of knowledge.

Appeal from Bexar county court; S. J. Brooks, Judge.

Action by August Hitzfelder against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Upson, Newton & Ward, for appellant. Nat. B. Jones and Lewis & Carter, for appellee.

FLY, J. Appellee instituted this suit to recover of appellant the sum of \$30,000, alleged to have accrued by reason of personal injuries inflicted through the negligence of appellant. The cause was tried by jury, and resulted in a verdict and judgment in favor of appellee for \$10,000.

We find that in 1893, appellee, at the time 15 years old, while engaged in the service of appellant as its employé, was permanently and seriously injured through the negligence of appellant, and sustained damages in the sum found by the jury.

Appellee alleged that he was a minor, without experience, and was employed by appellant as an apprentice in its paint shop, under the supervision and control of H. L. Darnell, who was foreman of the paint shop; that, on the date of the accident, appellee was ordered by said foreman to go under the tender of an engine for the purpose of holding up a brake beam on the tender, and while he was under the tender the foreman caused the tender to be moved in such a manner as to bring the brake beams violently together, crushing his skull and lacerating his face. The appellee further sets forth the nature of his injuries as follows: "Plaintiff alleges that by reason of the aforesaid injuries his skull was crushed, and his face and head badly cut and lacerated; that, by reason of the injuries to his head, his brain and mind have been violently affected, and his injuries have directly produced epilepsy, from which he constantly suffers, and, for the purpose of helping his mental and physical condition and attempting to relieve his epilepsy, the plaintiff was compelled to submit to a dangerous operation, whereby a part of his skull was removed in order to lessen the pressure upon his brain; that, notwithstanding this, the epilepsy continues, and his mental and physical condition is such as to unfit him for performing any physical or mental labor or attending to any business, and such condition is permanent, and will continue as long as

plaintiff lives. Plaintiff alleges that by reason of said injury he has, in body and mind, become so weakened as to be almost an invalid, and that such condition is permanent; that by reason of said injuries he has constantly suffered, and will continue to suffer, for all his life, great mental and physical pain. Plaintiff avers that prior to his injuries he was strong and healthy, and able to earn about \$50 per month, which would have increased as he grew in years and experience, but since his injuries he has been unable to work, and said injuries will permanently destroy his capacity to ever work again. Premises considered, plaintiff says he has been damaged in the sum of \$30,000, for which he prays judgment, together with costs and general relief." Appellant excepted to the portion of the petition above copied, on the ground that the allegations were conclusions, and did not apprise appellant of the grounds on which damages were sought to be recovered. The exceptions were properly overruled. The petition clearly set forth the nature of the injuries, and gave full notice to appellant of the case it would be called upon to meet.

After appellee had testified that he had been subject to epileptic fits since the injuries to his head had been inflicted, and after he had closed his testimony, and testimony was being introduced by appellant, appellee fell down in the court room in an epileptic convulsion, and caused some excitement, in the presence and hearing of the jury; and appellant asked that the cause be withdrawn from the jury, and the trial postponed, on the ground that the condition of appellee may have aroused the sympathy of the jury and prejudiced the cause of appellant. The motion was overruled, and appellant complains of the ruling of the court. There was no conflict of evidence as to the fact that appellee had been having violent epileptic convulsions from a time shortly subsequent to the time that he received the injuries to his head from the brake beams of the engine tender, and it does not appear how the convulsion in court could have intensified the evidence on the subject; but, if the evidence had been contradictory on the subject, there is nothing in the record that indicates that appellant was injured by it. If, as the proof tends to show, appellee's condition was attributable to the injuries to his head received through the negligence of appellant, there is no evidence of passion or prejudice deducible from the size of the verdict. A more pitiable case can scarcely be conceived of than that presented by the testimony, but there is nothing in the amount of the verdict that tends to show the least sympathy for appellee or prejudice against appellant. The rule that compensation should be the end attained in giving damages has not been infringed in any manner to give just cause of complaint to appellant.

The court did not, in the charge, preface

the law of the case by a statement of the issues raised by the pleadings, and this is assigned as error. While it is customary and proper for trial courts to make a brief presentation of the issues raised by pleadings, as a preface to the law embodied in the charge, there is no rule requiring a court to make such presentation, and a charge could not be held defective on the ground that it failed to make such preface. It is undoubtedly the duty of the trial court, in giving a charge, to present to the jury the law applicable to the issues raised by pleadings and evidence, and it may be true that this may be more satisfactorily done by first stating the issues raised by the pleadings and evidence, and then applying the law to such issues; but, if the application of the law is properly made to such issues, it would not follow that the absence of the statement of the issues by way of preface would constitute such error as would necessitate a reversal. Had there been an attempt and failure to point out the issues raised, there might be cause of complaint, but there is no authority to sustain the contention of appellant. Indeed, in one of the cases cited by appellant (*Railway Co. v. Tankersley*, 63 Tex. 60), the court refused to reverse on the ground contended for in this case. We think the issues in this case were sufficiently submitted in the different paragraphs of the charge, and that the jury obtained as full an understanding of them as would have been obtained from a preface enumerating the issues.

The contention that appellee's side of the case was given undue prominence in the charge is not well founded. The court, in its charge, presented every defense made by appellant to the jury, and, in addition, gave numerous special charges requested by appellant. Only one charge was refused, and properly so, as it was upon the weight of the evidence, and was not the law of the case. There was evidence tending to show that appellee, a mere boy, was not apprised of the danger of going under the tender; and the fact that he did go under it, standing alone, did not justify a verdict for appellant, as stated in the rejected charge. It ignored the question of the lack of knowledge on the part of the boy altogether. Appellee testified that he was ordered by Darnell, his foreman, to go under the tender, and that while he was under it the tender was moved and the injury inflicted. He swore that he had never been called upon to do such work before, and did not know that any danger attended his going under the tender, and in this statement he was not contradicted. Under such a statement of facts, it was obviously improper to charge that he had assumed the risk incident to going under the tender. The court properly presented the question as one of fact to be determined by the jury.

The assignments of error raising the question of the sufficiency of the evidence are disposed of by our conclusions of fact.

We do not think any error is shown by the record, and the judgment will be affirmed. Affirmed.

McLANE v. GRICE.

(Court of Civil Appeals of Texas. Oct. 10, 1900.)

BOUNDARIES—EVIDENCE—PLAT.

Where, on an issue as to the location of a boundary line, the deeds of both parties referred to a plat recorded in the county clerk's office, but the plat was of such a nature that the survey as actually made on the ground could not be ascertained therefrom, it was not error for the court to consider evidence, including the original map from which the plat was made, which showed the actual survey as originally made and marked on the ground.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Trespass to try title between H. H. McLane and Frank Grice. From a judgment for defendant, plaintiff appeals. Affirmed.

James Raley, for appellant. Chas. H. Bertrand, for appellee.

NEILL, J. This suit was brought by appellant against the appellee in the form of an action of trespass to try title, but, according to the admission of both parties, its object was to determine the question of boundary, which was the only matter in controversy. The cause was tried before the court without a jury, and, upon hearing all the evidence upon the question in dispute, judgment was rendered for the defendant.

It is unnecessary for us to recite the evidence. It is sufficient to say that, in our opinion, it fully sustains the judgment of the court. Though the deeds of both parties refer to a plat recorded in the office of the county clerk, the plat is of such a nature that the question in dispute could not be determined from it alone. It is merely evidence of the survey which it is intended to represent, and, as the survey as actually made upon the ground could not be ascertained from the recorded plat, it was not error for the court to hear and consider evidence, including the original map from which the recorded plat was made, which showed the actual survey and boundaries of the land in controversy as originally made and marked upon the ground by the surveyor.

The judgment of the district court is affirmed.

FLORES v. ATCHISON, T. & S. F. RY. CO. et al.

(Court of Civil Appeals of Texas. Oct. 24, 1900.)

RAILROADS—STANDING CARS—CHILDREN— TRESPASSERS—NEGLIGENCE—DI- RECTION OF VERDICT.

1. Where a string of cars about half a mile long was standing on a railway track, and a

child six years old went onto the track, and under one of the cars, without the knowledge of the railway employes, and without any right, the law did not impose on the employes the duty of exercising any care to ascertain his perilous position before driving their engine against the cars.

2. A railway company has a right to leave a string of cars half a mile long standing on a track used for switching and storing cars, and is not negligent in doing so.

3. In an action for personal injuries, where the undisputed evidence not only fails to show negligence, but is such that reasonable minds can draw no other conclusion than that there was an absence of negligence, a verdict for defendant is properly directed.

Appeal from El Paso county court; James R. Harper, Judge.

Action by Juan Flores, an infant, by his father, Cruz Flores, against the Atchison, Topeka & Santa Fé Railway and others, in which the son died pending the suit, and the father was substituted as plaintiff. Verdict directed for defendants, and plaintiff appeals. Affirmed.

Beall & Kemp, for appellant.

NEILL, J. This suit was originally brought on the 12th day of September, 1898, by Juan Flores, an infant, by his father, Cruz Flores, the appellant, for personal injuries alleged to have been inflicted by the negligence of appellees upon Juan. On February 19, 1900, the appellant, Cruz Flores, filed his first amended original petition, suggesting the death of his son Juan, and making himself the real party plaintiff. He alleged that since instituting the suit his son died, leaving as his only heirs the appellant and Sira Montez Flores, the deceased's mother. As his cause of action, the plaintiff alleged, in substance, that on the 23d day of June, 1898, the defendants, for the purpose of handling their cars and traffic, had a certain railway track within a few feet of where plaintiff and his family resided, in a populous part of the city of El Paso, where numerous persons and many young children lived; that the track for a distance of about a mile passed in front of where plaintiff's family and other people resided, and between it and the principal part of said city, to reach which from plaintiff's residence it was necessary to cross said track; that, going to and from the neighborhood in which plaintiff lived, the people and the public generally for a long time had been accustomed to cross said track, and had thereby acquired the license and permission of defendants to do so at or near the point where the accident occurred; that for several days prior to the injury, and at the date thereof, the defendants had negligently permitted to stand on said track, and in front of the settlement where plaintiff then lived, a string of cars, without openings between them, and close together; that the place where the cars were so placed was uninclosed and unguarded, and, with the cars so placed, attractive to children, and dangerous upon which to handle cars, without a proper lookout and precaution to guard against ac-

cidents to children. The defendants knew that numerous people, with their families, and children of tender years, resided there, and also knew that the cars had been placed and had stood there, and that under the existing conditions it was necessary to use a high degree of care in moving said cars to avoid injury to persons crossing said track, —especially children; that there was no guard, lookout, or precaution used to avoid such accident; that on the date of the accident said infant was either attempting to cross the track, as he had a right to do under said license, or was playing on or near the track, having been attracted there by defendants' negligence in leaving the cars as they did on the said track; and that defendants, without giving signals of warning, or without having a proper lookout, moved the cars and ran over the child, which was then about six years of age, and so injured his arm that it became necessary to amputate the same at the shoulder. The defendants, after interposing general and special exceptions, which seem not to have been acted upon, answered by a general denial, and specially that if Juan was injured in the manner alleged by plaintiff, and if said injury occurred at said time and place, said track and cars belonged to defendants, and were where in law they had a right to be, and where they had been standing for many days prior to the accident; that, if Juan was injured, the injury was occasioned by his own act of negligence in going under one of the cars mentioned in plaintiffs' petition, and placing himself in such a position as to be obscured from the sight of those who were in charge of and operating the engine and cars of defendants; that defendants, their agents and servants, did not see Juan while under the car, and it would have been impossible for them to have seen him unless they or some one had gone ahead and examined underneath each car in order to determine whether he was beneath the same; that Juan was not injured at a crossing, passway, or other place where he or the public had a right to cross or pass along said track, which track was in their yards in El Paso, and used daily for the purpose of storing and switching their cars; and that Juan should have known when he went beneath the car that the cars were likely to be moved at any moment, and, if moved, he was in danger of being injured by being run over by them. Upon hearing the evidence, the court peremptorily instructed the jury to return a verdict for the defendants, and it is from the judgment entered upon a verdict returned in obedience to such instruction this appeal is prosecuted.

Conclusions of Fact.

The evidence shows beyond question that on the 23d day of June, 1898, Juan Flores, the son of appellant, an infant about six years old, was injured by being run over by one of appellees' cars, in such a manner as

to necessitate the amputation of his arm at the shoulder; that in the following February he died from what was supposed to be small-pox, leaving appellant and his mother, Sira Montez Flores, his sole surviving heirs; that at the time and long prior to his injury the appellees owned and maintained, for the purpose of placing, storing, and switching on and from its cars used in the conduct of its business, a track about three-quarters of a mile long, situated in the city of El Paso, between the main business part of the city and where appellant, with his family, resided, and about 50 yards from his residence. There were about 10 families whose residences were constructed below and scattered along the entire length of the track, which separated them from the principal part of the city. There was no public crossing or pathway established by law or custom on this track. The people residing in the neighborhood of appellant, in going to the city, were accustomed to cross the track when they pleased at any place where it was convenient for them to do so, and sometimes would cross by going between or under cars standing and coupled together on the track. But there was no particular place along the track used by such inhabitants or others for crossing more than another. The evidence does not show that appellees or their servants knew that people were wont to cross the track by passing between or under cars standing upon it, as before stated, but they did know that people went across it in going from their homes to the city and returning. No consent, either expressed or that can be implied from their actions, was given by appellees to the public or people in appellant's neighborhood to cross said track anywhere along its entire length. Nor does the evidence tend to show that appellees or their servants knew that children of tender years were accustomed to play upon the track, or go under cars standing thereupon. When appellant's son Juan was injured, as before stated, a string of cars about half a mile long was upon the track in front of appellant's house, and, while the boy and his brother were under one of the said cars without any right or permission from appellees or their servants, an engine operated by appellees' employes, who did not know that Juan or any one else was under any of the cars, and had no reason to believe that he or any one was in such perilous position, without negligence, propelled the engine against said cars in the performance of their duty to appellees, thereby moving the string of cars and injuring Juan in the manner aforestated.

Conclusions of Law.

The question to be determined is, did the court, upon these uncontroverted facts, err in peremptorily instructing a verdict for defendants? To constitute negligence, it must be shown (1) that the defendants owed the injured party a duty; and (2) that they failed to exercise the degree of care required by law

in the performance of that duty. *Railway Co. v. Morgan*, 92 Tex. 102, 46 S. W. 28. The appellant's son being a trespasser upon appellees' track without their knowledge or that of their servants operating the engine, the law did not impose upon them the duty of exercising any care to ascertain his position of peril before driving the engine against the string of cars he was under. *Douglass v. Railway Co.*, 90 Tex. 125, 36 S. W. 120, 37 S. W. 1132. That the appellees had the right to place and have their cars standing upon the track, and that they were not negligent in exercising this right, cannot be denied. *Railway Co. v. Rogers*, 91 Tex. 56, 40 S. W. 956; *Railway Co. v. Knight*, 91 Tex. 663, 45 S. W. 557; *Railway Co. v. Harris* (Tex. Civ. App.) 53 S. W. 600. When, as in this case, the undisputed evidence wholly fails to show negligence on the part of the appellees, or either of them, and excludes every reasonable hypothesis of its existence, but is such that reasonable minds can from it form no other inference or conclusion than that they were not guilty of negligence, it is the duty of the court to give the jury such an instruction as is here complained of by appellant. *Sanches v. Railway Co.*, 88 Tex. 117, 30 S. W. 431; *Railway Co. v. Ryon*, 80 Tex. 59, 15 S. W. 588; *McDonald v. Railway Co.*, 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803; *Washington v. Railway Co.*, 90 Tex. 319, 38 S. W. 764; *Railway Co. v. Faber*, 77 Tex. 153, 8 S. W. 64; *Crawford v. Railway Co.*, 89 Tex. 92, 33 S. W. 534; *Haass v. Railway Co.* (Tex. Civ. App.) 57 S. W. 855; *Douglass v. Railway Co.*, supra.

The judgment is affirmed. Writ of error refused. Affirmed.

SMITH et al. v. FRIO COUNTY.

(Court of Civil Appeals of Texas. Oct. 24, 1900.)

VENDOR'S LIEN—RECONVEYANCE—JUDGMENT—IMPROVEMENTS—VALUE—EVIDENCE.

1. Where a decree foreclosing a vendor's lien in favor of a county provided that if the vendee should, before the sale, reconvey the land, such action should operate to cancel the judgment, and after judgment the vendee sold a house on the land, which was removed, and subsequently, before sale, a deed was made, which was accepted by the county judge, who stated at the time that the vendee would be held liable for the value of the house, there was no waiver of the vendor's right to recover the difference between the value of the land as conveyed and its value with the improvement.

2. Where a decree foreclosing a vendor's lien provided that, if the vendee should make a reconveyance before sale, the judgment should be canceled, and before sale, and before the reconveyance was made, the vendee sold a house and fence on the land to another, who removed them, the acceptance of the reconveyance by the vendor discharged the vendor's right of action against the purchaser of the improvements.

3. Where the value of certain improvements removed from land was in issue, and a witness detailed the respects in which the improve-

ments had deteriorated since their erection, it was proper to admit the evidence of a carpenter that he had seen the house two years before the removal, and had estimated what it cost to build it, and that he did not think it had been damaged much since it was built, or that it would have been damaged much in two years.

4. Where the value of improvements on land was in issue, and there was testimony to show that the improvements would have cost about \$400, and that they had not deteriorated much between the time of their erection and their removal, a verdict for \$225 was not excessive, though no witness testified that the improvements were worth more than \$150.

Appeal from district court, Frio county; M. F. Lowe, Judge.

Action by Frio county against B. F. Smith and one Hubbard. From a judgment in favor of plaintiff, defendants appeal. Affirmed as to defendant Smith, and reversed as to defendant Hubbard.

W. O. Read, for appellants.

JAMES, C. J. This is a second appeal. See 50 S. W. 958. The facts differ from those shown by the former record. On November 2, 1897, an agreed decree was entered, wherein the county had judgment against B. F. Smith for \$1,293.42 and costs, with foreclosure of a vendor's lien on 252 acres of the county school land; the decree reciting that should Smith, at any time before the issuance of an order of sale under said judgment, reconvey the land to plaintiff by deed, and pay all costs of suit, such reconveyance and payment should operate as a cancellation of the judgment. After the judgment, Smith sold a house that was upon the land, and the wire fence thereon, to defendant Hubbard, for \$50, which house and fence Hubbard removed. After such removal, and before an order of sale, Smith made a deed of the land to the county, which was accepted by the county judge, acting for the county, who stated to Smith at the time that he would hold defendants liable for the value of the house and wire moved off the land by them. Hubbard had nothing to do with this transaction. The county afterwards sold the land, and all the testimony goes to show that the value of the land and improvements was far less than the judgment, and the county, whose security was the land and improvements, was damaged by the removal of the house and fence the full value of the same. The action is by the county to recover of Smith and Hubbard such damages. Upon the former appeal it did not appear that a reconveyance of the land had been made to the county, and we then held that, pending the existence of the lien and right to foreclose, the county could recover of both defendants, in respect to the removal of the improvements, to the extent it was shown that the county was damaged in its security thereby. The new factor in the case is the effect of the reconveyance, which, it must be conceded, terminated its

right to sell the land for its debt. The decree, of course, contemplated that the reconveyance should carry the land as it was at the date of the decree. The improvements had been removed when Smith offered the deed,—a fact known to the county judge; for he, in taking it, expressly stated that he reserved the right to sue for such damages. In view of this, Smith delivered the deed. Under the terms of the decree, Smith's reconveyance should have been of the land and improvements; and when he delivered the deed after despoiling the land of the improvements, and it was accepted with said reservation, it would seem that there was no waiver of such cause of action, so far as Smith was concerned. The lien on the land was necessarily terminated, because the county had by deed taken back the land; but the county could, under the circumstances, maintain its action against Smith for the difference between the land as it should have been conveyed and as it was actually conveyed, to satisfy the judgment. Hubbard had been liable to the county for his acts in removing the improvements, but that liability, we think, existed by reason of the county's lien on the land, and when the county abandoned the lien, by taking back the land from Smith in satisfaction of the lien, it had no basis for action against Hubbard. There was no judgment against Hubbard. After the reconveyance there was no longer a lien on the land, and Hubbard was no party to the transaction in which the reconveyance was made. We are of opinion that acceptance of the county of the deed from Smith operated, under these circumstances, to discharge Hubbard from any liability to the county.

The charge of the court correctly submitted the issue, limiting the recovery, if any, to such sum as the jury, from the evidence, believed plaintiff's security had been damaged by the removal of the house and fence.

Appellants say that the verdict for \$225 is excessive, because no witnesses testified that their value exceeded \$150. We find one witness (De Vilbiss, a carpenter) testified that he had seen the house about two years previous to its removal, and estimated that it cost about \$400 to build it; that it seemed not to have been damaged much since it was built, and did not think it would have been damaged much in two years. The defendant Smith detailed the respects in which the house had deteriorated since it was erected. The testimony of De Vilbiss was properly admitted in connection with the testimony of Smith, and would be sufficient to warrant the verdict for \$225 for the house and fence.

The case appears to have been fully developed at this trial.

The judgment will be reversed as to Hubbard, and rendered in his favor, and affirmed as to Smith. Reversed and rendered in part, and affirmed in part.

RIO GRANDE & E. P. RY. CO. v. LYNCH.
(Court of Civil Appeals of Texas. Oct. 10, 1900.)

MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK—EVIDENCE—SUFFICIENCY.

A brakeman injured by reason of cars furnished by defendant railroad company having defective drawheads and link pins testified that he had been a brakeman five or six months before the accident, and knew the kind of cars used on defendant's road, and knew that none of the link pins were of the proper kind. A witness for the brakeman testified that the latter knew the difference in height of the drawheads. There was evidence that the railroad was only 26 miles long, and only used 58 or 59 cars, and that there were only two kinds of drawheads and link pins in use, and that the brakeman had knowledge thereof. *Held* to show an assumption of risk by the brakeman which would preclude a recovery.

Appeal from district court, Webb county; A. L. McLane, Judge.

Action by one Lynch against the Rio Grande & Eagle Pass Railway Company. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

Thos. W. Dodd, for appellant. Nicholson & Mullally and Coopwood & Coopwood, for appellee.

FLY, J. Appellee instituted suit against appellant to recover damages in the sum of \$20,000, alleged to have accrued by reason of the negligence of appellant in furnishing cars with defective drawheads and link pins. The cause was tried by a jury, and resulted in a verdict and judgment for appellee in the sum of \$2,000.

It is insisted by appellant that the testimony does not sustain the verdict and judgment, "because it affirmatively appears from the evidence, and especially from the testimony of plaintiff, that he was a skilled brakeman, and that he knew of the inequality in the height of the drawheads and the difference in the lengths of the coupling links on defendant's road, and with full knowledge thereof he continued, without objection or protest, to use the same, thereby assuming the risks incident to such conditions." The assignment is sustained by the record. Appellee testified: "I was a skillful brakeman, and always did my work well. * * * I had been working for defendant as a brakeman five or six months before the injury, and was familiar with the kind of cars in use on their road. We got that car at Canell, where we had placed it before. * * * I had often coupled the caboose to other cars." Another witness for appellee testified that Lynch knew about the difference in the height of the drawheads. Appellee testified that he knew that none of the link pins used by appellant were of the proper kind. It was in proof that the railroad was only 26 miles long, and had only 58 or 59 cars in use, and that there were only two kinds of drawheads and link pins in use, and that

appellee was fully acquainted with these facts.

We are of the opinion that the whole evidence tends to show that appellee knew of the defects causing the accident, and had assumed the risk arising from the use of the cars and link pins; and the judgment is therefore reversed, and the cause remanded.

CITY OF SAN ANTONIO v. BALL.

(Court of Civil Appeals of Texas. Oct. 24, 1900.)

MUNICIPAL CORPORATIONS—DEFECTIVE BRIDGE—NOTICE—SUFFICIENCY.

Notice to officers of a city not charged with the care of a bridge that it is defective, and the failure of the city to repair the bridge, does not render it liable for an injury resulting from its defective condition.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Action by one Ball against the city of San Antonio for personal injuries resulting from an accident alleged to have been caused from the defective condition of a bridge maintained by the city. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

Geo. C. Altgelt and I. C. Baker, for appellant. Frank C. Davis and Ogden & Terrell, for appellee.

NEILL, J. Appellee, Joseph Ball, on the 18th day of January, 1897, brought this suit against the city of San Antonio, claiming damages in the sum of \$10,000 for personal injuries alleged to have been received by being thrown from a buggy. He averred in his petition that the injuries were caused by the negligent acts of appellant in permitting a certain wooden bridge on Morales street to become defective and unsafe for traffic, and that while driving over said bridge his horse stepped upon a defective plank, which gave way, the horse's front feet going through the bottom of the bridge, thereby breaking the bridle bit, and causing the horse to run away with the buggy, and to throw plaintiff violently to the ground, causing his injuries. The appellant answered by a general demurrer, general denial, and specially denying that said bridge was defective, but alleged that the same was reasonably safe, and built of suitable material. The case was tried before a jury, and the trial resulted in a verdict in favor of the appellee for \$700 damages. From the judgment entered upon the verdict this appeal is prosecuted.

This part of the court's charge is assigned as error: "If you believe from the evidence that the defendant had a bridge on Morales street, and you believe that the defendant permitted said bridge to become out of repair by allowing the timbers therein to become thin upon the edges and decayed, so as

to render the same not reasonably safe for teams to cross; and you believe that said condition was known to the defendant, its officers, agents, or employes, or could have been known by the use of ordinary diligence; and you believe that it was negligence for the city to allow said bridge to remain in such condition, should you find it was in such condition; and you believe the plaintiff attempted to cross the bridge, and that in so doing his horse's weight caused the timbers of said bridge to give way, and that thereby the plaintiff's horse's forelegs went through, causing him to fall, and that the force of said fall caused the bit in said horse's mouth to break, and thereby plaintiff's horse was caused to take fright and run away, and you believe that thereby plaintiff was thrown out of his buggy and injured; and you further find that defendant's negligence, if any, was the proximate cause of plaintiff's injury, if any,—then you will find for the plaintiff. If you believe from the evidence that said bridge was not defective, as claimed in the petition, or that the defendant used ordinary diligence to keep said bridge in a reasonably safe condition, or you believe that said bridge was in a reasonably safe condition, or that the plaintiff was not injured in the manner alleged, or that the defendant, its agents, and employes, did not know and could not have known of said defect, if there was any defect, by the exercise of ordinary care, then you will find for the defendant,"—upon the ground that it makes appellant's liability depend upon notice of the alleged defects in the bridge upon the part of the city's officers, agents, and employes generally, or their ability to have known of said defects by the use of ordinary diligence. Section 60 of the charter of the city of San Antonio vests in the city council the power to construct and maintain bridges in the public streets of the city. From this and other provisions of the charter, as is said in the case of *City of Austin v. Colgate* (Tex. Civ. App.) 27 S. W. 896: "It is clear that it was the duty of certain city officers to keep the bridge in question in proper repair, but that duty did not devolve on all of appellant's officers, agents, and employes. Therefore notice of the defect in the bridge to some officers, agents, or employes, and the failure of such officers, agents, or employes to repair the defect, would not constitute notice to appellant, nor show negligence on its part." Notice to an officer or employe who had no authority in the premises, and who was charged with no duty in relation to such matter, would not affect the city with notice. *City of Dallas v. Meyers* (Tex. Civ. App.) 55 S. W. 742. A city's liability in a private action for an injury from defects or obstruction of a highway is not for maintaining or permitting a nuisance, but for culpable neglect of a duty; and such neglect can only be predicated on the fact that its officers upon whom the duty

devolved either knew, or by ordinary diligence might have known, of the existence of the defect, and that the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated. Shear. & R. Neg. (5th Ed.) § 387; 2 Dill. Mun. Corp. (4th Ed.) §§ 1024, 1025. We conclude, therefore, that the assignment points out an error in the part of the charge quoted that requires a reversal of the judgment.

Reversed and remanded.

LOUISVILLE & N. R. CO. v. WATHEN et al.¹

(Court of Appeals of Kentucky. Feb. 19, 1902.)

CARRIERS OF LIVE STOCK—EXTENT OF INJURY—QUESTION FOR JURY—INSTRUCTIONS.

1. A carrier of live stock is not liable for injury to the stock unless it is shown that the injury was caused by his negligence, but when negligence on his part, causing an injury, is shown, the extent of that injury is a question for the jury.

2. Where the evidence was conflicting as to whether the disease from which horses died was caused by injuries which they received while being carried by defendant railroad company, or by other causes, the court properly instructed the jury that they could not find any damages against defendant for any injury to or depreciation of the stock that was not due to the negligence of defendant; and this is as far as it was proper for the court to go.

3. There being proof that such injuries as the horses received were liable to cause pneumonia, which was the disease from which they died, and that the horses injured in the same way all had pneumonia, the jury was authorized to conclude that the disease resulted from the injuries received; and therefore a second verdict for plaintiffs will not be set aside as against the evidence.

Appeal from circuit court, Marlon county.
"Not to be officially reported."

Action by John W. and Ed. Wathen against the Louisville & Nashville Railroad Company to recover damages for breach of a contract to carry live stock safely. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. C. McChord and Edward W. Hines, for appellant. J. P. Thompson, for appellees.

HOBSON, J. This is the second appeal of this case. For opinion on the former appeal, see Railroad Co. v. Wathen, 49 S. W. 185, where the facts of the case are fully stated. On that appeal a judgment in favor of appellees for \$800 was reversed on all the testimony on the ground that it was against the evidence. On the return of the case to the lower court, it was tried again, and there were a verdict and a judgment in favor of appellees for \$650, and the railroad company has again appealed.

The proof, in the main, seems to be very much the same on this trial as the last, except that appellees introduced some additional evidence, and perhaps brought out the

facts a little more clearly than on the first trial.

A carrier of live stock is not liable for injury to them unless it is shown that the injury was caused by his carelessness or negligence. But when negligence on his part is shown, causing an injury, the extent of that injury is a question for the jury; and the court properly refused to instruct the jury peremptorily that they could not find anything for appellees on account of the death of the three horses. The court properly told the jury that they could not find any damages against appellant for any injury or depreciation of the stock that was not due to the negligence of appellant, and this is as far as the court should have gone.

It is earnestly insisted that the evidence does not warrant a finding against appellant for the loss of the three horses. There have been two verdicts for appellees. The evidence is largely circumstantial, and a jury of 12 men are peculiarly qualified to pass on such questions as the cause of the death of these horses. There was proof from which the jury might have inferred that the pneumonia from which the horses died was not the result of appellant's negligence. There was also proof that such injuries as the horses received were liable to cause pneumonia. The jury may reasonably have concluded that the pneumonia in one or more of the horses was due in part to both the causes. The three horses that had pneumonia stood facing the same way. By the violence of the blow against the car in coupling, they were thrown with such force against the oak railing, two inches thick, in front of them, as to break it down and throw them on the floor of the aisle of the car. That these three horses all had pneumonia is a circumstance from which the jury might have inferred that the disease was due in part, at least, to the same cause; there being expert testimony that such treatment was likely to produce the disease. The sixteen horses were loaded in good order, and apparently with great care. They reached their destination—all of them—in very bad condition. Appellees proved damages much larger than were allowed by the jury, and in view of the fact that there have been two trials of the case, both resulting in the same way, before juries composed, no doubt, largely of men with practical knowledge of stock, we are unwilling to disturb the verdict.

Judgment affirmed.

BATES v. SMITH et al.¹

(Court of Appeals of Kentucky. Feb. 19, 1902.)

SHERIFFS—BOND OF DEPUTY.

There being nothing in the order of the county court appointing a deputy sheriff which limited his services to any particular district or

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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to any particular character of service, and no such limitation appearing in the bond executed by him to his principal, the bond covers all collections made by him as deputy sheriff for his entire term.

Appeal from circuit court, Knott county.

"Not to be officially reported."

Action by Robert Bates against A. J. Smith and John W. Combs upon a bond. Judgment for plaintiff for only a part of his claim, and he appeals. Reversed.

Hazelrigg & Chenault and B. S. Phillips, for appellant. J. J. C. Bach, for appellees.

BURNAM, J. The appellant, Robert Bates, was the sheriff of Knott county for the years 1893 and 1894, and, at the request of numerous citizens of the county, had appellee John A. Smith appointed a deputy sheriff. Smith accepted the appointment, and executed a bond, with the appellee John W. Combs as security, covenanting to pay over all moneys that came to his hands as deputy sheriff to the parties entitled thereto, and to faithfully perform his duties in other respects. At the close of appellant's term, in 1894, Smith was indebted to him for taxes which he had collected and failed to pay over. He thereupon instituted this suit upon the bond, and asked judgment for \$150.16, a balance alleged to be due on taxes for the years 1893, and for \$1,091.57 for taxes which he alleged Smith had collected and failed to pay over for the year 1894. The answer of Smith pleads a settlement and overpayment of taxes for the year 1893, and alleges that he had paid \$953, the full amount collected by him for the year 1894. The appellee Combs filed a separate answer, in which he alleges that at the time he signed the bond it was the understanding between him and the appellant that Smith was only to collect taxes in voting precinct No. 6 for the year 1893; that after the execution of the bond the appellant, in violation of his agreement, listed with Smith taxes in district No. 2 for that year, and for the year 1894 he placed in his hands for collection taxes in precincts Nos. 2 and 6. The reply denies the settlement relied on by Smith for the year 1893, and also denies the averments of the answer of Combs that he was only to be bound on the bond for taxes collected by Smith for the year 1893 in district No. 6, but says that it was agreed and understood by Combs that he was to be bound for all taxes collected by Smith for both years, and as long as he continued to act as deputy sheriff. The trial court gave a judgment against Smith and Jones for \$140.32, taxes for the year 1893, and against Smith alone for \$527.03, taxes for the year 1894, and from that judgment Bates appeals.

There is nothing in the order of the county court appointing Smith a deputy which limited his services to any particular district, or to any particular character of service. Nor does such limitation appear in the bond executed by him, with appellee Combs as se-

curity; and it clearly covers all collections made by Smith as deputy sheriff. It appears from the report of the master commissioner that Smith collected in 1894 in district No. 2 \$434.78, and in district No. 6 \$858.84, making the aggregate \$1,293.62; and it credits him with \$734.51 taxes paid in by him during that year. In addition to the credits given to him by the commissioner, he should have been credited with the additional sum of \$103.48 by way of commissions, making his credits, in the aggregate, \$840.99, which, being taken from the gross collection, leaves a balance due by him for the year 1894 of \$452.63,—due appellant,—and for which he is entitled to judgment, with interest from the date of the institution of the suit.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

EDWARDS et al v. FUSON.¹

(Court of Appeals of Kentucky. Feb. 18, 1902.)

SALES—MISTAKE AS TO QUANTITY—PURCHASE MONEY—RECOVERY OF EXCESS.

A cause of action was stated by a petition alleging that plaintiffs purchased from defendant certain lots of lumber, one of which was represented as containing 704,000 feet, and paid for on that basis, when in fact it contained only 574,000 feet, the prayer of the petition being for the excess paid as money paid under a mistake of fact and without consideration.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by D. C. Edwards & Co. against S. S. Fuson to recover money paid by mistake. Judgment for defendant, and plaintiffs appeal. Reversed.

D. B. Logan, for appellants. O. V. Riley, for appellee.

WHITE, J. This appeal is from a judgment sustaining a demurrer to the petition and upon refusal to amend dismissing same. The only question presented is, does the petition state a cause of action? The allegation is that the appellants purchased from appellee certain lots of lumber, one in particular being 704,000 feet, on sticks, known as "upper Lee set," which it was impracticable to measure, and, as alleged, on account of its condition, was not measured, but was represented by appellee to be and contain 704,000 feet scale measure; and that appellants, relying on that representation, purchased same, and paid for it in full on that basis, believing there were 704,000 feet, scale measure, as represented. Appellants then pleaded that upon actual measurement there was only 574,000 feet scale measure, or 130,000 feet scale measure less than appellee represented, and that amount less than appellants had paid appellee for. The value

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

of the lumber was then pleaded to be \$8.25 per thousand feet. Appellants then sought judgment for the sum of \$1,072.50, the value of the 130,000 feet, as for the money paid under a mistake of fact and for money had by appellee without consideration. Taking these averments as true,—which we must on demurrer,—the petition, in our opinion, states a cause of action. The court therefore erred in sustaining the demurrer to the petition and in dismissing same; wherefore the judgment is reversed, and cause remanded for proceedings consistent herewith.

FIRST NAT. BANK v. GERMANIA SAFETY VAULT & TRUST CO.¹

(Court of Appeals of Kentucky. Feb. 19, 1902.)

BANKS AND BANKING—PLEDGE TO SECURE SPECIFIC DEBT—EXTENT OF LIEN—INSTRUCTIONS TO JURY—WAIVER OF ERROR.

1. Where bonds were pledged to a bank to secure a specific debt, the bank had no lien except for that debt.

2. Defendant cannot complain that instructions given on plaintiff's motion assumed the existence of a disputed fact, where the instructions asked by him contained the same error.

3. There can be no reversal for an error in admitting incompetent testimony to establish a fact the existence of which the instructions asked by both parties assumed.

Appeal from circuit court, Jefferson county.

"To be officially reported."

Action by the Germania Safety Vault & Trust Company, assignee of Jacob Krieger, Sr., against First National Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

Augustus E. Willson and D. W. Sanders, for appellant. Helm, Bruce & Helm, for appellee.

PAYNTER, J. Previous to August 4, 1891, the appellant, the First National Bank, loaned to the Masonic Savings Bank \$29,596.59, partly secured by collateral. On that day the latter bank, through its president, Jacob Krieger, Sr., applied to Adolph Schmidt, president of the former bank, for a further loan of \$3,000. This application was refused unless collateral was pledged. Shortly after the application for the loan was refused, Krieger again applied for a loan of \$3,000. He brought his check, as president, on the Masonic Savings Bank, for that amount, and tendered as collateral five bonds of the Louisville & Jeffersonville Bridge Company, for \$1,000 each. Schmidt, for the bank, agreed to make the loan, and the bonds were accepted as collateral. Thereupon Krieger's check was cashed, with the understanding it was to be held for some days, but before it was presented for payment the Masonic Savings Bank assigned for the benefit of its creditors.

These words, "5 L. & J. Bridge bonds," were indorsed on the face of the check by Krieger. At the time the Masonic Savings Bank assigned, it had not paid any part of its indebtedness to the First National Bank, so it owed it \$32,586.59. When the bonds were pledged, they had no commercial value. In the distribution of the assets of the Masonic Savings Bank, the First National Bank received its proper share. In the fall of 1891, Jacob Krieger assigned his estate to the appellee for the benefit of his creditors. He became greatly involved on account of becoming security for the East End Improvement Company, which had built the Louisville & Jeffersonville Bridge; and it is claimed by the appellee that, to protect him in the liability thus assumed, the improvement company delivered to him 73 of the Louisville & Jeffersonville Bridge bonds, and that the 5 bonds delivered by Krieger to appellant were part of that number. In May, 1895, by reason of an arrangement made with certain railroad companies, the bonds had become valuable. They were to be paid. The appellee desired to obtain the bridge bonds which had been delivered to Krieger by the improvement company, with a view of having them paid, so as to reimburse, as far as possible, the Krieger estate the sums which he had been compelled to pay for that company. The appellee, through its president, ascertained that there was due on the \$3,000 check \$2,987.52. So in April, 1895, it tendered the appellant that amount in payment of the balance due on the check, and demanded a surrender of the collateral (the five Louisville & Jeffersonville Bridge bonds), which it refused to surrender, claiming that they also stood in pledge for the payment of the balance of its debt against the Masonic Savings Bank. Immediately after the tender the appellant sold the bonds to Mr. Armstrong, from whom the appellee obtained them by paying \$0,462.50. This action was brought to recover the difference between \$2,987.52 and the value of the bonds. It is claimed they were worth the amount paid Armstrong for their redemption.

Issues of law and fact were involved in this case. To recover, it was essential for the appellee to show that the five bridge bonds belonged to Krieger, not to the Masonic Savings Bank; for, if they belonged to it, then Krieger's trustee had no cause of action. To show they did, appellee introduced T. W. Spindle, president of the appellee, as a witness. It is urged that the court erred in permitting him to give certain testimony. As we have concluded that the appellant cannot now complain of the alleged error, we do not pass upon the question as to whether the court did err in the admission of the evidence. The reason for the conclusion will be hereinafter given.

Counsel for appellant insists that the bonds were pledged to pay the \$3,000, but, as they were not pledged to pay that debt

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only, the law appropriates their proceeds to the payment of the balance which is due the appellant by the Masonic Savings Bank; and, further, it is claimed that there was an agreement at the time the bonds were pledged that they were to be a lien for the entire indebtedness of the bank. It is the contention of the appellee that they were pledged only for the \$3,000 debt, and that when that was paid it was entitled to have them surrendered to it. We do not understand that there is much disagreement between counsel as to the law with reference to the rights of bankers' general liens on collaterals pledged to them. The appellee does not base its claim upon the doctrine as to the general liens of bankers, but upon the right of a debtor to make a special pledge of collateral on a particular debt. The court below tried the case upon the theory that the appellee could recover if the bonds had been pledged only for the \$3,000 debt. The court tried the case upon the correct theory, for this court said in *Bank v. Bangs*, Adm'r, 84 Ky. 139, 4 Am. St. Rep. 197, "It is equally as well settled that when the deposit is made for a special purpose, with the knowledge and undertaking of the bank, that purpose must be carried out, or, when the pledge is specific, to secure a particular debt, the lien only applies to the debt intended to be secured by it." In its instructions the court recognized the doctrine of the *Bangs* Case, for the burden was placed upon the appellee to show that the collateral was to secure a particular debt. Instruction No. 1 reads as follows: "The court instructs the jury that if they believe from the evidence that in the transaction on the 4th day of August, 1891, when Jacob Krieger, president of the Masonic Savings Bank, borrowed from the defendant, the First National Bank, the sum of \$3,000, for which he gave a check, and indorsed on the same, '5 L. & J. Bridge bonds,' the said memorandum and transaction was intended by the parties thereto to put in pledge the said five bonds as collateral security for the payment of the said \$3,000, only, then, the same being a specific pledge for payment of the said sum, and the said bonds were not in lien beyond the amount of the said \$3,000 check and its interest, then they should find for the plaintiff the difference of the amount of the note at the date of the tender and the value of the bonds." It is urged, and properly so, that the court should have left to the jury the disputed fact as to the ownership of the bonds. The rule that this should be done is so well settled that it cannot be a subject of debate. If a court can properly do this, then the necessity for a jury is obviated. The court did not leave to the jury the question as to whether or not the bonds belonged to Krieger. The instructions assumed that they did belong to him. It is probable, from the circumstances which were properly proven, that the jury could not have found other-

wise, had the question been submitted to it. The court committed the error because both appellant and appellee offered instructions in none of which the question of the ownership of the bonds was submitted to the jury. On the contrary, they assumed that Krieger was the owner of the bonds. The error committed was the result of the combined action of appellant and appellee. When the instructions offered by the appellant were subject to the same fault as the ones given by the court, there should not be a reversal for such error. *Insurance Co. v. Hughes*, Adm'r (Ky.) 60 S. W. 850. To establish the ownership of the bonds in Krieger, appellee introduced Mr. Spindle, president of appellee (the appellee being the trustee of the Masonic Savings Bank as well as of Krieger) as a witness, who gave testimony, over the objection of the appellant, which tended to support that claim. It is insisted that certain parts of his evidence was incompetent to show that Krieger owned the bonds. If the instructions offered by both appellant and appellee assumed that Krieger did own them, and for that reason appellant is not entitled to a reversal, because the court committed the same error in its instructions to the jury, it necessarily follows that there should not be a reversal for the admission of incompetent testimony which only tended to prove the fact assumed in the instructions. Whether or not there had been evidence introduced to establish the ownership of the bonds is immaterial. Evidence, competent or incompetent, could not have done more than to establish the fact assumed in the instructions.

We cannot say that, at first blush, the verdict appears to be flagrantly against the weight of the evidence. Besides, two juries have found that the collateral was a special pledge for a particular debt. Under such circumstances, we do not feel authorized to reverse the case on the ground that the verdict is flagrantly against the weight of the evidence.

The judgment is affirmed.

ROTHENBURGER v. PEUGNET.¹

(Court of Appeals of Kentucky. Feb. 19, 1902.)

CONSTRUCTION OF DEED—WHOLE DEED CONSTRUED TOGETHER—WORD "HEIRS" CONSTRUED.

Where a deed conveyed land in trust for the use of A. for life, and then in trust for her daughter E. and such other heirs of the body as A. might have, and provided that if E. and the other heirs of A.'s body, if any, should die without issue, then in trust for J., a subsequent clause, providing that, should A. survive E. and the other "heirs" of A.'s body, if any, then the trustee should hold the property in trust for J., must be construed with reference to the preceding clauses, and therefore the word "heirs," as used therein, must be held to embrace not only the children of A., but the issue of E., and the issue of any other children A. might have.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action between C. E. Rothenburger and E. Peugnet. From the judgment, Rothenburger appeals. Affirmed.

David S. Levy, for appellant. M. A., D. A. & J. G. Sachs, for appellee.

PAYNTER, J. On the 18th of October, 1851, Benjamin F. Cawthon and Kate Cawthon conveyed to John R. Thompson a certain lot in Louisville, Ky., situated at the corner of Third and Campbell streets, in trust as follows: "(1) In trust for the use and benefit and behoof of Anna Abigail Thompson for and during her natural life. (2) In trust for the use, the benefit, and behoof of Ellen Louisa Thompson, daughter of said Anna Abigail, and such other heirs of the body of the said Anna Abigail as may be begotten by the party of the second part, and to their heirs forever. (3) Should the said Ellen Louisa and the other heirs (if any) begotten as aforesaid of the said Anna Abigail die without issue, then in trust for the use, benefit, and behoof of John R. Thompson, Jr., and to his heirs, forever. (4) Should the said Anna Abigail survive the said Ellen Louisa and the heirs (if any) of her the said Abigail begotten as aforesaid, then the party of the second part shall hold the property herein conveyed in trust for John R. Thompson, Jr., and for his heirs, forever. (5) Should the said Anna Abigail, survive the said John R. Thompson, Jr., and his heirs and the heirs of her body begotten as aforesaid, then the estate herein conveyed shall at her death vest in the party of the second part, and his heirs, forever, as a good and indefeasible estate in fee simple." Anna Abigail Thompson, mentioned in the deed, took a life estate in the property. She had but one child, Ellen Louisa Thompson. Whatever rights which passed under the second clause of the deed went to her daughter. Anna Abigail survived her daughter, but she left children surviving her. It will be observed under the third clause of the deed that John R. Thompson, Jr., was not to take any interest in the property if Ellen Louisa or any other heirs of the body of Anna Abigail died with issue. As Ellen Louisa left issue, John R. Thompson, Jr., did not take an interest under the third clause of the deed. This clearly shows that the grantors intended that he should not take an interest in the property if the children of Anna Abigail died leaving issue. The question arises then: Did the grantors intend by the fourth clause of the deed to change the import of the preceding clause? Certainly the grantors would not have provided in the third clause that John R. Thompson, Jr., was not to take any interest in the property if Ellen Louisa died leaving issue, and then in the next clause intend to provide

that, if Anna Abigail survived Ellen Louisa and any brothers or sisters she might have, although she or her brothers or sisters may have left issue, it should go to John R. Thompson, Jr. To so construe the third and fourth clauses would be to say that the grantors intended by the third clause that John R. Thompson, Jr., should take no interest if Ellen Louisa left issue; and in the fourth clause to say that, although she left issue, John R. Thompson, Jr., should take the property, and the issue thus left by Ellen should take no interest in it. Such an interpretation would lead to an absurdity. In construing a deed it is essential to consider all of its provisions. To do this we must reach the conclusion that the word "heirs," as used in the fourth clause of the will, was intended to embrace not only the children of Anna Abigail, but the issue of Ellen Louisa and the issue of any other children which Anna Abigail might leave. It follows from these views that the deed tendered to appellant will vest him with a good title to the property.

The judgment is affirmed.

TRABUE v. COMMONWEALTH.*

(Court of Appeals of Kentucky. Feb. 19, 1902.)

HOMICIDE—DEGREE OF OFFENSE—SELF-DEFENSE AND MANSLAUGHTER—RIGHT TO INSTRUCTIONS.

1. Under an indictment for murder, if there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction on that hypothesis.
2. Where defendant in an indictment for murder testified that, in a fight with the sister of deceased, either she or his sister accidentally cut him, she was entitled to an acquittal if the blow which struck deceased was given by her in self-defense as against his sister, and was guilty of manslaughter only if the blow was given in sudden heat and passion in a combat provoked and begun by the sister, and was aimed at her, with the unintended result of slaying her brother; and the jury should have been instructed accordingly.
3. As it is competent to show the occupation and associates of a witness, for the purpose of discrediting her, it was error to refuse to require a witness for the prosecution to state, upon cross-examination, with whom she lived.

Appeal from circuit court, Jefferson county, criminal division.

"Not to be officially reported."

Julia Trabue was convicted of murder, and she appeals. Reversed.

H. T. Wilson, for appellant. Morrison Breckinridge and R. J. Breckinridge, for the Commonwealth.

BURNAM, J. The appellant, Julia Trabue, was indicted by the grand jury of Jefferson county in April, 1901, for the murder of Ed Evans; and a trial before a jury in the following month resulted in a verdict finding her guilty of murder, and inflicting the death

* Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

penalty. A motion for a new trial was overruled, and judgment rendered on the verdict. An appeal has been taken to this court, and a reversal of the judgment asked by the appellant on several grounds: First, because of the failure of the trial court to give to the jury an instruction based upon the theory that the killing was in sudden heat and passion and without malice; second, because of erroneous rulings of the court in excluding important testimony material to her defense.

The testimony of Gertrude Evans, a sister of the deceased, and the chief witness for the commonwealth, is to the effect that she occupied two rooms upstairs in a double tenement house at the corner of Thirteenth and Congress streets, in the city of Louisville; that a friend of hers (Ardinia Garnett) had spent the day with her; that about 3 o'clock in the afternoon her brother, Edwin Evans, came to her room, and remained there with her and her visitor until he was stabbed by the appellant, at about 7 o'clock in the evening. She says that she heard appellant coming up the stairs, and that she walked out of the lighted room where they were, to the top of the steps, to meet her; that she did not recognize appellant, and asked her if it was Julia or Ollie; that appellant did not respond until she got in front of the door opening into the lighted room, where her brother was; she then answered, "It is Julia," and, addressing her brother, said to him, "Come on;" that he responded, "I am coming just as soon as George comes;" that she answered, with an oath, "Come on now," walked up to him, drew a knife from under her cloak, and stabbed him in the breast, and started to do so again, when she ran up and caught the knife; that, in the struggle that followed, the deceased ran to the steps, and she after him, and that appellant was immediately behind her; that, when she got to the top of the steps, appellant pushed her against the deceased, who was lower down on the steps, knocking him down. And the statements of this witness are substantially corroborated by Ardinia Garnett. The defendant testified that she had been living with the deceased for about five years, but was not married to him; that, in the afternoon of the day on which he was killed, he left home, saying that he was going to the brickyard in Shippingport; that a short time before the trouble she met John Ford, a brother-in-law of the deceased, on his coal wagon, and that he said to her: "Ed says for you to come to Gertie Evans' house, at the corner of Thirteenth and Congress, right away; that he wants you. Get your hat, and I will take you on the wagon;" that she went into the house, put on her hat, and went with him, and that he took her to Thirteenth and Congress and showed her the house; that she had never been there before; that she inquired for the quarters of Gertie Evans, and was directed to go upstairs; that, when she came to the top of the stairs,

Gertie Evans was standing there in the dark; that she said, "What brought you here?" that she responded, "Ed sent for me. What is the matter with him?" that Gertie answered, "Ed never sent for you;" that she walked through the dark room, into which the steps opened, to the lighted room, where she saw Ed Evans and Ardinia Garnett sitting on the side of the bed, kissing each other; that she did not cross the door sill, but said, "Ed, come on and go home," and that he refused to do so; that Gertie Evans said to her, "Don't raise a rukus in my house," and she immediately struck her, knocking her down, and that, when she got on her feet, Ardinia Garnett struck her on the back with a water bucket; that Gertie Evans drew a knife and said, "I will kill the bitch if she comes to my house;" that she responded, "I do not want trouble with you. I want to know what Ed wants with me;" that, while they were fighting, Ed ran between them and almost immediately cried out that he was hurt; that she did not know whether she or his sister cut him.

Upon the trial the court gave the usual instructions in such cases, with the exception of a manslaughter instruction, based upon a killing in sudden heat and passion and without previous malice, but in lieu thereof gave an instruction based upon the theory that the stabbing was an accident. In view of the proof in the case, and the conflict in the testimony as to how the trouble began and concluded, and as to the manner in which the deceased was stabbed, we think the trial court erred, to the prejudice of the appellant's substantial rights, in failing to instruct upon the theory that the stabbing was done in sudden heat and passion, and without previous malice. "It is not the province of the lower court, any more than of this, to weigh evidence for the purpose of determining whether a person on trial for his life is entitled to an instruction as to manslaughter. If there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction upon that hypothesis." See *Bowlin v. Com.*, 94 Ky. 395, 22 S. W. 543, and *Stott v. Com. (Ky.)* 29 S. W. 141. The instruction based wholly upon the theory of accidental stabbing failed to give the jury all the law of the case. The same character of instruction should have been given as if appellant had stabbed Gertie Evans instead of Ed. If Gertie Evans had been stabbed to death in the mêlée, it can hardly be doubted that an instruction on manslaughter would have been given, under the testimony here presented. The testimony of appellant tends to sustain the theory that, either in self-defense or in sudden heat and passion, she engaged in a fight with Gertie Evans, in the course of which the deceased was killed by a blow intended for his sister. The criminality of the homicide thus accidentally accomplished is measured by that of the hom-

icide which would have been accomplished had the blow reached its intended mark. If, as appellant claims, the blow was given in self-defense as against the sister, with the unintended result of slaying the brother, it was excusable. If, as a part of her testimony indicates, the blow was given in sudden heat and passion, in a combat provoked and begun by the Evans woman, and was aimed at her, with the unintended result of slaying her brother, then the offense was manslaughter, just as it would have been had it reached its intended mark. 1 Bish. New Cr. Law, § 328. The jury should have been instructed upon both theories, for the instructions are to be tested by the evidence for the defense.

Upon cross-examination of Gertie Evans, she was asked by the defendant's attorney who she lived with. The question was objected to, and the circuit judge remarked in the presence of the jury, "No testimony that will tend to discredit the witness is competent." The court erred in refusing to permit the question to be answered, as it is always competent to show the occupation and associates of a witness, for the purpose of discrediting her.

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

BASS v. BROWN.¹

(Court of Appeals of Kentucky. Feb. 20, 1902.)

BURDEN OF PROOF—FAILURE TO OBJECT.

Defendant cannot complain upon appeal of an error of the trial court in placing upon him the burden of proof, where he accepted the burden without objection.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by Lucy Brown against B. A. Bass upon a promissory note and an account. Judgment for plaintiff, and defendant appeals. Affirmed.

Clay & Clay, for appellant. Thomas E. Ward, for appellee.

WHITE, J. The appellee brought this action to recover of appellant the sum of \$200, due by note, and the further sum of \$28, due by account. Appellant pleaded payment as to both items. Upon trial before a jury a verdict and judgment was rendered for appellee for the two sums claimed, less a credit of \$12 paid in corn. After appellant's reasons and motion for new trial had been overruled, this appeal is prosecuted. The only question argued by learned counsel for appellant is that the verdict is flagrantly against the evidence. We are of opinion that there was no error in refusing to set aside the verdict on account of the evidence.

The evidence on the question of payment is conflicting; in fact, irreconcilable. One or the other party was mistaken as to the payment. The jury and the trial judge heard the witnesses testify, and have determined the matter in favor of appellee's contention. We do not feel authorized, under the proof as shown by the record, to disturb that verdict and judgment. The court, on the trial, assigned the burden of proof on appellant, and he accepted it without objection, and the case was tried on that idea, and, in the absence of exception in the trial court, the question cannot be raised here.

There appears no error in the instructions given, and the judgment is affirmed, with damages.

JONES' ADM'R v. LAY et al.¹

(Court of Appeals of Kentucky. Feb. 18, 1902.)

ADMINISTRATOR—APPOINTMENT—JURISDICTION—CHANGE OF RESIDENCE.

Where a husband left his home in H. county, at which he had resided over 60 years, his wife remaining there, and went to his daughter's home, in H. county, taking with him nothing but the clothing he wore, and a few months thereafter died there, the court was authorized to conclude that there had been no change of residence, though there was evidence to show that he said when he went to his daughter's home that he had come there to remain until he died; and therefore the appointment of an administrator by the H. county court was void, and the circuit court of that county had no jurisdiction of an action to settle the decedent's estate.

Appeal from circuit court, Hardin county. "Not to be officially reported."

Action by R. G. Phillips, as administrator of R. D. Jones, against J. S. Lay and others, to settle the estate of plaintiff's intestate. Judgment for defendants, and plaintiff appeals. Affirmed.

James Montgomery, for appellant. R. L. Stith and J. D. Irwin, for appellees.

WHITE, J. R. G. Phillips, as administrator of R. D. Jones, deceased, instituted this action in the Hardin circuit court to settle the estate of Jones, and to sell real estate necessary to pay debts. The appellee Lay was made a party defendant, as well as all the children and heirs of Jones; it being alleged that Lay claimed to be the administrator of Jones by appointment of the county court of Edmonson county, while appellant was appointed by the county court of Hardin. The appellee filed a special plea to the jurisdiction of the Hardin circuit court, and also a plea in abatement,—a former action pending in Edmonson county. The court below sustained the plea to the jurisdiction and dismissed the petition, and hence this appeal.

By section 65, Civ. Code Prac., the circuit court of the county having by law authority

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to appoint an administrator is given jurisdiction of the action to settle the estate. In the case at bar, both county courts undertook to appoint an administrator of the estate of Jones. Only one had authority and jurisdiction to make the appointment, as it is conceded Jones was a resident of this state. The contest arises as to which of the two counties Jones was a resident of when he died. The proof heard on the plea seems, by common consent, to have been taken and used in the form of *ex parte* affidavits. We presume this was by consent, as no objection seems to have been made to the proof. The proof, on the one hand, shows: That Jones was over 80 years of age, and a cripple, being unable to do any kind of work. His wife is living in Edmonson county, on the home place, where they had resided over 60 years. Their children were all married and had homes of their own. One child lived in Texas, and one lived in Hardin county, on a farm of Jones, and where he died. The others lived in Edmonson county. That there had been no separation or estrangement between Jones and his wife, but that he went to his daughter's, in Hardin county, for a short visit, and remained there several months, and died. On the other hand, the proof shows that Jones, when he went to his daughter's, in Hardin county, said he had come there to stay till he died; had come to make it his home, and did not intend to return to Edmonson county. The reason it is said he gave was that he was not treated right in Edmonson county, at home. He did stay some four or five months, and died in May at the home of his daughter in Hardin county. When Jones came to Hardin county he brought no clothing or property of any kind, except what he wore. Upon this proof the court below concluded that Jones was a resident of Edmonson county. We are of opinion that in this conclusion of the learned chancellor there was no error. Jones had been a resident of Edmonson county for more than 60 years, and the indications are that he left home temporarily, for a short visit. His extreme age and feeble condition probably did not permit him to return. The evidence is not sufficient to show a change of residence, or that he had removed his permanent residence so long established. The Hardin county court had no authority or jurisdiction to appoint an administrator on his estate. Therefore the Hardin circuit court had no jurisdiction of this action.

Judgment affirmed.

TRADEWATER COAL CO. v. HEAD.¹

(Court of Appeals of Kentucky. Feb. 7, 1902.)

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a servant of a coal company, after loading a cart with coal from a car, the end

of which swung on hinges, attempted to leave the car by climbing over the end, which fell in, breaking one of his legs, his injury was due to his own negligence in attempting to leave the car in that way, as steps were provided at the side of the car, and, besides, he might, by the exercise of ordinary care, have discovered that the car was sprung, and that the end was not secured either by the iron hooks provided for the purpose or by blocks of wood sometimes substituted for the hooks.

Appeal from circuit court, Union county.

"Not to be officially reported."

Action by Robert Head against the Tradewater Coal Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

H. X. Morton, for appellant. Geo. A. Prentice, for appellee.

PAYNTER, J. The appellant is engaged in the business of mining and shipping coal. The Illinois Central Railroad furnishes cars to it at its mines. The car in question has gates at the ends, which swing on hinges, and are made to let down and leave the ends of the car open, if desired. When raised, they are fastened to the sides of the car by large iron hooks and eyes. The sides of the cars are sometimes sprung so that the iron hooks will not catch in the eyes, and, when that is the case, to save the coal in shipment, it is necessary to fasten the ends with wooden blocks. Frequently the cars were delivered to the appellant in such condition. The ends cannot be fastened by the hooks provided for that purpose. The car was placed under the coal tipple with an end protruding, and was about two-thirds full of coal when the accident happened for which a recovery is sought in this action. The appellee, as a laborer, performed various duties for the appellant, among which was to drive a cart in which coal was hauled from the cars which were being filled for shipment to the furnace for the purpose of generating steam for running the machinery. The engineer was in need of coal, and he so advised the appellee, whereupon he drove his cart to the end of the car. He got in the car with another cartman engaged in the same business, and they loaded the cart with coal. Then both of them started to leave the car at the end, and in doing so attempted to climb over the end gate, and, while astride it, it fell in, and caught one of the appellee's legs and broke it. The appellee alleged that the injury which he received was the result of the gross negligence of the appellant, its agents and servants. The appellee claims that the negligence consisted in the appellant's failure to have the gate of the car fastened, so as to prevent its falling in the manner described. The record shows that the car had hand rails and steps on its side near its end, which afforded an easy and safe way to get in and out of it, of which fact the appellee was aware. The only reason given by the appellee for not

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leaving the car by the way provided was that he could leave the car more quickly at the end. The car was sprung so the hooks would not fit in the eyes, and thus make secure the gate or end piece, and this could have been discovered by appellee by the exercise of the slightest care. There was no conflict in the testimony, and there is nothing in the record to create a suspicion that any witness who testified in the case did not tell the truth. The question of fellow servant does not arise in this case, because, if there was actionable negligence, it was that of the master in not having a servant to do that which was necessary to make the gate reasonably safe. Whether it was the duty of a laborer or a foreman to have fixed it is immaterial. The wrong, if any, consisted in the failure to have it done. The repairing of gates of cars in which coal was shipped was not done with the purpose of avoiding the injury of appellant's servants, but to secure the safe transportation of coal. The company is in no wise responsible for the condition of the cars when delivered at the tippie, and the securing of the gates was usually made when the cars were about two-thirds full of coal. The record fails to show that there was any unreasonable delay in fixing the gate. The appellee was invited by the hand rails and steps to leave it in that way, and when he elected to leave it in the manner stated he did so at his own risk. Besides, by the exercise of the most ordinary care, he could have discovered that the car was sprung, and the gate was not secured by the iron hooks or blocks of wood. There is no conflict in the testimony of the case, and there is but one inference that could be drawn by reasonable men from the testimony, and that is that the appellee was negligent in leaving the car in the manner in which he attempted to do so, and that he failed to exercise ordinary care to discover the condition of the gate when he attempted to pass over it, and for this reason the injury was the result of his own negligence. It results that the court should have given the jury peremptory instructions to find for the appellant.

The judgment is reversed for proceedings consistent with this opinion.

ALLEN et al. v. PULLIAM.¹

(Court of Appeals of Kentucky. Feb. 19, 1902.)

LAND PATENTS—CONSTRUCTION—CONFLICTING PATENTS—COLLATERAL ATTACK.

1. Courses and distances in a patent must yield to well-known objects called for.

2. A patent covering land all of which is embraced by an older patent is void.

3. In an action to recover land, in which the parties claimed under different patents, there being no conflict in the evidence as to the location of the patent boundaries, and it being apparent that both patents cover the land, the

court properly instructed the jury to find for defendant, claiming under the older patent.

4. A patent cannot be declared void in a collateral proceeding upon the ground that it embraces more land than it calls for.

Appeal from circuit court, Russell county.
"Not to be officially reported."

Action by Ebenezer Allen and others against Thomas Pulliam to recover land. Judgment for defendant, and plaintiff's appeal. Affirmed.

Rollin Hurt, for appellants. J. F. Montgomery, for appellee.

PAYNTER, J. This action was instituted by appellants against appellee to recover the possession of 100 acres of land, and for damages for cutting and removing timber therefrom. This appeal involves a review of the action of the court in giving a peremptory instruction to find for the defendant. The appellee claims under a patent granted by the commonwealth of Kentucky to Nathan McClure on the 12th day of January, 1867. The appellants claim under a patent granted to Ebenezer Allen on June 26, 1898. The testimony of the county surveyor and another surveyor is to the effect that the Allen survey lies within the boundary of the McClure survey. Other testimony tends to support the same conclusion. There was no countervailing testimony, except the testimony is not clear, that, to follow the courses and distances given in the McClure patent, the Allen patent would be embraced by them. This, however, is immaterial, because the patent calls to begin at the corner of Daniel Cook's 50-acre tract; thence with the line of that tract to the corner of John McFall's land; thence with McFall's line to the corner of John Dunbar's land; thence with the line of his land to the corner of William Nelson's land; thence with Nelson's land to the corner of the land patented in the name of the Russell Academy; thence with Lindsay Fall's line to the line of the McClure 1,400-acre survey, and with that line to the beginning. To run the lines of the McClure patent with the lines of the abutting property called for, it embraces the Allen patent boundary. Under a well-recognized rule of interpretation, courses and distances must yield to well-known objects called for in patents and deeds. The Allen patent boundary lies within the line defined by the contiguous tracts called for in the McClure patent. All the evidence shows this to be true. The Allen patent being junior to the McClure patent, it is void. There being no conflict in the evidence as to the location of the patent boundaries, there was no issue of fact to submit to the jury. Therefore the court properly instructed the jury to find for the defendant.

The fact that the McClure patent embraces more land than it calls for does not make it void. That question cannot be raised in a collateral proceeding. The commonwealth

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could do so by a direct proceeding. *Marshall v. McDaniel*, 12 Bush, 380.

The judgment is affirmed.

Appeal of CAUDILL.¹

(Court of Appeals of Kentucky. Feb. 20, 1902.)

APPELLATE JURISDICTION—REFUSAL OF LICENSE TO SELL LIQUOR.

1. An appeal lies to the court of appeals from a judgment of the circuit court refusing, upon appeal from the county court, to grant a license to sell liquor.

2. Under Ky. St. § 4203, providing for the granting of licenses by the county court to merchants to sell liquor, and providing that no such license shall be granted "to any person of bad character, or who does not keep an orderly, law-abiding house," the county court did not abuse its discretion in refusing to grant a license to one who had been selling liquor without a license, and had further violated the law by selling to minors.

Appeal from circuit court, Simpson county.

"Not to be officially reported."

Application by J. W. Caudill for license to sell liquor denied, and he appeals. Affirmed.

C. W. Millikin, for appellant. L. B. Finn, for appellee.

WHITE, J. The appellant, Caudill, applied for a merchant's license to sell spirituous liquors before the county court of Simpson county, after a compliance with the law as to notices, etc. Upon hearing before the county court, a license was refused appellant for the reason, as recited in the judgment of the county court, that the applicant admitted in his testimony that he had repeatedly sold liquors at the present place of business without a license from the state so to do. The court, therefore, was of opinion that he had not kept a law-abiding house. Appellant then appealed to the circuit court from the order of the county court refusing him license. In the circuit court there was an agreed statement of facts presented, and upon which the trial of the application was had. This agreed statement is that the law had been complied with as to the notices and application; that applicant was a man of good character; that he was a merchant in good faith; that his place of business was orderly, and gentlemen and ladies of the neighborhood traded there, and there was no disturbance; that no protest was filed by any person; that applicant had sold whisky to divers persons under 21 years, and to persons over 21 years, within the preceding year, and had no state license to sell, and had been indicted and convicted on his plea of guilty for these offenses. The circuit court thereupon refused to grant the license, and this appeal is prosecuted.

It is argued that this court has no jurisdiction of this appeal. While there is force

in the reasoning presented, the question is not an open one. We have too often upheld our jurisdiction in this class of cases to deny it now. The matter is now so well settled as to preclude discussion. The latter part of section 4203, Ky. St., which provides for the granting of licenses by the county court to sell liquors by taverns, merchants, distillers, and druggists, provides, "Nor shall such license be granted to any person of bad character, or who does not keep an orderly, law-abiding house." It is under this provision of the law that the license was refused. There is no definition of the term "orderly, law-abiding house," as used in this statute, given in the revenue act. The court must, therefore, in the exercise of his sound legal discretion, determine what is there meant. Appellant contends that it meant that an orderly, law-abiding house is where no brawls or fights take place; where the citizen, gentleman or lady, may deal undisturbed by violence or fear of violence or insult; where everything done is peaceable and orderly. Appellant's contention, in effect, is that though he engaged in the illegal sale of liquors, both to adults and minors, he may keep an orderly, law-abiding house. It is contended that section 4193, Ky. St., strengthens this position, where it is recognized that a person may be granted a license, though he may have engaged in the business without a license within the previous six months, by the payment of a penalty. It will be noticed that the licenses contained in that subdivision of article 10 of the act are all granted by the county clerk, while the merchant's license, herein sought, must be granted by the county court. Section 4193 does not authorize or permit licenses to be granted in opposition to section 4203. In fact, there seems to be no connecting link between them as to whom the licenses may be or shall not be granted. By section 4203, the county court is given a judicial discretion as to whom a license to sell liquors may be granted, with the prohibition quoted. As to the prohibition, there is a discretion as to the application,—whether it applies to the applicant. From the admitted fact that appellant had sold without license, and in further violation of the law even if he had a license, we conclude there was no abuse of the legal discretion confided to the court as to the proper person to engage in this business, in refusing appellant license.

The judgment appealed from is affirmed.

MANN v. MOORE et al.¹

(Court of Appeals of Kentucky. Feb. 13, 1902.)

APPEAL AND ERROR — FAILURE OF JUDGE TO ATTEST STENOGRAPHER'S TRANSCRIPT.

Under Ky. St. § 4644, providing that a stenographer's transcript of testimony, "when

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attested by the judge before whom the trial was had, may be taken, without being copied, to the court of appeals to be used upon an appeal," a stenographer's transcript not attested by the judge will be stricken from the record on appeal, though there was an order by the trial court reciting that it was approved and signed, made a part of the record, and ordered to be transmitted to the clerk of the court of appeals without copying; but the appellee may withdraw such transcript for the purpose of having it properly attested, if it can be done, and then refile it as a part of the record.

Appeal from circuit court, Nelson county.

"To be officially reported."

Action between T. C. Mann and T. S. Moore and others. From the judgment, Mann appeals. Motion to strike stenographer's transcript from the record granted.

Halstead & Yewell, for appellant. John S. Kelly, for appellees.

GUFFY, C. J. The appellees entered a motion to strike from the record the paper filed as, and purporting to be, a transcript of the official stenographer's shorthand report of the testimony taken in court on the trial of this case, because they say that said pretended transcript is improperly and without right or authority filed in this court, and cannot be considered on this appeal, because same is not attested by the judge before whom the trial was had, as required by section 4644, Ky. St., and not identified as required by law. The appellant resists the motion, and also asks that, in the event it should be held that the paper in question cannot be considered as part of this record, leave be given him to withdraw the paper for proper signature and attestation. It appears from this record that R. C. Cherry was at the time of the trial in the court below the official stenographer of the Nelson circuit court, and was by order of court directed to take down in shorthand notes of all the evidence heard in the case. He was also directed to make a transcript of said evidence taken in the case, and on the 28th of May, within the time prescribed by order of court, said stenographer appeared in court and tendered therein a complete bill of evidence; and on the 10th of June, 1901, at the same term of court, said transcript was duly filed, by order duly made and entered, which order reads as follows:

"And the bill of evidence made and transcribed by R. C. Cherry, official stenographer of this court, heretofore filed by him, and tendered with and made a part of said bill of exceptions, and being examined by the court, is hereby approved, and, being signed, is made a part of the record in this case, and ordered to be transmitted by the clerk of this court to the clerk of the court of appeals, as part of the transcript in the case herein, without copying."

The paper has the following indorsements:

"Received of R. C. Cherry, official stenographer, and tendered May 28th, 1901. Att.: Wallace Brown, Clerk."

"Filed in court June 10th, 1901. Att.: Wallace Brown, Clerk."

The following also appears in the bill of exceptions:

"Said witnesses for plaintiff and defendant testified severally as shown by the statement of testimony, which is filed in this case as part of the record herein, being the transcript of evidence taken by the official stenographer of this court, R. C. Cherry, filed herein as a transcript of the testimony taken in this case; and said transcript of testimony contains all of the evidence there was in the action."

The bill of exceptions was duly signed by the circuit judge of Nelson county, and it may be taken as true that the orders heretofore copied refer to the transcript of evidence as made by the stenographer. The transcript is signed by Cherry, official stenographer, but is not signed, attested, or approved by the circuit judge by any indorsement made or signed by him upon said transcript of evidence. Section 4644, Ky. St., reads thus: "Any of said transcripts of testimony made by said reporter, as aforesaid, when attested by the judge before whom the trial was had, may be taken, without being copied, to the court of appeals to be used upon an appeal and thereafter returned to the court in which it was made." It will be seen from the foregoing section that, in order to authorize such a transcript of testimony as the one under consideration to be used as part of the record in an appeal to this court, such copy or transcript of the evidence must be attested by the judge who presided at the trial; and we are not aware of any rule of law by which we are authorized to dispense with such attestation, or authorized to consider any such transcript of evidence, unless the same be attested as required by the section supra. It is true that the transcript in question appears to be signed by the official stenographer, and also indorsed "Filed" by the clerk; and a transcript of the testimony in this case is evidently referred to by the orders of court, as well as mentioned in the bill of exceptions. Nevertheless the paper now in question has never been attested by the judge who presided at the trial, and, in the absence of such attestation, we cannot treat the transcript as part of the record in this case. The motion must therefore be sustained to strike it from the record, but the appellee is given leave to withdraw the same for the purpose of having it properly attested, if the same can be done; and, if properly attested, it may be again filed in this court, and considered as part of the record in this case.

GRAVES COUNTY WATER CO. v. LIGON
et al.¹

(Court of Appeals of Kentucky. Feb. 21, 1902.)

WATER COMPANY—FIRE PROTECTION—FAILURE TO SUPPLY WATER—CONTRACT WITH CITY—RIGHT TO BENEFIT—PRESUMPTION AS TO EXISTING LAW—STATUTE OF FRAUDS—OBLIGATIONS OF ORDINANCE GRANTING FRANCHISE.

1. A city property owner may maintain an action against a water company for the destruction of his property by fire by reason of its failure to maintain a water supply pursuant to its contract with the city.

2. It must be presumed that the parties to a contract contracted with reference to the law as it had then been declared by the highest court of the state.

3. Where a city, by ordinance, granted to a water company the franchise of supplying the city and its inhabitants with water for a period of 25 years, the water company holds the franchise so long as it enjoys it under the ordinance, and subject to the terms on which it was granted; and the company cannot escape the burdens imposed, at least as to past transactions, upon the ground that the contract is void under the statute of frauds, because it signed no memorial of the contract.

Appeal from circuit court, Graves county.
"To be officially reported."

Action by Ligon, Allen & Co. against the Graves County Water Company to recover damages for breach of contract. Judgment for plaintiffs, and defendant appeals. Affirmed.

Robertson & Thomas, for appellant. W. M. Smith and Crossland & Crossland, for appellees.

HOBSON, J. On July 30, 1891, the city of Mayfield made an ordinance providing for a supply of water and for electric lights for the city, by which it granted to appellant the franchise of supplying the city and its inhabitants with water and electric lights for a period of 25 years, appellant to keep a sufficiency of engine and boiler power, so that, if one engine or pump should get out of fix, there would be others which might be used for pumping water; all mains to be of suitable size, and to furnish an abundant supply of water. A public test of the power and capacity of the waterworks was to be given when completed. At this test they were to throw from separate hydrants in the business part of the city not less than three simultaneous streams, with 50 feet of hose, to the height of 80 feet. The city agreed to rent 64 hydrants, and pay therefor \$3,840 per annum, and for any additional hydrants \$50 each per annum. These hydrants were to be used only for extinguishing fires, and it was stipulated that they should furnish effective streams without the aid of portable engines. Appellant undertook to keep all these hydrants supplied with water, and to maintain them in effective working order, except during the time of repairing or remov-

ing any hydrant which had become ineffective by accident or other cause than willful negligence of appellant. Appellant was also to build a water tower not less than 12½ feet in diameter, and not less than 130 feet in height, which should be for a constant supply of water. Appellant accepted the grant, and built the plant, and put the works in operation. After this the means theretofore provided by the city and its inhabitants for fire protection were abandoned. On June 23, 1901, a fire began in a house in the city, which spread to and burned appellees' house from the want of water in the hydrants, there not being sufficient pressure to throw a stream of any size more than from two to five feet. There was no water in the tower, and the firemen were unable to get water to check the fire. By reason of this the fire spread to appellees' property and destroyed it. They then sued the appellant, alleging these facts. It demurred to the petition. Its demurrer was overruled. It then filed an answer, which it subsequently withdrew, and, the case having been submitted to a jury, a verdict was rendered in favor of appellees for \$12,000. The court entered judgment on the verdict, and appellant prosecutes this appeal without a bill of exceptions showing the evidence heard in the trial court. It insists that its demurrer to the petition should have been sustained on the ground that, as there was no privity of contract between it and the property owners, appellees have no right of action against it on the contract made by it with the city; and that, this contract being evidenced only by the ordinance of the city, and not signed by it, no action can be maintained against it under the statute of frauds.

In Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536, this court, after very mature consideration, held that the property owner might maintain an action against the water company for the destruction of his property by reason of its failure to maintain a water supply pursuant to its contract with the city. This decision is rested by the court on the ground that such a contract is made by the city as the corporate representative of its citizens, and for their benefit; and that they may, therefore, maintain an action under the rule allowing one to maintain an action on a contract made with a third person for his benefit. This decision was followed in Duncan v. Water Co. (Ky.) 12 S. W. 557, and in Duncan's Ex'rs v. Water Co. (Ky.) 15 S. W. 523. The learned counsel for appellant earnestly insists that these cases should be overruled, as contrary to the weight of authority and unsound in principle. We are referred to a large number of cases in other states holding otherwise, but upon a careful reconsideration of the subject we adhere to the rule heretofore laid down. This rule has since been followed in a well-considered opin-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

lon in *Gorrell v. Supply Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598. The court, after referring to the numerical weight of authority against the rule announced by this court, said that authorities are to be weighed, not counted, and that line should be adopted which is most consonant with justice and the reason of the thing. It then added: "Did the people of Greensboro have just cause to believe that by virtue of that contract they, as well as the corporation, were guaranteed a sufficient quantity of water to protect their property from fire, and did the water company understand it was agreeing for the valuable considerations named to furnish a sufficient quantity of water to protect private as well as public property from fire? The intent is to be drawn from the instrument itself, and on its face there can be no doubt it was contracted that the water supply should be sufficient to protect private as well as public property. If so, it follows that when, by a breach of that contract, private property is destroyed, the owner thereof, one of the beneficiaries contemplated by the contract, is the party in interest, and he and he alone can maintain an action for his loss." It is universally held that the city is not liable to the property owner for the loss of his property. It is equally clear that the city cannot sue the water company and recover damages for the loss of private property. The result is that, if the owner cannot himself sue for the loss of his property, he is without redress, although his property has been destroyed by the breach of a contract made for his benefit by the city. We are not prepared to so hold. The cases above referred to were decided by this court in the year 1889, or two years before the contract now before us was made. The rule thus three times announced by this court was recognized as the law of the state at the time the contract before us was made, and we must presume that the parties to the contract contracted with reference to the law as it had then been declared by this court. To give a different effect now to the words which they used from that which they at the time understood was the legal operation of the contract would be to make for them a contract different from that which they themselves made; for when they used words which, under the law as it had then been declared, created a certain obligation, it must be presumed that they intended to create this obligation.

The other objection to the petition may be more briefly disposed of. The franchise was granted to appellant by ordinance, and it signed no memorial of the contract. Since the contract was to run for twenty-five years, it is insisted that, as the contract was not to be performed in one year, it is within the statute of frauds, and appellant is not liable in this action. Appellant was granted a valuable franchise by the city. The grant was regularly made. The franchise was ac-

cepted by appellant, and has been enjoyed by it over 10 years. During this time it has received from the city annually the prescribed compensation for supplying the hydrants with water. After accepting the grant, and while in possession of the franchise and enjoying the compensation attached to it, appellant cannot be heard to say that it is not liable in damages for its negligent failure to furnish a supply of water. The city carried out its part of the contract by making the grant. Appellant, after accepting and enjoying the grant, and while in possession and still holding on to it, cannot escape the burdens it imposed, at least as to past transactions. *Roberts v. Tennell*, 3 T. B. Mon. 247; *Dant v. Head*, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369. It constructed its works, laid its mains in the streets, and exercised its powers under the ordinance. Whatever its rights as to the future may be, it holds the franchise, so long as it enjoys it, under the ordinance, and subject to the terms on which it was granted.

Judgment affirmed.

BARNETT v. HART, County Judge.¹

(Court of Appeals of Kentucky. Feb. 18, 1902.)

OFFICE AND OFFICERS—FAILURE OF JUSTICE OF THE PEACE TO EXECUTE BOND IN TIME—MANDAMUS TO COMPEL ACCEPTANCE OF BOND.

Under Ky. St. § 3755, providing that, "if the official bond is not given, and the oath of office taken, on or before the day on which the term of office to which a person has been elected begins," the office shall be considered vacant, mandamus does not lie to compel the county judge to accept the bond of a justice of the peace, not tendered until after the first Monday in January succeeding his election, that being the day when his term of office began.

Appeal from circuit court, Henderson county.

"To be officially reported."

Action by W. A. Barnett against J. H. Hart, county judge, for a mandamus. Judgment for defendant, and plaintiff appeals. Affirmed.

Yeaman & Yeaman, for appellant. J. H. Hart, pro se.

GUFFY, C. J. It is substantially alleged in the petition: That the defendant, now appellee, was the duly elected and acting presiding judge of the Henderson county court. That at the general election in November, 1901, the plaintiff (now appellant), Barnett, was duly elected to the office of magistrate of the Third magisterial district of said county, and was duly commissioned by the governor of the state (said commission was filed therewith). That on Tuesday, the 7th day of January, 1902, he tendered to the defendant, Hart, as said county judge,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

in open court, his commission as such magistrate, and offered to take the oath required by law, and requested said oath to be administered to him, and tendered to the said county judge his bond as such magistrate, as required by law, in due form, with W. T. Benton as surety. That said bond was sufficient and ample, and in all respects conformed with the requirements of said statute in such case made and provided. That on Monday, the 6th of January, 1902, being the first Monday in January, he was sick in bed, and unable to leave his bed, which fact he, on the 7th of January, made known to the defendant. Nevertheless said defendant failed and refused, and has since failed and refused, and now fails and refuses, to recognize the plaintiff's said commission, or to accept said bond, or to administer said oath, or permit said plaintiff to qualify as such magistrate. Wherefore the plaintiff prays for judgment of this court requiring the defendant to recognize said commission, to accept said bond, to administer the oath of office to the plaintiff and permit him to qualify as such magistrate, for his costs, and proper relief. The commission referred to is dated the 18th day of November, 1901. The appellee entered his appearance to the action, and filed a demurrer to said petition, which demurrer was sustained by the court, and, plaintiff declining to amend, the petition was dismissed absolutely, and judgment for costs rendered in favor of the defendant; to all of which the plaintiff excepted, objected, and prayed an appeal to the court of appeals, which was granted. The chief grounds of the demurrer are because said petition shows that plaintiff did not execute his official bond and take the oath of office on or before the first Monday in January, 1902, the date on which the term of office of said magistrate began.

The question for decision is whether or not it was the duty of the county judge to permit the appellant to execute bond and take the oath of office at the time that he (plaintiff) applied to the county judge so to do. It is provided by section 99 of the present constitution that a justice of the peace shall be elected in each justice's district, who shall enter upon the discharge of the duties of his office on the first Monday of January next after his election. Section 1084, Ky. St., provides that each justice shall be a conservator of the peace, and before he enters upon the discharge of the duties of his office shall take an oath to faithfully discharge the duties thereof, and shall execute a bond, with sureties, to be approved by the county judge, to the effect that he will faithfully discharge all the duties of his office. The bond shall be filed and recorded in the county clerk's office, and an entry made upon the order book of the county court showing that the bond was executed and approved, and giving the names of the sureties therein. Section 3755, Ky. St., reads

thus: "If the official bond is not given, and the oath of office taken, on or before the day on which the term of office to which a person has been elected begins, or in cases of persons appointed to office within thirty days after such person has received notice of his appointment, the office shall be considered vacant, and he shall not be re-eligible thereto for two years." It is the contention of appellant that the court had no right, under the facts of this case, to determine that the appellant was not entitled to the office, and that the legislature did not intend that so harsh a construction should be put upon the statute, and we are referred to *Patterson v. Miller*, 2 Metc. 408, and *Schuff v. Pfanz*, 99 Ky. 97, 35 S. W. 132, in support of his contention. The first-named case seems only to have held that the county court had no power to inquire into the eligibility of a person holding a certificate of election and applying to be qualified. We fail, however, to see that the case *supra* at all affects the question involved in the case at bar, nor do we think that the later case in 99 Ky., 35 S. W., is in conflict with the decision of the circuit court in this case. In the case *supra* *Pfanz* had executed for the year 1895 the several bonds required by law, but he had not executed an additional bond, as the law required, in the county court, at the time required by law. It is true that the statute (section 4180) provides that the sheriff shall, on or before the first Monday in January next succeeding his election, and on or before the said day annually thereafter, enter into bond, with surety, for the faithful performance of his duty. Section 4181 provides that on failure of the sheriff to give bond and qualify as hereinbefore provided he shall forfeit his office, and the county court may appoint a sheriff to fill the vacancy until a sheriff is elected, or it may appoint a collector for the county of all moneys due the said county, etc. The court, in substance, held that, inasmuch as *Pfanz* had qualified under his election by executing all the bonds required to be executed prior to 1896, the county court had a right to permit him to execute the additional bond after the first Monday in January, 1896. It will thus be seen that a very different question was under consideration in the case *supra* from that involved in the case at bar. It was held in *Bartly v. Fraine*, 4 Bush, 875, that the county court had the constitutional power to remove the sheriff from office for failing to give new bonds, but the question of removal from office is not necessarily the question involved on this appeal. The suit brought by appellant is essentially a suit to obtain a mandamus against the county judge to compel him to permit plaintiff to execute the bond required by law. The case of *Lowe v. Phelps*, 14 Bush, 642, was an action to compel the county judge to permit the sheriff to execute his bond after the date which he was by law required to execute it. This

court, in discussing the question, said, in substance, that, if the sheriff failed to give bond on or before the first Monday in January next succeeding his election, as prescribed by the statute, there is no law making it the duty of the county judge to accept his bond after that date, and therefore a mandamus would not lie against the county judge to compel him to accept a bond tendered after that day. In *Com. v. Yarbrough*, 84 Ky. 496, 2 S. W. 68, it was held that a sheriff's bond executed after the first Monday in January was void at least as to the sureties therein. It will thus be seen that the county judge in this case had no power to administer the oath, or accept the bond tendered or offered by the appellant, and it would seem from the opinion hereinbefore referred to in 84 Ky., 2 S. W., that, if the defendant had accepted the bond, the same would have been void, and of no effect. We have nothing to do with the harshness of the law, if, indeed, it was harsh, which cannot be fairly said, as we think, for the appellant had from the time he received his commission until and during the first Monday in January to comply with the statute, and, there being no provision authorizing the county judge to take the bond at a later date, it seems to us that the judge could not lawfully or properly accept or approve the bond after the first Monday in January. Judgment affirmed.

KENTUCKY UNION CO. et al. v. CORNETT
et al.¹

(Court of Appeals of Kentucky. Feb. 11, 1902.)

VOID LAND PATENT—DISCLAIMER OF TITLE TO LAND—JUDGMENT OPERATING BY WAY OF ESTOPPEL AS AGAINST STRANGERS TO ACTION—EXTENT OF POSSESSION—EFFECT OF CREATING NEW COUNTY.

1. Patents embracing land not vacant were void.
2. In an action by the grantees in a deed against the grantor to quiet title to land claimed by plaintiff as embraced in the deed, in which defendant denied that he claimed the land, and admitted that he had conveyed it to plaintiff, a judgment quieting plaintiff's title creates an estoppel running with the land, operating to vest in plaintiff all of defendant's title, without regard to the construction of the deed, even as against persons not parties to that action, unless they claim under a deed executed by defendant prior to the institution of the action.

3. A patentee who actually settled on the land embraced in his patent was in possession to the extent of his boundary, and the subsequent creation of a new county including a part of the land did not interrupt this possession.

Appeal from circuit court, Perry county.
"To be officially reported."

Action by the Kentucky Union Company and others against Arch Cornett and others for an injunction. Judgment for defend-

ants, and the Kentucky Union Company and C. J. Little appeal. Reversed.

W. B. Dixon, Marcum & Pollard, and Jas. H. Hazelrigg, for appellants. J. J. O. Bach, for appellees.

HOBSON, J. On February 5, 1848, a patent was issued by the state to Isham Stamper for a tract of land containing 12,000 acres by survey, bearing date July 24, 1846, lying in Perry county. Stamper settled on his patent, and while he was so living on it the county of Letcher was formed, which embraced a part of his patent boundary. After this, on May 3, 1882, Stamper, while so holding the land, gave an option for "all that portion of the 12,000.00 described in the patent from the commonwealth of Kentucky to Isham or Isam Stamper issued on the 5th day of February, 1848, and recorded in Book 22, page 185, of the records of the Kentucky land office, as lies in the county of Perry, supposed to contain 10,000 acres; that portion of the 12,000 lying in Letcher, supposed to be 2,000, being reserved." Pursuant to this option, Stamper, on June 1, 1882, conveyed by deed to Thomas G. Stewart, appellant's vendor, "all that part of the Isham Stamper 12,000-acre patent lying in the county of Perry and state of Kentucky, described as follows." Here follows a boundary by courses and distances, and then these words: "The patent referred to having been issued February 5, 1848, and recorded on page 185 of Book number 22, in the office of the register of the land office at Frankfort, Kentucky,—together with the appurtenances to the same belonging." Before the deed was made, they had the land surveyed by a local surveyor for the purpose of ascertaining definitely the quantity of land embraced by the patent which lay in Perry county, and the boundary given in the deed is the survey thus made. Neither Stamper nor Stewart was present at the survey. They relied on the surveyor's assurance that it was correct. It turned out that he began his survey four miles from the beginning point of the patent, thus leaving out a large part of the patent land, and including in the survey a large body of land that was not included in the patent. It is insisted for appellant that the false part of the description in the deed may be rejected, and that the deed, on its face, is sufficient to cover that part of the patent which lies in Perry county, on the ground, as claimed, that, if we take the boundary given in the deed in connection with the patent and the other recitals of the deed, the deed must be construed to embrace this land. It is insisted for appellees that the deed only conveys a designated boundary, and that appellant had no title to any land outside of this boundary, the actual location of which is clearly shown by the proof. The contest in this case is as to the title to that part of the Stamper pat-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ent lying in Perry county which was not included in this survey. Appellees claim the land under patents issuing from the land office after Stamper's patent was issued. These patents were void, as the land was not then vacant. There is no dispute that the land in contest is embraced in the Stamper patent, and no dispute as to Stamper's title to it. The only question is whether appellant has been invested with Stamper's title. We do not find it necessary to decide upon the proper construction of the deed from Stamper to Stewart above referred to. After the appellant had obtained a deed from Stewart for the land, it filed a petition in equity, on October 5, 1896, in the Perry circuit court, in which it set up that it owned and was in actual possession of all the Stamper patent lying within Perry county; that Stamper was and had been asserting a claim to the land, giving it out in words and speeches that appellant did not own the land; that he had thus cast a cloud upon plaintiff's title, impairing its full, free, and quiet enjoyment of the land, and the salable value thereof. Judgment was prayed forever quieting its title, perpetually enjoining Stamper from claiming any part of the land, and ordering him to release his claim to the plaintiff. To this petition Stamper filed an answer denying that he had set up any claim to the land, or done any of the acts alleged in the petition. Then, after setting out the issuance of the patent, and averring that it was the same referred to in the petition, he alleged "that on the 7th day of June, 1882, he, by deed properly executed, signed, and delivered to one Thomas G. Stewart, conveyed to said Stewart all his rights, title, and interest in and to all that part of said 12,000 acres survey then lying in the county of Perry and state of Kentucky. And he now says that since said 7th day of June, 1882, he has not asserted any claim or title to, nor does he now assert any claim or title to, said land embraced in the said 12,000-acre patent, lying in Perry county, Kentucky, or any part thereof. Wherefore, the premises considered, defendant prays to be hence dismissed," etc. On this answer the court on December 20, 1897, entered a judgment as prayed in the petition, forever barring Stamper from claiming title to the land. This judgment is in full force, and it is conceded to bind Stamper; but it is said that a judgment binds only parties and privies, and that it does not bind appellees, who were not parties to the action. The rule that a judgment binds only parties and privies is, of course, conceded; but the question is, does it apply to the facts of this case? Appellees do not claim under Stamper. If they had deeds from Stamper, made before the institution of the suit in question, then the principle invoked would apply. But there is no question here but that Stamper was invested with the title to the land by the patent from the commonwealth. That title either remains in him,

or has passed from him to appellant by virtue of the deeds above referred to, and the judgment in the action to quiet title. What was the effect of the deed Stamper had made, was a question proper to be determined in that case. When he declined to make that question, the judgment operated not only upon him personally, but upon the title, and vested in appellant all the title to the land that Stamper had. It was equivalent to a judgment by confession that Stamper had conveyed all the land to Stewart, and was of the same dignity as an amended deed made by Stamper as of that date, either personally or by order of court. Thus, in *Prescott v. Hutchinson*, 13 Mass. 440, the court said: "At common law such a disclaimer was never considered as a bar to the action. So far from showing that the demandant had no right to the demanded premises, it was an acknowledgment of his title. It operated in some respects as a release by the tenant. If two tenants were jointly sued, a disclaimer by one of them generally vested the whole in the other co-tenant. So, if only one was sued, and disclaimed, whatever estate he had was, in effect, passed to and vested in the demandant. He might immediately enter, and would become seised according to the title set forth in his writ, and the tenant would be afterwards estopped from disputing that title. A disclaimer, instead of being a plea to the action, resembles so far a release or conveyance of the land that in general no person could disclaim who was incapable of conveying the land." That the title to the land may be vested by estoppel, and that this estoppel runs with the land, has been recognized by this court. In *Perkins v. Coleman*, 90 Ky. 611, 14 S. W. 640, this court said: "It is true that where the estoppel merely affects the conscience of the parties, and not the title, it does not operate on strangers to the transaction; but, when it works an interest in the land conveyed, it runs with it, and is a title." See, also, to the same effect, *Bigelow*, Estop. p. 290; 11 Am. & Eng. Enc. Law, 391; *Dodge v. Richardson*, 70 Tex. 200, 8 S. W. 30; 2 Herm. Estop. § 672. The judgment in the disclaimer suit therefore created an estoppel running with the land, operating to vest in appellant all the title of Stamper to the land in controversy; and whatever may have been the proper construction of the deed made by him, without that judgment, it must now be held to pass to appellant, by way of estoppel, the entire title of Stamper to the land. Stamper, having taken possession and actually settled on his patent, was in possession to the extent of his boundary. The subsequent creation of the county of Letcher did not interrupt this possession. *Simon v. Gouge*, 12 B. Mon. 158.

The evidence is insufficient to show an adverse possession of any of the land by appellees, or those under whom they claim, for the statutory period. Appellants are enti-

tled to judgment for the relief sought, and, on the return of the case, the amount or value of the timber cut will be fixed by the trial court. It seems to us the reasonable construction of the record is that the trees in controversy were not cut from any of the exclusions within the Stamper patent. That patent makes no exclusions, but some exclusions are made in the boundary covered by the judgment in the disclaimer suit. Appellants will also be granted a permanent injunction as prayed in the petition.

Judgment reversed, and cause remanded for a judgment as herein indicated.

SOUTHERN CONTRACT CO.'S ASSIGNEE v. NEWHOUSE et al.¹

(Court of Appeals of Kentucky. Feb. 20, 1902.)

LIMITATION OF ACTIONS—TOLLING STATUTE—SUFFICIENCY OF PETITION AND SUMMONS—DEATH OF DEBTOR—ABSENCE FROM STATE—DEBT OF TESTATOR—DEVISEE'S LIABILITY.

1. In an action by the assignee of an insolvent corporation against stockholders to recover a dividend paid under mistake, in which "A., Exec. R.," was named in the caption as one of the defendants, and in the body of the petition R. was named as a stockholder having 20 shares of stock at the time the dividend was declared and paid, the filing of the petition and issuing of summons thereon against "A., Exec. R.," were sufficient to stop the running of the statute of limitations in favor of the estate of R., though the petition was not sufficient to authorize a judgment against the estate.

2. Ky. St. § 2528, part of article 4 c. 80, providing that, if any person against whom any action mentioned in the third article of that chapter may be brought dies before the expiration of the time limited for the commencement thereof, it may be commenced against his personal representative, devisee, heir, or all, after the expiration of that time, and within one year after the qualification of his personal representative, was designed to provide against the contingency of one's claim being barred when for some part of the statutory period there was no person in existence whom he had the legal right to sue; and therefore where a debtor against whom a cause of action named in article 3 had accrued died before the expiration of the statutory period of five years, and no administrator was appointed for one month after his death, and no action could, under the statute, be brought against the administrator for six months after his appointment, the period of limitation was extended seven months beyond the five years.

3. Under the express provisions of Ky. St. § 2532, where a debtor against whom any cause of action mentioned in chapter 80, art. 3, has accrued, obstructs the bringing of an action by absenting himself from the state, the period of his absence is not to be computed as a part of the period of limitation.

4. To an action by the assignee of an insolvent corporation against a stockholder to recover money prematurely distributed by the corporation as dividends, the bar of five years, as provided by Ky. St. c. 80, art. 3, applies; and therefore, as an action against a devisee of the stockholder to subject the estate devised to the payment of such liability must be brought on the original liability, the action is one named in article 3, and the provision of section

2532 that the period of the defendant's absence from the state shall not be computed as a part of the period of limitation applies.

5. Ky. St. § 2530, providing that "no action upon a cause of action which accrued against a deceased person in his life-time shall, when his estate has been distributed, be brought against his heirs or devisees, jointly with his personal representative, after the expiration of seven years from his death," applies only where there has been a distribution and division of the estate by virtue of a settlement had with the personal representative under the auspices of some court having jurisdiction thereof.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by W. T. Grant, assignee of the Southern Contract Company, against Alice S. Newhouse and others, to recover money paid under mistake. Judgment for defendants, and plaintiff appeals. Reversed.

Geo. Weissinger Smith and Henry L. Stone, for appellant. Fairleigh, Straus & Eagles, for appellees.

O'REAR, J. The Southern Contract Company, a corporation, declared a dividend on May 1, 1889, on its capital stock, payable in mortgage bonds of the Louisville Southern Railroad Company, which bonds were then owned by the contract company. This dividend was paid by the contract company to its stockholders. Afterwards certain debts developed against the contract company, which had their origin anterior to the date of the declaration of the dividend; and the contract company, being unable to pay them, made a general assignment for the benefit of its creditors in October, 1893, to W. T. Grant, assignee. On the 5th of October, 1893, W. T. Grant, assignee, filed a petition in the Jefferson circuit court against the Southern Contract Company and numerous other parties, stockholders of the contract company, seeking to recover from the stockholders severally the amount of the dividend paid to them, respectively, on the ground that the declaration of the dividend was unauthorized, because, as alleged, at the time it was made the contract company was insolvent, and the dividend was not declared or paid out of the profits, and that the contract company had not made any profits. On October 6, 1895, the plaintiff below (Grant, assignee) filed an amended petition, stating that at the time of the declaration and payment of the dividend the contract company believed that it had sufficient assets, after the payment of the dividend, to pay all of its debts, which was a mistake of fact, and that it believed it had the right to declare and pay the dividend, which was a mistake of law, and, further, that the stockholders of the contract company received the dividend under the like mistakes. Issues were joined, and the case was tried in the circuit court, and the petition dismissed. Upon appeal to this court the judgment was reversed. Grant v. Ross, 37 S. W. 263. Upon the return of the

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case to the circuit court, additional questions were made, and on the final hearing the petition was again dismissed, and an appeal was again taken to this court, and the judgment was again reversed. *Grant v. Contract Co.*, 47 S. W. 1091. The case was again returned to the circuit court in 1890, and nothing was left to be done, under the opinion of this court, but to enter several judgments against the respective stockholders for the amount of the dividend shown to have been paid to each of them, respectively. Judgments were accordingly rendered against most of the defendants named as such in the original petition.

In the caption of the original petition, among the numerous names of defendants, this is found: "Alice Newhouse, Exec. R. A. Newhouse." In the body of the original petition is this averment: "The plaintiff says that, at the time the said dividend was declared and paid, the following defendants were the owners and holders of the number of shares of such stock following their respective names, to wit." Here follows a page and a half of names of stockholders, with the number of shares held by each set out opposite their respective names. Among these names in the body of the petition is the following: "R. A. Newhouse, 20." Upon this petition a summons was issued against all the defendants named in the caption, including "Alice Newhouse, Exc. R. A. Newhouse." The summons was not served. Mrs. Newhouse became a nonresident after the filing of the original petition. The first question for decision is, was the filing of the action as above stated a "commencement" of an action against appellee as executrix of R. A. Newhouse, so as to suspend the running of the statute of limitations? Section 2524, Ky. St. is: "An action shall be deemed to have been commenced at the date of the first summons or process issued in good faith from the court or tribunal having jurisdiction of the cause of action." Errors in stating or failing to state matters material to the plaintiff's cause, including misnomer of parties plaintiff or defendant, have been regarded as not affecting the fact of the commencement of action, if it be begun in good faith. If it may reasonably be learned from the petition and exhibits filed that the plaintiff has attempted to set out a cause of action against the persons named, or attempted or intended to be sued, when summons has been issued in good faith on that petition, the running of the statute as to that cause is suspended. Otherwise the very purpose and real efficacy of the Code (Civ. Code Prac. § 134), permitting and requiring amendments of pleadings and proceedings so as to do substantial justice to the litigants in any cause, is nullified. *Insurance Co. v. Bland* (Ky.) 40 S. W. 670; *Railroad Co. v. Bowen* (Ky.) 39 S. W. 31; *Turner v. Mitchell* (Ky.) 61 S. W. 468; *Jones v. Scott*, 5 Ky. Law Rep. 858; *Bland v. Kittinger*

(Ky.) 9 S. W. 301. We are of the opinion and hold that the filing of the petition and issuing summons thereon against "Alice Newhouse, Exec. R. A. Newhouse," begun this action against the estate, so as to suspend the running of the statute of limitations, although the petition was so defective in its averments setting out the nature of the complaint that any judgment rendered on it alone against this estate would have been erroneous.

On June 20, 1899, the assignee filed in this action the amended petition, setting out sufficiently the cause of action against the personal representative of R. A. Newhouse, as well as against Alice S. Newhouse individually. Her individual liability in this case is because that she took under the will of R. A. Newhouse, the deceased stockholder, property of greater value than his liability to plaintiff, and that she had sold it and received the pay, which was in excess of plaintiff's claim. She entered her appearance to the action, her property having been attached on the ground of her nonresidence. This was in January, 1900. She pleaded the various statutes of limitation. The original cause of action accrued against R. A. Newhouse May 1, 1889. He died in October, 1891. His personal representative qualified in November, 1891. By section 2528, Ky. St., it is provided that, if a person against whom any action mentioned in the third article of that chapter may be brought dies before the expiration of the time limited for the commencement thereof, it may be commenced against his personal representative, devisee, heir, or all, after the expiration of that time, and within one year after the qualification of his personal representative; or, if no personal representative, then the action may be brought against his devisee or heir, or both, after the expiration of the time limited, and within two years after the debtor's death. It was the evident purpose of the legislature to provide against the contingency of one's claim becoming barred by limitation when for some part of the statutory period there was no person in existence whom he had the legal right to sue. Generally, six months must intervene between the date of qualification of the administrator or executor and the commencement of a suit against the estate to recover a debt owing by the decedent. So, if four years and six months had passed at the time of the debtor's death since the right to sue had accrued, and the law forbade a suit against his personal representative during the first six months after his qualification, it must be manifest that the creditor would lose six months of the five years allotted to him by statute if he were not relieved by the section just quoted. To guard against such contingencies, that section was adopted. We conclude that the time within which plaintiff could have sued appellee on her individual liability, under the section, was extended be-

yond the usual limit of five years, by seven months; one month being allowed during which there was no administrator or executor, and six months when suit could not have been filed against the personal representative. This would extend the time till about December 1, 1894. Mrs. Newhouse became a nonresident of this state "some time between June, 1894, and September, 1894," to use the language of the witness. Did the devisee's change of residence and subsequent continued absence from the state suspend the running of the statute against her? If it did, the question of limitation is eliminated. Section 2532, Ky. St. reads: "When a cause of action mentioned in the third article of this chapter accrues against a resident of this state, and he, by departing therefrom or by absconding or concealing himself, or by any other indirect means obstructs the prosecution of the action, the time of the continuance of such absence from the state, or obstruction, shall not be computed as any part of the period within which the action may be commenced. But this saving shall not prevent the limitation from operating in favor of any other person not so acting, whether he is a necessary party to the action or not." Under this statute, and similar ones, it has been repeatedly held by this court that a debtor's absenting himself from the state was such an "obstruction" of the statute as suspended its operation. *Ormsby v. Letcher*, 3 Bibb, 269; *Nunez v. Taylor*, 91 Ky. 461, 16 S. W. 128; *Ridgeley v. Price*, 16 B. Mon. 409; *Poston v. Smith's Ex'rs*, 8 Bush, 589.

The next question is, is the liability sued on embraced in the third article of the chapter of limitations? It is argued for appellee that section 2528, which is in the fourth article of that chapter, creates the liability of the devisee. We think not, for by section 2084 it is stated: "A devisee shall be liable for all debts and liabilities of the testator in the same manner as the heir of the testator would have been liable if the property devised had descended to the heir." Section 2089 provides for subjecting the property descended or devised, so long as it may be in possession of the heir or devisee in specie. These provisions do not make the ancestor's debt the heir's. They merely impose on the property descended or devised the ancestor's liabilities. These liabilities remain the ancestor's or testator's. Their character is not changed by the death of the obligor. Actions to subject the estate descended must be brought on the original liability. *Hopkins v. Stout*, 6 Bush, 375; *Craig v. Garnett's Adm'r*, 9 Bush, 97; *Willis' Adm'r v. Roberts' Adm'r*, 90 Ky. 122, 13 S. W. 250. The liability of the heir or devisee, so called, as fixed by statute, is not the creation of a new debt or obligation, but the creation of an additional remedy for the collection of an old liability. It is not "a liability created by statute," in the language of section 2515,

art. 3, of the statute. *Trustees v. Fleming*, 10 Bush, 239. The very words of section 2528 indicate that the liability is deemed to remain that of the testator or decedent. For it is to be noted that it says, "If any person against whom an action mentioned * * * dies before the expiration of the time limited for the commencement thereof, and the cause of action survives," an action may be commenced against his representatives, real and personal, in order, of course, that his estate—that taken by his personal representative and that devised to his devisee or inherited by his heir—may be subjected to the payment of the ancestor or testator's debt. We therefore hold that the liability in this case, to which the statute applies, is that of the original debtor, R. A. Newhouse, to his corporation, appellant company, and that it is an implied contract to pay back to it the money prematurely distributed by it in dividends May 1, 1889; that the statutory bar of five years, as provided in article 3 of the statute of limitations, applies; that the devisee's liability grows out of, and depends on, the original liability of the testator; and that therefore section 2532, above quoted, as to obstruction of suit, is applicable. Another section of the statute is relied on by appellees, in argument, as fixing the limitation in this case, viz.: "Sec. 2530. No action upon a cause which accrued against a deceased person in his lifetime shall, when his estate has been distributed and divided, be brought against his heirs or devisees, jointly with his personal representative, after the expiration of seven years from his death." We are of opinion that this statute is applicable only to the state of case when there has been a distribution and division of the estate by virtue of a settlement had with the personal representative under the auspices of some court having jurisdiction thereof. Thereby creditors will have been given some constructive notice, at least, of the proposed distribution of the estate, and an opportunity to then present their demands against the estate for settlement. This section reduces longer periods of limitations in such case to the maximum of seven years from the debtor's death. There was no such settlement or "distribution" in this case.

The circuit court dismissed the assignee's petition. The judgment is reversed, and the cause remanded, with directions to enter a judgment in favor of appellant for the sum prayed for.

ANDERSON v. PENICK.¹

(Court of Appeals of Kentucky. Feb. 21, 1902.)

BILLS AND NOTES—LIABILITY OF ASSIGNOR—PLEADING.

The mere insolvency of the obligor in an assigned note is not sufficient to render the assignor liable to the assignee upon his implied

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

contract to refund the money, but the assignee, in order to recover, must allege facts showing that he has used due diligence to collect the note, and has failed, the allegation of a legal conclusion to that effect not being sufficient.

Appeal from circuit court, Green county.
"Not to be officially reported."

Action by W. W. Anderson against B. W. Penick on a contract of assignment. Judgment for defendant, and plaintiff appeals. Affirmed.

J. A. Skaggs and W. W. Foster, for appellant. B. W. Penick, for appellee.

BURNAM, J. The appellant, W. W. Anderson, was adjudged a lunatic November 27, 1898, and the appellee, B. W. Penick, was appointed his committee, and took charge of his estate. On the 18th of November, 1898, a judgment was entered by the Green circuit court upon a verdict of a jury that appellant had been restored to his proper senses, and the former verdict of lunacy was set aside, and his committee was directed to make a settlement of his accounts preparatory to an order to restore to appellant the estate in his hands as committee. On the next day—November 19th—Penick, as committee, made his report of settlement, which was confirmed on the 25th of November, and the committee was ordered to turn over to Anderson the money, notes, and evidence of debt in his hands as committee. Among the notes so directed to be turned over was one for \$350, dated July 27, 1897, due six months after date, payable to Penick, as committee for Anderson, and signed by Thomas C. Stackhouse. This note recited on its face that it was secured by a mortgage on a crop of corn, hemp, and Hungarian grass. Pursuant to this judgment, Penick transferred the note to appellant with this indorsement: "For value received I transfer this note to W. S. Anderson, as per order of court made in case of Commonwealth of Kentucky v. W. W. Anderson, under inquest for lunacy. No recourse on me. Nov., 1896. B. W. Penick, Committee for W. W. Anderson." On the 6th day of March, 1901, appellant instituted this suit against the appellee in the Green circuit court, seeking to recover a judgment against him for the amount of the note and interest thereon. The petition, after reciting the foregoing facts, alleges that shortly after the note was transferred to him by the defendant it was attached in a suit instituted against him by his wife, Ruth Anderson, for divorce and alimony, and was by a judgment of the court placed in the hands of the commissioner with instructions to collect it; that the commissioner, upon investigation, found that the property embraced in the mortgage was not in existence, and that the note was worthless, and returned it to appellant; that, after it was turned over to him by the commissioner, he had made all proper efforts, legal and otherwise, and used all diligence, to collect

it, and had failed to do so; that Stackhouse had been adjudged a bankrupt in the United States district court, and discharged from all liability thereon; that at the time the money was loaned Stackhouse was a citizen of Fayette county, and was then absolutely insolvent, and the personal property given to secure the payment of the note had no existence; and that the defendant could, by the exercise of proper diligence, have known this fact, and asked judgment. The defendant filed a general demurrer to the petition, which was sustained, with leave to plaintiff to amend. Plaintiff elected to stand by his petition, and his suit was dismissed, and we are asked upon this appeal to pass upon the sufficiency of his petition.

It is unnecessary for us to determine whether the acceptance by appellant of the note on Stackhouse, under the judgment of confirmation, after his disabilities had been removed, operated as a release of the appellee from all liability or responsibility with reference thereto, as, in our opinion, the allegations of the petition are insufficient. The fact that Stackhouse was insolvent at the time the money was loaned to him, and had so continued until his discharge in bankruptcy, did not of itself authorize a recovery against the appellant upon his implied obligation as assignor, even upon demurrer. "The liability of the assignor to an assignee depends upon the existence of other facts, that must be alleged and proven in connection with the insolvency of the debtor, before the assignor can be held responsible. The question of due diligence arises as well as the question of insolvency, and the burden is on the assignee to allege and prove both before he is entitled to recover. The one is a question of law; the other is a question of fact. What is due diligence must be determined by the court, and, unless it appears from appellee's petition that legal diligence has been exercised by the appellee to recover from a debtor, a demurrer should be sustained; and, if no demurrer is filed, a judgment by default will be denied. When the assignment is silent as to the obligation it imposes on either the assignor or the assignee, the law implies an agreement on the part of the assignor to become liable to the assignee, if, after due diligence by suit against the obligor on the instrument assigned, he fails to make the debt by reason of the obligor's insolvency. The assignee accepts the note with the assignment on that condition, and must exercise proper diligence by action to recover money before the law will imply an agreement on the part of the assignor to refund what he has received. The insolvency of the debtor is not a breach of the implied obligation on the part of the assignor to refund the money, unless the assignee has complied with his implied undertaking by prosecuting the debtor without unreasonable delay, and obtaining a return of 'No property.' The latter rule affords ordi-

narily an exclusive guide in determining when the cause of action accrues to the assignee as well as the insolvency of the payee." See *Francis v. Gant*, 80 Ky. 193, *Clair v. Barr*, 2 A. K. Marsh. 255, 12 Am. Dec. 391, and *Johnson v. Lewis*, 31 Ky. 182. The averment of the petition that appellant had made all proper efforts, legal and otherwise, and used all diligence, to collect the note, and had failed, is a mere statement of a legal conclusion, and is not sufficient to support a cause of action. As the right of recovery in this case depended on the diligence exercised in coercing payment, and no diligence has been alleged, the trial court properly sustained a demurrer to the petition.

Judgment affirmed.

MARSHALL v. BARBER ASPHALT PAVING CO.¹

(Court of Appeals of Kentucky. Feb. 20, 1902.)

MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—COST OF CURBING.

Under Ky. St. § 2835, in the original construction of a street the cost of curbing is required to be apportioned to the front feet, though there was no sufficient space abutting on the street belonging to the city to permit the construction of a sidewalk.

"Not to be officially reported."

Opinion extended. For former reports, see 52 S. W. 1117, and 66 S. W. 182.

DU RELLE, J. The second paragraph of appellant's answer, to which a demurrer was sustained, presents the question that no sidewalk had ever been constructed, and that there was no sufficient space abutting on the street belonging to the city to permit the construction of a sidewalk; that the curbing was therefore a part of the street, and should be apportioned to the number of square feet owned by the lot owners in the fourth of a square contiguous to the improvement, and not according to the front feet abutting upon the improvement. The response to petition for rehearing in *City of Louisville v. Tyler* (Ky.) 65 S. W. 125, is relied on in support of this contention. In the *Tyler* Case the question was whether the city or the property holder should pay for the work,—whether it was reconstruction or original construction. No question was there presented, except incidentally, as to the mode of assessment. The curbing was held to be a part of the reconstructed roadway in that case, chargeable to the city as reconstruction, and therefore no apportionment was necessary. In the case at bar the improvement, both roadway and curbing, was original construction, and chargeable to the property holder. Under section 2835, Ky. St., the cost of making sidewalks, including curbing, is required to be appor-

tioned to the front feet as owned by the parties, respectively. Under just such a statute, in *Joyes v. Shadburn* (Ky.) 13 S. W. 361,—a case of original construction,—it was distinctly held that the cost of curbing should be apportioned to the front feet; and property in the quarter square contiguous to the improvement, but which did not abut thereon, was exempted from the cost of the curbing. The rule there laid down has been adhered to so continuously that we do not feel authorized to depart from it in a case of original construction, or to lay down a new rule of apportionment where the entire cost of the work—both roadway and curbing—is to be assessed against the property holder. The *Tyler* Case applies only to cases of reconstruction, where the curbing is constructed as a part of the roadway.

The extension of opinion heretofore filed is withdrawn, and the judgment affirmed.

HENRY VOGT MACH. CO. v. PENNSYLVANIA IRON WORKS CO.¹

(Court of Appeals of Kentucky. Feb. 19, 1902.)

JUDGMENT—COURTS OF CONTINUOUS SESSION—POWER OVER JUDGMENT—SIXTY-DAY LIMIT—COMPUTATION OF TIME—PROCEEDING TO VACATE JUDGMENT—NEW TRIAL—DISCRETION.

1. Under Ky. St. § 968, providing that a court of continuous session "shall have control over its judgments for sixty days as circuit courts have over their judgments during the term in which they are rendered," the day on which the judgment is rendered must be counted as one of the sixty days, and therefore, where a judgment was rendered December 5th, the court, when a motion was made on February 3d to set aside the judgment, had lost power to do so, except under Civ. Code Prac. §§ 518, 520, regulating proceedings for that purpose after the term has expired.

2. Under Civ. Code Prac. §§ 518, 520, proceedings to vacate or modify a judgment after the term has expired by granting a new trial for unavoidable casualty or misfortune preventing the applicant from appearing or defending should be by an independent action, but where a petition for that purpose was filed by defendant in the action in which the judgment was rendered, and the appearance of plaintiff corporation was entered, its substantial rights were not prejudiced by the irregularity.

3. An application for a new trial on the ground of surprise is peculiarly addressed to the discretion of the trial court, and that discretion will not be disturbed unless palpably abused, especially where the new trial has been granted, as the court is more inclined to sustain a judgment granting than one refusing a new trial.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by the Henry Vogt Machine Company against the Pennsylvania Iron Works Company for libel. Judgment granting defendant a new trial, and plaintiff appeals. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Gibson, Marshall & Gibson and Zack Phelps, for appellant. Bennett H. Young and Fred Forcht, for appellee.

HOBSON, J. On November 6, 1897, appellant filed this suit against appellee to recover damages in the sum of \$20,000 for a libelous publication alleged to have been made by appellee concerning appellant. On the same day a summons was issued, which was returned by the sheriff as executed on appellee by delivering a copy "to William R. Wilson, manager of said company, he being the chief officer found in this county at this time." On December 11th appellee entered a special appearance, and moved to quash the return on the summons, and on this motion the affidavits of Howland Holt and William R. Wilson were filed. The motion was overruled on March 19th. On March 26th appellee entered a special appearance, and moved to quash the summons. The court overruled the motion. On April 2d appellant moved the court to enter a judgment taking the petition for confessed, no answer having been filed. This motion was sustained on April 23d, and the action was assigned to October 20th for a jury to be impaneled to fix the damages. The trial was not had until the 5th of December, when a verdict was returned for \$20,000, on which judgment was entered. On February 3d appellee appeared by counsel, and moved the court to set aside the verdict and judgment, and to allow it to enter its appearance and file answer to the petition. By the answer which it tendered with this motion it denied the publication of the libelous matter complained of, and alleged substantially that it was published without its knowledge or consent. It also filed affidavits in support of the motion to the effect that William R. Wilson, on whom the process had been served, was not its agent, and that he had written it that he would attend to the action, and protect its interest, and that for this reason it had not filed answer before. On April 4th, it filed its petition as an amendment to the motion made on February 3d to vacate the judgment. In the petition it was alleged that the verdict and judgment were obtained without appellee being present in person or by authority, and that the petitioner was prevented by misfortune from appearing at the trial; that it had no knowledge that the trial was to be had; and that it was surprised and taken unawares by the trial. Appellant objected and excepted to the filing of the petition, and then traversed its allegations. The court, on hearing, set aside the judgment, and granted a new trial on condition that appellee pay the cost of the former trial, and from the judgment the appeal before us is prosecuted.

Section 988, Ky. St., regulating courts of continuous sessions, like the Jefferson circuit court, provides: "The court shall have control over its judgments for sixty days, as

circuit courts have over their judgments during the term in which they are rendered." As the law takes no notice of a fraction of a day, and the court has control of its judgment on the day it is rendered, and may set it aside or modify it on that day, the day on which the judgment is rendered must be counted as one of the sixty days. The judgment in controversy was rendered on December 5th. If we count that day, we have 27 days in December, 31 in January, and 2 in February; making 60 days which expired before the motion was entered on February 3d. *Chiles v. Smith's Heirs*, 13 B. Mon. 462; *Batman v. Megowan*, 1 Metc. 544; *White v. Crutcher*, 1 Bush, 472. The court had, therefore, lost control over the judgment, and was without power to modify it or set it aside, except under sections 518 and 520 of the Civil Code of Practice, regulating proceedings for this purpose after the term at which a judgment is rendered. By section 518 the court in which a judgment is rendered has power, after the term, to vacate or modify it by granting a new trial for unavoidable casualty or misfortune preventing the party from appearing or defending. By section 520 the proceedings to vacate or modify a judgment on this ground must be by petition, verified by affidavit setting forth the judgment, the grounds to vacate or modify it, and the defense to the action. On the petition the proceedings must be the same as those in the action in which the judgment was rendered. It is insisted for appellee that these provisions are inapplicable, because the proceedings here were not by an independent action, but were had in the suit in which the judgment was rendered. A petition was filed, to which appellee entered its appearance and filed answer. There was no necessity, then, for a summons to be issued on the petition. The case was tried on the merits, and the irregularity did not affect the substantial rights of appellant. In several cases heretofore this court has refused to reverse for this cause, although the proper practice is to make the application by an independent action, and the circuit courts should regularly so proceed. *Joseph v. Hotopp*, 7 Ky. Law Rep. 285; *Murray v. Murray*, 27 S. W. 977. On the merits of the case we have had grave doubt, but finally conclude, in view of the size of the verdict, what occurred at the trial, and the proof as to appellee being in fact misled, that we ought not to reverse the ruling of the learned circuit judge. An application for new trial on the ground of surprise is peculiarly addressed to the discretion of the trial court, and his decision will not be disturbed unless there is a palpable abuse of discretion. This court is more inclined to sustain a judgment granting than one refusing a new trial. *Ivers v. Avery*, 6 Ky. Law Rep. 220; *Ourtis v. Railway Co.*, 14 Ky. Law Rep. 272.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. LOWE.¹

(Court of Appeals of Kentucky. Feb. 10, 1902.)

MASTER AND SERVANT—RAILROADS—SIGNALS AND LOOKOUT—DUTY TOWARDS SERVANT IN YARDS—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS—EXCESSIVE VERDICT.

1. The servants in charge of an engine in a railroad yard owed to a car inspector the duty of giving signals of the approach of the engine and of keeping a lookout.

2. Whether the car inspector was guilty of contributory negligence was a question for the jury; and the question was also properly submitted to the jury whether, notwithstanding his negligence, those in charge of the engine, after they perceived his danger, or should have perceived it, by the exercise of ordinary care, might not have avoided the injury to him.

3. The car inspector and the men in charge of the engine were not fellow servants, and, being in different departments of work, the master was liable for an injury to the car inspector resulting from the ordinary negligence of the men in charge of the engine.

4. A verdict for \$13,000 for the loss of an arm by plaintiff, who was 34 years of age and earning \$1 a day, is excessive.

Du Relle, Burnam, and O'Rear, JJ., dissenting in part.

Appeal from circuit court, Washington county.

"To be officially reported."

Action by William S. Lowe against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

W. O. McChord, H. W. Bruce, W. D. Hines, B. D. Warfield, and Edward W. Hines, for appellant. J. W. S. Clements and L. H. Thurman, for appellee.

HOBSON, J. Appellee, Wm. S. Lowe, was in the service of the appellant, the Louisville & Nashville Railroad Company, as assistant inspector of trains at Lebanon Junction, which is a town of about 1,200 inhabitants, at the junction of the Knoxville branch with the main line of appellant's road. There is maintained at this place a railroad yard, containing an extensive system of side tracks, used in making up freight trains going out of the yards. The regular trains, too, pass over the main tracks, and are sometimes switched on the side track; so that cars are moving about the yard pretty much all the time. A switch engine is kept in the yard for the purpose of switching cars and making up trains. Large coal bins are maintained there by the appellant, at which all engines are supplied with coal. Perhaps as many as 150 engines, including the different passages of the switch engine, pass across the yard every day. The coal bins are north of the station, and in a curve of the track, so that an engine beyond a certain point cannot be seen south of the bins. Appellee had been the watchman in the shops for

about six weeks before he was made assistant car inspector. On the 12th of September, 1899, which was the first day that he served as car inspector, he went on duty at 6 p. m., and inspected a freight train then ready to go out southward on the Knoxville branch. The train was standing on a side track east of the main track, fronting south. He began at the engine on the west side of the train, and inspected the cars, going back from one to another until the inspection was finished, when the train pulled out. The tool house to which he was then to go was on the east side of the tracks, and south of the point where he then was. So he walked southward along by the side of the departing train, and when the side track merged in the track next west of it he got over on that track, and then on the main track. While he was walking southward on the main track, an engine and tender, backing down on that track, ran upon him in the rear, knocking him down, cutting off his right arm, and inflicting severe bruises, for which injuries he recovered damages in the sum of \$13,000. The evidence introduced by him on the trial tended to show these facts: The track was straight for some distance, and appellee, walking along with his back to the engine, could have been seen by the persons on it for some distance if a proper lookout had been kept. The tender had been loaded with coal at the coal bin. The coal was piled up higher than the engineer's head, so that his line of vision did not reach the track, but rose above the track the further it was prolonged, and he was therefore unable to see anything on the track in front of him. A passenger train from the south was just about due on the main track, and appellee supposed that no other train would be on that track, so he kept a lookout in front of him for it, but did not look behind him after he started south. When he turned and started south, he looked back, and, seeing nothing, supposed the way was clear. The engine by which he was hurt was then standing at the coal bin around the curve. After taking coal it came rather rapidly southward, in order to get off the main track before the arrival of the passenger train from the south. Appellee's proof tended to show that no signal was given of the movements of this engine, and that it was run substantially without any lookout in front of it. The proof is conflicting as to whether signals were given by the ringing of the bell and as to the speed of the train, but the evidence for appellee shows that the engine was running at something like 12 or 15 miles an hour. When it stopped after running over appellee, it was just even with the engine of the outgoing freight train by the side of which he had been walking, and had, therefore, run something like a quarter of a mile more than that engine after it started and appellee turned and began to walk south. When it stopped it had

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

only one minute to get in on the side track in time, according to appellant's proof. Appellee could not go directly to the tool house because the outgoing freight train was between him and it. He perhaps got on the main track thinking no other train, except the passenger train from the south, could properly be on that track at that time, and this would be in front of him. There is some evidence from which it is argued that the time had already expired when any other train, under the rules, might properly use the main track. The men in charge of the engine did not see appellee at all, and did not know that he was hurt until informed by others.

Appellant complains that the court refused to instruct the jury peremptorily to find for it. It also complains of the instructions given by the court. The court, in substance, instructed the jury that if they believed from the evidence that appellee at the time he received the injuries was upon appellant's track in the usual course of his employment, and that its agents in charge of the engine and tender that injured him negligently failed to ring the bell or give other signal of its approach, or negligently failed to stop it after they saw his peril, or after they might have seen it by the use of reasonable care, then they should find for the plaintiff, unless they believed from the evidence that he, by his own negligence, contributed to such an extent to the injury that, but for his negligence, it would not have happened, and that in this event he could not recover, unless appellant's agents in charge of the engine and tender knew, or could have known by ordinary attention, of the peril in which his negligence had placed him, and thereafter failed to observe reasonable care to avoid the injury which followed. It is earnestly maintained for appellant that the evidence shows no negligence on its part; that, as to appellee, it was not required to give notice of the movement of its trains or keep a lookout for him in moving them. In support of this view we are referred to a number of decisions in other jurisdictions; but, without discussing them, we conclude that the rule has been so often held otherwise in this state that it is no longer an open question. Appellant has at Lebanon Junction something like 200 employés. The place at which appellee was injured is used by them to a great extent in coming and going. The proof presents a case where the presence of persons on the track should reasonably be anticipated by those in charge of the train. The point was not far from the station, between it and the coal bins, and where a great many people passed back and forth, especially during the day. In *Shelby's Adm'r v. Railroad Co.*, 85 Ky. 224, 3 S. W. 157, the intestate was in the yard of the railroad at Junction City for the purpose of soliciting employment in watering stock, and was run over by a train backed without signal

or outlook. The place was not so much traveled as in the case before us, and the intestate was barely a licensee, and yet the court held the company liable. After showing that increased vigilance and precaution are required, the court said: "But it is obvious that neither the duty of giving the warning of the approach of the trains nor of resorting to the proper and necessary means to prevent collision with persons can be performed unless there be some one in a position to see ahead of the train and control it." In *Conley's Adm'r v. Railroad Co.*, 89 Ky. 402, 12 S. W. 764, the intestate was killed in like manner by a backing train as he was crossing the track, and the case is discussed on the idea that he was technically a trespasser. The court held the company liable, and said: "A train of running cars (these were running, according to the appellant's proof, at the rate of about fifteen miles per hour) is more dangerous to the life of persons with whom it comes in contact than that of the most ferocious and powerful wild animal. And certainly it cannot be lawfully turned loose to run by itself, and expose persons that may be on the track, either by accident, mistake, or design, to its destructiveness. Humanity positively forbids the owner of property that is dangerous to human life and safety to knowingly turn such property loose, even upon his own ground, where it will do mischief even to a technical trespasser. * * * It is the duty of the citizen not to knowingly do an act that will hazard human life and safety unless it is done to prevent crime. If the appellee had turned loose on the track a ferocious bull to run down it, and in running down it it had killed the appellant's intestate, would it be doubted that the appellee would be liable in damages for the injury, although the intestate was a trespasser? * * * It may be said that the parallel between the case just put and the running of the train is wanting in the fact that the running of the train is a business operation, and is governed as to the matters of damages for a violation of prudential business rules and obligations, and in the case put the parties are held responsible for violating police duties and obligations. As a general proposition, this distinction is correct. But here the train, possessing most destructive power, contrary to a manifest duty, is turned loose to run unlighted and uncontrolled, and kill all persons, whether trespassers or not, that may be overtaken by it. Such conduct is a violation of a manifest duty to the public—trespassers and all—not to turn such a power loose." In *Railroad Co. v. Potts*, 92 Ky. 30, 17 S. W. 185, the deceased was in the employ of the railroad company at Junction City, a town of about 400 people. It was his duty to enter in a book the numbers of the cars standing on the side tracks, and point out to the engineer those he was to take up. While standing on one of the tracks, he was run over and killed by some cars

detached from the engine, moving up behind him, without any lookout or signal of their approach. The court said: "The Shelby Case, 85 Ky. 224, 3 S. W. 157, which occurred in the same town, and the Conley Case, 89 Ky. 402, 12 S. W. 764, seem conclusive of the question. It is held in those cases that neither a train nor a single car should be permitted to move on a side track in a city or town without some servant is in position to give warning of its approach and to control its movements. * * * It was as essential that the servant should be in a position thus to see and give warning as it was to be in a position to control the cars." In *Barber v. Railroad Co. (Ky.)* 21 S. W. 340, the intestate was in the service of the railroad company getting out ballast near High Bridge, Ky. The quarry was on the west side of the track, and to obtain a suitable place for piling the rock he had to wheel it across the track, and along by the side of it a short distance, to a point on the east side, and for that purpose was required to place plank across the track on which to run his wheelbarrow. Warning signals by the train to laborers working on the road were required by the rules of the company. But no signal was given of the approach of the train, and when it was very close to the intestate he ran to the track, and tried to move the plank, to avoid danger of the train's being derailed. In doing this he was killed. The men in charge of the train knew of the labor done at this point and the mode of doing it. The trial court gave a peremptory instruction to the jury to find for the defendant, but on appeal this was reversed. In the subsequent case of *Railroad Co. v. Mahan (Ky.)* 34 S. W. 16, Mahan was the telegraph operator at Arlington, and received orders to stop an extra train. It disregarded his signal to stop, and he, seeing that a collision was inevitable with a passenger train coming in the opposite direction, unless the order to stop was obeyed, seized a lantern, and followed the train some 80 yards, waving his light. It stopped, and the conductor came back to him. The extra then backed in off the main track to get out of the way of the approaching passenger train, and they also got off the main track to let that train pass. In doing this they got on the side track, and while standing there the train which he had stopped continued backing down on the side track without any lookout or signal of its approach, and ran over him. Judgment in his favor was affirmed. The court said: "If, in the emergency which seemed to confront him, the appellee got on the side track, or too close to it, when there was space elsewhere within which to stand or walk and give his signals to the approaching passenger train, he was, perhaps, guilty of negligence, but for which the injury would not have occurred. Yet it is manifest that by the exercise of ordinary care on the part of those controlling the backing train the danger could

have been discovered and the injury averted. By witnesses in the service of the appellant it is shown to have been the duty of those operating the extra to have had a brakeman on the rear of the backing train, who might give warning of its comparatively noiseless approach; and it is no excuse for the failure to make such provision in this instance to say that the company was using instead of the usual caboose a box car, which did not conveniently admit of this customary precaution. The necessary care was not exercised on this occasion, and the failure to exercise it was gross negligence."

These cases control the one before us, for the danger from want of signals of the approach of the train or outlook in front of it was greater in this case than in any of them under the evidence. The same rule has been announced elsewhere. Thus, in 2 *Thomp. Neg. § 1839*, it is said: "Persons lawfully at work in repairing a railway track, or in repairing a highway where it crosses a railway track, cannot be expected to pursue their labors and at the same time maintain a constant lookout for an approaching train. They are passive, and are not a source of danger to the train. Those who are driving the train are active, and are handling and are in control of the instrument of danger and mischief. The obligation of reasonable care which the law puts upon the railway company under these circumstances therefore demands nothing less than an active vigilance in favor of persons thus lawfully at work upon the track, and the giving of seasonable danger signals to arouse their attention and enable them to get out of the way before it is too late." In sections 1840-1842 it is shown that the same rule applies in favor of the servants of a contractor, or persons engaged in loading or unloading cars or receiving mail or express matter. In section 1846 the care required in moving trains through cities and towns is pointed out, and it is laid down to be negligence, when a train is moved backwards, not to have a person keeping a lookout. See, also, 2 *Shear. & R. Neg. §§ 457, 458*. If appellant had fired a Winchester rifle down the track, or shot off a dynamite cartridge near by, without precaution to avoid injury to others, and had thus maimed appellee, it would hardly be supposed to be blameless. But a rapidly moving locomotive is as deadly as either of these, and it is no answer for appellant to say that a railroad track is necessarily a place of danger where locomotives are to be expected; for where persons are rightfully on the track, and the nature of the place is such that the presence of persons thereon should reasonably be anticipated, the security of life requires the railroad company to exercise its rights with such regard for their safety as not unnecessarily to endanger them. Cases are not wanting in which railroad companies were held responsible for sending loaded cars along their

tracks at such places with no one on them to control their movements or give warning of their approach. *Kay v. Railroad Co.*, 65 Pa. 269, 3 Am. Rep. 628; *Railroad Co. v. McGinnis*, 71 Ill. 846; *Bohan v. Railway Co.*, 58 Wis. 30, 15 N. W. 801. A locomotive is practically run in the same way when those in charge of it give no signals and maintain no lookout. The case of *Railroad Co. v. Dick*, 91 Ky. 434, 15 S. W. 665, is not inconsistent with the above. In that case Dick was only a licensee to cross the track. For his own convenience, he left the usual way of crossing, and was walking along the track. He had no right to be where he was; at least there is nothing in the case to show that his presence there should have been anticipated, or that it was a place at which the servants of the company should have been on the lookout for persons. The appellee was in the discharge of his duties in going from the inspection of the train to the tool house, and was at a place where the presence of persons on the track might be anticipated. While he was not at work on the track, he was at work for defendant, and was lawfully on the track in the course of his employment, and is as much within the principle of the rule as if laboring on the track. Whether he was guilty of contributory negligence was a question for the jury, and it was also properly submitted to the jury whether, notwithstanding his negligence, those in charge of the train, after they perceived his danger, or should have perceived it by the exercise of ordinary care, might not have avoided the injury to him. This qualification of the instructions is also assailed earnestly by counsel, but it was approved by this court in numerous cases, and is no longer open to question. *Railroad Co. v. McCoy*, 81 Ky. 411; *Railroad Co. v. Earl's Adm'r*, 94 Ky. 374, 22 S. W. 607; *Railroad Co. v. Krey*, 29 S. W. 869; *Crowley v. Railroad Co.*, 55 S. W. 434; *Gunn v. Felton*, 57 S. W. 15; *Flynn v. Railway Co.*, 62 S. W. 490. See, also, to same effect, 1 *Shear & R. Neg.* § 99, and cases cited.

It is further urged that appellee and the men in charge of the engine were fellow servants, being all engaged in the operations of the yard; and that, at any rate, appellant is not liable except for the gross negligence of its man in charge of the engine. The engine was run from the coal bin to the side track by a man employed for that purpose to take charge of engines in the yard, and known as the "hostler." There is much conflict in the authorities as to who are fellow servants, but the rule in this state has been steadily maintained from the beginning. In *Railroad Co. v. Collins*, 68 Ky. 114, 37 Am. Dec. 486,—the first case on the subject,—where a laborer on an engine in the yard was injured by the negligence of the man in charge of the engine, this court said: "The only consistent or maintainable principle of the corporation's responsibility is

that of agency. 'Qui facit per alium facit per se.' It is therefore responsible for the negligence or unskillfulness of its engineer as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient; as to subordinate employes, associated with the engineer in the conducting the cars, the negligence must be gross; but as to employes in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers, constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental but independent service, no one of them, as between himself and his co-equals, is the corporation's agent; and therefore it is not, on the principle of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employes would be its agent as to entire strangers to it." This case, and a number of others following it, were reviewed and approved in *Railroad Co. v. Cavens' Adm'r*, 72 Ky. 559, and still later in *Greer v. Railroad Co.*, 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345, and *Railroad Co. v. Hilliard*, 99 Ky. 684, 37 S. W. 75. In the last case the conductor of a train was injured by the negligence of a car inspector, and it was insisted that the jury should have been instructed that they were fellow servants, or that the company was at least liable only for the gross negligence of the car inspector. The court held otherwise, and said: "In the first place, the person employed at Mound Station to inspect each car of a train, and ascertain if it is in a safe condition, was not a fellow servant of plaintiff in the sense of being upon a common footing and agents of each other. They acted in different spheres, and neither could or was required to know whether the other was properly doing his duty. In the second place, it would have been improper to require the jury to believe the inspector was guilty of gross negligence. The simple inquiry was, as they had been instructed, whether the company, through its inspector, used ordinary care in examining the cars, so as to ascertain whether the ladders attached to each were in a safe condition; for it was the legal duty of the company to guard against every source of danger they could, by the exercise of that kind and degree of care, foresee and prevent; and, while a railroad company cannot be required to insure the safety of a train, it is bound to make a reasonable, proper, and careful examination of each car." In *Railroad Co. v. Davis*, 14 Ky. Law Rep. 716, a switch engineer in a railroad yard was held not to be a fellow servant of a switchman and coupler

in the yard. In *Railroad Co. v. Moore*, 83 Ky. 675, a fireman, while acting as engineer, was held to be engineer for the time, and not to be a fellow servant of the brakeman. The same rule has been applied as between the crews of different trains, and it seems to us to be a very unsubstantial distinction between the engineer who runs an engine in a yard and one who runs it at other stations along the road, as the fireman usually does in switching. Appellee had no control of the engineer in charge of this engine. He had nothing to do with the running of the trains or the running operations of the road. He was engaged in a distinct department, his only duty being to inspect cars.

Lastly, it is insisted that the verdict is excessive. Appellee is 84 years of age; was earning \$1 a day. He had lost one arm, and does not appear to have received other permanent injury. In no case before this court has it ever sustained so large a verdict for such an injury, and we are all of opinion that the verdict is excessive, and for this reason a new trial should be granted. We see no other error in the record.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

BURNAM, DU RELLE, and O'REAR, JJ., dissent from so much of this opinion as holds that a peremptory instruction should not have been given.

GRIFFIN v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 21, 1902.)

CRIMINAL LAW—ARRAIGNMENT—FAILURE OF RECORD TO SHOW PLEA BY DEFENDANT—FAILURE TO ASSIGN ERROR AS GROUND FOR NEW TRIAL.

1. No arraignment is necessary upon a trial for a misdemeanor.

2. Where defendant, at the conclusion of the evidence for the prosecution, moved the court to instruct the jury to find him not guilty, and the instructions and verdict show that he was tried upon a plea of not guilty, there can be no reversal because the record fails to show the nature of his plea, there being no reference to the matter in the grounds for new trial.

Appeal from circuit court, Knox county.

"Not to be officially reported."

Grant Griffin was convicted of the offense of selling liquor in violation of the local option law, and he appeals. Affirmed.

B. B. Golden, for appellant. Robt. J. Breckinridge, for appellee.

HOBSON, J. Appellant was indicted in the Knox circuit court for a violation of the local option law prohibiting a sale of spirituous, vinous, and malt liquors, on the charge of selling to Thomas McFarland a pint of whisky. The proof by the commonwealth fully made out the charge. The

proof by the defendant was that he did not sell any whisky to McFarland. But the credibility of the witnesses was for the jury, and we cannot reverse the judgment on the facts. The record does not show that the defendant pleaded not guilty, or that he was arraigned or waived arraignment, or that his plea was stated to the jury, or that the indictment was read to them. It is insisted for appellant that the judgment should be reversed for these reasons. No arraignment is necessary, except in felony cases. In the ground for new trial, appellant did not rely on any of the matters referred to. The instructions of the court and the verdict of the jury show that the defendant was tried on a plea of not guilty. At the conclusion of the commonwealth's evidence the defendant moved the court to instruct the jury to find him not guilty. This motion was overruled. It cannot be doubted, therefore, that the nature of his plea was understood by him, the court, and the jury, and that the failure to enter it upon the record was a mere omission of the clerk. In *Meece v. Com.*, 78 Ky. 586, this court refused to reverse a felony case on substantially the same condition of the record. In *Ison v. Com. (Ky.)* 66 S. W. 184, this court held that it would not reverse a case where the records failed to show that the indictment was read to the jury, or that the defendant's plea was stated to them, where the question was not presented in the lower court in the grounds for new trial, and in that case *Farris v. Com. (Ky.)* 63 S. W. 616, is distinguished.

Judgment affirmed.

WASHINGTON LIFE INS. CO. v. MILES et al.¹

(Court of Appeals of Kentucky. Feb. 19, 1902.)

LIFE INSURANCE—RIGHT TO PAID-UP POLICY—DELAY IN MAKING APPLICATION.

Where a policy provides that the insured shall, upon the lapse of the policy for nonpayment of any premium, be entitled to a paid-up policy, provided he applies therefor and surrenders the original policy within six months after such lapse, the insured does not forfeit his right to a paid-up policy for failing to make demand within six months after the lapse of the original policy, but is entitled thereto if he makes demand at any time within five years after the lapse of the original policy, time not being of the essence of the contract; and this is true though the company, after the expiration of six months, distributed the net reserve to continuing policy holders.

Appeal from circuit court, Franklin county.

"To be officially reported."

Action by Samuel I. Miles and Alma Miles against the Washington Life Insurance Company for a paid-up policy. Judgment for plaintiffs, and defendant appeals. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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O. P. Chenault, Hazelrigg & Chenault, and Grubbs & Grubbs, for appellant. Guy H. Briggs and W. H. Julian, for appellees.

GUFFY, J. The petition in this case shows that the appellant issued to appellee Samuel I. Miles a policy of life insurance in the sum of \$5,000, June 16, 1890. This policy was on what is termed the "twenty-year life survivorship distribution plan," the insurance being for the benefit of Alma Miles, sister to the insured. The premiums to be paid were \$27.10, payable quarterly, which payments were made by plaintiff for three years. It is further alleged as follows: "Plaintiff says that by the terms and conditions of said policy of life insurance the defendant agreed and stipulated that, if the said policy should lapse and become forfeited for the nonpayment of any premium upon which the same shall fall due after the payment of three annual premiums, the said defendant company agreed, upon demand of said insured plaintiff, to issue to said plaintiff a nonparticipating paid-up policy for such sum as the reserve on such policy at the time of such lapse and forfeiture by such nonpayment will purchase as a single premium at the company's rates. Plaintiff says that he has so paid to the said defendant three annual premiums, as heretofore set out, and that on the 16th day of December, 1893, the said policy did lapse and become forfeited for the nonpayment of a premium due upon that said date. Plaintiff says that in accordance with the conditions heretofore set out he did demand of said defendant the issue of a paid-up policy as aforesaid, but that defendant declined and refused to issue the policy aforesaid, and is now declining and refusing to issue same. Plaintiff says that at the time of the said lapse and forfeiture according to the published rates of the said defendant company there was and is now due him from the said defendant a paid-up nonparticipating policy of life insurance for \$750, which said defendant refuses and declines to issue to said plaintiff."

So much of the answer of defendant as is deemed material reads as follows:

"The defendant company admits that it did, on the 16th day of June, 1890, execute and deliver to plaintiff Samuel I. Miles its policy of insurance for \$5,000, No. 69,066, filed with the petition herein, and the contract of insurance between plaintiffs and defendant is set forth in said policy, and not otherwise. Defendant admits that said policy was so issued for the benefit of Alma Miles, sister of the insured, her coplaintiff; and admits that plaintiffs have paid three full annual premiums on said policy of insurance; and admits that on December 16, 1893, said policy did become lapsed and forfeited for nonpayment of premiums. For further answer the defendant company says that said policy and contract of insurance between plaintiffs and defendant contained, and does

now contain, the following stipulations and conditions, viz.: '(3) Notwithstanding this policy shall lapse and become forfeited for nonpayment of any premium upon the day upon which the same shall fall due according to the terms thereof, as hereinbefore contained, yet, after the payment of three annual premiums, and upon demand made with surrender of this policy within six months after such lapse by such nonpayment, this company will issue a nonparticipating paid-up policy for such sum as the reserve upon this policy at the time of such lapse and forfeiture by such nonpayment, as provided by chapter 347 of the Laws of New York of 1879, will purchase as a single premium at the company's published rates, and the paid-up insurance purchased by the surrender of this policy shall be payable at the same times and under the same conditions, except as to payment of premiums and the guaranty of the full reserve as a cash value as the original policy: provided and agreed, however, that any voluntary application by the company of such dividends as hereinafter mentioned shall, as relates to action under chapter 347 of the Laws of New York, 1879, be taken into consideration in computing the amount of the reserve thereunder.' Defendant, further answering, says that the law of New York referred to in said stipulation and agreement, is and was in words and figures as follows, to wit: 'Chapter 347, Laws of New York 1879. An act to protect the rights of policy holders in life insurance companies. Passed May 21st, 1879. The people of the state of New York represented in senate and assembly, do enact as follows: (1) Whenever any policy of life insurance hereafter issued by any company organized or incorporated under the laws of this state after being in force three full years, shall by its terms lapse or become forfeited for the nonpayment of any premium or any note given for a premium or loan made in cash on the policy as security, or of any interest on such note or loan, unless the provisions of this act are waived in the application and notice of such waiver written or printed in red ink on the margin of the face of the policy when issued, the reserve on such policy including dividends, additions, calculated at the date of the failure to make any of the payments above described according to the American Experience Table of Mortality and with interest at the rate of 4½ per cent. per annum, after deducting any indebtedness of the insured on account of any annual, semiannual or quarterly premium then due, or any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing, shall on demand made with surrender of the policy within six months after such lapse be taken as a single premium of life insurance at the published rates of the company at the time the policy was issued and shall be applied as shall have been agreed in the application and policy, either

to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse or purchase upon the same life at the same age paid up insurance payable at the time under the same conditions, except as to payment of premiums as the original policy: provided that if no such agreement be expressed in the application and policy the said single premiums may be applied in either of the modes above specified, at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy. Provided, also, that the net value of the insurance given for such single premium under this section computed by the standard of this state shall in no case be less than $\frac{2}{3}$ of the entire reserve after deducting the indebtedness as specified; but such insurance shall not participate in the profits of the company.' Defendant says that said law was printed in said policy filed herein, and made part hereof, and that defendant company and plaintiffs in issuing and accepting said policy contracted with reference to said law, and agreed that same should become and was a part of said contract of insurance. Plaintiffs, in accepting said policy, did so upon the conditions and agreements printed by the company on the inside of the policy, and such conditions and agreements were referred to and accepted by plaintiffs and the assured as part of the said contract of insurance, and it is and was agreed that such conditions and agreements should and shall have the same force and effect as if printed in full over the signature of the parties to said contract. Defendant further says that the law referred to and stated herein was by the people of New York represented in senate and assembly duly enacted for the benefit and to protect the rights of policy holders in life insurance companies, and said law was duly signed and sealed by proper authority, whereby it was placed in full force and effect, and was at the time of the making of the contract filed herein and is now the law of New York, and in full force and effect. Defendant further says that by the express terms, conditions, and agreements of said contract of insurance, as more particularly set out hereinbefore, it was provided and agreed between plaintiffs and defendant that no nonparticipating paid-up policy of insurance should be issued unless demand therefor was made within six months, with surrender of this policy, No. 69,066, from the time default was made in payment of premiums and from time policy lapsed and became forfeited for reason of nonpayment of the premium when due; and defendant says that six months was and is a reasonable time within which to make said demand and surrender of policy aforesaid. Defendant says that plaintiffs did make such default and said policy did lapse

and become forfeited for nonpayment of premiums as aforesaid, on the 16th day of December, 1893, and plaintiffs did not demand of defendant such paid-up policy or any policy within six months from the date of default and lapse as hereinbefore mentioned, and did not within said time offer to surrender said policy No. 69,066, and plaintiffs did not until in the month of December, 1897, four years after said default and lapse, make demand for such paid-up policy. Defendant pleads and relies upon said default in payment of premiums and plaintiffs' failure to demand said paid-up nonparticipating policy, with said surrender, within six months thereafter, as provided by the terms and conditions and agreements of said policy of life insurance and the laws of New York, in bar of plaintiffs' right to relief sought."

"(3) The defendant, Washington Life Insurance Company, for further answer says: It is a corporation created under and by virtue of the laws of the state of New York for the purpose of insuring the lives of its members upon what is known as 'the mutual plan' of insurance, and defendant says its insurance business has always been, was at the time of issuing of the policy filed herein, ever since then, and is now conducted on the principle of giving policy holders interest in the profits of the company, as is required by its charter, a copy of which is filed herewith and made part hereof, marked 'Charter'; and defendant says section 2 of article 3 of said charter reads as follows: 'Section 2, art. 3 (amended 1863 to read as follows): The insurance business of the company shall be conducted upon the principle of giving to policy holders an interest in the profits of the company as hereinafter provided, unless otherwise expressly agreed between the company and the insured.' Defendant says that its policy holders have at all times shared in the profits of the company as required by its charter, and said defendant has never otherwise expressly agreed with its policy holders at any time, but said policy holders have at all times shared in any and all profits of the company to which they were entitled under the charter of said defendant company and under its by-laws, and said profits have at all times been apportioned among such policy holders and paid or applied in the manner and at such times as the board of directors determined from time, which said board of directors had a right to so determine under the company's charter under the laws of the state of New York. Defendant says that section 2 of article 7 of said charter is in words and figures as follows, to wit: 'Section 2 (amended 1863 to read as follows): The holders of said capital stock shall be entitled to a semiannual net dividend out of the earnings of the company of (but not exceeding) three and one-half per cent. on the amount of stock held by them respectively, payable on and after the first day of

February and August without deduction; and said payments commencing with the first day of August, 1863.' Defendant says section 1, art. 8, of said charter is in words and figures as follows, to wit: 'Section 1 (amended 1863 to read as follows): The company, within sixty days next after the expiration of five years from the first day of January, 1861, and within the first sixty days next after the expiration of every subsequent period of five years, shall cause a general statement to be made of the affairs of the company, which shall then exhibit the amount of the then remaining net profits of the company after allowing a sufficient amount to reinsure all outstanding risks and to cover all other obligations. The whole amount of the net profits so ascertained as above provided shall be credited to the account of the policy holders entitled to participate in the profits, which shall be apportioned among them and paid or applied in such manner and at such time as the board of directors may deem equitable and from time to time provided.' Defendant says that out of the premiums paid by plaintiffs on said policy this defendant retained and held on hand until 1st day of July, 1894, which was and is three years and six months from the date of said policy, the sum of \$94.10, which was the net reserve derived from said policy, which was the full extent of plaintiffs' interest, if any they had, for life insurance in this defendant mutual life insurance company by reason of said policy No. 69,066. Defendant says that all other sums paid on said policy, and all other policies issued by said company then in existence and force, have long since been distributed and disposed of among its then outstanding policy holders according to the terms of its charter and as required by the laws of the state of New York, after having first paid therefrom the necessary costs and expenses of conducting the business of said defendant company. Defendant says by reason of plaintiffs' failure to pay premiums on said policy No. 69,066 when due, and their failure to deliver up to defendant the said policy within six months, as hereinbefore more specifically set out, said plaintiffs forfeited all right and interest in and to said net reserve derived from premiums paid on said policy and all other policies outstanding against said company, and plaintiffs' said interest in said net reserve was so forfeited and became the assets of the existing and continuing policy holders of said company, and has long since said lapse and forfeiture, with the knowledge and consent of plaintiffs, been credited and paid to them, the said existing and continuing policy holders, after first having paid costs and expense of carrying on the business of said defendant company, according to and as required by defendant's charter and by the laws of New York; and defendant says said net reserve derived from said

policy No. 69,066 has been so credited as the assets of the continuing policy holders of defendant company in all subsequent declarations and distributions of surplus and profits which said company has declared and distributed among its members since plaintiffs ceased to be members thereof. Defendant says that sixty days after the 1st of January, 1896, as required by its charter (section 1, art. 8), it made a general statement of its business and affairs, which exhibited the then remaining net profits of the company after allowing a sufficient amount to insure all outstanding risks and to cover all obligations, and the whole amount of net profits was ascertained and credited to the existing and continuing policy holders, and was apportioned among them as required by defendant's charter at which time plaintiffs were not members of the defendant company, their policy having long prior thereto lapsed and become forfeited as hereinbefore specifically set out. Defendant says that it was the duty of plaintiffs to surrender said policy with a demand for the paid-up policy in lieu thereof, if they intended to require defendant to issue paid-up policy, within a reasonable time from time of default as hereinbefore set out; but defendant says plaintiffs did not make such demand, coupled with surrender of policy, or at all, within a reasonable time after the lapse of said policy for nonpayment of premiums as hereinbefore more specifically set out. Defendant says that since the lapse of said policy and filing of petition herein the rights and interest of continuing policy holders have intervened, and to now require defendant to issue said paid-up policy would plunge its business in an unsettled and uncertain condition, would be a fraud and hardship upon its continuing members. Defendant says that said policy ceased to be a liability against said defendant on the — day of —, 189—, and prior thereto, and has never since that time been a liability against defendant, and is not now a liability against defendant company, by reason of plaintiffs' failure to demand a paid-up policy and surrender said policy No. 69,066 within a reasonable time after failure to pay premiums due and after lapse of said policy. Defendant says six months was and is a reasonable time within which to make such demands and surrender, and defendant says that by the negligence, laches, and failure to perform the condition of said policy and the conditions imposed by the law copied herein plaintiffs are estopped to maintain this action, and defendant pleads such negligence, laches, and failure as a bar to prosecution of this action and relief sought.

"(4) Defendant says, if it is liable to plaintiffs for a paid-up nonparticipating policy in any sum, which it denies, it is only liable for nonparticipating paid-up policy for such sum as the reserve, \$94.10, on said policy

at the time of lapse and forfeiture by reason of nonpayment of premiums, will purchase as a single premium at the company's published rates, and defendant says that said reserve would, at company's published rates, purchase only a paid-up nonparticipating policy for \$250, and no more, when ascertained in the manner set out in the policy No. 69,066, which was and is the manner agreed to by and between the plaintiff and defendant for determining the amount of such paid-up insurance. Wherefore defendant, having fully answered, prays that the petition herein be dismissed, that it have judgment for costs, and it prays for all proper and equitable relief."

It will be seen from the foregoing that the stipulations of the policy require the insured to apply for the paid-up policy in question, and required the demand, accompanied with a surrender of the policy, to be made within six months from the time at which the policy had lapsed on account of the nonpayment of premiums. The court, however, upon final submission of the cause, adjudged that the plaintiff should recover of the defendant, the appellant, a paid-up nonparticipating policy of life insurance for \$240 in said company for the benefit of the plaintiff Alma Miles, and it was further adjudged that the defendant, now appellant, issue to him, the plaintiff, the said policy of insurance aforesaid; and it was further adjudged that plaintiff have judgment against the defendant for the costs; to all of which the defendant excepted, and prayed an appeal to this court, which was granted.

Numerous authorities are cited by both appellant and appellees. It is the contention of appellees that time is not of the essence of the contract, and that under the stipulations of the policy the appellees had paid for and were entitled to a paid-up policy as stipulated for in the policy of insurance. In *Montgomery v. Insurance Co.*, 14 Bush, 51, it appears that a policy of life insurance was issued with the stipulation that, after certain payments had been made, the insured, within a certain specified time, might surrender the policy, and obtain a paid-up policy for a certain amount. The question in the case involved was the right of the insured to a paid-up policy although demand was not made within the time specified in the policy, and this court said: "Time is not generally of the essence of contracts. Story, Eq. § 776. It may be so when the contract is executory on both sides, or when the nature of the transaction or stipulation of the parties shows it was so intended by them; but when the defendant has received the entire consideration for performance on his part, and has no other defense except that the plaintiff did not come within the stipulated time to demand performance, we are not acquainted with any authority or legal principle upon which such a defense can be upheld in a court of equity. If, for

any reason, the defendant has become unable to perform his agreement, or performance would be more difficult or onerous at the time of the demand than it would have been at the time stipulated, there might be plausibility in such a defense, and a court of equity would no doubt either deny all relief to the plaintiff or grant relief upon terms that would compensate the defendant for the additional burden resulting from the plaintiff's delay; but nothing of the kind is pretended in this case. The proposition upon which this branch of the company's defense rests is this, and nothing more: It is admitted that the assured paid for a paid-up policy for \$4,000, and that, if the old policy had been surrendered at any time between September 5, 1872, and September 5, 1873, the company would have been bound to issue a new policy for that sum; and because the old policy was not surrendered within that time the assured has lost the benefit of \$4,000 paid-up insurance." In *Insurance Co. v. Jarboe*, 102 Ky. 80, 42 S. W. 1097, 80 Am. St. Rep. 343, the syllabus reads: "Under the provision of a policy of life insurance that, 'after three full annual payments have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premiums, or within six months thereafter, issue a nonparticipating policy for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy which number of full years' premium paid bears to the total number required,' time is not of the essence of the contract, and the insured does not forfeit his right to such paid-up policy by a failure to demand it or to surrender the original policy within six months after default. The original policy being dead, the insured is not required to surrender it before bringing suit for the paid-up policy." The court, in discussing the question under consideration, said: "It will be seen from the policy in the case at bar that it was distinctly provided that, if the assured paid three annual payments, he was then entitled to a paid-up policy in proportion to the premium paid, provided he surrendered the policy before he made default or within six months after default in the payment of premiums. It is clear under the contract that the three payments not only continued the policy in force for the time being, but also paid, at the election of the assured, for a paid-up policy in proportion to the premiums paid. The contract has none of the elements of an offer to sell, but it is a clear case in which the assured has bought and paid for a certain thing. It has a stipulation, in effect, that he shall demand it within six months after his abandonment of the other benefits acquired under the same contract. The only defense presented in this case is the simple fact that the appellees had not, within six months after the failure to pay the premium

due, surrendered the original policy and demanded the issuing of the other. It is not pretended that it was any more difficult or expensive for the appellant to issue a paid-up policy when demanded than if it had been demanded at the end of the six months, nor can it be of any pecuniary consequence to defendant whether the forfeited policy was delivered up before the institution of this suit. The original policy, being dead and of no effect, could be of no value to any person." It is further stated in the opinion as follows: "To the extent, if any, that the principles announced in the decisions in *Insurance Co. v. Barbour*, 92 Ky. 427, 17 S. W. 796, 15 L. R. A. 449, and *Hexter v. Insurance Co.*, 91 Ky. 356, 15 S. W. 863, conflict with the doctrine announced in *Montgomery v. Insurance Co.*, they are overruled." The same doctrine was affirmed in *Insurance Co. v. Patterson* (Ky.) 60 S. W. 383, 53 L. R. A. 378.

From the foregoing it will be seen that the settled rule of this state is that time is not considered of the essence of the contract in such insurance policies as the one under consideration, and that the mere failure to surrender the policy and demand the issuance of the paid-up policy within the time prescribed in the policy does not defeat the right of the insured to obtain the paid-up policy stipulated for in the contract of insurance. It is, however, insisted for appellant that under the principles of the decisions heretofore referred to the appellant in this case comes within the rule laid down in the decision *supra*, to wit: That the conditions of the parties had changed, or that performance would be more onerous than if required within the specified time; and it is claimed that the appellant in this case had distributed the supposed surplus accruing from the forfeited policy in question, and that the laws of New York, under whose laws the appellant was authorized to do business, required it to distribute such surplus amongst the policy holders, and that, therefore, to be required now to issue the paid-up policy demanded would impose upon the policy holders or others a loss or some deprivation of rights or interests that would not have occurred if the demand had been made within six months from the time the policy lapsed. We do not think there is any force in this argument. In the first place, it may be said that the company should be presumed to know the law, and should not report the proceeds of the lapsed policy as a surplus until after the time in which it would be exempt from issuing the paid-up policy. Moreover, the policy holders must be presumed, when they receive policies of insurance in the company, to assume whatever risks that legally attend or may result from the issuance of their policies. In addition to this, it may be said that there is nothing in this case to show that the reserve fund of appellant is not amply sufficient to

equalize and protect the interests of all the policy holders in said company. It is contended for the appellant that under the rules and customs of the company, on the 1st of January succeeding the expiration of the time lapsed policy holders can apply for a paid-up policy, the surplus is distributed or disposed of, and therefore they should not be required after that time to issue paid-up policies. If this be true as a matter of law, they might adopt any other rule, and in 10 or 20 days after the termination of 6 months make distribution of the surplus so acquired, and thus always defeat the rules laid down in the cases *supra*.

The appellant earnestly insists that the courts should lay down some rule or some time at which the right to demand and receive a paid-up policy should terminate. Taking into consideration the nature of life insurance, and all the facts and circumstances involved therein, we are of opinion that the insured should, within five years from the time he was entitled to demand a paid-up policy, make such demand, or that his laches in so doing should bar his right to demand and receive the same.

For the reasons indicated, the judgment appealed from is affirmed.

REDMOND'S ADM'X v. REDMOND et al.:
(Court of Appeals of Kentucky. Feb. 19, 1902.)

ESTATES OF DECEASED PERSONS—BENEFIT FUND—BURIAL EXPENSES—WIDOW'S RIGHT—SETTLEMENT OF ESTATE—SUIT—ABSENCE OF DEBTS OR PERSONAL ASSETS—CONVEYANCE BY HUSBAND—FRAUD OF—DOWER—HOMESTEAD.

1. Where a decedent left no personal estate except a certificate in a society to which he belonged, by which \$40 was appropriated to pay the burial expenses of a member, that fund having been paid to the widow, she was not entitled to retain it as part of her distributive share, but was properly required to pay it on burial expenses.

2. As the payment of that fund for that purpose left no personal estate to be administered or debts to be paid, an action by the administratrix to settle her accounts was properly dismissed.

3. Under Ky. St. § 2132, providing that "after the death of either the husband or wife the survivor shall have an estate for his or her life in one-third of all the real estate of which he or she or any one for his or her use was seized of an estate in fee simple during the coverture," the widow was entitled to dower in land which the husband conveyed to his son for the purpose of defeating her dower right, as the son held the title for his father.

4. The fact that the wife was not living with the husband at his death does not deprive her of the right to a homestead in property on which he made his home.

5. The widow must elect whether she will take dower or homestead, as she is not entitled to both.

Appeal from circuit court, Mason county.
"To be officially reported."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Action by Margaret Redmond, as widow and as administratrix of James Redmond, against Michael Redmond and others, for a settlement of the estate of plaintiff's intestate, and for judgment in plaintiff's favor for her interest therein as widow. Judgment for defendants, and plaintiff appeals. Reversed.

A. E. Cole & Son and E. L. Worthington, for appellant. Edward W. Hines and A. M. J. Cochran, for appellees.

HOBSON, J. Appellant, Margaret Redmond, and James Redmond were married about the year 1870. They had each been married before, and had had children by the former marriage. They did not live happily together, and after a few years separated, but were never divorced. James Redmond died in the year 1895. Margaret Redmond qualified as administratrix of his estate, and brought this suit as administratrix and as widow for the settlement of the estate and for judgment in her favor for her interest therein. James Redmond left no personal estate, except a certificate in a society to which he belonged, by which \$40 was appropriated to pay the burial expenses of a member. Before the suit was brought to settle the estate, the children of James Redmond had paid off all the debts except \$40 of the burial expenses, which was left to be paid by the \$40 from the society. The administratrix collected the \$40, and claimed it as part of her distributive share. As, by the rules of the society, the \$40 was to be applied to the payment of the burial expenses, the court properly held that the fund should be paid on this bill, and, as this left no personal estate to be administered or debts to be paid, he properly dismissed the action for a settlement of the accounts of the administratrix. The rights of the widow present a more difficult question. James Redmond owned at his death a house and lot, where he had resided, with his children, for many years. In the year 1885 he bought at public sale another piece of property for \$2,200, now worth about \$3,000. He paid for this property himself, except the last payment of \$450, which was paid by his son Mike Redmond; at least Mike Redmond gave the check. When James Redmond bought the property, he was separated from his wife, and did not desire her to have dower or any interest in it. He had it conveyed to Mike Redmond; but he always controlled it, collected the rents, and treated it as his own. Mike Redmond was then working at a salary of \$6 or \$8 a week, and seems to have had no other resources. About the year 1894 Mike Redmond was preparing to get married, and he then conveyed the property to James Redmond for life, with power to sell or convey at pleasure, and with remainder at his death to all his children. This deed was made because James Redmond preferred to

risk his wife's dower in the property, rather than, as he expressed it, that his daughter-in-law might get it all. Without regard to the effect of the second deed conveying a life estate with power of disposition, we are satisfied from all the circumstances that the property was originally bought by James Redmond, that the deed was made to Mike Redmond in fraud of the wife's rights, and that Mike Redmond always held the title for his father. By section 2132, Ky. St., "after the death of either the husband or wife the survivor shall have an estate for his or her life in one-third of all the real estate of which he or she or any one for his or her use was seized of an estate in fee simple during the coverture." Under this statute the wife is entitled to dower in the land held by Mike Redmond for the use of his father. At common law, conveyances in fraud of the rights of the wife were held void. This principle has often been recognized by this court. *Murray v. Murray*, 90 Ky. 1, 13 S. W. 244, 8 L. R. A. 95; *Manikee's Adm'r v. Beard*, 85 Ky. 20, 2 S. W. 545; *Petty v. Petty*, 4 B. Mon. 216, 39 Am. Dec. 501; *McAfee v. Ferguson*, 9 B. Mon. 475. The same rule is followed in other states. *Feigley v. Feigley*, 61 Am. Dec. 375; *Walker v. Walker* (N. H.) 31 Atl. 14, 27 L. R. A. 799, 49 Am. St. Rep. 616; *Flowers v. Flowers* (Ga.) 15 S. E. 834, 18 L. R. A. 75; *Bump, Fraud. Conv.* (2d Ed.) 491. Section 1906, Ky. St., is as follows: "Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder or defraud creditors, purchasers, or other persons, and every bond, or other evidence of debt given, action commenced, judgment suffered, with like intent, shall be void, as against such creditors, purchasers and other persons. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." The court below seems to have followed the case of *Phelps v. Phelps*, 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625; but the statute of New York under which that case was decided is not similar to ours, nor is the decision in keeping with the rule heretofore maintained in this state.

The wife also claims that she is entitled to a homestead in the property on which her husband made his home. The fact that she was separated from her husband would not, under the statute, affect her right to homestead. *Meador v. Place*, 43 N. H. 307; *Folsom v. Folsom* (N. H.) 34 Atl. 743; *Duffy v. Harris* (Ark.) 45 S. W. 545, 40 L. R. A. 750; *Atkinson v. Atkinson*, 77 Am. Dec. 712. Section 1707, Ky. St., continues the homestead for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband are entitled

to a joint occupancy with her until the youngest unmarried child arrives at age. The fact that the wife was not living with her husband at his death cannot, by construction, be made an exception to the statute where it provides none. But the widow is not entitled to both homestead and dower. If she takes homestead, she cannot have dower also; but, if she does not take homestead, she can then be endowed in all the real estate. *Sansberry v. Simms' Adm'r*, 79 Ky. 527; *Freeman v. Mills* (Ky.) 50 S. W. 3. On the return of the case the widow must elect whether she will take dower or homestead.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

BOTKIN v. MIDDLESBOROUGH TOWN & LAND CO.¹

(Court of Appeals of Kentucky. Feb. 19, 1902.)

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—STATUTE OF LIMITATIONS—CONTRACT IN WRITING, BUT NOT SIGNED.

1. The provision of the statute of frauds that no action shall be brought to charge any person upon a promise to answer for the debt of another, unless in writing, does not apply to a promise made to the debtor, on a sufficient consideration, for the benefit of a third person.

2. The provision of the statute that no action shall be brought to charge any person upon any agreement not to be performed within one year from the making thereof, unless the promise be in writing, applies only to agreements which are not to be performed upon either side within a year, and therefore does not apply to an undertaking by the purchaser of land to pay the price more than a year in the future, where the vendor fully executes his part of the contract at once, by making deed and putting the purchaser in possession.

3. Under Ky. St. § 2515, providing that an action upon a contract not in writing signed by a party shall be commenced within five years after the cause of action accrued, applies where the contract, though in writing, is not signed by the party sought to be charged, as where a deed signed by the grantor alone recites the undertaking of the grantee to pay, as a part of the consideration, a debt of the grantor.

Paynter, J., dissenting.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by the Middlesborough Town & Land Company against William Botkin and M. V. Pigg to enforce a lien on land. Judgment for plaintiff, and defendant William Botkin appeals. Reversed.

D. T. Edwards, for appellant. J. R. Sampson, for appellee.

BURNAM, J. On the 19th of May, 1890, the Middlesborough Town Company, by general warranty deed, conveyed to M. V. Pigg a lot in Middlesborough, reserving a lien in the deed to secure the payment of three

promissory notes for \$187.50 each, due in one, two, and three years, with interest from date. Afterwards Pigg conveyed the lot to A. W. Smidt; and Smidt, on the 5th of September, 1890, conveyed it to the appellant, William Botkin, by general warranty deed. Smidt's deed to Botkin recited that he had assumed and agreed to pay these lien notes. The notes were assigned by the Middlesborough Town Company to the Middlesborough Town & Land Company, who instituted this action on the 11th of April, 1900, against M. V. Pigg, the maker, and William Botkin, and asked a personal judgment against each of them, and that its lien be enforced. The defendant William Botkin answered in three paragraphs, denying liability. In the first, he says that his alleged promise to pay the notes executed by Pigg to the company was not in writing signed by him, or by any agent authorized by him to do so; second, that the alleged contract was not in writing signed by him, and was not to be performed within a year; third, that more than five years had elapsed from the maturity of plaintiff's cause of action, and it was barred by limitation. The trial court sustained a general demurrer to each of these paragraphs, and rendered a judgment enforcing the lien upon the lot, and also gave a personal judgment against the appellant Botkin. From the personal judgment this appeal is prosecuted.

The first paragraph was predicated upon subsection 4 of section 470 of the Kentucky Statutes, which provides: "No action shall be brought to charge any person upon a promise to answer for the debt, default, or misdoing of another unless in writing." This statute has been frequently passed on by this court, and it has uniformly held that it applied only to promises made to a person to whom another was already or was to become responsible, and not to promises made to the debtor, on a sufficient consideration, for the benefit of a third person. See *North v. Robinson*, 62 Ky. 71, and *Williams v. Rogers*, 77 Ky. 776. And this is the rule in England and most of our states. As appellant's assumption was to the debtor, and not to the creditor, it is not within the statute.

The second paragraph is based upon subsection 7 of section 470 of the Kentucky Statutes, which provides that "no action shall be brought to charge any person upon any agreement, which is not to be performed within one year from the making thereof, unless the promise * * * or some memoranda or note thereof be in writing and signed by the party to be charged therewith or by his authorized agent." This statute has also been frequently before this court, and the ruling in the latter cases is to the effect that it applies only to contracts which are not to be performed upon either side within a year, and not to agreements which are to be performed or have been performed

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

by one or either of the parties within that time. See *Berry v. Graddy*, 58 Ky. 553; *Dant v. Head*, 90 Ky. 261, 13 S. W. 1075, 29 Am. St. Rep. 369. In the latter case this court said: "The statute properly applies to agreements which are wholly executory, and one which has been performed by one of the parties within a year is to that extent executed, and cannot with propriety be called an agreement to be performed within a year." And 8 Am. & Eng. Enc. Law (1st Ed.) p. 692, lays down the rule as follows: "In England and most of the United States it is held that the statute applies only to contracts which are not to be performed upon either side within a year." In this case appellant's vendor fully executed his part of the contract of sale, by making the deed and putting appellant in possession of the premises; and the statute, therefore, does not apply.

The third paragraph of the answer presents a more formidable question. As more than five years had elapsed after the maturity of the notes for which the lien was retained in the deed, appellant answers that he is released from liability to appellee thereon by section 2515 of the Statutes, which provides that "an action upon a contract, not in writing signed by a party, express or implied, shall be commenced within five years next after the cause of action accrued." Appellee replies: "That statute has no application. By the acceptance of the deed containing the reservation of a lien to secure the notes executed by Pigg, you contracted in writing to pay them as effectually as though you had actually signed your name to a written obligation to do so, and the limitation is therefore fifteen years, and not five." And to support this contention we are referred to *Elliott v. Saufley*, 89 Ky. 52, 11 S. W. 200, and *McClure v. Biggstaff* (Ky.) 37 S. W. 294. In the first case, John W. Estis and the heirs at law of James Estis conveyed a tract of land to George W. Estis. The consideration recited in the deed was that their father had, in his lifetime, sold and given bond to convey the land to George W. for \$650, of which sum \$150 had been paid, and that by a settlement made by J. W. Estis, as administrator, with the county judge, he was found indebted to the estate in \$509; and it was further recited that a lien on the land was retained to pay such indebtedness, to be made evident by a receipt of each of the heirs and grantors, filed in the clerk's office. A suit was subsequently instituted by an outside creditor of George W. Estis to subject the land to the payment of other debts due by him, in which action a judgment was rendered decreeing its sale, and it was purchased by Saufley, to whom a commissioner's deed was given. He afterwards sold and conveyed the land to Elliott. In the same years the heirs of James Estis instituted a suit in equity against George W. Estis, making Saufley and Elliott defendants, to set aside the sale to Saufley,

and to subject the land to the payment of the purchase money due them as heirs at law of James Estis; and they were granted the relief sought, and judgment was rendered for the sale of the land to satisfy their debt, and Elliott was evicted by a writ of possession, whereupon he brought suit against Saufley for breach of his covenant of warranty, seeking to recover the purchase money paid to him. Saufley answered, denying that Elliott has been evicted by a paramount title in the heirs of James Estis, for the reason that they were barred by the five-year statute of limitation when they commenced their action. Elliott recovered judgment for the amount paid by him to Saufley for the land. In commenting upon the plea that the debt to the heirs of James Estis was barred after five years, the opinion says: "That position rests upon the assumption that the action was not founded upon a contract in writing, in the meaning of the statute. * * * The right of action in that case was clearly a contract in writing, which not only created a lien upon the land, but the acceptance of the deed and the possession of the land by G. W. Estis operated as an agreement on his part to pay the purchase price. But whether valid defense could or could not have been made to the action of Nancy Walls and others seems to us, in this action, immaterial; for it may be regarded as settled that all that is necessary for the vendee of land, in order to maintain an action on a covenant of warranty, is to allege and show that he had lost the land under a judgment of eviction in an action in which the vendor was a party, or of which he had notice." It is not perfectly clear what the distinguished writer of the opinion intended by his comment in the first part of the quotation from his opinion. It is certain, however, that he did not rest his decision upon the ground that the acceptance of the deed by the defendant, containing a reservation of a lien for purchase money, was equivalent to a contract in writing signed by him. We are inclined to think that all he intended to say was that the acceptance of a deed containing a reservation of a lien for purchase money estopped G. W. Estis from denying the lien on the ground that he had given no written obligation therefor. We are fortified in this view by the fact that, in the suit of James Estis' heirs and others against G. W. Estis, no personal judgment was asked against either Saufley or Elliott, and the only relief decreed was the enforcement of the lien against the land for the purchase money, and the basis of Elliott's suit against Saufley was the breach of his covenant of warranty. It would certainly be a great stretch to hold that he intended to eliminate from the statute its cardinal provision, "that the writing must be signed by the party to be charged thereby." In *Prewitt v. Wortham*, 79 Ky. 287, it was held

that, where the indebtedness was not evidenced by a written promise to pay, it was not taken out of the five-year statute of limitation by the mortgage executed to secure it, which recited the indebtedness, and was actually signed and acknowledged by the payor. And in *Bank v. Thomas* (Ky.) 3 S. W. 12, it was decided that the execution of a mortgage to secure a bill of exchange did not extend the time of limitation against the drawer beyond five years. The case of *Colvin* against *Newell*, which was decided by the superior court, determines the exact question in controversy here. In discussing the statute the opinion says: "The general statute provides that an action upon a contract not in writing signed by the party, express or implied, shall be commenced within five years. 'Express and implied' modify 'contract.' There is no such thing as a contract not in writing which is signed; but that there may be a contract in writing which is not signed by the party relying on the statute, the deed in this case is an instance. It is evidence of the contract against *Colvin* and *Applegate*, because they, as vendees, claim under it. We think the correct wording of the section is thus: 'An action upon an express or implied contract which is not in writing, or which, if in writing, is not signed by the party. * * *' The written contract referred to is one which is signed by the party pleading the statute. Every writing therein specially named is either a 'contract of record,' such as a 'judgment' or 'recognizance,' or it is an instrument which must be signed. As *Colvin* and *Applegate* did not sign any writing, the cause of action was barred after five years, unless intervening matter prevented it." The case of *McClure v. Biggs* is also relied on, but we think that case is not at all in point. There the notes for the purchase money had been executed both by the husband and wife, and the conveyance was made to the wife; and the court held that, while the note of a married woman was void so far as obtaining a personal judgment against her was concerned, it was nevertheless evidence of an indebtedness to secure the payment of which a mortgage was executed, and in that sense was a contract in writing, within the meaning of the statute of limitations; but there is no suggestion or intimation that, if *Mrs. McClure* had never signed any writing, the limitation would have been 15 years, instead of 5, nor does he discuss the question of limitation as a remedy to a claim for personal judgment. "In construing statutes of limitations, courts are inclined to follow the literal expression of the legislative will. They cannot ingraft upon them exceptions not made by the legislature, and ought not to construe the legislative exceptions so as to defeat the policy of the statutes. The public good demands that controversies shall be settled before the transactions out of which they grew have

faded from the memory of those who were conversant with them." See *McDonald's Ex'r v. Underhill's Ex'r*, 73 Ky. 590. And Judge Kent says that "it would be impolitic, as well as contrary to established rules, to depart from the plain meaning and literal expression of the proviso in the statute of limitations." See *Demarest v. Wynkoop*, 8 Johns. Ch. 129, 8 Am. Dec. 467.

Applying these rules of construction to the facts of this case, it follows that the acceptance of the deed containing the reservation of a lien to secure the notes of *Pigg* to the company estopped *Botkin* from denying the existence of the lien as against the land, and the law will imply a promise on his part to pay them. But as the promise was not evidenced by a writing signed by him, the five-year statute of limitation afforded a complete bar to recovery.

For the reasons indicated, the judgment is reversed, and the cause remanded, with instructions to overrule the demurrer to the third paragraph, and for further proceedings consistent with this opinion.

PAYNTER, J., dissenting.

WARREN DEPOSIT BANK v. YOUNGLOVE.¹

(Court of Appeals of Kentucky. Feb. 20, 1902.)

WITNESSES — TRANSACTION WITH PERSON SINCE DECEASED — OPINION EVIDENCE — DISCOUNTING OF NOTE — NOTICE OF DEFENSES — PARTNERSHIP — POWER TO BIND FIRM AS SURETY — NOTICE OF SURETYSHIP.

1. The opinion of a partner that a note to which his copartner had signed the firm name was executed for money borrowed to make a payment on land purchased by the latter was incompetent, as was also his opinion that a mortgage had been given for part of the money.

2. A surviving partner was not a competent witness for himself as to the purpose for which a note was executed by the deceased partner in the firm name.

3. A bank entitled to discount a negotiable note so that it may be placed upon the footing of a foreign bill of exchange is not required to exercise care to learn whether there are equities or defenses thereto.

4. Though it may be beyond the scope of a partnership business to execute notes as surety, yet the mere fact that a partner signed the firm name to a note under his own name was not sufficient to charge a bank discounting the note with notice of the fact that the firm was surety merely, and, in the absence of any other evidence that the bank had notice of that fact, a peremptory instruction to find against the firm should have been given.

Guffy, C. J., dissenting.

Appeal from circuit court, Warren county. "To be officially reported."

Action by the Warren Deposit Bank against J. E. Younglove on a promissory note. Judgment for defendant, and plaintiff appeals. Reversed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Wright & McElroy, for appellant. Sims & Grider, for appellee.

O'REAR, J. J. I. and J. E. Younglove were partners engaged in the sale of drugs at Bowling Green, Ky., and the firm name and style was J. I. Younglove & Bro. On December 9, 1893, a 60-day note for \$1,000 was executed, payable to Robert Underwood, and negotiable at appellant bank. It was signed: "J. I. Younglove. J. I. Younglove & Brother." This note was negotiated by and discounted to the bank before its maturity, and for value. J. I. Younglove died, and, his estate having proved insolvent, the bank brought this suit against J. E. Younglove, the other member of the firm, to recover the balance on the note. The defense was that the note sued on was not the debt of the firm; that it did not owe Underwood anything, and did not receive from him any consideration for the execution of the note; that it was executed by J. I. Younglove on account of his individual affairs, without the knowledge or consent of the other member of the firm, and that it was not on account or within the scope of the firm's business; that the name of the firm was signed to the note as surety only. An issue being joined, a trial resulted in a verdict and judgment for appellee.

The following questions of evidence are presented by this appeal: In the course of his testimony appellee J. E. Younglove said: "It is my opinion that he (meaning his brother, J. I. Younglove) borrowed the money to make a payment on some land which he bought about that time, because he made a cash payment on the land, and he had no money on hand out of which he could have made the payment." This evidence was objected to. The opinion of the witness and statements resting upon it were not relevant, nor was this witness competent to testify to the facts stated, even had they been given as matters of knowledge, instead of an opinion, and should have been excluded. The same witness further testified: "My brother agreed to pay for the land \$3,950. He paid a part of this, but at the time of his death all of it had not been paid. I think a mortgage was given for a part of the money given for the land." All of the foregoing was incompetent. This witness was not competent to testify for himself as to anything done or omitted to be done by the decedent, nor was his opinion that a mortgage had been given for part of the money relevant matter in evidence.

At the close of the evidence the court instructed the jury that they should find for appellant unless they believed from the evidence that plaintiff, when accepting and discounting the note, knew that its proceeds were not to be used for the benefit of the firm, but for the individual use of J. I.

Younglove, "or that the circumstances connected with the discounting of said note, if any are shown by the evidence, were such that the plaintiff could, by the exercise of ordinary care, have learned thereby that the discounting of said note was for the benefit of J. I. Younglove alone." The second and third instructions given embodied the same idea as that quoted above. The court is of opinion that these instructions were erroneous. Those entitled to discount negotiable notes, so that they may be placed upon the footing of foreign bills of exchange, are not compelled to exercise care to learn whether there are equities or defenses thereto. If the note or bill discloses by any matter upon its face any infirmity or defense to it, of course any purchaser will be affected with notice thereof. Or, if such purchaser has actual knowledge of such facts with reference to the paper as would in law constitute notice of the defense thereto, he will be affected by it. But we are of opinion that, although it may be beyond the scope of a partnership business to execute notes as surety, yet the mere signing of such a note, the signature of the firm being last upon it, is not sufficient of itself to indicate that the last signature is that of a surety. *Silverstein v. Atkinson*, 45 Miss. 81. The positions of the names signed to a note do not constitute their relation to the debt. In fact, the one signing first, and whose name may first appear, may be the surety, while the one whose name appears last may be the principal. From the necessity of the case, one name must appear first and others follow it. This is so whether the case be that of principal and surety or joint principals. Therefore the mere position of signatures to the note will not indicate that either is a surety in point of fact. The note appears to be a joint obligation. Nothing is said about either of the makers being a surety. No presumption can be indulged as to whether either is surety or both principals. Therefore, if there is nothing else in the case indicating the relation of the makers to the note at the time of its discounting by the bank, and the bank had no other notice or knowledge of the fact that the firm name was signed as surety instead of joint principal, a peremptory instruction should have gone directing a verdict for the plaintiff. *Story, Bills*, §§ 78, 188; *Le Roy v. Johnson*, 2 Pet. 196, 7 L. Ed. 391; *Bank v. Brooking*, 2 Litt. 45; *Woolfolk v. Bank*, 10 Bush, 515; *Montgomery v. Bank*, 16 Ky. Law Rep. 445,—seem to sustain the conclusion at which we have arrived.

The judgment is reversed, and cause remanded for a new trial not inconsistent with this opinion.

GUFFY, C. J., dissents. PAYNTER, J., not sitting.

LESLIE et al. v. YORK et al.¹

(Court of Appeals of Kentucky. Feb. 12, 1902.)

ATTORNEY AND CLIENT—CONSTRUCTION OF CONTRACT FOR FEE—MEANING OF WORD "RECOVER."

A client who agrees to pay his attorneys an amount equal to one-half of what they "recover" is liable only for an amount equal to one-half of what he actually obtains by the judgment recovered, and not one-half of the amount of the judgment.

Appeal from circuit court, Pike county.

"To be officially reported."

Action by J. M. York and others against A. P. Leslie and others to settle estate of James H. Leslie, deceased. Judgment allowing claim of J. M. York and A. J. Auxler, and Kate Leslie and others appeal. Reversed.

J. M. Roberson, M. W. Maynard, and P. B. Stratton, for appellants. York & York and Auxler & Auxler, for appellees.

DU RELLE, J. There is but one question necessary to the decision of this case, and that is the proper construction to be placed upon the word "recover" in the following contract of employment: "I have employed Auxler & York to institute a suit in the Pike circuit court vs. M. Schaumberg for fraud in land sale, in giving falsely the number of acres: Now I agree to pay them an amount equal to one-half they may recover, and if they do not recover I am to pay them nothing. This May 10, 1892. James H. Leslie." The claim of appellees against Leslie's estate is for an amount equal to one-half the amount of the judgment obtained October 11, 1900, by the personal representative of James H. Leslie, deceased, against M. Schaumberg for \$2,340. Various questions are made by appellants, but in the present condition of the case are not necessary to be, and are not, decided. For appellees it is insisted that in the contract quoted "recover" means to obtain judgment; that the attorneys in such contract do not guaranty the solvency of the judgment debtor, and that when they have recovered a judgment they have done all they are required to do to entitle them to compensation. In support of this contention they rely upon the case of *In re Stretton*, 15 Law J. Exch. 16, 14 Mees. & W. 806, in which it was held that in an undertaking by a solicitor to his client that, "should the damages or costs not be recoverable in this action, I shall charge you costs out of purse only," the result of the action, and not the solvency of the defendant therein, was referred to. We do not think this is a fair construction of the word "recover" as used in this contract. The word "recover" is habitually and properly used in connection with the word "judgment." It is a perfectly correct use of the

word to say that the plaintiff recovered a judgment for a named sum. But in this contract the agreement is to pay "an amount equal to one-half they may recover." It is not "an amount equal to one-half of the judgment they may recover." "Recover," as defined by *Kinney's Law Dictionary*, means: "To obtain by course of law; to obtain by means of an action; to succeed in an action." To the same effect is the definition in *Anderson's Law Dictionary*. In the *American & English Encyclopedia of Law* (volume 20, p. 604) it is defined thus: "To recover in law is to recover anything, or the value thereof, by judgment; as if a man sue for any land, or other thing, movable or immovable, and have a verdict or judgment for him. To recover is to obtain by course of law. Recovery is the obtaining of a thing by the judgment of a court, as a result of an action brought for the purpose; the obtaining of anything by judgment or trial at law." In *Webster's International Dictionary* the first definition given is: "To get or obtain again; to get renewed possession of; to win back; to regain." So we see that the primary meaning of the word in common speech, and even when used as a word of art, implies the actual obtaining of the thing sought, and that the meaning which implies the mere obtaining of a judgment which gives a right to the actual possession of the thing sought is secondary, though the word may be so used, and the context be so plain, as to show that the word was obviously used in its secondary meaning. The word has frequently—especially in contracts—been construed to bear its primary and popular meaning. In *Strohecker v. Bank*, 6 Pa. 41, the assignor of a bond agreed to pay the amount of the bond with charges accruing to the assignee, "in case the same cannot be recovered of the within-bound William Sherman." It was held: "One of the technical definitions of the word 'recovery' is the actual possession of anything, or its value, by judgment of a legal tribunal, and it is not to be doubted that this is the sense in which the word was used in this covenant." So, in the case at bar, the obvious intent of the parties was that counsel should have for their services one-half of what was obtained by the suit. But for the champerty statute the contract would have been so expressed. Because of that statute the phrase was used, "an amount equal to one-half they may recover." We are of opinion that the fair construction of the language is that Leslie was to pay an amount equal to one-half of what he actually obtained by the judgment, and not one-half of the amount of the judgment, which might or might not be worthless.

Inasmuch as such evidence as appears in this record indicates the solvency of Schaumberg, the judgment debtor, we have deemed it best to ignore the other questions raised and decide the main question argued, to the end that the rights of the parties may be

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

adjusted without loss by unnecessary delay.

For the reasons given the judgment is reversed, and cause remanded, with directions for further proceedings consistent herewith.

FRIEDMAN et al. v. JANSSEN.¹

(Court of Appeals of Kentucky. Feb. 21, 1902.)

LIS PENDENS — PROPOSED CORPORATION — LAND HELD IN TRUST—WANT OF LEGAL ORGANIZATION—RIGHT TO PLEAD—PROMOTERS TREATED AS PARTNERS.

1. Where J. employed plaintiff to perform services as an architect for a corporation which he represented that he and two other persons were about to organize, and for which he, with the consent of his associates, had bought certain land, which he was to turn over to the corporation in payment of his subscription for a certain number of shares of stock, the project having been abandoned, plaintiff was entitled to treat J. as a trustee for the corporation, and to enforce the trust by subjecting the land to the payment of his debt.

2. The institution of the action to enforce the trust created a *lis pendens* lien on the land sought to be subjected, which was specifically described in the petition; and therefore persons who purchased from defendant pending the action took subject to his rights, though they had no actual notice of the action.

3. It is not clear that the subsequent purchasers from J. should be permitted to come into the action and plead that the corporation was not legally organized, as neither J. nor the corporation could have made that defense; but, even if the corporation be treated as not legally organized, J. and his associates must be treated as partners, and a court of equity will treat the land as firm assets, subject to the firm liabilities, and will entertain jurisdiction against J. to enforce the trust.

Appeal from circuit court, McCracken county.

"Not to be officially reported."

Action by Ernest C. Janssen against the Paducah Brewing Company and L. W. Johnson to enforce a lien on real estate. Judgment denying motion by James L. Friedman and others to set aside judgment for plaintiff, and they appeal. Affirmed.

Thos. E. Moss and Greer & Reed, for appellants. Campbell & Campbell, for appellee.

HOBSON, J. On April 3, 1899, appellee, Ernest C. Janssen, instituted this suit in the McCracken circuit court against the Paducah Brewing Company and L. W. Johnson. He alleged in his petition that the brewing company was a corporation created under the laws of this state, and that Johnson was its president; that on December 3, 1898, the company, by its president, entered into a written contract with him, by which he was to perform certain services for it as architect; that he performed the services, and that they amounted at the contract price to the sum of \$1,650, which was unpaid; that Johnson represented to him, at the time the contract was made, that the corporation

would acquire title to certain real estate in the city of Paducah, Ky., on the corner of Sixth and Jarrett streets, and desired to erect a brewery and all necessary machinery, at a cost of about \$65,000; that the land had already been bought, and the corporation desired appellee to do the work as architect, and as an inducement to get him to make the contract Johnson represented that he had subscribed for 200 shares in the capital stock of the company of the par value of \$100, and one Rath and one Bennett had each subscribed for 150 shares; that in part payment of his 200 shares the real estate bought by Johnson would be turned over to the corporation, and become part of its assets; that the land had been purchased for that purpose with the consent of Johnson and all the stockholders, and it was held for the use and benefit of the corporation; that Johnson was to receive stock for said real estate, and the title was to be vested in the corporation. He alleged that Johnson did procure and receive a certificate for 200 shares of stock, but that he had not conveyed the land to the corporation, although he held the land for it; that none of the buildings were erected, or even commenced; that the corporation was insolvent, and had abandoned its enterprise, and none of the subscriptions had been paid, leaving no assets, except the land, for the payment of his debt. He prayed that the land be subjected, and described it minutely in the petition. Appellee also filed in the county clerk's office a memorandum of the lien claimed by him pursuant to section 2358a, Ky. St., when the suit was filed. Johnson and the corporation filed answers denying the allegations of the petition. Proof was taken, which sustained its allegations, and showed that, after the architect had done his work, Johnson, Rath, and Bennett failed to raise money to pay their subscriptions, and the whole scheme fell through, leaving nothing but the lots, which had been conveyed to the president, Johnson, but bought for the corporation with a view to the erection of the buildings thereon, under an understanding that Johnson was to have credit therefor on his subscription. The certificate of stock was issued to Johnson for the 200 shares, although he had paid nothing, except for the land. Like certificates were issued to Bennett and Rath, although they had paid nothing. There was no other debt of the corporation, except a small debt to Rath. On this proof the court entered a judgment directing the lots to be sold to pay Janssen's debt. At the same term of the court appellants entered a motion to set aside the judgment, and in support of this motion tendered a petition, which they asked should be taken as their answer. In this pleading it was alleged that during the pendency of the action the defendant Johnson had by deed conveyed to appellant Thompson the lots in contest for \$800, for which Thompson executed to Johnson a note

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

of \$600; that Johnson, for a valuable consideration, sold and assigned this note to appellant Friedman, and that a lien was retained on the land to secure its payment. They denied that appellee had any lien on the lot, and alleged that they had no notice of the suit; also that there had not been a subscription of stock to the amount of 50 per cent. of the capital stock in good faith; that the so-called corporation had no interest in the lots, or any existence at all; that it had not paid anything for the lots; that the company had no power to contract at all; that there was no valid subscription for stock, and that nothing was ever paid, or ever to be paid, for any stock. The court refused to allow these pleadings to be filed or to set aside the judgment, and the petitioners have appealed.

The first question to be determined is whether appellee acquired a *lis pendens* lien on the lots. He took out no attachment, and, if he acquired no lien by the filing of his suit, appellants do not stand as *lis pendens* purchasers, subject to his rights; but, if he acquired a lien by the filing of his action, it is superior to the subsequent purchase by appellants from Johnson. The property was bought for the corporation for the purpose of the erection of its plant on it. Johnson was the president of the corporation, and, having received the stock, which was in part to be paid for in the land, he held the land in trust for the corporation. Appellee, as a creditor of the corporation, might maintain an action against the trustee to compel him to execute the trust and subject the trust property in his hands to the payment of the debts of the corporation. There was no need for an attachment to give him a *lis pendens* lien. The chancellor laid hold of the conscience of the recusant trustee, and required him to do what he ought to have done voluntarily. The trust property, which was chargeable with the payment of the debts of the corporation, being described in the petition, there was a *lis pendens* lien upon it from the institution of the action, for the purpose of the suit was to subject this property to the payment of the debt of the corporation. *White v. Land Co.*, 49 Mo. App. 450; *Perry, Trusts*, § 129; 3 *Thomp. Corp.* § 4155.

The corporation could not plead its own want of legal organization, and, as it could not contest the allegations of appellee's petition on this subject, and he acquired thereby a lien on the property, which was good as against it and Johnson, we are by no means clear that the subsequent purchaser from Johnson should be permitted to come into the action and make a defense that he and the corporation could not have made. But, however this may be, if we treat the corporation as having no legal existence, and regard Johnson, Bennett, and Rath as a partnership, the result will be the same; for, if the lots were bought for partnership

purposes under an agreement that Johnson would put them into the firm as his contribution to the capital stock, and were held by him for this purpose, and if, after all this, the firm dissolved, leaving the debt to appellee unpaid, under the facts shown, equity would treat the land as firm assets, subject to the firm liabilities, and would entertain jurisdiction against Johnson to enforce the trust. We therefore conclude that in any view of the case appellee had the superior right, and that the court did not err in refusing to set aside the judgment. Judgment affirmed.

COMMONWEALTH v. LOUISVILLE & N. R. CO. et al.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

RAILROADS — STATUTORY REQUIREMENT AS TO RUNNING OF TRAINS—FAILURE TO STOP AT STATION.

1. Ky. St. § 772a, providing that all companies or persons owning and operating a railroad line or any branch of any railroad in the commonwealth, the length of which exceeds five miles, shall be required to run at least one passenger train each way on every day of the year, Sundays excepted, over said line, being a penal statute, must be strictly construed.

2. Where a part of a railroad was jointly operated by two companies, the running of one train each way over that part of the road was a sufficient compliance with the statute, though no train stopped at one station, and there was thus a failure to so operate the road as to accommodate passengers.

Appeal from circuit court, Shelby county. "To be officially reported."

Action by the commonwealth of Kentucky against the Louisville & Nashville Railroad Company and Chesapeake & Ohio Railway Company to recover a fine and to obtain a forfeiture of the charters of defendants. Judgment for defendants, and plaintiff appeals. Affirmed.

R. F. Peak and R. J. Breckinridge, for the Commonwealth. Willis & Willis, for appellees.

GUFFY, C. J. This is an action instituted by the commonwealth against the appellees seeking to recover judgment for the sum of \$300, and to obtain a forfeiture of the charters of said companies, on account of the failure of said companies to comply with section 772a, Ky. St. So much of said section as is deemed applicable to the case on trial reads as follows: "That all corporations, companies, persons or associations owning and operating a railroad line in this commonwealth or any branch of any railroad in this commonwealth, the length of which exceeds five miles, shall be required and they are hereby directed to run at least one passenger train each way on every day of the year, Sundays excepted, over said line: pro-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

vided, however, that the operation of a train known as a mixed train, on lines carrying passengers and freight in the manner in which both passengers and freight are carried, if operated in accordance with the provisions of this act, shall be deemed a compliance therewith." It is further provided "that any corporation, association, company or person who shall willfully violate the provisions of this act, shall be liable to a forfeiture of the charter of the said corporation, company or association, and upon conviction in a court of competent jurisdiction, shall be fined not less than \$300.00 for each offense, and the failure of such corporation, company, association or person to run a train either way on any day during the year, Sundays excepted, shall be considered and treated as a separate and distinct offense." It is further provided that the penalties may be recovered by indictment or by information by the county or commonwealth's attorney or by an ordinary suit for penalties. This action was instituted under the provisions of the statute aforesaid. The defense may be treated as a plea of not guilty. The agreed facts show that the line of road specified in the appeal is what is known as the "cut off," leaving the line of what is now the Louisville & Nashville Railroad at Christiansburg, and thence to Shelbyville, being a distance of more than eight miles from Christiansburg to Shelbyville; that the line aforesaid is operated by the appellee Chesapeake & Ohio Railway Company; that it runs two trains each day each way over the said line, but that it will not accept passengers for Shelbyville except at Bagdad, which is east of Christiansburg. We are of opinion from the testimony in the case that the railroad is jointly operated by the two appellees. It is insisted for the commonwealth that the plain meaning of the statute in question is that the railroad should be so operated as to accommodate the passenger traffic between Christiansburg and Shelbyville. The contention of the appellees is that they have not violated the statute in question, and that nothing is said in the statute as to carrying passengers or traffic on the line aforesaid. It seems to us that applying the strict rule in penal actions to the case at bar justified the second instruction given by the court below, which was to the effect that if the appellees really ran as many as one train each way each day upon said road the jury should find the defendants not guilty. It may be that the intent of the legislature was to require the operation of trains on the roads indicated in the act for the accommodation of passengers and traffic thereon, but it is clear that the act in question does not so read, and under the well-settled rules of construction of penal statutes we are not authorized to hold that a failure to so operate the road as to accommodate passengers brings the companies within the purview of the act in question,

or, in other words, subjects them to the penalty denounced by the statute aforesaid.

Some reference is made to the powers of the railroad commission in regard to the operation of railroads. It is also argued that under the law railroads, being common carriers, are bound to furnish reasonable facilities for passengers and traffic thereon; but neither of these questions is before us for decision, and we expressly decline to give any opinion thereon. It is, however, clear to us that the appellees have not violated the letter of the statute aforesaid, and it therefore follows that the judgment appealed from must be and is affirmed.

COMMONWEALTH, to Use of KENTUCKY
JEANS CLOTHING CO., v. BEGLEY
et al.¹

(Court of Appeals of Kentucky. Feb. 25,
1902.)

SHERIFFS—LIABILITY ON BOND—FAILURE TO
LEVY EXECUTION.

Where the defendant in an execution had sufficient property to satisfy the execution at the time the writ was placed in the hands of the sheriff, and the sheriff, though having abundant opportunity to levy thereon, failed to do so, and failed to return the execution until after return day, and until after the defendant had died insolvent, he is liable on his bond for the loss resulting therefrom.

Appeal from circuit court, Leslie county.

"Not to be officially reported."

Action by the commonwealth of Kentucky, for the benefit of the Kentucky Jeans Clothing Company, against A. L. Begley and others, on an official bond. Judgment for defendants, and plaintiff appeals. Reversed.

T. G. Lewis and D. B. Logan, for appellant. Tinsley & Faulkner, for appellees.

GUFFY, C. J. This is an action instituted in the name of the commonwealth, for the benefit of the Kentucky Jeans Clothing Company, against A. L. Begley and others, his sureties. It is substantially alleged in the petition that in June, 1895, the plaintiff, Kentucky Jeans Clothing Company, recovered a judgment in the Leslie circuit court against W. P. Bentley for the sum of \$201.15, with interest and costs; that on the 28th day of September, 1895, the said jeans clothing company had execution issued for the amount thereof, directed to the sheriff of Leslie county, and made returnable on the 18th of November, 1895, and the same was placed in the hands of said Begley, as sheriff, for execution thereof; that on the 2d day of December, 1895, the said sheriff returned said execution to the office, indorsed as follows: "I return this *fi. fa.* not satisfied; no property found to make said debt, or any part thereof; and on account of the death of W. P. Bentley. [Signed] A. L. Begley. S. L. Co." It is further alleged in the petition that, at the time the execution was

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

placed in the hands of said Begley, said Bentley was the owner and possessor of a sufficient amount of real estate and personal property not exempt from execution, which was subject to said execution, to satisfy same; that Begley, without any excuse, failed and refused to levy said execution on any of said Bentley's property, and that, by defendant's unlawful act in failing to levy on the property aforesaid, the defendants, by the terms and conditions of their bond, became liable to the plaintiff for said debt and interest and cost, which has never been paid, wherefore they pray judgment against the defendants for said debt, interest, and costs. Said execution and return are filed with the petition. A demurrer was filed to the petition, and afterwards amended petitions perfecting the cause of action were filed. The answer of defendant is a denial that he could have, by any diligence, levied upon or sold any of Bentley's property while said execution was in his hands as sheriff. It is further alleged in the answer that while said execution was in full force and effect the defendant therein, W. P. Bentley, was shot and killed; that he had been out of the county for and during all the time the execution was in defendant's hands, except less than a week; that, during the time Bentley was in the county, defendant only saw him once, and Bentley promised to replevy same in a few days, but was instantly killed before he replevied same; that said execution created a lien upon all of the property of Bentley set out in the petition, and said lien existed at the time Bentley died, and followed same into the hands of his administrator; that this lien plaintiff might have enforced against the said property, and thereby saved its debt, but that by plaintiff's negligence, and not by any negligence of defendant, it lost said lien. The demurrer to plaintiff's petition as amended was properly overruled. The reply is a traverse of the averments of the answer. The testimony introduced upon the part of the plaintiff conduces to show that the sheriff could have levied and collected the execution aforesaid; that the defendant in the execution had an abundance of property while the execution was in the hands of the sheriff, liable to execution, sufficient to have satisfied the execution; and that the sheriff had abundant opportunity to have levied upon same, which he failed to do, and failed to return the execution until after the return day thereof. At the conclusion of plaintiff's testimony the court instructed the jury to find for the defendant, which was accordingly done, and judgment entered dismissing the plaintiff's petition; and, its motion for a new trial having been overruled, it prosecutes this appeal.

It is evident from the testimony introduced in this action that the sheriff might have levied the execution upon a sufficient amount of property liable thereto to have

satisfied the claim of the plaintiff, and if such levy had been made, whether there was time to have made a sale or not before the death of Bentley, a lien would have existed upon the property for the satisfaction of the execution. It also appears from the evidence that the estate of the said Bentley, after his death, proved to be insolvent; and, so far as this record appears, the plaintiff lost its debt by reason of the neglect of the sheriff to diligently attempt to collect the execution in question. It results from the foregoing that the court erred in giving the peremptory instruction, and erred in overruling the plaintiff's motion for a new trial.

For the reasons indicated, the judgment is reversed, and the cause remanded for a new trial upon principles consistent with this opinion.

MILLER et al. v. WILSON'S ADM'R et al.¹
(Court of Appeals of Kentucky. Feb. 19, 1902.)

WILLS—EMANCIPATION OF SLAVES—LEGACIES TO SLAVES—LEGACY PAYABLE ON DEATH OF WIDOW—FAILURE TO SERVE WIDOW—EMANCIPATION BY OPERATION OF LAW.

1. A will by which testator gave all his estate to his wife for life, and expressed the "will and desire" that at her death all his slaves should be set free, and that his executor should pay to each of said slaves "when emancipated" \$200, and that if there should be more than enough for that purpose after paying the executor for his trouble it should be equally divided among testator's slaves and their increase, was sufficient to confer freedom upon the slaves upon the death of the widow, and was not merely advisory as to that matter.

2. The fact that the legacies may have been given to the slaves to enable them to remove from the state in order that they might be free, and that at the death of the widow the legacies were no longer necessary for that purpose, does not cause them to fail, there being nothing in the will to manifest any such purpose.

3. The fact that the slaves were emancipated by operation of law prior to the death of the widow, and were therefore no longer slaves at that time, does not deprive them of their right to the legacies.

4. Under Rev. St. c. 46, art. 2, § 3, providing that "When any property shall be devised subject to or upon the payment by the devisee to another of a sum of money, or his doing some other thing, the latter shall have a lien on the legacy for the sum so to be paid, or for the value of the thing to be done," the legacies would not be defeated by the failure of the slaves to serve the widow, even if the will had expressly required them to do so, as there would have been merely a lien on the legacies to secure the services; and in any event the widow alone would have had the right to complain.

5. The estate goes to the surviving slaves of testator and the descendants of his female slaves per capita.

Appeal from circuit court, Todd county.

"Not to be officially reported."

Action by Fannie Miller and others against the administrator of Edward G. Wilson and others, to settle the estate of Edward G. Wilson, and to enforce certain provisions made

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

in his will for their benefit. Judgment for defendants and plaintiffs appeal. Reversed.

W. S. Pryor, B. B. Petrie, J. D. Standard, and O. W. Wilson, for appellants. Perkins & Trimble, S. Walton Forgy, F. B. Gill, and Hazelrigg & Chenault, for appellees.

BURNAM, J. The following will of Edward G. Wilson was probated by the Todd county court and recorded in the Todd county court clerk's office on the 13th of February, 1854: "I, Edward G. Wilson, of the county of Todd, state of Kentucky, being of sound mind and disposing memory, but knowing the uncertainty of life, do make and constitute my last will and testament in manner and form as follows: Item 1st. I give and bequeath to my wife, Susan M. Wilson, all my estate, of any kind, both real, personal, and mixed, during her natural life, and at her death it is my will and desire that all my slaves, together with their future increase, be emancipated and set free, and that my executor hereinafter named pay to each of my said slaves when emancipated the sum of two hundred dollars. Item 2nd. It is my will and desire, at the death of my wife, that all my landed estate be sold, and the proceeds of the sale be used to pay the legacies bequeathed to my slaves. Item 3rd. At the death of my wife, should there be more than enough to pay each of my slaves two hundred dollars after paying my executor for his trouble, it is my will and desire that it be equally divided among my said slaves and their increase. Item 4. I hereby appoint my friend, S. H. Sullivan, as my executor, to this, my last will and testament, and it is my desire that he be allowed five hundred dollars for his services in executing my will. Item 5th. It is my will and desire that my slave Anderson be given fifty dollars over and above the rest of my slaves. Item 6th. It is my will and desire that the court do not require security of any kind of my executor, I having perfect confidence in his integrity. In testimony whereof I have hereunto set my hand and seal this 15 of October, 1852. Edward G. Wilson. [Seal]." After the death of Edward G. Wilson his widow married C. G. Camp, and they sold and conveyed her life interest in the lands of her deceased husband to O. O. Tandy, who in turn conveyed them to one Sebree, by whom the lands were held until the death of Mrs. Camp in February, 1900. After her death Otis Wilson qualified as administrator with the will annexed, and on the 15th day of March, 1900, plaintiffs, who were slaves and descendants of slaves owned by Edward G. Wilson at his death, instituted this suit to settle his estate, and to have enforced the provision made for them in the will. They made the administrator and heirs at law of Ed Wilson defendants. The administrator, Otis Wilson, filed his answer and cross petition, in which he unites with plaintiffs in the construction placed by

them upon the will. The Wilson heirs filed a general demurrer to both the original and amended petition filed by plaintiffs, and also to the answer and cross petition of Wilson, administrator, which was sustained, and the petition of plaintiffs and cross petition of the administrator dismissed. And we are asked upon this appeal to review the judgment upon the demurrer and construe the will. The affirmance of the judgment of the lower court is asked upon three grounds: First, it is claimed that the language of the will is not sufficient to confer freedom, but is only advisory, leaving the power to emancipate them with his surviving widow; second, that the legacies were given for the purpose of providing means to enable the slaves of the testator to remove from the state, in order that they might be free, and, as the legacy is no longer necessary for that purpose, the devise fails; third, that the devise was to slaves as a class, and, as there was no such class at the time the devise took effect, it falls, and the heirs inherit.

It is fortunate for the court, so long after the abolition of slavery in this state, that the reported decisions of this court afford abundant precedents for the proper construction and decision of each of the grounds relied on for an affirmance. We will consider them in the order in which they have been stated: First, is the language of the will sufficiently definite to confer freedom upon the slaves of testator? The fact that the widow is given a life estate in slaves does not affect the validity of the devise. "It was very common in Kentucky, during the existence of slavery, for the owner to provide for the liberation of his slaves, and also to devise them property, and their right to the property, when so freed, was never judicially denied them; and we know of no statute nor public policy which forbade a testator from directing the freedom of his slaves in future after serving a given time, and when so freed to be paid out of his estate a given sum or to have a given piece of property." See *Monohon v. Caroline*, 2 Bush, 410; *Isaac v. Graves' Ex'r*, 16 B. Mon. 366; *Graham's Ex'r v. Sam*, 7 B. Mon. 403; *Darcus v. Crump*, 6 B. Mon. 365; *In re Bodine's Will*, 4 Dana, 476. That it was the intention of Ed G. Wilson that his slaves and their increase should be freed at the death of his wife admits of no serious contention. The language is plain and unambiguous. By the first item he declares that all of his slaves, with their future increase, shall be set free at the death of his wife, and that his executor shall pay to each of them \$200; in the second item he directs the sale of his landed estate at the death of his wife for the purpose of paying the legacies; and in the third he directs that any surplus of his estate, after paying the executor for his trouble, shall be divided among his slaves and their increase. Two dominant ideas are presented by the will,—the desire to provide

for his wife during her life, and at her death that his slaves and their increase should have his property. In our opinion the will conferred freedom absolutely upon the slaves of the testator and their increase at the death of his wife, and they were entitled after freedom to the provision made for them in the will.

We are unable to discover anything in the language of the will to support the second ground relied on by appellee for an affirmance. There is nothing referring to their removal from the state; the devise is absolute and unconditional. And the contention that the devise was to the slaves of testator as a class, and that they should forfeit the provision made for them because at the time the devise took effect they were no longer slaves, and for the further reason that they had failed to serve the wife of testator during her life, seems equally untenable. There is no suggestion in the will that they were to forfeit their freedom upon such a contingency; on the contrary, it is provided that all of his slaves and their increase, without regard to age or sex, young or old, male and female, share equally, with the exception of Anderson, who is entitled to \$50 more than the others. In *Parish v. Hill*, 2 Duv. 397, the following will was under consideration: "I give and bequeath to my beloved wife, Cella Parish, all my estate, both real and personal, during her natural lifetime or widowhood. After the death of myself and beloved wife, it is my desire and will that all my negroes, young and old, be set free, and to have \$200.00 given to each one, to be paid to them out of my estate, and they, the said negroes, when free, to be conveyed to a place where they can enjoy the right of freedom." The widow, without legally renouncing the devise, married a second husband, and in 1864 the negro devisees filed a petition, asserting that they were free, and claimed that they were entitled to their pecuniary legacies, with interest, and also an outfit for emigration to some other country. In construing this will Judge Robertson used this language: "The amendment of the constitution of the United States abolishing slavery has made them free and legally capable of taking and enjoying legacies. And the fact that they became free, not by the will, but by law, consistently with the end desired and provided for by the testator, is not material. The anticipation of the time cannot be deemed essentially contrary to his wishes. His leading purpose was their emancipation and the payment of their pecuniary legacies whenever they became free. As soon as they became free, they were entitled to the money bequeathed to them, and from that time until the payment they will be entitled to interest." In *Bigstaff v. Lumkins* (Ky.) 16 S. W. 449, the court had under consideration the following clause in the will of Gen. James Taylor, who died in 1840: "All my other male servants not herein provided for,

and who may be under twenty-five years of age at the time of my death, are to serve my children until they are thirty years of age, and then to be freed, and they are to have, each of them, twenty-five acres of land, to be laid off out of the Clark tract, or out of such land as my executor shall think fit in that section of the county." These devisees sued the personal representative and children of Taylor, asserting their right to the land or its equivalent in money. The defendants answered that plaintiffs had received their freedom by operation of law, instead of under the will, and had failed to serve the children of Taylor until they were 30 years of age. This court said: "It is immaterial whether they served appellants or not; they were entitled to their freedom, when they arrived at thirty years of age, unconditionally, and their right to freedom by the terms of the will was not made to depend on the performance of service by them." And they were held entitled to recover. In the above case the slaves were expressly directed to serve, and the devise was to them as a class, while in this case there is no such direction, yet the court held that there was no condition precedent. Section 3, art. 2, c. 46, of the Revised Statutes, reads: "When any property shall be devised subject to or upon the payment by the devisee to another of a sum of money, or his doing some other thing, the latter shall have a lien on the legacy for the sum so to be paid, or for the value of the thing to be done." Under this statute a devise subject to a charge for services is not defeated by the failure to do the thing required, but the party to whom the money is due has a lien on the legacy, which may be enforced in the event of such failure. And even if there had been an express provision to serve, and the failure to do so, the widow of testator would have been the party to complain, and not appellees. After a careful consideration of the able brief of appellants, and an examination of the authorities cited, we are of opinion that the circuit judge erred in sustaining the general demurrer and dismissing appellants' petition; and that they are entitled to have the landed estate of testator sold by his executor and the proceeds appropriated to their use as directed by the will.

We are also asked by the administrator with the will annexed to decide whether the \$200 devised to each slave is to go to the original slaves only, and the residue of the estate to be equally divided between the slaves and their increase, or whether both the slaves and increase are to share alike. In our opinion the language of the will is susceptible of but one interpretation; testator intended to provide for the slaves owned by him and their increase who would have belonged to his estate at the death of his wife. The construction excludes the descendants of male slaves by female slaves of another. The estate therefore goes to those

persons who are now alive who were the slaves of testator at his death, and the children and descendants of his female slaves, per capita. The executor is entitled to collect the rents upon the landed estate devised by testator from the termination of the life estate, and to sell the realty and to appropriate the proceeds of both to the payment of the legacy of testator.

For reasons indicated, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

WHITE v. ROBERTS.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

HOMESTEAD—ABANDONMENT—EXECUTION SALE—SEPARATE TRACTS—FAILURE TO OFFER SEPARATELY.

1. Where a debtor and his wife left the debtor's farm, renting out the dwelling house thereon, and moving to a town where they engage in pursuits from which they realize much more than they could hope to realize on the farm, their indefinite intention to return to the farm is not sufficient to prevent the removal from operating as an abandonment of the homestead.

2. Where a farm was divided into two separate tracts by a county road, in selling the land under execution each tract should have been offered separately; and it appearing that the smaller of the two tracts, if it had been sold separately, would have realized a sum sufficient to satisfy the execution, it was proper to quash the sale and direct a resale under venditioni exponas.

Appeal from circuit court, Lee county.

"To be officially reported."

Action by T. T. Roberts against J. B. White to set aside an execution sale. Judgment quashing sale, and defendant appeals. Affirmed.

E. E. Hogg and J. K. Roberts, for appellant. Marcum & Pollard, for appellee.

BURNAM, J. On the 1st day of March, 1898, an execution issued from the office of the Lee circuit court in favor of appellant and against appellee for \$100, with 6 per cent. interest thereon from the 8th day of April, 1892, and \$7.86 which had been adjudged appellant for costs, directed to the sheriff of Madison county, which was levied by him upon a tract of 73 acres of land belonging to the appellee; and on the first day of the May term of the Madison county court the land was sold by the sheriff at the court-house door, appellant becoming the purchaser thereof at the price of \$144.40. On the 24th day of September, 1898, the appellee, Roberts, filed his petition in equity, seeking to set aside the sale upon two grounds: First, he alleges that he is an actual, bona fide housekeeper, with a family, resident in this commonwealth, and that the entire tract of land sold did not exceed in value \$1,000,

and was for this reason exempt from sale; second, that more land was sold than was necessary to satisfy the execution under which the sale was made.

It appears from the pleadings and proof that the appellee, Roberts, lived on the tract of land in controversy for several years prior to 1897 with his family; that it was reasonably worth from \$800 to \$900; that it was divided into two separate tracts by a county road, 15 acres lying on one side, and 58 on the other; that in 1897 appellee rented out the dwelling house on the place, and moved back to Beattyville, where he had previously resided, with his family; that his wife, who had some means of her own, started a small distillery, which he ran as distiller; and that in addition his wife ran a hotel, and he a barroom. Whilst he testifies that he always claimed the tract of land in Madison county as a homestead, and that he intended to return to it whenever his interests justified him in doing so, yet he says that he and his wife are realizing about \$1,500 per annum from their present pursuits, and as this sum is largely in excess of what, under the most favorable circumstances, he could raise on his farm, his intention to return is too vague and indefinite to justify the court in treating his removal therefrom as a temporary one. We therefore think the circuit judge properly held the property liable to execution.

The practice of selling real estate under execution was unknown at common law, and the rule is that a statute authority whereby title may be divested must be strictly followed in all the requisites which appear to be beneficial to the owner. Subsection 1 of section 1682 of the Statutes prescribes that "only so much land can be sold as will satisfy the execution under which the sale is made." Whilst the law secures to the creditor his just demand, and sequesters the property of the debtor to satisfy it, it carefully guards his interest in all the various steps taken leading to the sale of his property; and "the sale under execution of several parcels of land at one bid, and putting up for sale a whole tract when some portion of it could be sold to satisfy the debt, is uniformly condemned by the courts, as tending to the sacrifice of property and to oppression of the debtor." See Herman, Ex'n, p. 349, and authorities there cited. And one who seeks to sustain such a sale must show its justice and expediency. Ordinarily in the sale of land under execution each tract should be offered separately, and, if they fail to sell in this way, the officer will then be justified in selling all the property together, on a reasonable bid, if he make full return of the facts. The proof in this case shows that the detached tract of 15 acres, if it had been sold separately, would have realized a sum sufficient to have extinguished the debt of appellant, leaving the main tract untouched.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

We are therefore of the opinion that the circuit judge did not err in quashing the sale and directing a resale under venditioni exponas. The judgment is therefore affirmed both on the original and cross appeals.

ASHER v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

VALIDITY OF JUDGMENT—DEATH OF ONE OF SEVERAL DEFENDANTS AT TIME JUDGMENT WAS RENDERED—JURISDICTION OF FRANKLIN CIRCUIT COURT.

A default judgment rendered by the Franklin circuit court in favor of the commonwealth against the principal and sureties in the bond of a clerk was not void as to the sureties though the principal was dead at the time the judgment was rendered, as that court would have had jurisdiction of an action against the sureties alone.

Appeal from circuit court, Franklin county.

"Not to be officially reported."

Action by the commonwealth of Kentucky against J. F. Neal and others on the bond of J. F. Neal as clerk. Judgment for plaintiff, and defendant A. J. Asher appeals. Affirmed.

N. B. Hays, for appellant. Morrison Breckinridge, for the Commonwealth.

GUFFY, C. J. This action was instituted by the commonwealth of Kentucky against J. F. Neal, A. J. Asher, and J. F. Slusher. The first named was clerk of the Bell circuit court, and the others were his sureties. It appears from the petition that the defendant Neal received from the commonwealth or its auditor \$284.29, which he was not entitled to receive, and the commonwealth instituted this suit to recover said sum from the defendant. At the January term, 1901, it appears that, the defendants having been duly summoned and failing to answer, a judgment was rendered against them for said sum of \$284.29, with interest and costs. Afterwards, at the March term, 1901, of court, Molly C. Neal, administratrix of J. F. Neal, presented her petition, which shows that said Neal died on the 24th of July, 1899, and that on the 14th of August D. G. Colston was appointed his administrator, and afterwards, on the 21st of February, 1900, said Molly C. Neal was appointed administratrix; that, although her husband died July 24, 1899, this action has never been revived against either of the personal representatives of said Neal, nor had the plaintiff presented to either representative any claim against the estate of said Neal. The issue of the execution upon the judgment aforesaid is also set out. She asked to be permitted to file this petition for the purpose of affecting said judgment and quashing said execution. At the April term, 1901, motion of said Molly C. Neal,

as administratrix aforesaid, was sustained as to J. F. Neal, and the judgment against him was set aside and held for naught, and the execution in the hands of the sheriff of Bell county against the said Neal be, and the same is now, quashed and held to be of no valid effect against the said J. F. Neal and his estate; and at the same term and time the defendant Asher filed notice, executed on R. J. Breckinridge, attorney general, and G. C. Coulter, auditor of public accounts, and thereupon moved the court to vacate and set aside the judgment rendered in the above action against him at the January term of this court for 1901, and to quash the execution issued on said judgment, and to set aside the levy on same, for the reasons therein stated, which motion, having been considered by the court, was overruled,—to all of which the defendant Asher excepted, and prayed an appeal to this court, which was granted.

The appellant seeks a reversal upon several grounds, none of which, we think, is tenable. We think that the circuit court of Franklin county had jurisdiction of appellant, and that the mere fact that the judgment was rendered against Neal after his death in no wise affects the validity of the judgment against the appellant. We are of opinion that the commonwealth might have sued either of the defendants, or all of them, in the Franklin circuit court, and, if it showed itself entitled to a judgment, might have obtained judgment against either or all of defendants. No defense to the merits of the action has been interposed by any of the defendants. It therefore follows that a default judgment was properly rendered against those who were summoned and were still alive. The fact that no judgment has yet been obtained against Neal does not release him from liability to his sureties who may have to pay a valid demand against him, nor do we think that the commonwealth was bound to prosecute its suit against Neal to judgment before it was entitled to a judgment against the appellant.

Judgment affirmed.

CHENAULT et al. v. SCOTT et al.¹

(Court of Appeals of Kentucky. Feb. 21, 1902.)

CONSTRUCTION OF WILL—DEFEASIBLE FEE—DEVISE TO WIDOW DURING WIDOWHOOD—FAILURE TO RENOUNCE WILL.

1. Where a testator devised his entire estate to his wife, "with the following exception of my undivided interest in my mother's estate," to have and to hold so long as she should remain testator's widow, and then added, "and the undivided interest in my mother's estate I hereby give and bequest to my father," the widow took a defeasible fee in that part of testator's estate other than that which he inherited from his mother, and upon her remarriage her interest ceased.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

2. The widow, having failed to renounce the provisions of the will, and having lost by her remarriage that part of the estate devised to her, cannot, after the time for renunciation has expired, claim any part of the estate.

Appeal from circuit court, Green county. "Not to be officially reported."

Action by W. P. White against Una C. Scott and T. S. Scott to recover land. Judgment for defendants, and Barnett Chenault and others, in whose names the action was revived, appeal. Reversed.

B. W. Penick and Henry & Woodward, for appellants. Garnett & Garnett, for appellees.

PAYNTER, J. Edward L. White died testate on the 15th of March, 1896. At the time of his death he owned a small amount of personal property; two tracts of land, one containing 40 acres and the other 5 acres; and also an undivided one-third interest in a tract of 150 acres, which he inherited from his mother. The personal estate and $4\frac{1}{2}$ acres of the 5-acre tract were consumed in paying his debts. He did not leave a child or children. He left a widow, Una C., who in September, 1900, intermarried with T. S. Scott. Shortly after the marriage, W. P. White, the father of the testator, brought this action to recover the 40-acre tract and the remaining part of the 5-acre tract. W. P. White died, and the action was revived in the name of his real representatives. The construction of the will of Edward L. White is involved on this appeal, which reads as follows: "The Last Will and Testament of Ed L. White. I, being of sound mind, do hereby give and bequest to my wife, Una C. White, all my property, both real and personal (with the following exception of my undivided interest in my father's estate), to have and to hold, so long as said Una C. White shall remain my widow; and the undivided interest in my father's estate I hereby give and bequest to my father, W. P. White; and I hereby appoint my wife, Una C. White, as executrix of this will, and it is my will that she shall qualify without bond."

It is insisted on behalf of Mrs. Scott that she took a fee-simple title to the land, other than the interest which the testator devised to his father in the land which he inherited from his mother; it being agreed that the testator referred in his will to the interest inherited from his mother, not his father. It is claimed that the words in the will, "to have and to hold so long as said Una C. White shall remain my widow," refer to the character of interest which she took in the property which the testator willed to his father. We are of the opinion that she took a defeasible fee in the 40 and 5 acre tracts. When she married her rights therein ceased. We regret very much that we cannot concur in the opinion of the court below that she took a fee-simple title to the tracts mentioned. It is insisted that, if her title is defeated by her remarriage, then she is entitled

to take a widow's part in the estate of her husband, as the husband did not provide to whom the land should go in the event his widow lost it by her remarriage. She did not renounce the provisions of the will. She claimed under it. She cannot now claim against it. This court said in *Vance v. Campbell's Heirs*, 1 Dana, 230: "The devise to the wife during her widowhood should not be construed as a condition in restraint of marriage, but should only be deemed an allowable limitation to the estate devised. The marriage ipso facto terminated the devisee's right to any portion of the estate as derived from the will. And as she had not renounced the provision made for her by the will, but had elected to hold under the will, she cannot be entitled to any part of the estate by operation of law, and contrary to the provisions of the will. Having elected to hold under the will, and having so held until after the time allowed for renunciation had expired, she cannot now be permitted to assert a right against the will or independently of it." Again, in *Chambers v. Davis*, 15 B. Mon. 526: "But when she takes under the will she holds the estate as a devisee, merely, and derives no right to it as widow, although the devise may have the effect to bar her claim to dower. The statute allows her the right to waive the provisions made for her by the will and demand her dower, but if she fail to do it, and claims under the will, she occupies the same attitude as other devisees."

The judgment is reversed for proceedings consistent with this opinion.

SIKKING v. FROMM.¹

(Court of Appeals of Kentucky. Feb. 20, 1902.)

FRAUDULENT CONVEYANCE — HUSBAND AND WIFE—BURDEN OF PROOF.

The act of 1894 regulating the property rights of married women has not changed the rule which places the burden of proof upon the wife in an action brought against her by a creditor of the husband to subject land conveyed to her upon the ground that it was purchased and paid for with money furnished by the husband and conveyed to her for the purpose of defeating plaintiff's claim.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by John Fromm against Lula L. Sikking to enforce a judgment. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. A. Earl, for appellant. A. O. Rucker, for appellee.

WHITE, J. The appellee, Fromm, obtained a judgment in the quarterly court of Jefferson county against W. A. Sikking, husband of appellant, which being returned nul-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

la bona, he took a transcript of the execution and return, and obtained an execution from the circuit court, which was likewise returned "No property." This action was brought for discovery, and it was sought to subject to appellee's debt certain real estate deeded to appellant, the wife of W. A. Sikking, upon the allegation that the property had been purchased and paid for by the husband, and, in order to defeat appellee in the collection of his debt, the deed was made to the wife, appellant here. The appellant answered, and denied the allegations of the petition, but did not affirmatively allege that she paid for the property, nor did she offer any explanation as to how she obtained the property, nor from what source she obtained the money to pay for it. She contented herself with a denial. The case was submitted on petition and answer, no proof being taken by either party. Judgment was rendered subjecting the property to the payment of appellee's judgment; that is, the court appointed a receiver to take charge of the property and rent same out till sufficient was raised to satisfy appellee's claim and costs. From that judgment this appeal is prosecuted.

Counsel for appellant recognizes the fact that this court in the cases of Edelmuth v. Wybrant, 53 S. W. 528, Treadway v. Turner, 10 S. W. 816, Robertson v. Robertson, 20 S. W. 543, and other cases, had laid down the rule that in cases of this kind the burden is on the wife to show that she obtained the property from other sources than her husband, but earnestly contends that this rule should be changed since the enactment of the Welsenger law as to married women and their property rights. We are of opinion that the act of 1894 known as the "Welsenger Act," did not change this long-established rule as to these cases. The rule was laid down because of the relationship between husband and wife, and not necessarily because of the law as to property rights. The same reason for the rule exists now that has always existed. If the act of 1894 is to affect the rule at all, it should make it the more closely adhered to.

We are of opinion there was no error in the judgment, and the same is affirmed.

MCCORMICK HARVESTING MACH. CO. v. LITER.¹

(Court of Appeals of Kentucky. Feb. 19, 1902.)

MASTER AND SERVANT—DANGEROUS MACHINE—FAILURE TO INSTRUCT SERVANT—ASSURANCE THAT THERE WAS NO DANGER.

Where plaintiff, who was employed by defendant to feed a corn-shredding machine, had his hand caught in the rollers of the machine, defendant corporation was not liable for the injury, though it had failed to instruct plaintiff how to use the machine, and had assured him there was no danger, as plaintiff had rep-

resented that he understood how to operate the machine, and the danger was obvious.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by Albert Liter against the McCormick Harvesting Machine Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

A. M. Rutledge and Kohn, Baird & Spindle, for appellant. Dodd & Dodd and W. M. Smith, for appellee.

PAYNTER, J. About the 1st of November, 1898, A. Hunter Mason made a purchase conditionally from appellant of a corn-shredding machine. Under the contract the appellant was to set up the machine upon Mason's farm and give it a practical test with the corn on his place. If it operated to Mason's satisfaction, he was to accept it and pay for it; if not, it was to be taken back by appellant. It was delivered at Mason's farm on November 5, 1898. On November 7th the appellant sent A. T. Wright, one of its employes, to set it up and make the trial test. On the 8th of November, Wright began to operate the machine, and did so for three days. When Wright left, Mason's employes took charge of the machine and operated it until December 8, 1898. In the meantime a ratchet got out of repair, when Wright returned and supplied a new one. This was on November 23, 1898. During the three days which Wright operated the machine, the appellee, Liter, was band cutter, and at times helped Wright feed the machine. Before Wright left, he showed the appellee how to feed it. It was somewhat of the same character as a threshing machine. The feeder stood upon a slightly-raised platform at the end of the feeding table. The shredder had what are known as the "snapping rolls." They revolved inwardly, drawing the cornstalks into a set of revolving knives which were immediately back of the snapping rolls, which shredded the stalks and blades. The stalks were fed by first giving their butt ends to the snapping rolls, and as they were drawn in the ears of corn were snapped off and dropped into an opening made in front of the rolls, where they were shucked. From the platform where the feeder stood to the top of the feed table was three feet and one inch. The feed table rested upon a framework. At the outer end of it, where the feeder stood, was three feet and nine inches from the snapping rolls, but it could be made three inches shorter when desired; but at the time the accident occurred the outer end was three feet and nine inches from the snapping rolls. Wright was five feet and eight inches high, so his body stood two feet seven inches above the top of the feed

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

table, when standing in front of and against it. The corn was cut and put in bundles, which were secured by bands. It was hauled and placed on the table, where the bands were cut. It was then passed to the feeder. After Wright had tested the machine for three days, a man by the name of McDowell took his place as feeder, who fed it until about the 23d of November, when Mason's foreman employed the appellee, Litter, to do it. Litter had been band cutter and worked near the front of the machine from the time it was placed on Mason's farm until the 23d of November, when he assured Mason's foreman that he could feed the machine. He received \$1 a day as band cutter, but was paid \$1.50 per day for feeding the machine. He had fed the machine some during the time when McDowell was there. There was attached to the shredder a lever which by some mechanical appliance could stop the snapping rolls. The lever was brought around in front of the feed table, so that the feeder, by the pressure of his body against it, could manipulate it. Two purposes were to be accomplished by the lever: It was to stop the rolls so as to unchoke the machine when necessary, and at the same time operated as a safety appliance. About the 23d of November, Wright discovering that the ratchet which was manipulated by the lever was being worn out by use, and thus prevented the successful operation of the machine, he tied the lever so as to prevent its use for either of the purposes stated. Litter knew of this fact; being present when the lever was thus tied, and well knowing the purpose for which it was done. The snapping rolls can be seen by the feeder, as can the teeth of the cylinder of a threshing machine. On the 8th of December, while Litter was feeding the machine, his left hand was caught between the snapping rolls, and his arm was so mangled that amputation was necessary. This action was brought to recover damages for the loss of his arm and for the mental and physical suffering which he endured. In describing how the accident happened, he said: "I was snatched in. A stalk of corn caught my glove and snatched me in." He says that Wright told him that there was no danger in operating the machine with the safety lever tied up, and that he continued to feed it "because he told me I could not get in it. He says a man was too far away,—he could not get in it."

A master is not required to furnish machinery with the latest improvements. It is the duty of the master to provide reasonably safe machinery for the use of his employes, and to keep it in reasonably safe repair. The appellee was 27 years of age. He knew the exact condition of the machine which he was operating. He knew it was dangerous for him to place his hands in close proximity to the snapping rolls. He knew that it meant the destruction of his arm if it was

caught between them. This danger was as obvious as the machine was visible. Any one with ordinary understanding, with the slightest observation, could see the danger of being caught between the rolls. He claims that Wright did not advise him of the danger in feeding the machine, but that he assured him that he could do so safely, as he stood so far from the rolls. If Wright had advised him that there was no danger in placing his hands between the rolls, he could not have so placed them at the risk of the master, because he would not have been authorized to have done so reckless a thing, even had he been assured it was safe to do so, as the danger of doing so was so obvious. There was no evidence to show that the machinery was defective, nor was it attempted to be shown that appellee's hand was caught in the machine by reason of any defect in it. If the evidence of the appellee be true, his hand was drawn between the rolls by being caught by a cornstalk. He was a farm laborer, and knew the character of cornstalks he was to, and did, feed the machine. If they had such formations or growths upon them as made it dangerous to feed them to the machine, he did so at his own risk. It was a risk voluntarily assumed. The more hazardous his employment, the greater care should have been exercised in pursuing it. When one engages in the service of another, with a knowledge of the dangers incident thereto, he, not the master, assumes the risk. This is a well-recognized rule in this as in other jurisdictions. In *Sullivan's Adm'r v. Bridge Co.*, 9 Bush, 81, the court said: "While this doctrine is fully recognized, it is equally as well settled that, where the employe undertakes to perform labor that is necessarily attended with danger to himself, he so far assumes the risk as to require the exercise of ordinary prudence and caution on his part. He is not bound to engage in work that places his life in peril; and when labor of that sort is voluntarily assumed, and an injury occurs, he cannot look to his employer for damages upon the ground of negligence, if by the exercise of ordinary vigilance he could have avoided the accident." Many other decisions of this court could be cited in support of the doctrine. But it may be added here that one of the risks which the employe does not take is the negligence of the master. *Railroad Co. v. Vestal* (Ky.) 49 S. W. 204. Litter had experience enough in feeding the shredder to have enabled him to have performed the duties of feeder with reasonable safety to himself. He well knew what was required of the feeder, and, with that knowledge, assured the foreman that he could do the work. Having taken the employment under such circumstances, he, and not his employer, was responsible for the consequences of the accident. In *Ray v. Jeffries*, 86 Ky. 368, 5 S. W. 869, this court said: "The correct rule is that when as

employé represents and undertakes that he possesses the knowledge and skill requisite to operate or use machinery or implements of a dangerous character, and which, if not properly used, is liable to cause injury, he, and not the employer, is responsible for consequences resulting to himself from his unskillful or negligent handling it." With reference to the right of an employé to recover when he has been injured by a machine he has seen others operate, and has himself operated, this court, in *Jones v. Railroad Co.*, 95 Ky. 579, 28 S. W. 591, said: "But when a servant has actually operated, and seen others operate, an implement or machine often enough to enable him, by the exercise of ordinary intelligence and care, to learn how to avoid being injured by it, or when the mode of operating it is so simple as that a person of ordinary intelligence or care can at once perceive the safe and proper mode of operating it, there is no duty resting on the master to instruct him." In *Kelly v. Asphalt Co.*, 93 Ky. 363, 20 S. W. 271, it appeared that the servant was injured by getting his shirt caught in a revolving shaft over which he was required to bend in drawing buckets through an opening. In discussing the case, the court said: "It was revolving right before his eyes, and which he was bound to see, and did see, while he was performing his duty. * * * It also conclusively appears that the only prudence that was necessary to be exercised in reference to this piece of machinery was to keep off of it, and that the common instinct of safety would have suggested to him to do that; and the exercise of only ordinary prudence would have enabled him to do that. * * * As said, he did see the shaft, and that it was revolving, and that he would be compelled to bend over the shaft in drawing up the buckets, before he commenced to draw up the buckets; and he knew, as well as a country youngster would know, that, if his clothes were caught by a revolving well windlass, he would likely be drawn to it and hurt, and that it was safest for him not to get close enough to it for such accident to befall him." As the appellee knew that the lever had been tied to keep it from being used, he was bound to know that he could not rely upon that as a means of protection. He assumed the dangers incident to feeding the machine, and he cannot be relieved of that assumption by saying that Wright told him he could feed it without danger to himself, as the danger was obvious. A peremptory instruction should have been given for appellant. As we have reached this conclusion from another point of view, it is unnecessary to consider the question, if there had been a liability on one for the injury appellee received, whether it rested on Mason or the appellant.

The judgment is reversed for proceedings consistent with this opinion.

SHIVELY v. GILPIN.¹

(Court of Appeals of Kentucky. Feb. 12, 1902.)

DEEDS—CONVEYANCE OF LAND LYING IN TWO COUNTIES—PROPER PLACE OF RECORD.

Under Ky. St. § 495, where a deed conveys land lying in two counties it may be recorded in that county in which the greater part of the land lies, so as to operate as constructive notice of the grantee's title to the entire land.

Appeal from circuit court, Marion county.
"Not to be officially reported."

Action by W. G. Gilpin against Robert Shively for an injunction. Judgment for plaintiff, and defendant appeals. **Affirmed.**

J. P. Thompson, for appellant.

O'REAR, J. This suit involves the title to a small strip of land in Marion county. Both parties claim from a common grantor, —John Newton. Newton's original tract lay partly in Marion and partly in Taylor county. Appellee's deed covers the land in dispute, and is older than appellant's. It includes in its boundary lands in each of the counties named. The deed was recorded in Taylor county only. It is claimed by appellant that, as appellee's title was not recorded in Marion, appellant was an innocent purchaser, without notice of appellee's claim. Section 495, Ky. St. (same as Gen. St. c. 24, § 9), allows a deed conveying land lying partly in two or more counties to be recorded in that county in which the greater part lies, and makes such record of full constructive notice. We gather from the record in this case that the greater part of appellee's boundary embraced by the deed of November 17, 1873, from Jno. Newton and wife to Wm. F. Gilpin and R. H. Spurling, lay mostly in Taylor county. Appellant was therefore affected with constructive notice of the contents of that deed from the date of its recording. We are also convinced from the record that appellant, when he purchased, had actual notice of the extent of appellee's claim, and that appellee's deed covered the land in dispute.

Such having been the judgment of the circuit court, it is affirmed.

BURGE v. FIDELITY TRUST & SAFETY VAULT CO.¹

(Court of Appeals of Kentucky. Feb. 11, 1902.)

LIFE ESTATES—TRUSTEE FOR LIFE TENANT—AUTHORITY TO SELL—JURISDICTION TO CONFER.

Under the direct provisions of Civ. Code Prac. § 498, where lands are held in trust by one person for the life of another, with remainder over to a class of persons, or to any person not ascertained or to be ascertained until the death of the person upon whose life such estate for life is made to depend, the circuit court may empower the trustee to sell the

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

land, provided it is averred and proved that the sale would be beneficial to all the parties concerned.

Appeal from circuit court, Oldham county.
"To be officially reported."

Action by the Fidelity Trust & Safety Vault Company, trustee of A. W. Burge and Hallie L. E. Burge, against A. W. Burge and Hallie L. E. Burge, praying that plaintiff be ordered to sell certain real estate and to reinvest the proceeds. Judgment granting relief sought, and defendant A. W. Burge appeals. Affirmed.

P. B. & Upton W. Muir, for appellant.

PAYNTER, J. Many years ago Richardson Burge died, leaving a will by which he devised a certain interest in his very large estate to John T. Moore in trust for his son A. W. Burge and Rena Burge, his wife, during their lives, the remainder over to any child or children born to them, and in the event no child or children were born to them and survived Rena Burge, or in the event such child or children did survive, and die under the age of 21, the property at the termination of the lives of Albert and Rena should go to other children of the testator. It was provided in a codicil to the will that if Rena Burge should die, and if Albert Burge should marry again and have children as a result of that union, they were to take an interest in the share devised to him. Rena Burge is dead, leaving an only child, Hallie Burge, who is now over 21 years of age. The father has not again married. Hallie being over 21 years of age, the children of the testator have no interest in the share devised to Albert. The appellee, Fidelity Trust & Safety Vault Company, is now the trustee for A. W. Burge, etc., and as such holds, under the provisions of the will, certain property in Pewee Valley, particularly described in this proceeding. The trustee, A. W. Burge, and his daughter, Hallie Burge, have entered into a contract with W. H. Holt by which they have sold him the property mentioned, at a price of \$7,800. The question involved in this case is the power of the court to direct the trustee to convey the property to the purchaser at the price stated. It was averred and has been proven that the sale is at a fair price, and would be beneficial to all the parties concerned. To determine whether or not such private sale can be made by the trustee under the direction of the court depends upon the interpretation to be given section 498, Civ. Code Prac., which reads as follows: "That when lands are held in trust by one person for the life of another, with remainder over to a class of persons, or to any person not ascertained or to be ascertained until the death of the person upon whose life such estate for life is made to depend, or with power on the part of such person for whose life such life estate is held by the trustee, to dispose by a last will and testament, it shall be competent for the

circuit courts or courts of like jurisdiction in the county in which such land or a part thereof is situated, in an action to which all persons having a present or vested interest in such land are parties, to direct the trustee to either sell or mortgage such land; but in all actions it must be averred and proven to the court that such sale or mortgage would be beneficial to all the parties concerned, and facts showing such benefits must be alleged and proven. Any deed or mortgage executed under authority, or in pursuance of any judgment rendered in any such action, shall be held and construed and have the same effect as if executed by every person having a vested or contingent interest in or ownership of such land, and as if executed by all persons and classes who could take under the limitations or provisions of said deed, or as devisees under the exercise of such power to devise or appoint, and as if every claimant, present or future, under such deed or power, was under no disability whatever." The purpose of this section of the Code, as amended by the act of 1882, was to confer upon the court the right to direct a trustee to sell privately lands held in trust by one person for the life of another, with remainder over to a class of persons or to one person not ascertained, etc. The amendment was intended to accomplish a purpose clearly manifested by language employed. The amendment to section 498 was enacted when section 696 was in force, and the latter section does not apply to a case provided for in the former one. Section 498 of the Code (Carroll's, 1900) expressly authorizes the court to direct the sale or mortgage of the property as above indicated. The general assembly thought it wise to vest the court with such power, and that its exercise would be beneficial to the parties interested in the estate held in the manner mentioned in the section.

The judgment is affirmed.

PEACOCK v. LIMBURGER et al.

(Supreme Court of Texas. Feb. 27, 1902.)

INTOXICATING LIQUORS—SALOON KEEPER'S BOND—CIVIL LIABILITY—SALE TO STUDENTS—NECESSITY OF KNOWLEDGE—ESTOPPEL—APPEAL.

1. Rev. St. art. 5060g, requires a saloon keeper to give bond not to sell intoxicating liquors to minors or students of any institution of learning, and not knowingly to sell any impure or adulterated liquors, and gives any person aggrieved by a violation of the provisions of the bond a right of action for \$500 as liquidated damages. A proviso in the statute enacts that the fact that a sale is in good faith, with the belief that the minor is of age, shall be a defense to such suit. *Held*, that the statute authorizes a recovery of the penalty for the sale of liquor to a student of an institution of learning, though the saloon keeper and his employees have no knowledge or reason to believe that the purchaser is a student.

2. Where the complaint in an action for a penalty for a breach of the bond in selling to a student is held insufficient on demurrer for

want of an allegation of knowledge on the part of the saloon keeper or his employes, the act of plaintiff in amending his bill to allege such knowledge, and introducing evidence in support thereof, and asking instructions based on the theory that such knowledge is necessary, does not preclude the plaintiff from urging on appeal that he is entitled to recovery without showing that the saloon keeper or his employes had knowledge that the purchaser was a student.

Certified questions from court of civil appeals of Fourth supreme judicial district.

Action on a saloon keeper's bond by Wesley Peacock against August Limburger and others. From a judgment in favor of defendants, plaintiff prosecuted an appeal to the court of civil appeals, which certified questions to the supreme court. Questions answered.

M. W. Davis and R. P. Ingram, for appellant. Wm. Aubrey and J. R. Norton, for appellees.

WILLIAMS, J. Certified questions from court of civil appeals for the Fourth district, as follows:

"In October, 1900, defendant Limburger, a saloon keeper in San Antonio, through his employes, sold beer to two students of appellant's school for boys. The action is by Peacock, the proprietor of said institution of learning, against Limburger and the sureties on his liquor dealer's bond, which was in force and conditioned as the law required at that time, to recover the penalty of \$500 in reference to each of said students, upon the ground of their being at the time students of his school. The petition did not allege knowledge on the part of Limburger or his employes that the boys were students of an institution of learning. A special demurrer to it on this ground was sustained, and plaintiff then amended by trial amendment, alleging such knowledge, and that, by the exercise of reasonable diligence, defendant and his employes could have known such fact. Upon the trial plaintiff introduced testimony of circumstances tending to show notice of the fact that one of the boys (Joe Speed) was a student of an institution of learning. Plaintiff objected to defendant proving want of knowledge of such fact, as immaterial, and took bills of exceptions to the action of the court overruling the objection. In his requests for charges, plaintiff asked the following inconsistent instructions, one of which, it will be noticed, was in accord with the theory adopted by the court in its charges, to wit, that notice was material to defendants' liability:

"Special Charge No. 1: Gentlemen, you are instructed that it is not necessary that defendant should know that Joe Speed and John Bivins were students of Peacock's School for Boys, to entitle plaintiff to recover; and if you find from the evidence that defendant August Limburger, his agents or employes, sold a glass of beer to said boys

on or about the date mentioned, you will find for the plaintiff.

"Special Charge No. 2. Gentlemen, you are charged that if there were circumstances that would put a reasonably prudent man on notice that either Joe Speed or John Bivins were students of an institution of learning, then plaintiff is liable for selling to one or both of said boys, as the jury may find from evidence, if any, that said sale, if any, was made."

"Questions.

"Question No. 1. Was plaintiff, by reason of the fact that he acquiesced in the ruling upon the demurrer, and amended accordingly, and by reason of the fact that he introduced testimony of circumstances to show that defendant Limburger or his employes had notice that one of the boys was a student, and by reason of his having requested the second charge above quoted, or by reason of any of said facts, cut off from complaining of the court's trying or submitting the case upon the theory that knowledge on the part of Limburger or his employes that the boys were students of an institution of learning was essential to defendants' liability?

"Question No. 2. If the above question should be answered in the negative, was knowledge of Limburger or his employes of such fact material to defendants' liability on the bond?

"As bearing on the first question, the court is respectfully referred to certain decisions: *Railway Co. v. Fox* (Neb.) 83 N. W. 748; *Healy v. Rupp* (Colo. Supp.) 63 Pac. 319; *Elliott, App. Proc.* § 683. As bearing on the second question: *State v. Donovan* (N. D.) 86 N. W. 709."

The second question may more conveniently be treated first. Our opinion upon it is that, under the statute, knowledge of Limburger and his employes of the fact that the parties to whom the beer was sold were students of an institution of learning was not material to Limburger's liability on the bond. The statute in force when the sale was made (Rev. St. art. 5080g; Acts 1893, p. 177) required a bond conditioned that the dealer in intoxicating liquors, etc., would not sell the same to any person under the age of 21 years, or to a student of any institution of learning, or to any habitual drunkard, or to any person, after having been notified as prescribed; that he would not adulterate the liquors sold by him, in any manner, by mixing the same with any drug; and that he would not knowingly sell or give away any impure or adulterated liquors of any kind. The other conditions need not be noticed. The statute also gave to any person aggrieved by the violation of the provisions of the bond a right of action for \$500, as liquidated damages. A proviso was to the effect that "where the sale is made in good faith, with the belief that the minor was of age, and there is good ground for

such belief, that will be a valid defense to any recovery on such bond." The act of 1887 contained no such proviso, and under its provisions it has been held by the court of appeals—correctly, we think—that a sale of liquor to a minor constituted a breach of the bond, whether the seller knew the fact of minority or not. The reasons for the decision are so fully and satisfactorily stated in the opinion of Judge Willson that a reference to it, without further discussion of the point there decided, is sufficient. *McGuire v. Glass* (Tex. App.) 15 S. W. 127. After that decision was rendered, the statute was changed by the insertion of the proviso which permits the seller to prove as a defense to a suit for selling to a minor that he believed such minor to be of age, where there was good reason for such belief; but this provision applies only in suits based on sales to minors, and the statute at the time of the sale in question stood unchanged in its provisions concerning sales to the other classes of persons named in the condition of the bond. Students of institutions of learning are not necessarily minors, and they are treated in the statute as a distinct class, sales to whom are prohibited. It could only be held that knowledge was an essential element in suits founded on sales to such students by adding to the statute, in effect, a further proviso. This the courts are not authorized to do. Since the transaction involved in this case, a further similar proviso has been added, concerning sales to habitual drunkards; and this indicates the legislative construction of the statute as it previously stood,—that it did not admit such a defense. Act 1901, p. 814.

We answer the first question in the negative. The pleading, as amended, simply alleged a fact which it was unnecessary, under the law, for plaintiff to prove in order to make out his case. The ruling of the court on exceptions did not change the rules of law by which his right was ultimately to be determined. If he established all facts that were essential to a recovery, he had the right to judgment, notwithstanding the amendment, as fully as if his original petition had contained the immaterial allegation, and he had failed to prove it. The fact that he endeavored to meet the views of the trial court, and to prove the fact held to be necessary, did not estop him from relying on the legal effect of the facts which he did prove. Nor is he estopped by the special charges or all that he did, as set out in the certificate, from complaining of the charge of the court requiring proof of an unessential fact. If he established all other facts, the result of the trial is that he is denied a recovery because he did not prove that which we have held to be immaterial, although he was contending throughout for the rule which is now laid down. The court having held and charged that proof of knowledge was necessary, certainly it was plaintiff's right to have the

jury instructed as to what character of notice or knowledge was sufficient, and in requesting such instruction he did not concede the proposition that knowledge was essential. The case is not one in which the party has involved himself in inconsistent positions, nor one in which he has misled the court and induced the error of which he complains.

LAKEVIEW LAND CO. v. SAN ANTONIO TRACTION CO.

(Supreme Court of Texas. Feb. 24, 1902.)

FOREIGN CORPORATIONS—RIGHT TO HOLD PROPERTY—DOING BUSINESS IN STATE—NECESSITY OF LICENSE—CONSTRUCTION OF STREET RAILROAD—CONTRACT—ASSIGNMENTS.

1. A foreign corporation having power, under its charter, to acquire and hold real and personal property, may acquire title to such property in Texas by a purchase made outside the state, though the corporation has not procured a permit to do business in the state, as such purchase is not the transaction of business within the state by a foreign corporation without a license, which is prohibited by Rev. St. arts. 745, 746, and there is no law to prevent a foreign corporation from acquiring and holding real and personal property in the state.

2. A contract by which a street railroad company obligates itself to construct and operate a street railroad is assignable under the general law and under Rev. St. art. 308, providing that the obligee of any written instrument not negotiable by the law merchant may transfer his interest by assignment.

Certified questions from court of civil appeals of Fourth supreme judicial district.

Action by the Lakeview Land Company against the San Antonio Traction Company. From a judgment in favor of the defendant, the plaintiff prosecuted an appeal to the court of civil appeals, which certified questions to the supreme court. Questions answered.

Jas. Routledge, William Aubrey, and Keller & Williams, for appellant. Houston Bros. and R. J. Boyle, for appellee.

BROWN, J. The court of civil appeals for the Fourth supreme judicial district has certified to this court the following statement and question:

"Appellant sued the San Antonio Street Railway Company to recover damages alleged to have accrued by reason of the breach of a certain contract in which said street railway company, for a valuable consideration, had bound itself to construct and operate a line of street railway from San Antonio out to and through what is known as the 'Lakeview Addition,' a tract of land within the city limits, then owned by the New England Land Company, of whom appellant was the vendee. It was alleged in an amended pleading that during the pendency of the suit the charter of the San Antonio Street Railway Company had been forfeited by a decree of court, and appellee had acquired all its rights, property, and fran-

chises, and assumed the payment of all its obligations and performance of its contracts. Appellee filed a general demurrer and special exceptions. The court sustained the general demurrer, and two of the special exceptions, and, appellant having declined to amend, the cause was dismissed. It was alleged in the petition that appellant is a private corporation duly incorporated under the laws of Maine on November 20, 1893, and that a duly-certified copy of its articles of incorporation was filed in the office of the secretary of state of the state of Texas, and appellant was granted a permit to do business in the state of Texas on January 28, 1895. It was further alleged: "That the New England Land Company was incorporated under the laws of the state of Maine on or about December 26, 1889, and duly filed with the secretary of state of the state of Texas a duly-certified copy of its articles of incorporation, and was granted a permit to do business in the state of Texas on, to wit, January 1, 1890. That plaintiff herein is a corporation duly organized and fully authorized to acquire and conduct a town site, and to make all necessary contracts for the improvement or bettering of the same, and to make contracts for the purpose of improving or benefiting the said property by the construction or the operation of a street railway through the same. That the New England Land Company is a corporation with like powers. That on or about December 28, 1898, plaintiff became the purchaser through mesne conveyances from the New England Land Company, and is now the owner, of all of Lake View and Rosedale Park, save and except a few lots that had been sold to purchasers by the New England Company; and also the owner of Rosedale Park, which formed a part of Lake View, and all the streets, avenues, reserves, alleys, parks, rights of way, lakes, lots, and blocks into which said Lake View and Rosedale Park had been divided, and, in addition to all the privileges, successions, rights, benefits, contracts, and franchises which had in any way accrued to the New England Land Company; and by mesne conveyances became the holder and owner of the contract hereinbefore described, and entitled to all of its benefits, and all the rights in any manner which the property had acquired. That the immediate grantor of this plaintiff was Glen Raymond, a citizen and resident of the state of New York. That the contract with said Glen Raymond for the purchase of said property above described was made and the deed therefor executed and delivered to this plaintiff in the state of New York, and that said Glen Raymond derived title thereto by mesne conveyance from said New England Land Company. That the plaintiff did not transact any business in the state of Texas, or exercise its corporate functions, until long after it acquired said property as aforesaid."

"The contract is as follows:

"This indenture of the 11th day of August, 1890, is to evidence an agreement made between the San Antonio Street Railway Company, a corporation duly authorized under the laws of the state of Texas, hereinafter designated as the "Railway Company," and the New England Land Company, a corporation duly authorized under the laws of the state of Maine, hereinafter designated as the "land company." Witnesseth: Whereas, the land company desires the railway company to construct and operate a line of electric street railway for the term of its charter from West Commerce street via said Commerce street to Seventeenth street; thence north to Zavalla street, or, if via Zavalla street, to their property known as "Lake View"; thence from Zavalla north on West Nineteenth street to Woodbury avenue; thence along Woodbury avenue to West Belknap street; thence along West Belknap street to Highland Park; also from the junction of West Nineteenth and Zavalla streets on Avon street, and across lots to Bellevue avenue. The equipment of said railway to be equal to that employed on its other lines and the cars, to be run in the same frequency as those operated upon the eastern end of West Commerce street. And whereas, the railway company is ready to undertake the construction and operation of the said line of street railway: Now, then, in consideration of the mutual covenants and agreements herein contained to be kept and performed by the parties hereto respectively, it is mutually agreed and covenanted as follows:

"Article 1. The railway company agrees, obligates, and binds itself to begin the construction of the said line of railway as hereinbefore mentioned by September 15th, and will have the same completed by November 1st, '90, and thereafter operate the same: provided, that they are not delayed in the beginning or progress of the work by municipal interference: and provided, further, that should the railway company be prevented by the municipal authorities from occupying or constructing the said line of railway on the highways mentioned, in that event it shall be excused from the performance of this contract: And provided, also, that the acts of God or the public enemy shall excuse it from the performance of this contract by the day and date stipulated.

"Art. 2. The land company agrees, obligates, and binds itself to pay therefor the following considerations: First, Seventeen thousand five hundred (\$17,500.00) dollars in lawful money of the United States, to be paid in the following manner: Three thousand five hundred (\$3,500.00) dollars on the signing of this instrument, four thousand three hundred and seventy-five (\$4,375.00) dollars when the ties to be used in the construction of the track are laid on the line of the track, four thousand three hundred and

seventy-five (\$4,375.00) dollars when the track is laid and the necessary and convenient poles are set, five thousand two hundred and fifty dollars (\$5,250.00) when the railway line is completed and has been in operation for (20) days. Also a donation of a certain parcel of land situated near the property known as "Lake View," lying and being between West Commerce street and Zavalla street, in the city of San Antonio, Texas, and known as "Block No. 163," in range 4, district 5 or 7, containing twenty-four (24) acres or more of land, less one acre, which said one acre has been sold to one George Lane. Also four hundred and fourteen shares (414) of the capital stock of the Cross Town Railway Company, same being a controlling interest in the Cross Town Railway Company. And the land company hereby guarantees that the said four hundred and fourteen shares of stock are free from all assessments levied to date by said Cross Town Railway Company, and also that there is no bonded or other indebtedness of any nature against the said Cross Town Railway Company, and that with the delivery of the said four hundred and fourteen shares the said land company agrees, binds, and obligates itself to deliver to the railroad company all the property, real or personal, of the said Cross Town Railroad Company, free from all debts, etc., together with all books, papers, contracts, etc.; and said four hundred and fourteen shares of stock in the said Cross Town Railway Company shall be delivered to the railway company when the third cash payment herein provided for shall be due. The land company shall furnish simultaneously with the signing of this instrument a bond for title to the parcel of land hereinbefore referred to as "Block No. 163." The same is hereby made a part of this contract, conditioned that after twenty days' (20) operation of the line of street railway herein contemplated it will make good and sufficient warranty deed to such person or persons, corporation or corporations, as the railway company may desire.

"Art. 3. Should the land company at any time after six months from the completion of the line of railway hereinbefore mentioned, and within eighteen months (18) thereof, desire that an additional line of railway shall be operated from Highland Park upon Highland avenue to Lake View avenue and from Lake View avenue to Buckingham road and from Buckingham road to Bellevue avenue to the junction of the terminus of the outlet of Avon street, the railway company agrees to operate the said additional line: provided that the land company shall pay for all material and work for the entire construction as the same may be purchased and done by the railway company; and the railway company shall have the right to do the work and select and contract for the material and equipment, and upon completion of the said

additional line it shall be the exclusive property of the railway company.'

"The road was constructed under the terms of the contract, and the amounts were paid, but in July, 1894, the road was torn up and discontinued, and damages are sought for breach of the contract.

"Question. When appellant bought the land and appurtenances and above contract and other privileges belonging to the New England Land Company, did it obtain thereby the right to maintain a suit for damages for any breach of the contract that would have been held by its vendor, the New England Land Company?"

In their brief accompanying the certificate and in their oral argument before the court counsel for appellee contended that the contract in question was not such as would "run with the land," but that question is not submitted by the court of civil appeals. The question assumes that the appellant bought the contract, upon which fact the question is based. We understand that the question submitted involves the two following: (1) Did the purchase of the contract by a foreign corporation, before it procured a permit to do business in Texas, confer upon the purchaser the right to sue for damages arising out of the breach of that contract? (2) Is the contract such as by law may be assigned so as to give the assignee a right of action for its breach? There is no law in Texas which prohibits corporations created in other states to purchase and hold land and personal property in this state, if authorized by their charters or the laws under which they were created. The charter of appellant conferred that power; therefore the title to the land and contract vested in appellant. 6 Thomp. Corp. § 7913. The purchase in this case was made outside of this state, and did not constitute the "transaction of business within the state," as expressed in articles 745, 746, Rev. St. Security Co. v. Panhandle Nat. Bank, 98 Tex. 575, 57 S. W. 22. The purchase of the land and contract under the facts alleged did not violate any law of Texas. Article 308, Rev. St., is in these words: "The obligee or assignee of any written instrument not negotiable by the law merchant may transfer to another by assignment all the interest he may have in the same." The contract sued upon is a "written instrument, not negotiable by the law merchant," and was therefore within the terms of the law. The statute is very general, but a proper construction would limit it so as not to include the classes of contracts which are by their terms or in their nature not assignable,—as for service requiring professional skill, and the like. *La Rue v. Groezinger*, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179. There is nothing in this contract to indicate that it was limited to the parties making it either by its terms or by the subject-matter of the contract, the char-

acter of the thing to be done, nor any other fact that would go to show that the parties intended it should not be assigned. We see no reason why the obligations of this contract could not be as well performed to any other owner of the lands mentioned as to the original land company, and we are of opinion that the assignment would be effective under the general rule, independent of the statute. *La Rue v. Groezinger*, supra; *Himrod Furnace Co. v. Cleveland & M. R. Co.*, 22 Ohio St. 451. The case last cited was very much like this. The railroad company entered into a contract with certain persons binding itself to grant to them certain privileges in freights and transportation of the products of their furnace, provided the obligees would construct and operate a furnace at a point upon the line of railroad. The obligees in the bond complied with the terms of the contract, and then assigned it, and sold the furnace property to the plaintiff in that suit. The railroad company declined to carry out the terms of the contract, and the suit was instituted to recover damages. The issue was made that the contract was personal, and not assignable; but the supreme court of Ohio held it to be assignable, reversing the judgment and remanding the cause.

We answer: The purchase of the contract, together with the lands, invested the appellant with all the rights which the original obligee in the bond would have had under the same circumstances.

VALLEGAS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

BURGLARY—INDICTMENT—ALLEGATION OF DATE OF OFFENSE—NECESSITY.

An indictment which fails to allege the date of the commission of the offense charged is fatally defective.

Appeal from district court, Travis county; R. L. Penn, Judge.

Victor Vallegas was convicted of burglary, and appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of five years, and he prosecutes this appeal. An inspection of the indictment shows that no date is alleged for the commission of the offense; that is, the allegation in the indictment is that "Victor Vallegas, in said county and state, on or about the — day of —, in the year of our Lord 1900, and before the presentment of this indictment, did then and there," etc. Under the decision of this court in *Coleman v. State*, 62 S. W. 753, 2 Tex. Ct. Rep. 524, citing other cases on the same line, the indictment

is defective, for failing to allege the date of the commission of the offense. The judgment is accordingly reversed, and the prosecution ordered dismissed.

McKINNEY v. STATE.¹

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

AGGRAVATED ASSAULT—INDICTMENT—DEFECTIVE COUNTS—GENERAL VERDICT—SENTENCE—IMPRISONMENT—STATUTORY CONSTRUCTION—MEANING OF WORD "MONTH."

1. The court on appeal will not quash an indictment, though containing defective counts, where one count is sufficient and the verdict is general; there being no statement of facts, and no motion to quash having been made in limine.

2. A sentence imposing 30 days' imprisonment under a statute authorizing the imposition of imprisonment of not less than "one month" or more than two years complies with the minimum punishment authorized; for the word "month," in the statute, means a solar month, or 30 days, and not a calendar month.

Appeal from Collin county court; J. H. Faulkner, Judge.

Sam McKinney was convicted of aggravated assault, and appeals. Affirmed.

Garnett, Smith & Merritt, for appellant. Abernathy & Beverly and Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was charged by indictment with an aggravated assault, upon trial was convicted, and his punishment assessed at a fine of \$50 and 30 days' confinement in the county jail.

The assistant attorney general has filed a very able brief in this case, and we adopt the same as the opinion of this court, to wit:

"The record is without statement of facts or bill of exceptions. The motion for new trial complains that the court erred in refusing to quash the first and second counts in the indictment. The state submits, there being no statement of facts, and no formal motion to quash having been made in limine, and the fourth count in the indictment being unquestionably good, the verdict may be applied to the fourth count. Where any count in the indictment is good, and the verdict is general, the verdict may be applied to the count that is good. *Isaacs v. State*, 36 Tex. Cr. R. 505, 38 S. W. 40. Appellant, in his brief, practically presents but one proposition; that is, that the punishment for aggravated assault being by fine not less than \$25 nor more \$1,000, or imprisonment in the county jail not less than one month or more than two years, or by both such fine and imprisonment, the judgment of the court, assessing thirty days' imprisonment in the county jail, does not comply with the minimum punishment fixed by law. The authorities cited by appellant in his brief show conclusively that, where the word 'month' is

¹ Rehearing denied February 25, 1902.

used in a civil statute, the meaning of the same is a calendar month. This is made so by a specific statute. See Sayles' Ann. Civ. St. art. 3270. A month, as used in the civil statute, is a calendar month, and is determined arbitrarily by the number of days that the calendar gives to each particular month; that is, thirty-one days for January; twenty-eight for February, except leap year, etc. In civil contracts, in estimating what is a calendar month, the authorities are almost unanimous in holding that it is to be counted from the particular day when it begins to the corresponding day in the month in which the time expires; that is, if it begins on the 5th of January, it would end on the 5th of February, although thirty-one days would elapse. If it begins on the 5th of February, it would end on the 5th of March, although but twenty-eight days have elapsed, leap year being excepted. Or if it begins on the 5th of February during leap year, it would end on the 5th of March, although twenty-nine days elapse. If it begins on the 5th of June, it would end on the 5th of July, although thirty days had elapsed. In estimating a calendar month on civil contracts, if the month in which the period ends has not the corresponding day of the month when the period began, the time expires with the end of the month; that is, if it began on the 31st day of January, there being no 31st day of February, it would end on the last day of February,—either the 28th or 29th, according to whether or not it was leap year. *McGinn v. State* (Neb.) 65 N. W. 46, 80 L. R. A. 452, 50 Am. St. Rep. 617, and authorities there cited. This cannot apply to a criminal statute, for the following reasons: The punishment in fixing its minimum and maximum, must be definite and inflexible. The word 'month,' as used in the cases cited by appellant, means originally, under the common law, a lunar month of twenty-eight days. 16 Am. & Eng. Enc. Law, under 'Month'; *Rap. L. Law Dict.* p. 835. *Rapalje's Dictionary*, defining what the calendar month means, states that they are of unequal length, according to the almanac or calendar, and of which twelve make a year. It will therefore be seen, if we say lunar month was meant by the legislature, we would go against the persuasive statutory definition of what the word 'month' means in the civil statute. We also contradict the doctrine of all American decisions. 16 Am. & Eng. Enc. Law, *supra*. The state therefore contends that the word 'month' means a period of days, corresponding with what is known as the solar as distinguished from the lunar month, but insists that it means an exact number of days. Otherwise we would have the following anomalies: (1) Should A. be prosecuted for an aggravated assault, and should the verdict be one month, instead of thirty days, as in the case at bar, but his trial occurred in January, he would be incarcerated for thirty-one days. If it occur-

red in February, he would have the good fortune of only having to serve twenty-eight days, unless it be leap year; and, if he was so unlucky as to be tried during leap year, he would have to serve one more day than otherwise, if his trial were in February. Therefore the day when he is tried would decide whether he stayed in jail thirty-one days, or thirty, twenty-nine or twenty-eight days. Or it may be he was tried in a month of thirty-one days, and if he fails to appeal he would stay in jail thirty-one days; but should he give notice of appeal, and this court should decide his case in February, he would be the winner by three days, unless he should be so unfortunate as to have this court decide his case during a leap year. Again, one county (say, Dallas) may hold her county court in which she tries the criminal docket in the months having only thirty-one days, and the adjoining county may hold its county court in months having thirty days. If a man should be convicted in Dallas county, he would, therefore, because of the accident of the time of the term of the court, have to serve one more day in Dallas county than he would in the adjoining county. (2) It is a well-established rule that in calculating the calendar month, or in calculating what a month is in law, that in a month ending on Sunday it is to be excluded. Therefore, if a man were tried on the 31st day of January, and began on that day to serve his sentence of one month, and if February end upon Sunday, he would only have to serve twenty-seven days to complete the month, under the rule laid down in civil statutes, whereas, if he were tried December 31st, he would have to serve to the 31st of January, making four days more. In other words, the word 'month' must be an inflexible period of a given number of days, consisting of a given number of hours and a given number of minutes and a given number of seconds. The minimum punishment must be uniform at all times and in all places. The dictionaries say, and the custom is, that in the computation of interest a month is understood to be thirty days. Where a statute uses the words 'thirty days' in one place and 'one month' in another, it has been held that the word 'month' and the words 'thirty days' were synonymous. See *Heaston v. Railroad Co.*, 79 Am. Dec. 434. The state further submits that, as a matter of common knowledge, a solar month, where simply the word 'month' is to be defined in the abstract, and not any particular month or number of months is referred to, it is generally understood and accepted that a month is a period of thirty days. To hold that the words 'one month' mean one calendar month, as fixed by the calendar, would work confusion, make the sentence indefinite, make the length of the portion of the imprisonment depend upon accident, and lead to a destruction of the statute. The purpose should be to so construe a statute as to give it life, and in do-

ing so, by finding that the words 'one month' mean thirty days, making thirty days synonymous to one month, will not only give life to the law, but will sustain the validity of the verdict and judgment in this case."

No error appearing in the record, the judgment is affirmed.

WHITTLE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

FORGERY — EVIDENCE — SUFFICIENCY OF OBJECTION — ADMISSIBILITY — COMPARISON OF HANDWRITING — JURORS — CHALLENGES TO ARRAY — INCOMPETENCY OF JURY COMMISSIONERS.

1. White's Ann. Code Cr. Proc. art. 661, provides that a defendant may challenge the array when the officer summoning the jury has acted corruptly and has willfully summoned persons on the jury known to be prejudiced against defendant. Article 662 provides that article 661 is inapplicable "when the jurors summoned are selected by the jury commissioners," and then "no challenge to array is allowed." *Held*, that it is not ground for a motion to quash a venire drawn for the term of court by the jury commissioners that one of the commissioners was interested as a party in certain civil suits on the docket for that term, requiring a jury, though Rev. Civ. St. art. 3145, prescribes that the jury commissioners shall have no suit in court requiring the intervention of a jury.

2. An objection to certain testimony that it is irrelevant and immaterial is insufficient to present on appeal the question of the admissibility of the testimony.

3. On a trial for forgery, where the prosecution claimed that defendant's marriage to a certain woman, whose name was alleged to be forged, was illegal and fraudulent, it was proper to permit evidence that defendant, subsequent to his alleged marriage to such woman, introduced another woman as his wife.

4. On a trial for forgery, the comparison of the signature alleged to be forged with a genuine signature on an instrument is inadmissible, where profert of the latter instrument was not made for comparison.

5. Where defendant, on trial for forging an indorsement of a note, alleged that the prosecutrix made the indorsement on the note, it was error to permit the prosecutrix to write her name in the presence of the jury, and present to the jury such signature in connection with the signature claimed to be forged, though she did not at that time have the indorsement on the note before her.

Appeal from district court, Hill county; W. Poindexter, Judge.

J. W. Whittle was convicted of forgery, and appeals. Reversed.

Johnson & Stollenwerck, for appellant. J. B. Callicutt and Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for a term of seven years.

Appellant moved to quash the array of jurors on the ground that one of the commissioners who drew the jury for that term of court was interested in three certain civil suits, being a party thereto; said suits re-

quiring the intervention of a jury, and being on the jury docket; and, further, that said jury commissioners were not residents of different portions of the county. A reference to article 3145, Rev. Civ. St., which prescribes the qualification of jury commissioners, shows, among other things, that they should be residents of different portions of the county, and that they shall have no suit in said court which requires the intervention of a jury. If the expression "shall be," in connection with the qualification of jury commissioners, is given a mandatory meaning, then a jury drawn by commissioners not possessing such qualifications would not be a legal jury, and the verdict rendered by such a body would not be a legal verdict. For instance, if one or more jury commissioners should be impeached to select a jury who are not intelligent citizens, and unable to read and write, and not qualified jurors and freeholders of the county, are not residents of different portions of the county, or one or more of them happen to have a suit on the jury docket, then it would follow that all of the verdicts rendered by a jury so drawn could be vitiated. It has been held in a number of cases, where the language was equally as strong, prescribing the qualification of jurors,—for instance, that the juror shall be a freeholder,—this could not avail a defendant after verdict on motion for new trial. He must in such case go further, and show that probable injury resulted to him. *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398; *Williamson v. State*, 36 Tex. Cr. R. 225, 36 S. W. 444; *Mays v. State*, 36 Tex. Cr. R. 437, 37 S. W. 721. It has also been held that it was too late after verdict to raise the question, where a juror was not a citizen of the state 12 months prior to his service. *Trueblood v. State*, 1 Tex. App. 650; *Sutton v. State*, 31 Tex. Cr. R. 297, 20 S. W. 564. These cases, however, only establish that the objection comes too late after verdict. In this case the objection was made to the jury on their impanelment, so that we are squarely confronted with the question whether or not the refusal of the court to entertain the motion at the earliest moment when it could be made was error. If we so hold, unless each of the commissioners shall possess all of the qualifications prescribed, then in every case in which a jury is tendered, drawn by said commissioners, the jury list should be set aside, because the language in reference to each clause prescribing the qualifications of commissioners is equally mandatory; and because two of the commissioners should be residents of the same portion of the county would equally disqualify the jury drawn, as if it should turn out that they should not be qualified jurors and freeholders of the county. In order to impose this test, it is said that the rule that injury must be shown before a party can avail himself of the objections to the commissioners would be im-

possible; that, the law having prescribed the machinery for the selection of the jury, he has suffered a legal injury, though it may not be possible to show any actual injury. It occurs to us, if, because the machinery provided for the selection of jury commissioners has not been strictly followed, a jury drawn by them should be set aside on the ground that legal injury will be presumed, it would be productive of such confusion as to produce a public hardship, which ought not be brought about except upon the strongest reasons. Evidently the lawmakers had this in view when they provided for the character of challenge to the array. Article 660, White's Ann. Code Cr. Proc., provides for a challenge to the array on the part of the state; and article 661 provides for a challenge on the part of defendant, to the effect that the officer summoning the jury has acted corruptly, and has willfully summoned persons upon the jury known to be prejudiced against defendant, with the view to cause him to be convicted. Article 662 provides that the two preceding articles do not apply when the jurors summoned are those who have been selected by jury commissioners. In such case no challenge to the array is allowed. Now, the challenge to the jurors in this case, though presented as a motion to quash, was simply a challenge to the array; and, if article 662 means anything, it means what it says,—that is, a challenge to the array cannot be made to a jury selected by jury commissioners. See authorities cited in White's Ann. Code Cr. Proc. under article 662. So that this article of the procedure, in connection with the articles prescribing the qualifications of the jury commissioners, must be construed in pari materia. In other words, the article of our Code places a limitation on challenges to the array, and prescribes that this shall not be allowed where the jury have been selected by jury commissioners. And the former articles further suggest that the challenge to the array can only be made when prejudice is shown. Even if we apply this test, what prejudice is shown where one of the commissioners is interested in some civil suit not connected at all with the prosecution in this case? We are not now discussing a case where the jury commissioners are shown to have acted corruptly in the particular case in drawing a list of jurors to secure the conviction of defendant. It has been held that other causes may exist for the quashal of the array outside of the statute, but in all such cases violation of some constitutional guaranty or some injury must be shown. *Carter v. State*, 39 Tex. Cr. R. 352, 46 S. W. 236, 48 S. W. 508; *Williams v. State*, 20 Tex. App. 359. We hold that the court did not err in refusing to entertain the motion.

We do not think the court committed any error in refusing to quash the indictment on the ground that there is any variance be-

tween the purport and tenor clause of the indictment. We do not understand the indictment to allege the forgery of the note, but it sets out the note, and then alleges the forgery of the indorsement.

Appellant objected to the introduction of the testimony of Stevens, who testified that some time about the 5th of March he met defendant and a woman in New Orleans, when defendant introduced said party to him as his wife. This was excepted to on the ground that it was irrelevant, immaterial, and prejudicial, and was subsequent to defendant's marriage with Dollie Trimble. The first grounds of exception have been held not to present the question of the admissibility of testimony sufficiently for review. *Hamblin v. State* (Tex. Cr. App.) 50 S. W. 1019. The fact that the introduction took place subsequent to his marriage with Dollie Trimble, or his alleged marriage, would not suggest that this testimony was not competent. The state claimed throughout that the marriage with Dollie Trimble was a fraud and did not constitute a legal marriage, so that the evidence regarding appellant's marriage to another woman was competent on this issue.

Appellant proposed to prove by Lee Frisby that the signature of Dollie Trimble to the indorsement on said instrument did not compare with the signature on a deed which she had executed. The court excluded this testimony because profert of the deed was not made for comparison. In this there was no error.

In bill of exceptions No. 6, appellant brings in review the admissibility of certain evidence introduced before the jury for the comparison of signatures. The bill is substantially as follows: The state had the witness Dollie Trimble to write her name on a blank piece of paper three times before the court and jury, and offered her signature, in connection with the signature upon the note, in evidence before the jury; thereby securing a comparison of the signature as written upon the note and as written upon the blank piece of paper, which was offered as evidence in this case. To which defendant excepted upon the ground that the same had been written long after the signature was written upon the back of the note, and under different circumstances, and was written with a stub pen, when the signature on the back of the note appeared to have been with a sharp-pointed pen, and that the manner of proving the handwriting of Dollie Trimble, in the way it was done, was illegal; and for the further reason that the signature made by her in the court room in the way and manner aforesaid should not have been introduced, for, she being the main witness and the alleged injured party, she could, therefore, on account of her hostility to defendant, disguise her handwriting and dissemble the same, if she saw proper to do so, and in that way showing the dissimilar-

ity in her signature on the back of said note and as written upon the blank piece of paper. Which objections the court overruled, and permitted the evidence to go to the jury, and the defendant excepted. In support of his contention that the evidence thus affording the jury a comparison of the handwriting was inadmissible, appellant cites us to *McGlasson v. State*, 37 Tex. Cr. R. 620, 40 S. W. 503, 66 Am. St. Rep. 842. However, the state insists that said case is not in point and conclusive upon the question, inasmuch as the bill, on its face, does not make it appear that at the time Dollie Trimble wrote her signature she had the indorsement on the back of the note before her. It is true, the bill does not state in so many words that she had said indorsement before her at the time she made the signatures before the jury, and in that respect the cases as presented are not similar. But, it does occur to us, even if it be conceded that she had not seen the indorsement on the note at that time, yet, if she had really signed the indorsement thereon, she would, no doubt, have recalled how she signed the same. She certainly would remember how she made her ordinary signature. And, of course, the opportunity would be afforded her to dissemble and disguise her handwriting,—that is, not write in her ordinary method,—so that the danger of fabrication, upon which the cases seem to be based, would still be present. Evidence of the genuineness or want of genuineness by comparison of handwriting, to go to the jury, does not appear to be encouraged by the authorities, and is only permitted under proper safeguards. Such comparison is permitted between the alleged forged instrument and one offered in evidence, executed before there was any inducement to fabricate, and proved to be genuine; but the authorities hold that it is not competent, as was held in *McGlasson's Case*, to have the witness make her signature before the jury for the purpose of comparing same with the signature on the alleged forged instrument. We see no reason to change the rule laid down in said case, and we believe the bill here presented brings the question squarely under the doctrine laid down in *McGlasson's Case*, and the authorities therein cited. In this particular case appellant's defense appears to have been twofold, to wit: (1) That he executed the indorsement on the instrument himself (though there is no positive proof of this), under authority of the prosecutrix; and (2) that prosecutrix herein executed the indorsement. And the admission of illegal testimony tending to support the evidence of prosecutrix and destroy the theory of appellant, to the effect that the indorsement was made by her, was calculated to injure and impair his rights before the jury.

Appellant objected to the charge as given by the court, particularly with reference to the alleged marriage of the prosecutrix with

appellant, as bearing on the issue of appellant's authority to control the notes and transfer the same. We think the charge as given is correct, and was as liberal as appellant could ask, under the circumstances.

For the error indicated, the judgment is reversed and the cause remanded.

HEARNE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

CRIMINAL LAW—MOTION FOR NEW TRIAL—EXCEPTIONS.

Where, in a motion for a new trial in a criminal prosecution, an objection was made that "the court erred in its charge to the jury," the charge could not be reviewed, since the exception did not specifically point out wherein there was error.

Appeal from district court, Grimes county; J. M. Smither, Judge.

Wash Hearne was convicted of murder in the second degree, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of seven years.

The record contains no bill of exceptions. In his motion for new trial appellant complains of the court's charge, his objection being stated as follows: "The court erred in its charge to the jury, which fact will be more fully stated by the amendment hereafter to be filed." The amendment subsequently filed in no particular criticises the charge of the court. The exception to the charge of the court in the original motion is too general to be reviewed, not specifically pointing wherein there is error. *Quintana v. State*, 29 Tex. App. 403, 16 S. W. 258, 25 Am. St. Rep. 730. The evidence amply supports the verdict of the jury.

The judgment is affirmed.

WHITE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

UNLAWFULLY CARRYING PISTOL—DISABLED WEAPON—INTENTION.

Where one removed the cylinder rod of a pistol while at his home, with intention of thus rendering it harmless, and, believing that it was thus rendered incapable of shooting, carried it about with him, trying to sell it, he was not guilty of unlawfully carrying a pistol, although it appeared that the pistol could in fact be made to shoot by placing the cylinder in position with the hands.

Appeal from Denton county court; I. D. Ferguson, Judge.

Oscar White was convicted for unlawfully carrying a pistol, and he appeals. Reversed.

Greenlee & Bradley, for appellant, Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for unlawfully carrying a pistol, and his punishment assessed at a fine of \$25.

On Sunday, January 9, 1901, defendant was at the depot in the town of Denton, and had in his possession what the state witnesses called a pistol, which he let fall on the ground, as he was running after Bradford. He picked it up, and put it in his pocket, and then went to the buggy in which were Ashby and McCuller, and showed it to them, and tried to sell them a chance in a raffle which he was making up. At about the same time he had the pistol in a store, trying to sell chances to Sledge and others, and at a restaurant, also trying to sell chances. He also tried to sell chances in the raffle to various other parties, including the city marshal. But the evidence shows that in each instance, before taking the pistol away from his home to exhibit to such persons as he thought would buy chances in the raffle, he removed the cylinder rod from the pistol, and left it at home, so that he could exhibit it without violating the law. All of the witnesses testify that the cylinder rod was not in the pistol, and that defendant explained to them that he removed the rod so he could carry and show it to prospective purchasers of chances in the raffle without violating the law. After appellant's arrest the county attorney and sheriff took the pistol, and found that by placing the cylinder in position with the hands it could be made to shoot. One witness testified that it would be dangerous to shoot the pistol without the cylinder rod, as it would likely split the ball and injure the person firing it. It is not made to appear that appellant knew the pistol could be made to shoot without the cylinder rod. On the contrary, it seems he did not so believe. We do not think the evidence supports the verdict of the jury, since there can be no violation of law unless there be an intention to do the thing prohibited by law. If appellant, while carrying the pistol to show to persons who might buy chances in the raffle, first removed the cylinder rod, leaving it at home, and believed that it could not be made to shoot or be used as a firearm, he would not be guilty of unlawfully carrying a pistol. *Lann v. State*, 25 Tex. App. 497, 8 S. W. 650, 8 Am. St. Rep. 445; *West v. Same*, 21 Tex. App. 427, 2 S. W. 810; *Underwood v. Same* (Tex. Cr. App.) 29 S. W. 777.

The judgment is reversed, and the cause remanded.

KELLY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

CRIMINAL LAW—APPEAL—DEATH OF ACCUSED—LIABILITIES ON APPEAL BOND.

Where one convicted of crime appeals, but dies before his appeal is submitted or action of any kind taken thereon, neither the

sureties on his appeal bond nor his estate can be held for any costs which have or may afterwards accrue.

Appeal from Johnson county court; W. D. McKoy, Judge.

E. T. Kelly was convicted of crime, and his appeal dismissed. Motion to reform judgment dismissing appeal. Granted.

Goldsmith & Walker, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. At a former day of this term the appeal in this cause was dismissed and abated on account of the death of appellant, and the judgment of this court provided "that appellant, E. T. Kelly, as principal, and J. D. Goldsmith and J. W. Floore, as sureties on his recognizance, pay all costs herein incurred in this court, and that this decision be certified below for observance." Since the dismissal of this cause the sureties by attorney have filed a motion to reform the judgment, and absolve them from any liability on the principal's bond, on the ground that appellant died on the 7th day of November, 1901, before the cause was submitted to this court or action of any kind taken thereon. This motion is sustained by proper affidavits. And appellant cites us to *March v. State*, 5 Tex. App. 450, in which the court say: "In a criminal prosecution, when the accused has taken an appeal in the manner prescribed by law, the proceeding is still pending and undetermined until the appeal shall have been decided, and that, in case the appellant die whilst the appeal is pending and undetermined, the prosecution or the criminal action does not survive, but, on the death of the appellant pending the appeal, the prosecution abates in toto, whatever be the judgment appealed from." This case is directly in point, and sustains appellant's contention. It is therefore ordered by this court that the judgment heretofore rendered in this cause be reformed, and that the sureties above named, together with appellant, be in all things released and relieved from any and all costs that have or may accrue by virtue of the prosecution.

RIDGE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

BURGLARY—CONSENT OF OWNER OR OCCUPANT—EVIDENCE.

Where, on a prosecution for burglary, the owner or occupant of the premises is a witness for the state, his nonconsent to the alleged crime must be shown, and a resort to circumstances is not sufficient.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Dorsey Ridge was convicted of burglary, and he appeals. Reversed.

J. El. Yantis, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary of a private residence in the daytime, and his punishment assessed at confinement in the penitentiary for a term of three years.

The alleged owner was used as a witness on the trial, and failed to testify to his non-consent to the burglary. The circumstances seem to indicate that he did not consent. Appellant asked a charge to the effect that, before a conviction could be sustained, the want of the consent of the owner should be proved, which was refused; and the question is properly raised in the motion for new trial. The charge should have been given. Where the state has the owner of the property or occupant of the house in a case of burglary before the jury, it must be affirmatively shown that he did not consent. Resort to circumstances will not suffice. For a discussion of this question, see *Wisdom v. State* (Tex. Cr. App.) 61 S. W. 926.

The judgment is reversed, and the cause remanded.

NELSON v. STATE.

(Court of Criminal Appeals of Texas, Feb. 12, 1902.)

AGGRAVATED ASSAULT—INFORMATION—DUP- LICITY—EVIDENCE—INSTRUCTIONS —APPEAL—BILL OF EXCEPTIONS.

1. An information averring that defendant, "by the use of a knife, or some hard substance or instrument to affiant unknown, * * * did commit an aggravated assault, and did by the means aforesaid strike the said G.," is not bad for duplicity because of the use of the disjunctive.

2. An objection that the county attorney acted unfairly in not presenting the second count of an information to the jury in his opening speech cannot be considered, in the absence of a bill of exceptions reserved thereto.

3. Failure of the court, in presenting a count of an information which charged that defendant, "with premeditated design, and by the use of means calculated to inflict great bodily injury, etc., committed an assault, to use the word "and" after the phrase "with premeditated design," was immaterial.

4. The prosecuting witness testified that defendant came up to him and said, "I want to see you a minute;" that defendant pulled him into the street; that he refused to go further; that defendant said he wanted to beat him, and, with his closed pocket knife in his fist, struck witness on the head twice; that there were two wounds on witness' head, from which blood flowed, etc. Defendant and his witnesses denied that he had a knife, but other witnesses for the state corroborated the prosecuting witness. Held to sustain a count averring that the assault was committed with premeditated design, and by means calculated to do great bodily injury.

On Rehearing.

Where a bill of exceptions to certain matter is disapproved by the trial judge, and appellant fails to prepare and present a bill supported by bystanders, the matter complained of will not be considered.

Appeal from Fannin county court; W. A. Evans, Judge.

J. F. Nelson was convicted of crime, and appeals. Affirmed.

Thomas & Donaldson, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$25.

Appellant filed a motion in arrest of judgment on the ground that the means alleged in the information as used in committing the offense are stated in the alternative, to wit: In the first portion of the information it is alleged that appellant "did then and there, with a knife, or some hard substance to affiant unknown, strike, wound, and bruise the said B. Glazer, and did thereby inflict upon the said B. Glazer serious bodily injury." In the latter portion it is stated: "J. F. Nelson, * * * with premeditated design, and by the use of means calculated to inflict great bodily injury, to wit, by the use of a knife, or some hard substance or instrument to affiant unknown, in and upon B. Glazer did commit an aggravated assault, and did then and there by the means afore-said strike the said B. Glazer." The contention here is that, the means used in committing the assault being stated in the alternative, appellant could not tell with any degree of certainty the evidence the state would introduce against him. Appellant refers us to several authorities: *Hart v. State*, 2 Tex. App. 42; *Tompkins v. State*, 4 Tex. App. 161; *Venturio v. State*, 37 Tex. Cr. R. 653, 40 S. W. 974. These are all cases where the same statute constituted a number of different acts an offense. These decisions hold that in such case the information or indictment must allege the various matters conjunctively, and not disjunctively. No case has been pointed out where the same principle would apply to an allegation descriptive of the means used or the weapon with which an offense was committed. It is a doctrine of general application that where the weapon is stated, if a different weapon is proven, if it is capable of inflicting the same character of wound, there is no variance. For instance, if the indictment alleges that the wound was inflicted with a sword, it can be shown that it was done with any character of sharp instrument; or a gun, proof of any firearm will respond to the indictment. Here the allegation is that the assault and battery was made by striking with a knife, or some hard substance to affiant unknown. There is no allegation here that the knife was used to cut with, but as a weapon to strike with. So that, if an unopened pocketknife was used merely to strike with, it would inflict the same character of wound as any other hard substance; and it does not occur to us that, as here presented, there was any uncertainty as to the character of weapon used. If it had been alleged that the knife was used to cut or stab with, or the wounds were inflicted by blows with a hard substance, then the information would appear to be duplicitous.

But we do not understand that to be the case.

Appellant also contends the county attorney acted unfairly by not presenting the second count of the information to the jury in his opening speech. There is no bill of exceptions reserved to this, and the same cannot be reviewed.

The charge of the court is also complained of, because, in presenting the second count of the information, the court failed to interpolate the word "and" after "premeditated design," and before the phrase "by use of means calculated to do great bodily injury." We do not think this was necessary, as the two elements constituting an aggravated assault were plainly put by the charge as given. The jury were bound to understand from it that an assault, in order to be aggravated, must be with premeditated design; also by the use of means calculated to do great bodily injury.

Appellant urgently insists that the testimony is not sufficient to support the verdict. In this connection it is shown that appellant had previously been convicted in the corporation court of a simple assault, which he pleaded in bar to the accusation here; and, unless there is evidence sufficient to sustain the conviction for an aggravated assault, appellant could not be convicted of that offense, nor could he be convicted of a simple assault. An examination of the testimony shows that no serious bodily injury was inflicted on Glazer, so that the first count is eliminated. Did the testimony show that the assault was committed with premeditated design, and by the use of means calculated to inflict great bodily injury? On this subject prosecuting witness Glazer states: "I had taken a cold drink, and was walking on the sidewalk between McFarland's saloon and Weldon's store. Defendant came up to me, took me by the arm, and said, 'I want to see you a minute.' Defendant pulled me some ten feet into the street, between the stores above mentioned. I told him I could go no further,—that I was sick,—and asked defendant what he wanted with me. He said he wanted to beat the s—t out of me. Defendant ran his hand into his pocket, pulled his knife, and, with his closed pocketknife in his fist, struck me on the head two blows. I cried out and ran. Defendant followed me, and kicked me several times as I was running. There were two wounds on my head, from which blood flowed all over my face, and a knot on the back of my head. I had the wounds dressed there that evening by Dr. Neilson, and next morning by Dr. Davis at his office. They pained me a great deal, and hurt me so I could not sleep that night." The question of appellant having a knife was controverted by himself and his witnesses. However, the state introduced other witnesses tending to show that appellant had a knife in his hand at the time of the alleged assault.

Evidently the assault was of a premeditated character, and, using a knife as is shown, the instrument was calculated to inflict great bodily injury. It occurs to us that the evidence sustains that count in the information.

There being no error in the record, the judgment is affirmed.

On Motion for Rehearing.

(Feb. 26, 1902.)

Appellant insists, on motion for rehearing, that we should consider what purports to be a bill of exceptions, but which was disallowed by the judge; said bill setting up certain remarks of counsel for the state which appellant construes to be a reference to his failure to testify; and he says that this should be considered as a proper bill of exceptions, inasmuch as the judge failed to file a bill of his own, or to point out the imperfections in the bill presented by counsel. In support of this contention he refers us to *Exon v. State*, 33 Tex. Cr. R. 461, 26 S. W. 1088. We do not believe said authority is in point. In that case, on the refusal of the court to sign the bill as presented to him by appellant, a bill was prepared by appellant, predicated on the affidavits of bystanders. The clerk, it seems, filed this bill, but subsequently erased his file mark; and the court held that a certiorari should be granted to bring that bill up as a part of the record. In this case the bill as presented by appellant was disapproved by the judge, and appellant failed to prepare and present a bill supported by bystanders. The action of the judge was simply tantamount to saying that the matter did not occur as set forth in said bill. If it did occur, appellant should have, under the statute, resorted to bystanders, and presented his bill as was done in *Exon's Case*. So that, if it be conceded that the language imputed to the prosecution was a reference to appellant's failure to testify, which is doubtful, the same is not presented to us in such shape as to be the subject of revision.

The motion for rehearing is overruled, in accordance with the original opinion.

ESSER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

BIGAMY—INDICTMENT—SUFFICIENCY— APPEAL—RECORD—REVIEW.

1. An indictment for bigamy, charging that defendant unlawfully married S. B. when he had a "former lawful wife then living"; that he, at the time of "his marriage with said S. B., had theretofore been and was then lawfully married to O. E., then living,"—is a substantial compliance with the form for such indictments prescribed by White's Ann. Code Cr. Proc. art. 458, § 11.

2. The court on appeal in a criminal case, where there is no bill of exceptions or statement of facts, will not consider a motion for a new trial based on questions relating to the sufficiency and admissibility of the evidence.

Appeal from district court, Denton county; D. E. Barrett, Judge.

A. P. Esser was convicted of bigamy, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of bigamy, and his punishment assessed at four years' confinement in the penitentiary.

The charging part of the indictment is as follows: "That A. P. Esser * * * did then and there unlawfully marry Stella Black, he, the said A. P. Esser, then and there having a lawful former wife then living, to wit, Olivia S. Esser, née Olivia S. Hull; that is, the said A. P. Esser, at the time of his said marriage with the said Stella Black, had theretofore been and was then and there lawfully married to the said Olivia S. Esser, née Olivia S. Hull, and at the time of his said marriage with the said Stella Black the said Olivia S. Esser, née Olivia S. Hull, was then and there living, and was then and there and at the time thereof the lawful wife of the said A. P. Esser," etc. The indictment is in substantial compliance with White's Ann. Code Cr. Proc. art. 458, § 11; May v. State, 4 Tex. App. 425. The record is without bill of exceptions or statement of facts. Appellant's motion for new trial in no particular criticises the charge of the court, but relates to the sufficiency and admissibility of certain evidence. In the absence of the statement of facts, the same cannot be considered.

The judgment is affirmed.

ROLLER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

CRIMINAL LAW—ADULTERY—INDICTMENT—CRIME CHARGED—DESCRIPTION IN TRANSCRIPT—AMENDMENT—CLERK'S CERTIFICATE—HARMLESS ERROR—ADMISSIBILITY OF EVIDENCE—DECLARATIONS OF ACCUSED—INTRODUCTORY EVIDENCE.

1. Code Cr. Proc. art. 471, providing for the transfer of indictments to such inferior courts as may have jurisdiction to try the offenses therein charged, not requiring the transcript to state the name and nature of the offenses charged, a statement in a transcript, otherwise sufficient, that defendant was charged with "adultery and fornication," instead of "adultery" alone, as charged in the indictment, did not vitiate the indictment and deprive the court to which it was certified of jurisdiction.

2. The misdescription in the transcript being insufficient to vitiate the indictment, error in admitting, for the purpose of amending the transcript, the clerk's certificate stating that the indictment charging defendant with adultery was the only one returned against her, and the only one transferred, was harmless.

3. On a prosecution for adultery, charged to have been committed with one B., an officer was allowed to testify that during the preceding year he went to defendant's house to arrest another woman, who he was informed was staying with her; that B. was not there, but defendant asked witness if he would accept B. on the woman's bond; and that he did not

make the arrest he intended because the woman "gave him the slip" and got away. Held, that the declarations of defendant indicating that she might be able to get B. to go upon the other woman's bond were admissible as tending to show intimacy between defendant and B.

4. The evidence as to the officer seeking to arrest the woman staying with defendant was admissible as introducing and leading up to defendant's declarations.

Appeal from Ellis county court; J. E. Lancaster, Judge.

Lillian Roller was convicted of adultery, and she appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of adultery, and her punishment assessed at a fine of \$100.

Appellant excepted to the action of the court overruling the following plea to the jurisdiction of the court: "That the court is without jurisdiction to try this cause, for the following reasons: This charge is by indictment returned by the grand jury of this county into the district court of Ellis county, Texas, charging defendant with adultery. The transcript of the district clerk of Ellis county accompanying the indictment herein appears to have transferred a case or indictment against appellant charging her with fornication and adultery. Wherefore defendant says that the transcript is insufficient, and this court is without jurisdiction." That portion of the transcript which describes the offense is as follows: "No. 12,407. State of Texas v. Lillian Roller. Adultery and Fornication. 3 day, 4 week. June, A. D. 1900." Appellant's contention appears to be that the statement of the offense as adultery and fornication, when the charge was simply "adultery," rendered the transcript null and void, and therefore that the court is without jurisdiction, because the same is a misdescription of the offense as charged in the indictment, to wit, adultery. Article 471, Code Cr. Proc., provides: "Upon the filing of an indictment in the district court of each county in this state which charges an offense over which the court has no jurisdiction, the judge of said court shall immediately or as soon as convenient make out an order transferring the same to such inferior court as may have jurisdiction to try the offense therein charged, stating in such order the cause transferred and to what court transferred." From this article it will appear that the order of transfer does not require the transcript to state the name and nature of the offense charged, and we so held in *Tellison v. State*, 35 Tex. Cr. R. 388, 33 S. W. 1082, and *Malloy v. State*, 35 Tex. Cr. R. 389, 33 S. W. 1082. We hold that a misdescription of the name and nature of the offense, such as has been indicated above, would not vitiate the transcript, nor deprive the county court of jurisdiction over the offense. The transcript shows the name

of the defendant, the district court number of the case, and then says that defendant is charged with "adultery and fornication." The bare statement of the fact that defendant was charged with "adultery and fornication" instead of "adultery" alone, as the indictment indicates, would not deprive the county court of jurisdiction. Therefore we hold that the court did not err in overruling appellant's motion.

Bill No. 2 complains of the court permitting the county attorney to introduce a certificate from the clerk of the district court of Ellis county, certifying, as follows: "The State of Texas vs. Lillian Roller. No. 7,432. That the indictment against the above-named defendant in said cause now pending in county court of Ellis county, in which said indictment the said Lillian Roller is charged with adultery, is the only indictment against the said Lillian Roller returned by the grand jury charging said offense against the said Lillian Roller, and is the only indictment transferred from this office against said Lillian Roller." It appears that the county attorney admitted that the minutes of the district court of Ellis county showed that the court ordered an indictment against Lillian Roller charging her with "adultery and fornication" transferred to the county court, and that the clerk's minutes showed said fact. The indictment simply charged adultery. Appellant objects to this certificate because irrelevant, and did not amend or in any way remedy the defect complained of in the original transcript. The transcript could not be amended by the certificate. However, we have held above that the transcript was sufficient, and the error in the admission of the certificate therefore becomes harmless.

In the third bill of exceptions appellant complains that the court permitted Minnick to testify for the state that during the year 1900 he was an officer, and as such went to the house of Lillian Roller to arrest a woman whom he was informed was staying with her; that he saw no one at the house of defendant except defendant and the woman he was seeking; that M. M. Bass (with whom appellant was charged with living in adultery) was not there; that defendant, Lillian Roller, asked him if he would accept Bass as a surety on the said woman's bond; that he did not arrest the woman because she "gave him the slip" and got away. Appellant objects to this testimony, because the same is irrelevant and immaterial; that the defendant stood charged by indictment with the offense of adultery with M. M. Bass, and the said testimony did not in any way show any connection between defendant and said Bass,—that defendant and Bass were living together; nor was it a circumstance tending to show their relations were in any manner wrongful or illegal; nor was it a circumstance tending to prove the state's case against defendant in any way. We do

not think these objections are tenable. Certainly it was a circumstance to introduce the declarations of defendant asking witness if he would take Bass as surety on another person's bond, thereby indicating that defendant could secure Bass' signature to said bond. If this was a fact, then to that extent it would show an intimacy between defendant and Bass, and being a circumstance, however meager, tending to prove the allegations of the indictment.

No error appearing in the record, the judgment is affirmed.

JENNINGS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

INCEST—EVIDENCE—SUFFICIENCY.

On a prosecution for incest it appeared that a marriage license had been issued to accused to marry N., his niece, and a minister testified that he had performed the marriage ceremony between accused and another at about dusk. The county clerk could not swear that he had issued the license to accused, but merely had a recollection of something being said about keeping silent as to the matter. The father and mother of N. testified that on the day the marriage was alleged to have occurred N. had been at home from about 4 o'clock in the afternoon, and defendant showed that he was visiting various houses as a solicitor on the day in question, until subsequent to the time the minister located the marriage, and denied the fact of a marriage. *Held*, that the evidence was insufficient to sustain the conviction.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

W. J. Jennings was convicted of incest, and he appeals. Reversed.

Hamp P. Abney and Davis & Garnett, for appellant. Robt. A. John, Asst. Atty. Gen., for the state.

DAVIDSON, P. J. This conviction was for incest, the charge being that appellant intermarried with his niece, his sister's daughter. There are some interesting questions raised by bills of exception and motion for new trial, but as the evidence, in our opinion, is insufficient to support the conviction, a discussion of those matters is pretermitted. Without going into a detailed statement of the testimony, it is disclosed that the marriage license was issued to W. J. Jennings to marry Mary N. Brooks. Walker, a minister of the Baptist Church, testified that a party whom he recognized as appellant approached him in the early afternoon, with the request that he perform the marriage ceremony between himself and a lady later that afternoon at a designated point in the road. At the appointed time, about dusk, or nearly dark, he says appellant, with a lady, in a buggy, met him at the rendezvous, and he performed the marriage ceremony; that, after the ceremony was over, he approached the lady, who was

wearing a large sunbonnet, in order to see whether he married appellant to a white person or a negro, or to ascertain to whom he had married him; that the woman asked him why he did that, and he gave the above reason. He stated to the father of Mary N. Brooks and to one of the officers that the woman or the person purporting to be a woman to whom he married defendant was in woman's attire, slovenly dressed; was wearing a greasy, dirty sunbonnet; was a tall, rather coarse-looking woman or man, and had a coarse voice. The county clerk testified, upon examining the license, that he recollected in an indistinct way issuing the license, but had no definite recollection of the matter, or the party who obtained the license. He did not recognize appellant as the party, and in fact stated he did not know who it was; that the whole matter was very indistinct in his mind; simply recollected the fact, after examining the license, that he had issued it, and that more by reason of the fact that his name was signed to the license and to the affidavit indorsed on the back than any other reason; that he also had an indistinct recollection of something being said about the lady being in school, and the request being made to keep silence in regard to the matter. This marriage of which Walker spoke occurred north of Woodbine, and quite a number of miles north of Whitesboro, where Mary Brooks resided. This is practically the state's case, with one additional fact; O. L. Brooks, brother of Mary N., identified the signature to the affidavit on the back of the license as that of appellant, but his confidence in this statement is sharply shaken on cross-examination. J. N. Brooks (the father), and also the mother of Mary N., testified that on the particular day the marriage is alleged to have occurred, their daughter Mary N. attended school in the town of Whitesboro, where they all resided, until about 4 o'clock in the afternoon; that she returned home about that hour, and assisted her mother and sister in domestic duties about the house,—among other things, ironing some clothes; later on, as night approached, Mary assisted her mother in preparing supper; that there were visitors at the house on this occasion,—among others, a sister of Mary, who lived in Indiana, and also a lady friend in no way related to them. After supper Mary N. assisted her mother in the dining room, washing dishes, etc., after which she and her sister lighted a lamp and prepared their lessons for the following day. After doing this, Mary N., at the instance of her visiting sister, who did not write very well, wrote a letter to her brother-in-law, in Indiana. When this letter was finished, she took her little niece upon her knee, and held the pen or pencil while the little one dictated a few short sentences to her father. This letter was introduced in evidence, showing the date, etc. It is shown by quite a number of

witnesses that appellant, who was a sewing machine agent, was traveling through the neighborhood to the east, and perhaps to the southwest, of Whitesboro, in Grayson county, and visited quite a number of houses in the interests of his business, collecting money, taking notes, giving receipts, etc. Some of these writings were introduced in evidence, all bearing date September 14, 1899, which is the date of the alleged marriage. This alibi as to defendant covered the entire afternoon until subsequent to the time Walker locates the marriage, some miles away. Defendant himself testified that he did not obtain the license; knew nothing of it; never married his niece; never was in the clerk's office in Gainesville in his life; and gives a history of his day's work, in connection with these various transactions, as well as the writings introduced. There are many facts and circumstances bearing upon these matters of alibi, both as to the girl and appellant, which we deem unnecessary to state, corroborating the matters stated. It is placed beyond question that the only act, if this was a fact, connected with this whole transaction, bringing the parties within the statute of incest, was the fact that they intermarried as testified by Walker. In the light of this testimony, the facts and circumstances, we are not willing for this conviction to stand. We do not believe the testimony sustains the conviction. The motion for new trial has attached thereto quite a lot of affidavits made by various witnesses, which set up newly-discovered testimony to the effect that the minister Walker's reputation was bad for truth and veracity.

The judgment is reversed, and the cause remanded.

MORRISON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

CRIMINAL LAW—PRELIMINARY COMPLAINT—LOSS—SUBSTITUTION.

Under Code Cr. Proc. art. 470, declaring that, where an indictment or information has been lost, another indictment or information may be substituted on the written statement of the prosecuting attorney "that it is substantially the same as that which has been lost," a preliminary complaint made by O. cannot be substituted for a lost complaint made by D.

Appeal from Hunt county court; R. D. Thompson, Judge.

W. Morrison was convicted of crime, and appeals. Reversed.

S. D. Stinson and R. L. Porter, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of selling liquor to a minor, and fined \$50.

By motion in arrest of judgment, appellant sought to attack the substitution of the

complaint and information, both of which had been lost. The attack upon the complaint was based upon the fact that the substituted complaint purported to be made by Hart Craddock, whereas the lost complaint was made by C. A. Duff. The information was attacked because it was based upon a complaint signed by Hart Craddock, whereas there was no such complaint ever made. The statement that these matters were unknown is verified by the affidavit of R. L. Porter, an attorney in the case, supported by that of C. A. Duff. The court refused to investigate the matter, and overruled the motion. The matter should have been investigated. If, as a fact, the original complaint was made by C. A. Duff, then no other complaint could be substituted under our law except that complaint. Article 470, Code Cr. Proc. In order to substitute at all, the substituted paper must be substantially the same as that which has been lost, mislaid, mutilated, or obliterated. This phase of the statute is not met by the substitution of a complaint made by Hart Craddock for one made by C. A. Duff. In fact, Hart Craddock, under the purported showing, never made a complaint in the case. Before a substitution can occur, there must be something to substitute. If C. A. Duff made the complaint, then it cannot be substituted by a complaint made by Hart Craddock. The only substituted complaint that could have been used in this case was the complaint made by said Duff. There was nothing to substitute so far as Hart Craddock was concerned, and the complaint injected in this case as a complaint made by Hart Craddock was not a substituted complaint, because he had not previously made a complaint that had been lost, and which could be substituted. The information, of course, must follow the complaint. If there had been no information upon the complaint made by Hart Craddock, then there could be no substituted information along that line. The court should have tried the issue, and if, as a matter of fact, the original complaint was signed by C. A. Duff, the motion in arrest of judgment should have been sustained.

The judgment is reversed, and the cause remanded.

SMITH v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

INTOXICATING LIQUORS—GIVING LIQUOR TO MINOR—PROSECUTION—EVIDENCE—SUFFICIENCY.

On a prosecution for unlawfully giving intoxicating liquor to a minor, the defense was that defendant did not know the prosecutor was a minor. The evidence showed prosecutor only 18 or 19 years of age. Several witnesses testified to his boyish appearance, and it was shown that he and defendant had known each other since prosecutor was 5 years of age, and that they had been neighbors for 13 years. There was evidence that on one

occasion defendant advised prosecutor to tell a saloon keeper that he was of age so that he could get liquor. *Held*, that the evidence was sufficient to sustain a conviction.

Appeal from Hood county court; H. D. Payne, Special Judge.

Bill Smith was convicted of unlawfully giving liquor to a minor, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of unlawfully giving intoxicating liquor to a minor, and his punishment assessed at a fine of \$25.

The only question presented for our consideration is the sufficiency of the evidence to sustain the verdict. There is no question as to appellant giving prosecutor liquor. The only contention is that he did not know at the time that appellant was under 21 years of age. In this connection, the proof shows that appellant was only 18 or 19 years of age. Several witnesses testified to his boyish appearance. It was further in proof that he and defendant had lived close neighbors for about 13 years; that they had known each other since prosecutor was 5 years old. It was also in evidence on the part of the state that on one occasion appellant advised prosecutor to tell the saloon keeper in Granbury that he was of age, and he could get whisky. We think this testimony, in connection with the other circumstances, was sufficient to authorize the jury to find that, when appellant gave prosecutor liquor, he knew he was a minor.

The judgment is accordingly affirmed.

BAILEY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

INTOXICATING LIQUORS—LOCAL OPTION LAW—VIOLATION OF—EVIDENCE—SUFFICIENCY—INSTRUCTION ON THE FACTS.

1. The court instructed, in a prosecution for violating the local option law by selling Dallas Tonic, in which the question whether it was intoxicating was in issue, that if defendant sold liquor labeled "Dallas Tonic," and if the jury believed it to be intoxicating, the defendant should be found guilty, but that he could not be found guilty, even if he had sold the liquor and it contained alcohol, if there was a reasonable doubt as to the existence of alcohol sufficient to produce intoxication. *Held*, that the instruction was not erroneous as assuming that Dallas Tonic was a liquor, but was a proper instruction as to the issue whether the tonic was intoxicating.

2. Where the chemists introduced by the state testify that the tonic contains alcohol, and there is evidence that it is practically the same as beer in appearance, taste, and quality, a judgment of conviction will not be reversed by reason of the insufficiency of the evidence though it is conflicting as to the effect of the tonic on persons drinking it.

Appeal from Hunt county court; R. D. Thompson, Judge. Digitized by Google

J. W. Bailey was convicted of violating the local option law, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail.

It is contended in the motion for new trial that the court assumed in his charge that Dallas Tonic was liquor, and only submitted whether or not it was intoxicating as the question to be decided by the jury, and was, therefore, a charge upon the weight of evidence. That portion of the charge is as follows: "If you believe from the evidence beyond a reasonable doubt that defendant, J. W. Bailey, did, at the time and place alleged in the indictment, sell to Charley Patterson two bottles of liquor labeled 'Dallas Tonic,' and if you further believe that the same was intoxicating liquor, according to the definition hereinbefore given you, you will find defendant guilty. If the jury believe from the evidence beyond a reasonable doubt that defendant sold two bottles of liquor to Charley Patterson at the time and place alleged, and that the same contained alcohol, but should have a reasonable doubt as to it containing alcohol in such proportion that it would produce intoxication when taken in such quantities as may practically be drunk, then you will acquit defendant." This charge, as before stated, fairly submits the issue, and is not upon the weight of the evidence. It was a question in the case as to whether Dallas Tonic was intoxicating, and there was testimony introduced of chemists as experts. There was a good deal of evidence along this line. The court submitted the issue to the jury, we think, in appropriate terms.

It is suggested that the evidence is not sufficient to support the conviction, in that Dallas Tonic is not an intoxicant within the purview of the local option law. As before stated, there is a good deal of testimony on this question. The chemists who were introduced state the tonic contained alcohol. There was testimony pro and con as to its effect upon parties who drank it. The evidence for the state is to the effect that it was practically the same as beer in appearance, taste, and quality. Under this state of case we do not feel justified in reversing the judgment for want of sufficient testimony.

The judgment is affirmed.

DONATHAN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

GAMING—CRACK-LOO—MANNER OF PLAYING.

Pen. Code, art. 388, making it criminal for any person to bet or wager on poker dice,

jack pot, high dice, low dice, dominoes, euchre with dominoes, poker with dominoes, muggins, crack-loo, crack-or-loo, or at any game of any character whatever that can be played with dice or dominoes, authorizes the conviction of a person for betting at a game called "crack-loo," though it is not played with dice or dominoes, but by tossing coin at a crack in the floor.

Appeal from Hood county court; Phil Jackson, Judge.

Jim Donathan was convicted of betting at a game called "crack-loo," and he appeals. Affirmed.

Jno. J. Hiner, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of betting at a game called "crack-loo," and his punishment assessed at a fine of \$10.

Appellant contends that this is not an offense under article 388 of our Penal Code. As we understand it, his contention is that the portion of said article where the game of crack-loo is found is in connection with the inhibition of betting at games played with dice and dominoes. We quote that portion of the article, as follows: "If any person shall bet or wager at any * * * of the following games, viz.: poker-dice, jack-pot, high-dice, low-dice, low-die, dominoes, euchre with dominoes, poker with dominoes, sett with dominoes, muggins, crack-loo, crack-or-loo or at any game of any character whatever that can be played with dice or dominoes or at any table, bank or alley, by whatsoever the name may be known, and without reference as to how the same may be constructed or operated, he shall be fined * * *: provided, no person shall be indicted under this section for playing at any of said games with dice or dominoes at a private residence." True, crack-loo is found in connection with games that are played with dice and dominoes. In fact, all the games enumerated in that portion of the statute, except jack pot and crack-loo, are such games as are played with dice or dominoes; but we do not think it by any means follows that, if crack-loo is a game not played with dice or dominoes, it is not prohibited by said statute. The games that precede crack-loo, except jack pot, which is a game played with cards, down to and including muggins, are all dice or domino games, while crack-loo, as we understand it, and as explained in the record here, is a game played by two or more persons tossing up a coin and letting it fall upon the floor; the one whose coin falls and remains nearest a crack in the floor being the winner. This is not played with either dice or dominoes, though one of the witnesses states that it could be played by tossing up dice or dominoes instead of a coin; but this is not the mode of playing the game. Following the enumeration of games, the language is not, "or at any other game of any character that can be played with dice or dominoes," etc.;

but the language is, "or at any game of any character,"—showing that the legislature did not regard crack-loo as a game played with dice or dominoes. The dictionaries and books on gaming, so far as we have investigated, do not contain the game of crack-loo, or any definition thereof, and it seems to be peculiarly a Texas game. The legislature has prohibited the betting on such game, and it was entirely competent for it to do so.

Appellant further contends that, if it is a game prohibited by the statute, it is a game played with dice or dominoes, and that the evidence shows that the playing was at a private house, and therefore it cannot be an offense. What we have said above disposes of this contention. It is not a game played with dice or dominoes, but played, as shown by the witnesses, as stated above, by tossing up coins.

The evidence supports the verdict of the jury. The judgment is affirmed.

GRIFFIN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

CRIMINAL LAW—GAMING—SUFFICIENCY OF INDICTMENT—ADMISSIBILITY OF EVIDENCE—TESTIMONY OF ACCOMPLICES—EXEMPTION OF WITNESS FROM PROSECUTION—TESTIMONY BEFORE GRAND JURY—INCOMPETENCY OF GRAND JURORS.

1. An indictment for gaming charging that defendant unlawfully played "at a game with cards in a public place, to wit, a gaming house," sufficiently charges the offense.

2. Under Pen. Code, art. 391, exempting from prosecution, for violation of any of the provisions of the preceding articles, any person summoned and examined as to the violation by another person of any such provisions, and providing that a conviction for any of the offenses enumerated may be had upon the unsupported evidence of an accomplice or participant, the mere fact that an accomplice or participant is required to testify for the state exonerates him from punishment, whether such testimony is given before or after the indictment or arrest of the witness or any of the other parties; and hence it was error to refuse to allow one charged with gaming to show that he had testified before the grand jury in regard to the transaction with which he was charged, although at the time he testified defendant had not been arrested, and knew nothing of the charge against him.

3. The fact that defendant's testimony was before the grand jury, and that the grand jurors could not testify as to the transaction in which it was given, was not a sufficient objection to the introduction of the evidence in relation thereto.

Appeal from Johnson county court; W. D. McKoy, Judge.

L. M. Griffin was convicted of gaming, and he appeals. Reversed.

Cleveland & Haynes, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of gaming, and fined \$10. The charging part of the indictment is as follows: "Did then and there unlawfully play at a game

with cards in a public place, to wit, a gaming house." The motion to quash on the ground of insufficiency is not well taken. *Thorp v. State* (Tex. Cr. App.) 59 S. W. 43.

The first bill of exceptions is reserved to the refusal of the court to permit appellant to prove by himself and other witnesses that he was summoned before the grand jury and testified in regard to this transaction, and gave information and testimony in regard to violations of the gaming laws, and especially this particular occurrence, in which game defendant himself engaged. The state's objection to the introduction of this testimony was that the grand jurors were not permitted to testify as to the transaction and this evidence before that body. The court explains this bill by stating that the witnesses Floyd and Rogers on preliminary examination by the state testified that at the time defendant was before the grand jury the indictment herein had been returned, and the state's attorney admitted that at the time defendant testified before the grand jury he had not been arrested in this case, and knew nothing of the indictment against him. The objection urged by the state's attorney should have been overruled. *Wisdom v. State* (Tex. Cr. App.) 61 S. W. 926; Pen. Code, art. 391. This article provides: "Any court, officer or tribunal having jurisdiction of the offenses enumerated in this chapter or any district or county attorney may subpoena persons and compel their attendance as witnesses to testify as to violations of any of the provisions of the foregoing articles. Any person so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify and for any offenses enumerated in this chapter a conviction may be had upon the unsupported evidence of an accomplice or participant." *Kain v. State*, 16 Tex. App. 282; *Day v. State*, 27 Tex. App. 143, 11 S. W. 36; *Wright v. State*, 23 Tex. App. 313, 5 S. W. 117. And it would make no difference whether the grand jury had returned the bill or was simply examining into the transaction. If the testimony of one of the participants is used by any of these tribunals, courts, or officers in behalf of the state, it exonerates the witness whose testimony is used by virtue of the terms of the statute. Nor does it make any difference at what stage of the investigation or trial the evidence of the participant is used. The grand jury may not have been satisfied that the evidence upon which the bill was returned was sufficient to justify a conviction, but, if they had been, still, under the terms of the law, the use of the testimony of one of the participants exonerates him from prosecution. In cases where indictments have been returned, and one of the indicted parties is used as a witness for the state, this would exonerate, even though he be one of the indicted parties. Article 391, supra, was enacted for the purpose of forcing witnesses

to testify in behalf of the state. He cannot plead that rule of evidence which does not permit a witness to incriminate himself, because when he testifies he is exonerated from punishment, and the incriminating testimony can never be used against him. The mere fact that the participant is required to testify for the state exonerates him from punishment, and it is wholly immaterial whether it is before the arrest of himself or any of the parties, or subsequent to their arrest. See authorities *supra*. This testimony should have been admitted; and if, as contended, he was used by the grand jury as a witness in the examination of the case then upon trial, and gave testimony in behalf of the state, as he offered to prove, appellant is entitled to his discharge.

The judgment is reversed, and the cause remanded.

HALL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

ASSAULT WITH INTENT TO MURDER—HOMICIDE TO PREVENT MURDER—PRESUMPTION FROM USE OF DEADLY WEAPONS—INSTRUCTIONS—SELF-DEFENSE—HUSBAND AND WIFE—CUSTODY OF CHILDREN—RIGHT TO VISIT—RIGHT TO USE VIOLENCE—PROVOKING ASSAULT—IMPEACHMENT OF WITNESSES—REPUTATION FOR CHASTITY.

1. Under Pen. Code, art. 676, providing that when homicide is committed to prevent murder, maiming, etc., if the weapons used by the aggressor are calculated to accomplish the purpose imputed to him, it is to be presumed that he intended to inflict the injury, the legal presumption that the party using such weapons designed to inflict the injury indicated is binding on court and jury, and in such a case should be given in the charge to the jury.

2. On a prosecution for assault with intent to murder, defendant testified that the prosecuting witness approached him with a pistol, and said, "I am going to kill you;" that defendant's pistol was in his pocket, and when he remonstrated she leveled her pistol, whereupon he knocked her pistol up so that it fired over his head, and drew his pistol and shot her; that she again threw the pistol on him, and he shot her again; and that he tried to take her pistol from her, but was unable to do so until she had weakened from the second shot. *Held*, that the evidence was sufficient to bring the case under Pen. Code, art. 676, and the jury should have been instructed that if, when defendant fired, the prosecuting witness was attacking him under circumstances reasonably indicating an intention to murder or seriously injure him, and that the weapon used by her was calculated to produce those results, then the law presumed that she intended to kill or seriously injure defendant, in which case he would be justified in shooting her.

3. Defendant and his wife had separated, she taking their children to her father's house; and defendant testified that when he went there to see his children his wife attempted to shoot him, whereupon he shot her in self-defense. *Held*, that in instruction conditioning defendant's right of self-defense upon the question as to whether his wife's father had forbidden him to come upon the premises, or whether his wife had invited him to come, was erroneous, since he had a right to go to see his children in a peaceful manner, whether forbidden or invited.

4. The mere statement by defendant that he

carried the pistol with which he shot his wife upon the premises to protect himself from a threatened attack by her father was insufficient to authorize an instruction based upon the hypothesis that her father had forbidden him to come upon the premises.

5. Although he had a right to go to see his children peaceably, if he went to the house intending, if necessary in order to see them, to bring on a difficulty, and, so intending, did any act reasonably calculated to produce apprehension on the part of his wife that he intended to force an entrance, and thus brought on the difficulty, his perfect right of self-defense was forfeited, and, even though he shot his wife in self-defense, he would be guilty of at least an aggravated assault.

6. If defendant went to the house of his wife's father with intention of provoking a difficulty and killing his wife, and there made any demonstration with intention to kill her, he would be guilty of assault with intent to murder, whether he shot her in self-defense or not.

7. An instruction that defendant, in order to see his children, had a right to go upon the premises of his wife's father "in a peaceful manner," was not erroneous.

8. An instruction that the jury were not to consider any of the evidence, either written or oral, which was admitted for the purpose of impeaching witnesses, was erroneous, as being too indefinite, and as not sufficiently indicating to the jury what evidence was referred to.

9. There was evidence that defendant had been invited by his wife to come to the house to see her. *Held*, that an instruction that if defendant went to the house, whether by invitation of his wife or not, to see his children, or for any other lawful purpose, and his wife made an unlawful assault upon him with a pistol, and it reasonably appeared to defendant that she was about to kill or seriously injure him, he had a right to shoot her in order to prevent such injury to himself; that, having once commenced to so shoot, he would have the right to continue to shoot as long as there was an appearance of danger to him; that, if the danger was reasonably apparent, defendant had the right to shoot and continue to shoot, whether there was danger in fact or not; and that such appearances must be viewed exclusively from defendant's standpoint,—was correct.

10. The only exception to the rule that it is not permissible to impeach a witness for truth and veracity by showing that her reputation for chastity is not good is that a witness may be asked on cross-examination whether she is a common prostitute, and then the party asking the question is bound by the answer given.

11. Where there was evidence that the difficulty occurred in connection with the children, it was error to allow the state to prove by cross-examination of defendant that after the separation he took one of his children and put him in his buggy, with intention of taking him home with him, since, there being no divorce decreeing the custody of the children, the rights of the husband and wife with reference to the care and custody of the children were the same.

Appeal from district court, Collin county; J. E. Dillard, Judge.

Gabe Hall was convicted of assault with intent to murder, and he appeals. Reversed.

Garnett & Smith, J. M. Pearson, R. C. Merritt, and Jones & Eastham, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of seven years. This

is the third appeal of this case, the previous appeals being reported in 60 S. W. 769 and 64 S. W. 248.

Appellant, in his fifth assignment of error, complains of the failure of the court to give the following charge: "If the jury find and believe from the evidence that, at the time defendant fired the shot, that the prosecuting witness, Susan Hall, was making a violent attack upon him under circumstances which reasonably indicated her intention to murder him or inflict serious bodily injury upon him, and the weapon used by her, and the manner of its use, were such as was reasonably calculated to produce either of those results, then the law would presume that the said Susan Hall intended to kill him or inflict serious bodily injury upon him; and in such case, if defendant so acted, he would be justifiable." This charge should have been given. Article 676, Pen. Code, provides: "When the homicide takes place to prevent murder, maiming, disfiguring, or castration, if the weapons or means used by the party attempting or committing such murder, maim, disfiguring or castration are such as would have been calculated to produce that result, it is to be presumed the person using them designed to inflict the injury." It will be seen from this article that when the homicide is committed to prevent murder, and the weapon or means used by the aggressor was calculated to effect that purpose, the Code makes it an absolute presumption of law that his design was to inflict the injury indicated. This legal presumption is imperative with the jury as well as with the court, and, when applicable, must be given in charge to the jury. *Kendall v. State*, 8 Tex. App. 569; *Jones v. State*, 17 Tex. App. 612; *Cochran v. State*, 28 Tex. App. 422, 13 S. W. 651. The learned trial judge, in presenting appellant's defenses, did so properly, except as to this phase; but, under the circumstances of this case, the statute imperatively requires this charge asked by appellant to be given. The testimony authorizing this charge is substantially as follows: Appellant testified that when he got near the porch Susan Hall came out with a pistol in her hand, and pointed it at him and said, "You dirty son of a bitch! I am going to kill you for telling about that Dallas matter;" that at this time defendant's pistol was in his pocket; that she drew the pistol on him, and he remonstrated, and she said, "You dirty son of a bitch! you shall never see your children again," and leveled her pistol up, and that he threw up one hand, and drew his pistol from his pocket, and shot her in the right side; that when he threw up his left hand he knocked her pistol up, and it fired over his head; that the first shot struck her in the right side; that she again threw the pistol on him, and he grabbed it with his left hand and shot her in the stomach; that when he grabbed the pistol with his left hand the hammer came down on his

hand, and made an incised wound between his thumb and index finger on his left hand; that after he shot her the second time he wrenched her pistol from her and walked off; that when he first grabbed it he tried to take it from her, but was unable to do so until she began to weaken from the effects of the second shot. As stated, we think this evidence clearly authorized and required the court to give the charge requested by appellant.

Appellant complains of the eleventh paragraph of the charge of the court, which is as follows: "The jury are instructed, if they believe from the evidence that defendant, Gabe Hall, and Susan Hall were married some time during the year 1887, and that they lived together as husband and wife until the early part of February, 1900, and that about that time they separated and ceased to live together as husband and wife, and that Susan Hall took their five minor children with her and went to reside with her father, Moses Wright, and that defendant, Gabe Hall, went elsewhere to reside, then you are further instructed that defendant, Gabe Hall, at any time had the legal right to enter the premises of Moses Wright, if not forbidden to do so by Moses Wright, in a peaceable manner, for the purpose of visiting his children, or for the purpose of visiting his wife, if invited by her to do so, and in doing so he would not be guilty of any trespass; and if the jury believe from the evidence that defendant, under these circumstances, went upon the premises of Moses Wright upon the invitation of Susan Hall, or for the purpose of seeing his children, with no ulterior object of killing his wife or making an attack upon her of any sort, then his right of self-defense would not be compromised or abridged in any manner by going upon said premises; and if Susan Hall attacked him with a pistol under such circumstances, in such manner as to cause him to believe that she was then and there about to take his life or to inflict upon him serious bodily injury, then defendant would have the right to defend himself against such assault, even to the taking of the life of Susan Hall." Appellant objects to this charge on the ground that the same is erroneous and misleading, and is upon the weight of the evidence, in that the jury are told that defendant had the legal right to enter the premises of Moses Wright, if not forbidden to do so by Moses Wright, in a peaceable manner, for the purpose of visiting his children, or for the purpose of visiting Susan Hall, if invited by her to do so, and in doing this he would not be guilty of any trespass, whereas, under the law, defendant had the right to go upon the premises of Moses Wright at any reasonable time to see his children, whether forbidden by Moses Wright or not, if he allowed and permitted the children of defendant to stay at his house. Furthermore, there was no proof

In the case whatever that Moses Wright had ever forbidden defendant to come upon his premises for the purpose of seeing his children, and this charge is without evidence to support it. Again, the testimony of prosecutrix, Susan Hall, shows that she had left word with defendant's mother for him to come down to Moses Wright's and see her; while defendant's mother testified that she had requested her to tell defendant to come down and see her, and that she had so informed defendant. This charge should not have been given in this form. As appellant contends, defendant had the legal right to visit his children. This proposition of law was clearly laid down in the opinions on the former appeals of this case. Appellant had the legal right to go upon the premises to see his children. Still he would have to go in a peaceable manner. The record on this appeal, as on the former appeals, shows that appellant and his wife had separated; the wife taking the children to her father's, Moses Wright. If Moses Wright had forbidden appellant to come upon his premises after permitting the children to remain there, this might be introduced as a circumstance to show that appellant went there for the purpose of provoking a difficulty; but the mere fact that Moses Wright had forbidden appellant to come upon the premises would not, per se, make appellant a trespasser in coming upon said premises. Nor would the fact that his wife had not invited him to come preclude his going upon the premises to see his own children. The court should have charged that defendant had the legal right to go upon the premises in a peaceable manner to see his children, whether forbidden by Moses Wright or invited there by his wife or not. Appellant insists that the evidence does not show that Moses Wright forbade him going upon the premises. We see nothing to authorize this statement, except an inference to be drawn from the evidence, wherein appellant says he carried the pistol to the premises to protect himself from the threatened attack by Moses Wright. We do not think this statement of appellant authorized the court to charge the jury that Wright had forbidden appellant to come upon the premises. If Moses Wright had forbidden appellant to come upon the premises, such fact would not preclude appellant entering the same in a peaceable and lawful manner, since his children were there, and he had a legal right to see his children; but appellant would not have any right to force an entrance upon the premises, and resist Moses Wright or his wife in entering the premises. If he did so, and the difficulty ensued, brought on by such unlawful act, then appellant's perfect right of self-defense would be forfeited. If appellant went to the premises for the purpose, as stated, of seeing his children, and intending to bring on a difficulty, if necessary, in order to see them, and attempted to force an entrance to

said premises, or did some act reasonably calculated to, and which did, produce in the mind of his wife the apprehension and fear that defendant intended to force an entrance, and said acts and conduct on the part of appellant brought about the difficulty, producing the occasion of the injured wife assaulting appellant, then appellant's right of self-defense, to that extent, would be forfeited; and, if appellant shot and wounded deceased (his wife) under such circumstances, then he would be guilty at least of an aggravated assault, whether he shot his wife in self-defense or not. If appellant went to the premises of Moses Wright, where his children were, with the intention of provoking a difficulty and killing his wife, and he did some act or made some declaration reasonably calculated to provoke a difficulty, with the intention to kill, he would be guilty of assault to murder, whether he shot the injured party (his wife) in self-defense or not. The mere intention to provoke a difficulty will not forfeit appellant's right of self-defense, but at the time of the difficulty he must then and there do some act or make some declaration evidencing an intention and calculated to provoke a difficulty, before his right of self-defense is forfeited. This matter is thoroughly discussed in the authorities cited by counsel for appellant in their brief. See *Cartwright v. State*, 14 Tex. App. 486; *Jones v. State*, 17 Tex. App. 611; *White v. State*, 23 Tex. App. 164, 3 S. W. 710; *Ball v. State*, 29 Tex. App. 126, 14 S. W. 1012; *Franklin v. State*, 30 Tex. App. 640, 18 S. W. 468; *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17; *Carter v. State*, 37 Tex. Cr. R. 404, 35 S. W. 378; *Tollett v. State* (Tex. Cr. App.) 55 S. W. 575; *Young v. State* (Tex. Cr. App.) 55 S. W. 331; *McCandless v. State* (Tex. Cr. App.) 57 S. W. 672; *Grayson v. State* (Tex. Cr. App.) 57 S. W. 808. During the conjugal relation, and before the decree of divorce had been granted, and before a court of competent jurisdiction has passed on the question of the custody of the children, the husband has as much legal right to the care, custody, and control of them as the wife. The wife has no legal right to prevent the husband from seeing the children. Their legal rights are coequal. This being true, appellant had the right to enter the premises. He had the right in a peaceable manner to seek admission there for the purpose of carrying out his lawful purpose in seeing the children. If this was all that he did, and his wife assaulted him with the pistol, his right of self-defense would be perfect. And as stated, whether invited by his wife or forbidden by Moses Wright, defendant could not be deprived of his legal right to see his children. If his children were placed in the home of Moses Wright, and he could not see his children without resorting to violence, then such legal right to see his children would not be a predicate for using violence

to see them, but he would have to resort to the courts of the country. Appellant complains of that portion of the charge which instructs the jury that appellant "would have the right to enter the premises in a peaceable manner." We do not think there was any error in this. But the court should not have limited his right to see his children to an invitation from his wife, or a prohibition on the part of Moses Wright.

The twelfth paragraph of the court's charge is subject to substantially the same objections urged by appellant to the eleventh paragraph, and we do not deem it necessary to further consider the same.

Appellant complains of the sixteenth paragraph of the court's charge, which reads as follows: "The jury are instructed not to consider any evidence, either written or oral, which was admitted before them for the purpose of impeaching or discrediting witnesses sought to be impeached or discredited." This charge should have been more explicit. Where the trial court is called upon to limit the consideration of certain evidence to certain purposes, it should clearly indicate the evidence attempted to be so limited in his charge; otherwise the jury could and would not know what evidence was referred to.

Appellant further complains of the failure of the court to give the eighth special charge requested by him, as follows: "If you believe from the evidence that defendant, Gabe Hall, went to the home of prosecuting witness, Susan Hall, at the instance and request of the said Susan Hall, or if the mother of defendant (Mrs. J. M. Hall) told defendant that the said Susan Hall wanted him (defendant) to come down and see her as soon as he returned from Dallas, or if you should find and believe from the evidence that defendant went to the home of said Susan Hall to see his children, or for any other lawful purpose, without invitation, and the said Susan Hall made an unlawful and violent assault upon defendant with a pistol, and it reasonably appeared to defendant that said Susan Hall was about to take his life or inflict serious bodily injury upon him, and defendant shot and wounded said Susan Hall with a pistol in order to save his own life, or to prevent serious bodily injury to himself from such unlawful assault so made upon him, then you will find defendant not guilty. And in this connection you are further instructed that, if defendant once commenced to shoot in order to save his life or to prevent serious bodily injury to himself, then he would have the right to continue to shoot as long as there was an appearance of danger to himself from such threatened assault; and in determining whether or not the defendant was in danger from such an assault, you are instructed that it is not essential to the right of self-defense that the danger should in fact exist. The danger may be only appar-

ent, and not real. If it reasonably appears from the circumstances of the case that danger existed, the person threatened with such apparent danger has the right to defend himself against it, and to the same extent that he would have were the danger real. And in determining whether there was reason to believe that danger did exist, the appearances must be viewed from the standpoint of defendant, who acted upon them, and from no other standpoint. If it reasonably appeared to defendant that the danger in fact existed, he had the right to defend against it to the same extent and under the same rules as if the danger had been real." This charge is correct, and presents the law, as we view it, applicable to the facts of this case, and should have been given.

Appellant's ninth assignment of error complains that the court erred in permitting the state to prove by Gauldin that he was acquainted with the general reputation of Amy Moss for chastity in the neighborhood of Garland, Dallas county, Tex., and that her reputation for chastity in that vicinity was bad. Appellant objected because the same was irrelevant, immaterial, and incompetent; because the character of said witness for truth and veracity could not be impeached by such evidence; because the state could not introduce such evidence, the same being original evidence on the part of the state, for any purpose; because said Amy Moss had been introduced by defendant as a witness, and had testified to material facts, and the purpose of the evidence was solely to prejudice defendant's case before the jury. It is not permissible to impeach any witness for truth and veracity by showing that his or her reputation for chastity is not good. *Stayton v. State*, 32 Tex. Cr. R. 33, 22 S. W. 38; *Woodward v. State* (Tex. Cr. App.) 53 S. W. 144; *McCray v. State*, 38 Tex. Cr. R. 613, 44 S. W. 170; *McAfee v. State*, 17 Tex. App. 139; *Conway v. State*, 33 Tex. Cr. R. 327, 24 S. W. 401; *Lancaster v. State*, 36 Tex. Cr. R. 16, 35 S. W. 165. This seems to be the uniform rule in this state. However, at common law numerous authorities can be found pro and con on the proposition. The only qualification that we have ever placed upon this proposition is that a witness may be asked on cross-examination if she is a common prostitute, and the party asking the question (state or defendant) is bound by the answer given, and cannot call other witnesses to impeach her testimony or disprove her answer. *McCray v. State*, 38 Tex. Cr. R. 613, 44 S. W. 170. The eleventh assignment of error complains of the introduction of the same character of testimony.

Appellant also complains that the court erred in permitting the state to prove by defendant, on his cross-examination, that when he went to John Burns', after the separation between himself and his wife, that he (defendant) took his little boy, Homer

Hall, and put him in the buggy, with the intention of taking him home with him and keeping him a short while. We do not think it was proper to allow the introduction of this testimony. The rights of the husband and wife with reference to the care and custody of the children are the same; and if they separate prior to the decree of divorce, or a proper order of the trial court awarding the care, custody, and control of the children exclusively to one parent, each parent has the equal right to the custody of the children. Hence it is prejudicial to introduce before the jury the acts of defendant showing efforts on his part to take the children away from his wife, as shown by this bill.

We do not deem it necessary to pass upon any other questions presented by the assignments of error.

For the errors discussed, the judgment is reversed and the cause remanded.

WILKS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

PERJURY—TESTIMONY BEFORE GRAND JURY—JURISDICTION OF GRAND JURY.

That, at the time one testified before a grand jury relative to a gaming transaction, complaint had been made before a justice on account of the same transaction, did not prevent such testimony from being a basis for prosecution for perjury, on the ground that the matter was taken from the jurisdiction of the grand jury by such pending complaint.

Appeal from district court, Franklin county; J. M. Talbot, Judge.

Dan Wilks was convicted of perjury, and he appeals. Affirmed.

Chas. S. Todd, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of three years.

The perjury was assigned upon the testimony of appellant before the grand jury, in that he swore that on the 7th of May, 1901, he had not seen S. M. Long, J. W. Johnson, Dr. Oglesby, Verde Poe, and Will Ramsey play games with cards and play at a game with cards in a public house and place, to wit, in the back room of a storehouse occupied by J. W. Johnson as barber shop, etc. On the trial appellant offered the following testimony: "That at the time the said Dan Wilks was brought before the grand jury to testify, with reference to a certain game of cards played by S. M. Long, J. W. Johnson, Dr. Oglesby, Verde Poe, and Will Ramsey in the back room of J. W. Johnson's barber shop, as charged in such indictment against him, complaints had been made before Squire C. S. Yates, a justice of the

peace in and for Franklin county, Texas, and that these cases were then pending in a court of competent and proper jurisdiction." It is stated that this testimony was offered for the purpose of showing that it was not a matter material to be inquired into by the grand jury for the due administration of the criminal laws of the state, and that his oath before that body was not administered for the ends of public justice. This testimony was excluded. The judge qualifies this bill by stating that it appeared to the court that the grand jury did not know that such complaints had been filed, and was proceeding in the usual way to investigate crimes. The theory of appellant, as manifested by his contention, is that, because the justice of the peace may have acquired jurisdiction of the matters inquired of defendant by the grand jury, therefore these matters had been placed beyond the jurisdiction of the inquiry of the grand jury. This contention of appellant seems to find authority in the further proposition that, where a court with authority obtains jurisdiction of a case, it does so to the exclusion of the investigation of any other court having authority to investigate or to obtain jurisdiction. In other words, the court which first obtains the jurisdiction obtains it to the exclusion of all other courts which might likely exercise jurisdiction. This proposition is not sound. *Schindler v. State*, 15 Tex. App. 894. If the bill properly raises the proposition contended for, then it would be no reason why the grand jury might not investigate the same transaction, any more than it would be fatal to the jurisdiction of the county court acquired by reason of a transfer from the district court of an indictment returned into that court by the grand jury, or the filing of a complaint and information in such court in the same transaction. The conviction in any court would bar a prosecution in the other court for the same offense.

The evidence is not before us. The record as presented shows no reversible error, and the judgment is affirmed.

FAULKNER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

CRIMINAL LAW—PROSECUTION ON COMPLAINT—INFORMATION—NECESSITY OF.

A prosecution on complaint in the county court is insufficient to sustain a conviction unless there is an information based on the complaint.

Appeal from Grayson county court; J. D. Woods, Judge.

Will Faulkner was convicted of unlawfully carrying a pistol, and he appeals. Reversed.

J. Q. Adamson, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of unlawfully carrying a pistol, and his punishment assessed at a fine of \$25. This prosecution was based upon a complaint, and the record is before us without an information based upon said complaint. This is necessary in a prosecution begun and carried on in the county court, as was this case. For the want of an information, the judgment is reversed and the cause remanded.

WINES v. STATE.

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

CRIMINAL LAW—EVIDENCE—WITNESSES—DISQUALIFICATION—CONVICTION—PARDON.

On a criminal prosecution a witness for the state testified on cross-examination that he had been convicted of horse theft, and his subsequent testimony to the effect that he had been pardoned, and also a certified copy of his pardon, was objected to as irrelevant and immaterial. Held that, defendant's counsel not having stated that he had drawn out the testimony as to the conviction merely for the purpose of impeachment, and having been in a position to take advantage of the witness' incompetency as shown by his testimony, the certified copy of the pardon and the testimony of the witness as to the same were not open to the objection.

Appeal from district court, Erath county; W. J. Oxford, Judge.

Lou Wines, alias Red, was convicted of the theft of a mule, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of a mule, and his punishment assessed at confinement in the penitentiary for a term of six years.

There are but two bills of exceptions in the record, both of which relate to the admission of testimony concerning the pardon of J. M. Boyett. The state introduced as a witness against appellant J. M. Boyett, whose testimony is substantially copied in the bill. On cross-examination he was asked by defendant's counsel if he had not been indicted, tried, and convicted in this state for horse theft, and punished in the penitentiary therefor, to which he answered that he had, whereupon state's counsel asked witness if he had been pardoned, to which defendant objected for the reason that the same was immaterial and irrelevant. The court overruled appellant's objection, and permitted the witness to answer said question, which he did by saying that he had been pardoned, to which said question and answer defendant excepted. It will be noticed here that the grounds of objection stated are that the answer of the witness that he had been pardoned was immaterial and irrelevant. It occurs to us that, under the circumstances, if it was claimed that by the answer of the witness that he had been convicted he was

rendered incompetent, then his pardon was both relevant and material. If it had been objected that parol evidence of his pardon was not the best evidence, then the objection would have been well taken. In *White v. State*, 33 Tex. Cr. R. 177, 26 S. W. 72, it was held that, unless the state interpose a timely objection to the mode of proof, a witness might be disqualified by parol proof that he had been convicted of a felony. Here appellant's counsel did not intimate the purpose of his testimony, and was in a condition to avail himself of the incompetency of the witness. If he had proposed to insist merely that the testimony was for the purpose of impeachment, he should have stated it. As presented, we think it was relevant and material for the state to show that the witness had been pardoned.

In the next bill of exceptions a certified copy of the pardon of the witness Boyett was introduced in evidence for the state. This was objected to on the ground that said pardon was immaterial, irrelevant, and hearsay. If appellant had frankly stated that he only introduced evidence of witness' conviction for a felony as going to his credit, and not for the purpose of disqualifying the witness, and that he objected to the pardon because it was not relevant or material as tending to strengthen or corroborate the witness, then the exception would have been well taken. But we are nowhere informed of the purpose of the introduction of the testimony on the part of the appellant that the witness Boyett had formerly been convicted of a felony; and, inasmuch as it was competent for him (the state not having objected to that mode of proof originally) to move to strike out the testimony of the witness on the ground that he was not competent, it was proper for the state to meet this phase of the testimony, and to show that the competency of the witness had been restored by a pardon. *Batson v. State*, 36 Tex. Cr. R. 606, 38 S. W. 48.

Appellant also insists that the testimony is not sufficient to sustain the verdict. We cannot agree to this contention. We have examined the record carefully, and, in our opinion, the evidence is sufficient.

The judgment is affirmed.

HILLMAN v. EDWARDS et al.

(Court of Civil Appeals of Texas. Feb. 8, 1902.)

SHERIFFS—EXECUTION OF PROCESS—FORCIBLE ENTRY INTO DWELLING—RIGHTS AND LIABILITIES.

1. An officer, having in his hands an order for the sale of specific property, issued in an action to foreclose a lien thereon, is not entitled to effect a forcible entry into the dwelling of the defendant for the purpose of seizing the property.

2. An officer, in order to execute civil process, cannot climb through an open window of the

defendant's dwelling, if that is an unusual place of entry.

3. An officer who, in executing civil process, has once effected a lawful entry into a dwelling house, and thereby acquired a right to use all necessary force in making a levy, but who voluntarily leaves without doing so, is not entitled to re-enter the house by force.

Error from district court, Bowle county; J. M. Talbot, Judge.

Action by J. W. Hillman against T. S. Edwards and others. Judgment for defendants, and plaintiff brings error. Reversed.

Smelser & Mahaffey, for plaintiff in error. P. A. Turner, for defendants in error.

RAINEY, C. J. Plaintiff in error brought this suit against T. S. Edwards, sheriff of Bowle county, and his official bondsmen, Charles Gallagher, his deputy, and Thos. & John Goggan, to recover damages for an alleged trespass and forcible entry into plaintiff's private dwelling, and the unlawful seizure and conversion of a piano. Actual damages were sought against all, and exemplary damages against all except the bondsmen of the sheriff. Upon a trial before a jury, under peremptory instruction of the court, a verdict was rendered for the defendants, and judgment entered accordingly, from which this error is prosecuted.

The action of the court in instructing a verdict is assigned as error. The facts, in substance, are that Thos. & John Goggan recovered a judgment against plaintiff, J. W. Hillman, for balance due on the piano, and foreclosing a lien thereon, with order of sale, etc. An order of sale was issued, and placed in the hands of defendant Gallagher, deputy sheriff. Armed with this writ, he went to the dwelling of plaintiff, plaintiff at the time being absent. Gallagher went to the front door, which opened into a hall, and knocked. Mrs. Duke, a married daughter of plaintiff's, came out of the door of her room, which opened into the hall. The deputy stepped into the hall through the door, which was open, and informed Mrs. Duke of his purpose in being there, and, according to his statement, began to read the order of sale. Mrs. Duke told him he would have to wait until her papa came home, which would be that afternoon. While they were talking, Miss Inez Hillman came out of the room and told Mrs. Duke not to accept any papers, and said to the deputy that he must leave, and wait until her papa came home. Gallagher replied that he had come for the piano, and must have it. Miss Inez then passed around Gallagher out onto the front gallery, and crossed to an open hall, and locked the door of the room where the piano was, and put the key away. Gallagher followed and threatened to arrest her for resisting an officer. He demanded of her the key, and threatened to arrest her if refused, and also to break the door if it was not opened. After further parleying, he left the building, and sent one of the men he had

brought with him to remove the piano for a screw-driver, in order to enter the room through a window, and take off the keeper of the lock, and open the door, and take the piano out. When the party returned with the screw-driver, he entered the room by climbing through an open window, removed the latch of the lock by unscrewing the top screw, opened the door, and had the piano removed. He then put the latch back, and left it as he had found it. He states that he stood out in the yard while the party had gone after the screw-driver. One of the ladies says he went out of the front gate, and walked up the sidewalk, as though he was looking for something to break in the room. Plaintiff had previously told Gallagher that no one should enter his residence and take the piano unless he was paid back \$110 he had paid on it, and that he would keep it until he paid off the judgment. The piano was sold under the order of sale, and bid in by the Goggan Bros. Plaintiff gave notice at the sale that the levy was illegal.

It is a well-settled rule of common law that in the execution of civil process an officer is not authorized to break open an outer door, or raise a window, or forcibly enter the dwelling house of the defendant in execution, used and occupied as such by him, without his consent. If he gains admission without force, he may go from room to room, or forcibly enter an inner room, or break open trunks, wardrobes, etc., for the purpose of a necessary levy. 2 Freem. Ex'ns, par. 256; Murfree, Sher. par. 268; Kelley v. Schuyler (R. I.) 39 Atl. 893, 44 L. R. A. 435, 78 Am. St. Rep. 887; Ilsley v. Nichols, 22 Am. Dec. 425; Swain v. Mizner, 69 Am. Dec. 244; Snyderacker v. Brosse, 99 Am. Dec. 551; People v. Hubbard, 35 Am. Dec. 628; State v. Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257. Numerous other authorities might be cited, but this will suffice. This is conceded by the able counsel for the appellees, but he insists that an exception exists to this general rule where the officer is commanded by the writ to seize specific property. Authorities are cited by counsel to support this contention, but, in our opinion, the great weight of authority—especially decisions of later years—is to the contrary. Kelley v. Schuyler (R. I.) 39 Atl. 893, 44 L. R. A. 435, 78 Am. St. Rep. 887; State v. Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257; Swain v. Mizner, 69 Am. Dec. 244; Snyderacker v. Brosse, 99 Am. Dec. 551; 3 Freem. Ex'ns, par. 408; Murfree, Sher. par. 268. Mr. Freeman, in his excellent work on Executions (volume 3, par. 468), after stating the effect of the holding in Keith v. Johnson, 1 Dana, 604, 25 Am. Dec. 167, which supports counsel's contention, says, "The more recent decisions, however, indicate that, in the absence of statutes specially authorizing it, an officer is in no case warranted in breaking into a dwelling for the purpose of serving any civil process,

and hence that he may not lawfully do so under an execution in replevin." The common-law action of replevin was to recover possession of specific property, and the writ issued therein commanded the sheriff to seize the identical property for which the action was brought to recover. The writ in this case has no greater force than the writ of replevin, and the cases cited hold that in the execution of the writ of replevin the officer cannot effect a forcible entrance into the dwelling of the defendant in said writ for the purpose of seizing the property.

The next question is, did the officer in this case use such force as to make his action a trespass? It seems the test as to whether it was a trespass is analogous to that of burglary when the entry is made with intent to commit a criminal offense. 2 Freem. Ex'ns, par. 256. Under our Penal Code (article 842, relating to burglary), the entrance into a house at an unusual place, with intent to commit a felony or theft, constitutes a forcible entry. In construing this statute the court of criminal appeals has held that it was a question of fact whether an open window is an unusual place of entry. Alexander v. State, 31 Tex. Cr. R. 359, 20 S. W. 756. The testimony shows that the officer, in making the levy, climbed through an outer open window. Whether it was an unusual place is not shown by the evidence in the record. If it was an unusual place of entry, then the officer was not authorized to make the entry, unless, as contended by appellees, the officer had begun the levy, and such entry was a continuation thereof. We are of the opinion that such contention should not be sustained. The evidence shows that the first entry into the house by the officer was lawful, and while in there he could have used the necessary force for the purpose of making the levy; but he did not do this, but saw proper to voluntarily leave the building, and when he did so he lost the right to re-enter by force. That he intended when he left the house to re-enter did not preserve to him the right to afterwards make a forcible entry. If the levy was made by unauthorized force, it was void, and the officer is liable therefor. 3 Freem. Ex'ns, par. 468.

For the reasons stated, we think the court erred in instructing a verdict for appellees, and the judgment is reversed, and the cause remanded for another trial. Reversed and remanded.

WALTERS v. CANTRELL et al.

(Court of Civil Appeals of Texas. Jan. 18, 1902.)

HUSBAND AND WIFE—JOINT JUDGMENT—LIABILITY OF WIFE'S SEPARATE ESTATE—INJUNCTION—FRAUDULENT CONVEYANCE—CANCELLATION.

1. A judgment against a husband and wife may be satisfied out of the wife's separate

property, though it does not specifically direct that execution may issue against her property.

2. Injunction will not lie to restrain execution against a wife's separate property on a judgment against husband and wife on a joint note, on the contention that the note was not given for necessities, or for expenses incurred for her separate estate, or for any tort committed by her.

3. A mother deeded property to her 18 year old son, who had lived with her all his life. Before the deed was made, he was present, and heard her consult attorneys as to how the property could be arranged so as to place it beyond her creditors. The trial court found that there was no consideration for the conveyance. Held sufficient to justify a finding that the conveyance was for the purpose of placing the property beyond the reach of creditors.

4. Where a deed to a son conveyed 62 acres of land, and execution was levied on 26 acres thereof as the debtor's property, it was error, on decreeing the conveyance fraudulent at the instance of the execution creditor, to render a decree canceling the deed as a whole, but it should have been canceled only as to the 26 acres.

Appeal from district court, Collin county; J. E. Dillard, Judge.

Injunction by Jacob Walters against C. A. Cantrell and another. Judgment for defendants, and plaintiff appeals. Reformed and affirmed.

This is a suit brought by appellant, Jacob Walters, against C. A. Cantrell and J. O. Belden, constable of precinct No. 3, appellees, to enjoin the sale of about 28 acres of land upon which execution had been levied by said constable. A temporary writ of injunction was issued. At the final trial appellant claimed the land by virtue of a conveyance from his mother, M. J. Wren. The land at the time of the conveyance being the separate property of the said M. J. Wren, and M. J. Wren owing no debts that were a charge upon her separate property, appellant claimed a fee-simple title to the land in controversy. Appellees asserted that the conveyance was fraudulent and void, and that the land was subject to a judgment in favor of C. A. Cantrell, appellee, against M. J. and J. R. Wren, on which judgment the execution enjoined had been issued. The court rendered judgment dissolving the injunction and canceling the deed, and adjudged that the land in controversy was subject to the judgment in favor of C. A. Cantrell. Plaintiff appealed.

The trial court filed the following findings of fact: "(1) I find that J. R. and M. J. Wren were husband and wife, and have been since 1890. I find that plaintiff, Jacob Walters, is a son of M. J. Wren by a former husband. (2) I find that in February, 1893, the said J. R. and M. J. Wren executed their note to the defendant C. A. Cantrell, and that said Cantrell brought suit on said note March 3, 1900, and obtained judgment on said note in the justice court against the said J. R. and M. J. Wren jointly, and the said judgment is now, and was at the time when it was obtained, to wit, 14th day of

June, 1900, a valid and subsisting judgment against said J. R. and M. J. Wren; that on the 10th day of July, 1900, an execution was duly issued on said judgment, and was placed in the hands of J. O. Belden, constable of precinct No. 8 of Collin county, Texas, and by virtue of said execution the said constable, Belden, levied upon the land here in controversy, and advertised the same for sale on the 1st Tuesday in September, 1900. (3) I find that plaintiff, Jacob Walters, applied for and obtained a temporary writ of injunction restraining said sale on the 4th day of September, 1900. (4) I find that the 62 acres of land, including the land in controversy, to wit, 26 acres, was on the 25th day of September, 1899, the separate property of said M. J. Wren, having been purchased by her with funds inherited from the estate of her father, deceased; that she purchased said 62 acres of land from W. N. Arrington and wife on the 22d day of September, 1899. (5) I find that on the 25th day of September, 1899, the said M. J. Wren, joined by her husband, J. R. Wren, for a purported consideration of \$850 paid, and the assumption of notes against said land, executed an instrument in writing purporting to convey said 62 acres of land to Jacob Walters, plaintiff herein, and said deed or instrument of writing was duly recorded on the 8d day of November, 1899, in volume 80, p. 543, Deed Records of Collin county, Texas. (6) I find that the said J. R. Wren and M. J. Wren are now, and were at the time of the execution of said deed to Jacob Walters, notoriously insolvent, and were at the time largely indebted to the said C. A. Cantrell and various other parties in the sum of several thousand dollars. I find that the plaintiff, Jacob Walters, is a minor son of said M. J. Wren, and is now about 19 years of age, and that he has all of his life lived with his mother, M. J. Wren, and well knew the insolvency and the indebtedness of M. J. and J. R. Wren, and of their purpose in executing said instrument. (7) I find that the said pretended deed from J. R. and M. J. Wren to said Jacob Walters was simulated, and that in fact no consideration was paid by the said Jacob Walters to said grantors, or either of them. (8) I find that the said instrument was executed for the purpose of placing the property therein mentioned beyond the reach of the creditors of the said J. R. and M. J. Wren, and that this fact was well known to the plaintiff, Jacob Walters, when he received said instrument, and that it was not intended by the parties to said deed that any right or title should pass thereby." These conclusions are supported by the evidence, and are adopted by this court.

Abernathy & Mangum, for appellant. John Doyle and H. L. Davis, for appellees.

BOOKHOUT, J. (after stating the facts).

1. The appellant contends that as the land

in controversy was the separate property of Mrs. M. J. Wren, and the judgment against her was upon a simple contract, and did not decree that execution might be levied upon her separate property, the trial court erred in holding that the 26 acres of land in controversy was subject to the judgment of C. A. Cantrell against J. R. and M. J. Wren. This judgment was rendered in the justice's court, precinct No. 8 of Collin county, on June 14, 1900, against the husband and wife, after service upon each of them. It was in full force and effect at the time of the trial in the lower court; not having been annulled, set aside, or appealed from. It had not been paid. The judgment was valid and binding upon the wife. *Baxter v. Dear*, 24 Tex. 17, 76 Am. Dec. 89; *Carson v. Taylor* (Tex. Civ. App.) 47 S. W. 395. A judgment against the husband and wife may be satisfied out of the common property, or the separate property of either of them, although the judgment does not specifically direct that execution may be levied upon the separate property of the wife. *Deposit Co. v. Campbell* (Tex. Civ. App.) 65 S. W. 65; *Carson v. Taylor* (Tex. Civ. App.) 47 S. W. 395; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Baxter v. Dear*, supra.

2. It is contended that the court erred in refusing to permit appellant to prove that the note sued on by Cantrell, and upon which the judgment of Cantrell was based, and upon which judgment the execution enjoined was issued, was not given for necessities for herself and her children, and was not for expenses incurred by M. J. Wren for the benefit of her separate estate, nor for any tort committed by her, but that said note was given for groceries bought by said J. R. Wren during the marriage of M. J. Wren. It is contended that the testimony would have proven that the land in controversy, which is the separate property of M. J. Wren, was not subject to the execution of C. A. Cantrell. The appellant offered to prove the facts set out in this contention. The evidence was not admissible. This was a collateral attack upon a judgment rendered by a court of competent jurisdiction. It has been repeatedly held that such a judgment cannot be inquired into collaterally, but can only be set aside in a direct proceeding. *Carson v. Taylor* and *Deposit Co. v. Campbell*, supra; *Nichols v. Dibrell*, 61 Tex. 541; *Freeman v. McAninch*, 87 Tex. 139, 27 S. W. 97, 47 Am. St. Rep. 79.

3. It is insisted that the court erred in finding that the deed from J. R. and M. J. Wren to appellant was executed for the purpose of placing the property therein mentioned beyond the reach of the creditors of J. R. and M. J. Wren, and that this fact was well known to Jacob Walters, appellant. The evidence shows that appellant is a son of Mrs. M. J. Wren, that he has lived with his mother all his life, and that he was about 18 years old when she deeded him the land. Before the deed was made to him, he was

present, and heard her consult attorneys as to how this property could be arranged so as to prevent it from being taken on the Cantrell debt. The trial court found that no consideration was paid by appellant to his mother for the property. The evidence is sufficient to justify the finding that the conveyance to appellant was for the purpose of placing the property conveyed beyond the reach of the grantors' creditors.

4. The contention that the court erred in canceling the deed from M. J. and J. R. Wren to appellant, of date September 25, 1899, and recorded in volume 90, p. 543, Collin County Deed Records, for the reason that said deed conveys 62 acres of land, and only 26 acres are in controversy in this suit, is well taken. The levy which was sought to be enjoined in this suit was made on 26 acres only of the land described in the deed. The judgment should only have canceled the deed as to the 26 acres so levied upon. The judgment will be reformed in this respect, and here rendered canceling the deed as to the said 26 acres levied upon and described.

The judgment as reformed is affirmed. The other contentions of appellant not herein discussed are overruled. Reformed and affirmed.

SAN ANTONIO & A. P. RY. CO. v. THOMPSON.

(Court of Civil Appeals of Texas. Feb. 5, 1902.)

CARRIERS—PRODUCE—DELAY IN SHIPMENT—LIABILITY—MEASURE OF DAMAGES.

1. A railway agent agreed to have a refrigerator car at B. on May 11th. On May 12th a refrigerator car arrived, and the vegetables left on the 13th; their destination being changed several times after shipment. Plaintiff testified that they were damaged while waiting for the second car, but also that when they arrived at their final destination they had begun to rot; that he changed their destination because he thought he might sell them at another point, and a delay of a day would not hurt them. *Held* insufficient to warrant a finding of damage by reason of delay at B.

2. A railroad company chargeable with unreasonable delay in holding a car containing vegetables is liable for the natural consequences thereof, even beyond its own line.

3. Where a railway agent at the point to which vegetables were consigned agrees to send the car containing them as soon as it arrives to another point, and thereby their destination is changed to the latter, the measure of damages for delay in holding the car at the original destination is the difference in values at the changed destination.

Appeal from Bee county court; Fred G. Chambliss, Judge.

Action by Edgar Thompson against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Proctors, for appellant. S. J. Lancaster, for appellee.

JAMES, C. J. This action is to recover damages to a car load of vegetables shipped from Beeville over appellant's road. According to the testimony, certain facts are clear. These facts are that plaintiff on May 10, 1900, ordered a refrigerator car, which the agent at Beeville agreed to have there on the morning of the 11th. The car tendered on that morning was not a refrigerator car, and plaintiff refused to use it. The next day a refrigerator car was brought there, and the vegetables loaded upon it by plaintiff, and it left Beeville on the night of the 13th, destined for Kansas City. On the morning of the 14th, plaintiff had the agent at Beeville change the destination to Dallas. That morning plaintiff reached Kenedy, and there had the agent again change the destination to Waco, as he thought he might dispose of the produce there. He arrived at Waco that night at about 8 o'clock. The car arrived there the same night at 11:30. The car was held at Waco some days, and was then sent on to Dallas by plaintiff's instruction. There was no testimony whatever that would have warranted a finding that there was any delay in the transportation of the car from Beeville to Waco, nor in the transportation from Waco to Dallas. Nor is there any testimony upon which a jury could have found damage to the vegetables by reason of the delay of 24 hours at Beeville. True, plaintiff says generally that they were damaged by being kept in wagons, awaiting the second car; but his other testimony shows that, if there was any such damage, it was not material, because he testified that when the car arrived at Dallas the vegetables had begun to rot. They had evidently not begun to rot at Beeville, or he would not have testified that they had begun to rot at Dallas. He evidently had no idea they had begun to rot before then. He further stated that he had the destination changed to Waco because he thought he might sell the vegetables to better advantage there, and the delay of a day at Waco would not hurt the vegetables. This testimony of plaintiff himself is wholly inconsistent with damage having occurred to them at Beeville, awaiting shipment. Upon the evidence contained in this record, we are of opinion that no issue should have been submitted to the jury, except that bearing on the delay at Waco. Upon this matter there was a well-defined issue of fact, as to whether or not that delay was owing to the fault of plaintiff or of defendant. The submission of other issues not really existing in the case naturally tended to obscure the real issue.

The question of defendant's liability for damages occurring on the Missouri, Kansas & Texas Railway does not arise. There is nothing to show delay or undue handling on that line; and if it should be found that defendant was chargeable with unreasonable delay of the car at Waco, and this was the cause of the damaged condition of the prod-

uce, defendant would be liable for all the natural consequences thereof during the entire transit,—even beyond its own line.

As to the measure of damages: If it should be found that defendant's agent at Waco agreed, as plaintiff contends, to send the car on to Dallas as soon as it should arrive at Waco, and thereby the destination was again changed to Dallas, the measure of damages should be based upon the difference in values at Dallas.

Reversed and remanded.

SKAGGS et al. v. DESKIN et al.

(Court of Civil Appeals of Texas. Jan. 22, 1902.)

WILLS—CONSTRUCTION—PROPERTY CONVEYED—COMMUNITY PROPERTY—ACCEPTANCE OF BEQUEST—ESTOPPEL TO DISPUTE BALANCE OF WILL—TRESPASS TO TRY TITLE—PARTITION—LIFE TENANT—RIGHT TO SUE.

1. Testator and his wife owned a community estate consisting of a tract of land and certain personalty. Testator's will gave to his wife "one-half of all my land, the division line to be run in the same direction that the present field fence runs, and that is nearly north and south. My wife is to have the N. E. end of the land, including my homestead"; and to his children "one-half of all my land, the N. W. end of the land." The will directed that all testator's live stock, except 2 mules and 8 cows, which he gave his wife, should be sold, and the proceeds divided among their children, etc. Held an attempt on the part of testator to dispose of the entire community estate, and not merely of his half thereof.

2. Testator and his wife owned a community estate, consisting of a tract of land and certain personalty. His will attempted to dispose of the entire property, giving half the land to the wife and the other half to the children, and most of the personalty to the wife. Held that, as without the will, the wife would be entitled to but one-half the personalty, her acceptance of more than half estopped her from asserting any community rights in any part of the land disposed of by the will.

3. A person owning a life interest in land can bring a suit to try title and for partition thereof.

Appeal from district court, Karnes county; Jas. C. Wilson, Judge.

Action to try title and for partition by Minnie Skaggs against Hal Deskin and others. From the judgment rendered, plaintiff and others appeal. Reversed.

A. J. Prichard and M. B. Little, for appellants. Bell & Browne, for appellees.

JAMES, C. J. The facts of this case, briefly stated, are: R. R. Skaggs and his wife, Amanda, owned a community estate, consisting of a tract of land and certain personalty. Skaggs died, leaving a will, duly probated, as follows: "The State of Texas, County of Karnes: I, R. R. Skaggs, of this county and state, being of sound mind and understanding, do make this, my last will and testament, in manner and form as follows: First I give, devise, and bequeath to my wife, Amanda J. Skaggs, one-half of all my land, the division line to be run in

the same direction that the present field fence runs, and that is nearly north and south. My wife is to have the N. E. end of the land, including my homestead. I also give to her my largest span of mules, and my wagon and hack, and all my farming implements belonging to my farm, and eight cows, to be selected by my wife out of my stock of cattle, and all of my money that I have on hand at the time of my death, and all that may be due me at the time of my death, after paying all of my burial expenses. Second. I give, devise, and bequeath to such of my children as may be living at my death one-half of all my land,—the N. W. end of the land; that is, the said half of my land is to be kept leased or rented to the best advantage, and the money collected thereon to be paid in equal parts to my children yearly, and at the death of my children the said land shall then be the property of all my own grandchildren equally. Third. I hereby direct my executor to sell and dispose of all my live stock except the two mules and eight cows that goes to my wife, to sell to the highest bidder for cash, and the cash to be divided equally between all my children and my wife's children. Fourth. My organ that is now in the possession of Mr. & Mrs. Crow, of Falls City, Texas, is to be the property of the Cumberland Presbyterian Church, and used at this place for the benefit of the Cenkester Congregation so long as there is a congregation here, and when the congregation fails to exist here then the organ shall be delivered over to Calvert Congregation of Karnes City, Texas. Fifth. I hereby appoint Tom Campbell, of Atascosa county and state of Texas, executor of my last will and testament. In testimony whereof I, R. R. Skaggs, the testator, have to this my last will and testament set my hand this, the 6th day of December, A. D. 1894. [Signed] R. R. Skaggs. Witness: E. C. Crow."

The following agreement and report are a part of the statement of facts:

"It is agreed by and between counsel for plaintiff and defendants that: (1) Plaintiff is one of two children of R. R. Skaggs, and Mrs. Susan Mudd the other, living at time of his death. (2) That R. R. Skaggs was living with his second wife, Amanda J. Skaggs, who survived him, and she is now dead. (3) R. R. and Amanda J. Skaggs had no children by their said marriage, but Amanda J. Skaggs had by a former marriage four children, viz., Jack and Tom Deskin, Mrs. Letha Young, and Mrs. Mattie Deskin, who survive her. (4) That plaintiff and defendants, viz., Minnie Skaggs, plaintiff, Jack and Tom Deskin, Mrs. Letha Young, and Mrs. Mattie Deskin, and Mrs. Susan Mudd, defendants, derive title through a common source, viz., R. R. and Amanda J. Skaggs. (5) That all property, both real and personal, owned by R. R. and Amanda J. Skaggs, or either of them, at the time of the death of R. R.

Skaggs, was community property of R. R. and Amanda J. Skaggs. (6) That R. R. Skaggs died testate, and his said will was probated in Karnes county, Texas. The said Amanda J. Skaggs qualified as administratrix with the will annexed; and that the exhibit marked 'A,' hereto attached, contains a complete list of all property owned by said R. R. and Amanda J. Skaggs at the time of his death; and that the said Amanda J. Skaggs took charge of and disposed of all of said personal property except such as was on hand at time of filing of her final report as shown by the record thereof, which may be used as evidence in this cause."

The following report was made by Amanda Skaggs as administratrix of the community of herself and R. R. Skaggs:

"Now comes Amanda J. Skaggs, administratrix of the estate of R. R. Skaggs, deceased, and reports to the court that due and legal notice has been served upon her that the sureties upon her bond as such administratrix have asked to be relieved from further liability. This action of said sureties was in compliance with the wishes of said administratrix, and she therefore refuses to give a new bond, but hereby resigns the administration of said estate, and makes the following exhibit of said estate: (1) The following, belonging to said community estate of deceased and administratrix, came into administratrix's possession, to wit: 174¼ acres of land, valued at \$1,747.50; 8 head stock horses, valued at \$38.00; 2 mules, valued at \$30.00; 1 wagon, valued at \$15.00; 1 hack, valued at \$5.00; 16 head of cattle, valued at \$128.00; 7 head of hogs, valued at \$20.00; 1 mower and rake, valued at \$20.00; 1 stalk cutter, valued at \$25.00; 1 cultivator, valued at \$10.00; 1 planter, valued at \$10.00; 2 plows, valued at \$12.00; 4 hives bees, valued at \$4.00; 1 garden plow, valued at \$2.00; household furniture, valued at \$45.00; 19 head of sheep, valued at \$19.00; cash from E. Parza, \$6.50; open account of A. Lott, \$13.00; open account of J. Skaggs, \$32.00; open account of E. A. Crow, \$100.00. (2) Of the community estate the administratrix has sold the following 6 head of steer cattle, \$54.00. The wolves killed all sheep but 11, and one of them is on hand. The administratrix has paid out the following amounts: To Dr. Beakley, for last sickness, \$77.50; to Dr. J. M. Mason, for last sickness, \$13.00; to Graves & Wilson, \$32.50; to John Taylor, \$14.65; and others, amounting in the aggregate \$164.65. Administratrix has advanced to Minnie Skaggs, one of the two daughters of R. R. Skaggs, on her portion of the estate, \$29.00. The administratrix is the same Amanda J. Skaggs mentioned and alluded to as the wife of testator R. R. Skaggs, and legatee under the last will of the said testator to one-half of the testator's lands, and to all the farming implements mentioned in the inventory, and to the hack, wagon, eight cows, and two mules. She has

therefore set apart and appropriated to her own use, under said will, her community one-half interest in said land 87½ acres, making a total that she has set apart to herself, 8 cows, 2 mules, 1 wagon, 1 hack, 1 mower, 1 rake, 1 cultivator, 1 planter, 2 plows, 1 stalk cutter, and all accounts due to said R. R. Skaggs. None of accounts owing to said estate have been collected, and no money belonging to said testator has come to the hands of the administratrix. All of the property owned by testator, or in which he had an interest, except where this report shows sold or dead, is yet in this administrator's hands, which is as follows: 174¼ acres of land, 10 head of stock cattle, 2 head of mules, 10 head cattle, 1 hack, 1 wagon, 2 plows, 1 garden plow, 4 hives of bees, 1 stalk cutter, all household furniture, head of hogs, and all accounts. Administrator charges herself with sales herein reported, and asks credit for debts paid and amounts advanced Minnie Skaggs. Amanda J. Skaggs.

"Sworn and subscribed before me, the undersigned authority, this 31st day of August, 1896. W. N. Robinson, J. P. & ex Officio N. P. Karnes Co., Tex."

The court gave judgment in favor of the children of Mrs. Skaggs for her community half interest in the land, and also one-half of the community half of Skaggs, making three-fourths, upon the theory that either the will of Skaggs did not refer to or dispose of more than his community half of the land, or, if it did, Mrs. Skaggs had not estopped herself by accepting benefits under the will. The facts are undisputed, and the questions involved are purely of law. We are of opinion that the will, construed by its terms, undertook to dispose of the entire estate. The reference to land in the will indicates that the testator had in his mind the entire tract, and not an undivided half thereof. He divides the land to which he refers in two equal parts by a line. He evidently was referring to an entire tract, and not a tract to be segregated and made certain by a separation of undivided interests. He speaks in the will of all the property as his. He says "my land," "my homestead," "my farm," "my span of mules," "my farming implements," "my money," etc. He even goes so far as to direct that all his live stock, except the two mules and eight cows that go to his wife, should be converted into money, and the proceeds divided between his and her children. It would not be contended that in this he was referring to an undivided half of the animals. His disposition of the personal property leaves no doubt as to his intention to deal by the will with the entire estate, and not simply with his undivided half. It would, we think, be doing violence to the language of the instrument to hold otherwise.

The next question is, did Mrs. Skaggs receive and accept under the will benefits

which she would not otherwise have been entitled to? The testator was entitled to an undivided half of the personalty, and, but for the will, she would not have been entitled to this half. She was made the sole legatee of most all of it, and as legatee her report shows she received and accepted it. This was sufficient to estop her from claiming her community rights in any of the property disposed of by this will. *Smith v. Butler*, 85 Tex. 130, 19 S. W. 1083. The will gave to the testator's children, so long as they shall live, the revenues of the half left to them. Thereafter it should belong to his grandchildren equally. No question is raised by assignment as to the right of his children to bring this suit to try title or to have partition, and we think, although they did not own the fee, but merely had an interest for life in the land, they were authorized to maintain this action. *Thurber v. Conners*, 57 Tex. 98. The will virtually provided for a division of the land in halves, but a line to be run in a certain way.

The result of the views above expressed is that the judgment should be reversed in so far as it adjudicates the respective interests in the land, and judgment rendered here decreeing to plaintiff Minnie Skaggs and the intervener Susan Mudd one-half of the land, to be taken off the northwest end of the tract by a division line as defined in the will, and to defendants Thomas Deskin, Letha Young, and interveners A. J. Deskin and Mattie Deskin, each an undivided one-fourth of the northeast half of the land as cut off by such line. In respect to partition the decree will be in the form adopted by the judgment of the district court. The costs of this court and that of the district court up to the date of the judgment of that court will be adjudged against defendants Thomas Deskin and Letha Young and interveners A. J. Deskin and Mattie Deskin. The costs of the partition proceedings will be left for adjudication by the district court, and the cause will be remanded for the purpose of effectuating the partition.

RENFRO v. HARRIS.

(Court of Civil Appeals of Texas. Feb. 26, 1902.)

Corrected opinion. For former opinion, see 68 S. W. 460.

COLLARD, J. In looking over the opinion of this court filed January 29, 1902, we notice a typographical error in the second section of the opinion. 68 S. W. 461. It states, "Nor do we find error in the court's sustaining Renfro's plea to the jurisdiction." It should read, "Nor do we find error in the court's sustaining exceptions to Renfro's plea to the jurisdiction;" and the words "exception to" are interlined in the original opin-

ion in the proper place to make the opinion read as it should, and as the matter was fact decided.

HABERMANN v. HEIDRICH et al.
(Court of Civil Appeals of Texas. Feb. 1902.)

SURETY—RIGHT OF ACTION AGAINST PRINCIPAL—TIME OF ACCRUAL—LIMITATIONS—PENSION—ABSENCE FROM STATE—CERTIFIED QUESTIONS.

1. A surety on a note, who pays the sum on the maker's default, is not subrogated the rights of the payee, and can maintain action on the note itself, but his right of action against the maker is founded on an implied promise, and where he does not pay note until after the maker has left the state and become resident in another, limitation will not be suspended by reason of the latter's absence from the state, the cause of action against him not having arisen while he was in the state.

2. The court of civil appeals will not certify questions to the supreme court unless some one of its members is in doubt about the question certified, or the question itself is of great public interest.

On motion for rehearing and to certify question to supreme court. Overruled.

For former opinion, see 68 S. W. 106.

KEY J. After due consideration of the motion and the argument submitted in support of it, we are still satisfied that our former decision was correct. It is conceded as suggested by counsel, that Heidrich, surety, had the right, before Habermann, principal, left the state, to compel the payee to institute suit upon the note, and it may be that he had other rights besides; but he did not have the right to maintain this action until after he had paid the debt, and that right was not created by the contract embodied in the note. The latter right had no existence until Heidrich paid the debt, and in determining the question of limitation as against that right it is not permissible to consider other rights that may have been secured by the contract, and may or may not have been barred by limitation. The statute relied on as taking the case out of the statute of limitations, reads thus: "Any person against whom there shall be a cause of action, shall be without the limitation of this state at the time of the accruing of such action, or at any time during which the same might have been maintained, if the person entitled to such action shall be at liberty to bring the same against such person after his return to the state, and the time of such person's absence shall not be accounted or taken as a part of the time limited by any of the provisions of this title." It was decided in *Lynch v. Ortleib*, 87 Tex. 591, 30 S. W. 545, that the statute quoted does not apply when the defendant has become a resident of another state before the cause of action accrues, and has not returned to this state. Accepting that decision as the law, and applying it to this case, the

¹ Writ of error denied for want of jurisdiction.

only question that remains is, when did the plaintiff's cause of action accrue? If before Habermann left Texas, then the statute quoted applies; but, if after that time, that statute does not apply, and the statute of limitations was not suspended. Now, if the plaintiff's cause of action was based upon the note executed by Habermann and himself, and resulted from Habermann's failure to pay the note according to its terms, then the plaintiff's contention would be correct, because the note fell due before Habermann left the state. But *Faires v. Cockerell*, 83 Tex. 429, 31 S. W. 190, 639, 28 L. R. A. 528, settles the question that when a surety discharges the debt he is not subrogated to the rights of the payee, and can maintain no action upon the note, and that his right of action against the principal is founded upon an implied promise, resulting from the fact that the surety has paid the debt, which, as between the principal and surety, the principal should have paid. Applying the doctrine of that case to this, it is manifest that the right of action relied upon here did not exist before Habermann left the state, because at that time Heldrich, the surety, had not paid the debt, and no judgment had been obtained against him for it.

In reference to the motion requesting us to certify the controlling question to the supreme court, we deem it proper to say that, while the statute authorizes this court to certify any question it may deem proper, it was not intended that the authority thus conferred should be used as a means of appeal in every case not otherwise appealable, and in which a litigant was dissatisfied with a ruling of this court. In our judgment, the authority conferred upon this court to certify questions to the supreme court should not be exercised unless some member of this court is in doubt about the question certified, or the question itself is one of very great public interest. The questions involved in this case do not come within either class, and therefore the motion to certify will be overruled.

LEHMAN et al. v. CHATHAM MACHINERY CO.

(Court of Civil Appeals of Texas. Feb. 5, 1902.)

MORTGAGES—FORM—DEED AS MORTGAGE—EVIDENCE.

A deed to real estate, though absolute in form, may be shown by parol evidence to have been intended as a mortgage, and will be given the effect of a mortgage.

Appeal from district court, Milam county; W. G. Tallaferrero, Judge.

Trespass to try title by the Chatham Machinery Company against John A. Lehman and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

This suit was brought in the district court of Milam county by A. M. Rhodes and H. G.

Rhodes, a copartnership doing business under the firm name of the Chatham Machinery Company, in the form of trespass to try title and for damages, against G. Schrader and John and Selma Lehman; and judgment was rendered upon a verdict for the company, from which defendants have appealed. The court instructed the jury to return a verdict for the plaintiff, the company. (1) Plaintiffs read in evidence general warranty deed of John D. Carothers to defendant John A. Lehman, dated April 7, 1891, reciting consideration of \$287.50, of which \$87.50 is acknowledged as paid in cash and two promissory notes, each for \$100, due one November 1, 1891, and the other November 1, 1892, for the land sued for. (2) General warranty deed of G. Schrader, May 9, 1896, to A. M. and A. G. Rhodes, reciting a cash consideration of \$300 for the land sued for. (3) General warranty deed of defendants John A. Lehman and his wife, Selma, duly acknowledged, for the land, to plaintiffs A. M. and H. G. Rhodes, expressing a cash consideration of \$2,000, of date March 26, 1898, which conveys the land in controversy. (4) There was testimony to the effect that deed of John A. Lehman to Schrader, executed in 1892, was intended as a mortgage to secure a loan of \$300, and that Rhodes, one of the plaintiffs, was informed of the fact before they took a deed from Schrader, which the parol evidence shows they did do; they agreeing to, and did, pay Schrader the \$300 for Lehman. Lehman was indebted to plaintiffs for mill machinery about \$2,000, and there was testimony, besides that of Lehman, tending to show that the deed of Lehman and wife was intended by the parties as a mortgage to secure the debt. It was in proof that the land was the homestead of Lehman and wife before and during the time of these transactions, and is their homestead yet. The notes of Lehman evidencing his debt to the company were not delivered to him, and all the while he has retained possession of the premises, residing on the same. There was testimony on the part of plaintiffs disputing the mortgage effect of the deed, and knowledge on their part of such asserted fact.

Monta J. Moore, for appellants. Hefley, McBride & Watson, for appellees.

COLLARD, J. (after stating the facts.) Unquestionably, the court below committed error in instructing the jury peremptorily to return a verdict for the plaintiffs, and that error assigned is sustained. The testimony warranted the submission of the question as to whether or not the deeds, though absolute in form, were intended as security only for debt, and, if such was the fact, whether plaintiffs, or either of them, had notice of the fact as to the deed to Schrader at or before his deed to them. The court, under the facts, should have left these questions to the

jury. It has been long since and often decided by the courts of this state that a deed to land, absolute in form, may be shown by parol evidence to have been intended as a mortgage or merely security for debt, and in case of such a finding it will have the effect of a mortgage. *Hardie v. Campbell*, 63 Tex. 296, citing *Carter v. Carter*, 5 Tex. 93; *Fowler v. Stoneum*, 11 Tex. 478, 62 Am. Dec. 490; *Hudson v. Wilkinson*, 45 Tex. 445; *Loving v. Milliken*, 59 Tex. 423. "The true test is the existence or nonexistence of the relation of debtor and creditor" after the deed, but this and all the facts bearing on the issue should be considered together. Appellant has cited many other authorities in support of his contention, but we deem it unnecessary to cite all of them.

Because of the error in the court's charge, as above indicated, the judgment of the lower court is reversed, and the cause remanded. Reversed and remanded.

TEXAS & P. RY. CO. v. HAMILTON et al.¹
(Court of Civil Appeals of Texas. Dec. 21, 1901.)

RAILROADS—FRIGHTENING ANIMALS—LIABILITY—EVIDENCE—INSTRUCTIONS.

1. Decedent and others were riding mules on a public road alongside defendant's railroad tracks, about 80 yards distant. A train came up from behind, and, when about 300 yards away, whistled for a flag station, and also in response to the conductor's signal to stop. There was positive evidence that the engineer, when opposite decedent and his companions, saw them, smiled, gave 10 or 12 blasts on the whistle, and let off a volume of steam. Decedent's mule was frightened, and threw him. Defendant's evidence tended to show that only the customary signals were given. *Held* to support a verdict against the company.

2. A charge that if the engineer saw decedent, and sounded the whistle and let off steam in order to frighten the animal, or with reason to believe that the animal would be frightened, defendant would be liable; that if he did not see decedent, or if only the customary signals were given, or if unnecessary noise was made without intention to frighten the animal, and without reason to believe that it would be frightened, defendant would not be liable,—was as favorable to defendant as it could ask.

3. The evidence showed that the mule was of average docility; that it manifested some signs of uneasiness when it discovered the train, but was controlled by its rider until the unusual noises just opposite it; that the saddle turned when it jumped out of the road, but it did not appear that the saddle was defectively fastened. *Held* not to show contributory negligence, as matter of law, on decedent's part, in failing to dismount from the mule.

4. An instruction that if decedent knew the train was approaching in time to have taken such action to avoid injury as a person of ordinary prudence would have done, and failed to do so, and such failure contributed to the injury, the company was not liable, was a sufficient charge on contributory negligence, in the absence of correct charges asked by defendant.

6. A charge requiring a verdict for defendant, regardless of whether such facts caused

or contributed to the injury, was properly fused.

Appeal from district court, Bowie county. J. M. Talbot, Judge.

Action by Lela Hamilton and others against the Texas & Pacific Railway Company. Judgment in favor of certain plaintiffs, and defendant appeals. Affirmed.

W. T. Armistead, for appellant. F. Ball, for appellees.

TEMPLETON, J. This suit was brought by the father, mother, wife, and children of Hovace Hamilton to recover damages sustained by them on account of his death, which was alleged to have been caused by negligence of the Texas & Pacific Railway Company. A jury awarded the wife and children the sum of \$2,000, and the company has appealed.

Hamilton lived in Bowie county, a short distance west of Oak Grove, a flag station on appellant's road. The town of Dekalb, one of appellant's regular stations, is situated eight or ten miles east of Oak Grove. A public road runs from Dekalb to Oak Grove and points beyond. The dirt road lies north of the railroad track, and runs approximately parallel with it, being distant therefrom at the place of the accident about 80 yards. The track and right of way are fenced, and the public road is outside the inclosure. On the day he was killed, Hamilton went from his home to Dekalb in company with his wife, Stuart, and Lacy. After transacting their business at that place, they started to return home. Lacy was with them, and they were all riding mules. When they reached a point about one-fourth mile east of Oak Grove, a regular passenger train of appellant passed them, going west. Hamilton's mule became frightened, ran away, threw him off, and killed him. Hamilton and his companions were in the public road, which at that point slightly inclined toward the railroad track as they advanced. When the train was about 300 yards from and behind them, the usual whistle for the station was sounded. There were passengers on board the train. Hamilton, at Oak Grove, and the conductor, by pulling the bell cord, notified the engineer of the fact, and he, to let the conductor know that he had received the notice and would stop the train, again sounded the whistle. Hamilton and those with him heard the signals and continued to ride on, Hamilton leading in front. There was direct and positive evidence to the effect that when the train was about opposite Hamilton the engineer looked at and saw him and his companions, smiled, laughed, and gave 10 or 12 sharp, quick blasts of the whistle, and let off a volume of steam in their direction, whereupon Hamilton's mule became unmanageable, dashed out of the road, and threw him off. On the other hand, the testimony tending strongly to establish the facts that only the customary signals

¹ Writ of error denied by supreme court.

were given, and no unusual noises were made, and that the engineer never saw Hamilton and his companions. In this state of the evidence, the finding of the jury upon these controverted issues of fact is conclusive, and the contention of appellant that the evidence is not sufficient to support the verdict in these particulars cannot be sustained.

The court charged the jury, in substance, that if the engineer saw Hamilton, and sounded the whistle and let off the steam for the purpose of frightening the animal he was riding, or if he saw Hamilton and sounded the whistle and let off the steam unnecessarily, knowing or having reason to believe that the doing so would probably frighten his mule and cause Hamilton to be injured, then appellant would be liable for the consequences of such uncalled-for and unjustifiable acts of its servant. In submitting appellant's theories of the case, the court instructed the jury that if the engineer did not see Hamilton, or if only the customary signals were given and the usual noises made, or if unusual and unnecessary noises were made, but there was no intention to thereby frighten Hamilton's mule and injure its rider, and the engineer did not know or have reason to believe that the effect of such noises would be to frighten the mule and injure Hamilton, then, in either event, appellant would not be liable. Appellant was not entitled to more favorable instructions on these issues, and its complaints as to these charges are not well taken. *Hargis v. Railway Co.*, 75 Tex. 19, 12 S. W. 963; *Railroad Co. v. Traub* (Tex. Civ. App.) 47 S. W. 282; *Railroad Co. v. Moseley* (Tex. Civ. App.) 58 S. W. 48.

Appellant insists that Hamilton was guilty of contributory negligence in not dismounting from his mule when he became aware of the train's approach, because the mule was wild and unmanageable, and his saddle was not securely fastened on. The evidence shows that the mule was of average docility and gentleness, and that the saddle turned when the mule jumped out of the road, but does not show that the saddle was caused to turn by reason of its being defectively fixed on the mule. The evidence further shows that the mule manifested some signs of uneasiness when it discovered the coming train, but was controlled by its rider until the unusual and unnecessary noises were made just opposite to it. Such being the evidence, the court would not have been authorized to hold, as a matter of law, that Hamilton was guilty of contributory negligence in not dismounting from his mule, and we would not be justified in disturbing the finding of the jury upon that issue. The court instructed the jury that if Hamilton knew that the train was approaching in time to have taken such action to avoid injury to himself as a person of ordinary prudence would have taken under like circum-

stances, and failed to do so, and such failure caused, or contributed to cause, his injury, then the plaintiffs could not recover. This was a sufficient charge on the issue of contributory negligence, at least in the absence of correct charges asked by appellant. The special charges requested by appellant in respect of this matter were erroneous, because (1) they required a verdict for the defendant regardless of whether the facts to be found caused or contributed to cause the accident; and (2) they declared that the facts stated amounted to contributory negligence, when it was a question of fact for the jury to determine, under all the evidence, whether, if such facts existed, an ordinarily prudent person would have acted as Hamilton did.

We find no error in the record, and the judgment is affirmed. Affirmed.

On Rehearing.

(Jan. 11, 1902.)

In its motion for rehearing, appellant complains that we erred in approving that paragraph of the court's charge wherein the jury were authorized to find for the plaintiffs if they believed that the engineer sounded the whistle intentionally for the purpose of frightening Hamilton's mule. The contention is that the charge is in conflict with the rule of law announced by the supreme court in the Cooper Case, 88 Tex. 607, 32 S. W. 517, and by this court in the Yarbrough Case, 39 S. W. 1096. The objection now urged to the charge was not presented by any assignment of error, and was not passed on by us. Appellant not only did not present its contention in respect to this issue in the lower court, but it there, by special charge, urged the opposite contention,—that it was not liable unless the whistle was intentionally sounded.

The objection comes too late to be considered, and the motion for rehearing is overruled.

PARLIN & ORENDORFF CO. v. MOORE. (Court of Civil Appeals of Texas. Feb. 12, 1902.)

MORTGAGES—FORECLOSURE—DISTRICT COURT—INCIDENTAL JURISDICTION—PARTIES—CONVERSION OF MORTGAGED PROPERTY—LIABILITY.

1. A mortgagee suing in the district court to foreclose a mortgage on real and personal property may join as parties defendant third persons alleged to have converted the personal property, though the value thereof is less than \$500, and the district court would have had no jurisdiction of a separate action therefor.

2. A mortgagee of real and personal property suing to foreclose his mortgage may join junior mortgagees of the personal property as defendants, and have their rights adjudicated, regardless of the amount involved.

3. A mortgagee of personal property converted by third persons may elect to recover the value thereof from the latter, and is not re-

quired to enforce his mortgage, especially where they have placed the property beyond his reach.

4. An objection that a senior mortgagee of real and personal property should have been compelled to enforce his mortgage against the real estate before being allowed to recover the value of the personal property from junior mortgagees on account of their conversion thereof was untenable where the judgment directed that the real estate be first sold, and it was only in the event that it was insufficient to satisfy the debt that they were made liable.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Action by John Moore against the Parlin & Orendorff Company and another. Judgment for plaintiff, and defendant corporation appeals. Affirmed.

F. M. Maxwell, for appellant. Scarborough & Scarborough, for appellee.

KEY, J. This case is submitted in this court on an agreed statement of facts, found on pages 15, 16, 17, and 18 of the transcript, which discloses no conflict of testimony, and is adopted by this court as conclusions of fact. The suit was brought by appellee, Moore, to foreclose a mortgage made by the defendant W. S. Rock, and covering certain real and personal property. Parlin & Orendorff Company were also made defendants, the plaintiff alleging that they had converted the personal property, and were liable for its value, alleged to be \$100.

Under the first assignment of error it is contended that, while the district court had jurisdiction to foreclose the mortgage, because real estate was involved, it had no jurisdiction to try the issue between the plaintiff and the defendants Parlin & Orendorff Company, because the amount involved was less than \$500. While it is true that the district court would have had no jurisdiction of a separate action to recover the alleged value of the personal property from Parlin & Orendorff Company, yet, as plaintiff sued to foreclose his mortgage, and the district court had jurisdiction because real estate was involved, he had the right to make Parlin & Orendorff Company parties defendant, and recover damages from them for a conversion of a part of the mortgaged property. *Cobb v. Barber*, 92 Tex. 300, 47 S. W. 963. Besides, being mortgagees themselves, while they may not have been necessary parties, plaintiff had the right to make them parties, and let their rights be adjudicated, regardless of the amount involved.

Parlin & Orendorff Company had a junior mortgage on the personal property, under which they caused said property to be sold, and the court held that, if the real estate did not sell for enough to satisfy the plaintiff's mortgage, he could recover from Parlin & Orendorff Company the value of the personal property, or so much thereof as was necessary to satisfy his demand. This holding is assailed under the second assignment of error upon the theory that the plain-

tiff's remedy, under the circumstances stated, was to enforce his mortgage against the purchaser who bought the property when it was sold under the junior mortgage, the proof showing that it was sold to a citizen of the county in which this suit was instituted, and failing to show that it was not still in that county. It has been decided by this court that a mortgagee may elect to recover the value of the mortgaged property when it has been converted by another, and is not compelled to enforce his mortgage. *Fouts v. Ayres*, 11 Tex. Civ. App. 338, 32 S. W. 435. Besides, the court below incorporated in the judgment a finding of fact to the effect that Parlin & Orendorff Company had converted the personal property covered by the plaintiff's mortgage, and placed it beyond his reach, and there is no assignment of error attacking that finding. If it be true that Parlin & Orendorff Company had placed the mortgaged property beyond the plaintiff's reach, thereby rendering it impossible to enforce his mortgage, then there can be no doubt as to the liability established by the judgment and complained of by appellants.

As to the contention that the plaintiff should have been compelled to enforce his mortgage against the real estate before he could recover from appellants, who were junior mortgagees, on account of their conversion of the mortgaged property, it is sufficient to say that the judgment fully protects them in that regard. It directs that the real estate shall be sold first, and it is only in the event of the failure to obtain sufficient funds from that source to satisfy the plaintiff's debt that any recovery is permitted against the appellants.

No error has been pointed out, and the judgment will be affirmed. Affirmed.

RAPID TRANSIT RY. CO. v. LUSK.

(Court of Civil Appeals of Texas. Jan. 25, 1902.)

STREET RAILWAYS—PASSENGERS—INJURIES—INSTRUCTIONS.

Plaintiff, a street car passenger, as a car slowed down upon reaching a cross street, stepped from the car to its sideboard, intending to alight, and was thrown off by its sudden start. There was evidence showing that by the company's rules cars only stopped to let off passengers after crossing cross streets, and also evidence that the car slowed down just as it reached a cross street for the purpose of permitting plaintiff to alight. *Held*, that an instruction which assumed that the car slowed down when reaching the cross street to enable plaintiff to alight was erroneous, since defendant's servants were not negligent in slowing down the car if they did not know of plaintiff's intention, while, if the slowing down was to enable him to alight, it would be liable for lack of ordinary care, and these were matters of fact to be determined by the jury.

Appeal from district court, Dallas county.

Action by J. A. Lusk against the Rapid Transit Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Holloway & Holloway, for appellant. Parks & Crawford, for appellee.

BOOKHOUT, J. This was an action by J. A. Lusk against the Rapid Transit Railway Company for personal injuries received by him in attempting to alight from a moving trolley car. The plaintiff had judgment, and defendant appeals.

1. The appellant complains of certain paragraphs of the court's charge for the reason that the court assumed therein that at the time of the accident the car had been stopped, or its speed checked, to enable the plaintiff to alight therefrom. The petition alleged that the plaintiff desired to alight at the intersection of Crowds and Commerce streets. Plaintiff boarded an east-bound trolley car operated by the defendant company over and along Commerce street, and as he was getting his money preparatory to paying his fare he dropped a half dollar, which rolled off the car. He rang the bell for the purpose of halting the car, so as to get off and get his money. The car was running rapidly. It slowed down just as the front end reached Crowds street, a cross street. The plaintiff testified that in attempting to step from the car to the side step, which ran along the entire side of the car, with a view of alighting, he was, by reason of a sudden jerk of the car, thrown from the car, and fell to the ground, sustaining injuries. There was evidence tending to show that by the rules of the company the cars only stopped at the far side of cross streets, and it was contended by appellant that the slowing down of the speed of the car was for the purpose of bringing the car under control so that the same could be stopped at the usual stopping place, the far side of Crowds street. The plaintiff contended that the slowing down of the speed of the car was to enable plaintiff to alight at the place where he attempted to alight. There was evidence tending to support each of these contentions. The paragraphs of the charge complained of assumed that the object of slowing down the car was to enable the plaintiff to alight. This was error. If it was the custom and rule of the company to stop its cars only at the far side of the cross streets for the purpose of taking on and letting off passengers, and such custom was generally known and observed by the defendant's agents and employés in operating the cars, and the purpose of checking the speed of the car was to bring the car under control so that the same could be stopped at the usual stopping place; and if the agents and employés of defendant did not know that plaintiff was attempting to alight from the car, or ought not to have reasonably anticipated that plaintiff or some other passenger might be in the act of get-

ting off the car, and be injured as the result of a sudden movement of the car, then the company was not negligent in so slowing down the speed of the car. If, however, the slowing down the speed of said car was done in response to plaintiff's notice that he desired to alight, and to enable plaintiff to alight, and in doing so the defendant company did not use the proper care,—that is, such care as a prudent and cautious person would have exercised under such circumstances,—then it was guilty of negligence; and, if such negligence was the cause of the injury to plaintiff, the company would be liable, unless plaintiff himself was negligent, and his negligence contributed to the injury. These were questions of fact, which should have been settled by the jury under a proper charge.

2. It is contended that the court erred in its charge as to the duty and care owed by defendant to plaintiff. The charge submitted the duty owed by a carrier to a passenger. In this there was no error. The evidence contained in the record constituted plaintiff a passenger.

The other matters assigned as error are not liable to arise on another trial. For the error in the charge above indicated the judgment is reversed, and the cause remanded. Reversed and remanded.

INTERNATIONAL & G. N. RY. CO. v. VINSON et al.¹

(Court of Civil Appeals of Texas. Feb. 5, 1902.)

DEATH BY WRONGFUL ACT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. It appeared that while a freight train was being backed down a grade at night it was derailed, and the conductor was killed. The evidence showed that the train started back at a high speed; that the conductor gave directions to the brakeman to be ready to apply the air brake, and went out on the platform. The engineer slowed up to about 10 miles an hour, and then increased its speed. The conductor gave no signals to lower the speed. By the rules of the company, he was primarily in charge of the train, and its speed was limited to 8 miles an hour. *Held*, that the evidence did not show, as a matter of law, that the conductor was guilty of contributory negligence.

2. The evidence did not show, as a matter of law, that the conductor assumed the risk.

3. Where a freight conductor was killed by the derailment of his train while backing down a grade at night, the evidence showed that the engineer could not lower the speed because the air brakes were not filled, and that with a full pressure of air the train could have been suddenly stopped, or within five or six car lengths. The conductor gave no signals to have the train slow down. Defendant requested an instruction that if the conductor knew that the engineer was running the train at a higher speed than permitted by the company's rules, and could have lowered the speed by a signal, and failed to do so, there could be no recovery. *Held*, that the requested instruction was properly refused, as it required a verdict

¹ Rehearing denied February 26, 1902, and writ of error denied by supreme court.

for defendant if the conductor could have checked the train, though insufficiently to prevent the accident.

4. Permitting a brakeman on the train to testify that, in his opinion, the rate of speed of the train coming in contact with the obstruction on the track caused the derailment, was not prejudicial, where his opinion was in accord with the testimony in the case.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Brenda C. Vinson and others against the International & Great Northern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Denman, Franklin & McGown, for appellant. W. W. King and Nat B. Jones, for appellees.

JAMES, C. J. Appellee Brenda C. Vinson, the widow of Charles Vinson, recovered judgment for \$10,000 damages on account of the death of her husband, a conductor on one of appellant's freight trains. One ground for reversal is the contention that the testimony clearly established that his death was due to his contributory negligence, and that the danger which occasioned it was a risk he assumed. It is not necessary to state the evidence, further than to show, if possible, that these issues should have been submitted to the jury for decision.

The train was being backed down a hill or grade at night. The rules of the company provided that a freight train shall not be run backwards at night at a speed exceeding eight miles an hour; also that a freight train shall be under the control of the conductor, unless the conductor does something that is contrary to the rules, and then the engineer and conductor are held equally responsible. The contention, in substance, is that the conductor, Vinson, on this occasion, was permitting the train to move faster than eight miles an hour, when it backed against a steer, which caused the caboose, upon the platform of which he stood, to be derailed and upset, and that he was thereby killed. The following facts appear in S. D. Cochran's testimony: "When the engineer gave the back signals, we started back pretty lively. Vinson was sitting at his desk in the caboose, making up his reports. He got up and said to me, 'I don't like this running so fast,' and as he started out the engineer applied the air and slowed up a little, and Vinson said, 'I will stand out here with my light, and you have your hand on the lever, so that if I give you a signal you put the air on in emergency;' and we went on a few minutes, but a very few minutes after that; and I applied the air once in a while to see if it was all right; and then the cars commenced increasing in speed until, in my judgment, they were running about fifteen miles an hour, when all of a sudden the caboose went up." This witness went on to say: That just as Vinson went out on the platform it slowed up a little,—

to about 12 miles an hour. It was a very short time after it began to increase the rate of speed before the accident happened. That after Vinson went out on the platform, witness could see his light through the door, and supposed that he was looking in the direction the train was going. "When he got up to go out on the platform he appeared to be all broke up on account of starting down the hill as fast. After he got out on the platform it started up faster,—so fast that it scared me." Witness did not see Vinson give any signals to the engineer. After he made the above remark about speed he walked directly to the door, opened it, and stood on the rear platform of the caboose, but gave no signal that witness could see. He said to witness: "I am going to watch this track for stock, and if I see anything in the way I will give a signal, and you put the air on in emergency." "When we first started out fast, before the engineer first reduced his speed, I tried the air just a little, to see whether it would take effect. I wanted to feel confident that it was all right. While I was applying it the engineer applied it and reduced the speed." "After Mr. Vinson got out on the platform it was a very short time before we struck the steer. I could not tell how far we ran. It must have been a hundred yards; maybe not that far." The testimony of Armstead Scott, the engineer, evidenced the following facts: That the night was dark, and he could not say positively as to the exact rate the train was running. That he "just opened up enough to start the train and let it roll down, then increased to about fifteen miles an hour, and when about halfway from the start to where we stopped I reduced it to about ten miles, at which speed it ran until the accident happened." But he testified also: "When the caboose was cut out it ought to have put on the emergency brakes, and if I had not just released the brakes it would, but I released them just as the accident happened. I wanted to speed the train,—thought we were going too slow." "After the brakes were thrown off and the speed increased going downhill, I could not fill the air, because the accident happened about the time I released it, and before the air chambers could be re-filled." It appears that it was about 11 o'clock at night, dark, and had been raining. The road was unfenced at this place. These were the only witnesses to the circumstances of the occurrence. Their testimony will admit of inferences in favor of the verdict. According to the testimony of Cochran, deceased was quick to perceive the high rate of speed at which the train was running soon after it started down. He was alarmed and went out upon the platform, instructing Cochran to be ready at the lever to apply the brakes upon his signal. He went out for the purpose of taking action. According to Cochran, as soon as he was on the platform the engineer began reducing the speed,

and, according to the engineer, it was reduced to about 10 miles an hour. The night was dark, and if, as the engineer says, he could not be certain about the rate of speed, for this reason is Vinson to be held, as a matter of law, to have known the exact speed, or that it exceeded 8 miles an hour? We think not. If, as the train was slowing, or had slowed to about 10 miles an hour, the conductor could not, under the circumstances, in the brief time that elapsed before the accident, with reasonable certainty have appreciated the fact that it exceeded the prescribed rate, his conduct would not have been a willful or a negligent violation of the rule. Upon such view of the facts, he could not be held to have assumed the risk of the excessive speed, nor would he have been chargeable with contributory negligence. The jury could have found from the testimony before them that Vinson did not signal the engineer, when he went out, to slow up, because the engineer was then in the act of slowing; that it slowed down to about 10 miles an hour, as the engineer says, and that he did not then signal because he thought it was running at or about the prescribed rate, or did not know that it was running faster; and that he did not have time to do anything when the train was subsequently started at a greater speed, because the engineer testified that as soon as he again released the brakes, and thus increased the speed, the accident happened. That the engineer was negligent, in the way he handled the train under the circumstances, may well have been found as the cause of Vinson's death; but the evidence was not such as would have warranted a withdrawal from the jury of the issues of contributory negligence or assumed risk. Therefore the court did not err in refusing to direct a verdict for the defendant, as alleged in the first assignment, nor in overruling the motion for new trial, as alleged in the fourth.

The second assignment is that the court should have given the following requested charge: "The court instructs you that if you believe from the evidence that Charles Vinson, the deceased, knew the engineer was running the train in violation of the rules of the company, and at a dangerous rate of speed, and that he could have slackened the speed of said train prior to the accident by signal to the engineer, or by directing the brakeman to put on the brakes, and failed to give such signals, then the court instructs you to return a verdict for the defendant." The evidence is that the accident occurred immediately or very soon after the engineer had released the brakes, and they could not have been effectively put on until the air chambers had been refilled. The engineer testified that after he had thrown the brakes off, and the speed increased going downhill, he could not fill the air, because the accident happened about the time he released it, and before the chambers could be refilled. Coch-

ran testified that, if there had been a full pressure of air, this train should have stopped very suddenly, or in five or six car lengths, after the caboose was derailed. It did not stop that quickly. It ran about 26 or 27 car lengths. The testimony amounts to this: That the train could not have been stopped after the brakes were thus released, but that its speed might have been checked to some extent had the conductor given signals. But it does not necessarily follow that it could have been sufficiently checked in that brief space of time to have prevented this accident. The charge requested would have entitled defendant to a verdict if it could have been checked at all on a signal, it matters not how little. To have been correct in this respect, the charge should have required the jury to find the deceased could have, by signals, checked the speed, and thereby prevented the accident. If he could not have done this, his failure to give the signals could not have been contributory negligence. The court gave a proper charge on that issue.

The special charge No. 3 refused is squarely based upon the theory that the violation of the rule in respect to speed was negligence, and that the dangers incident thereto were assumed risks. Besides, the same defect exists in this charge as in the one above discussed.

The fifth assignment is that the witness Cochran should not have been allowed to testify that, in his opinion, the rate of speed and coming in contact with the steer caused the derailment. As that opinion was in accord with all the testimony proved, no harm was done by admitting it.

Affirmed.

LUEDDE et al. v. HOOPER.

(Court of Civil Appeals of Texas. Feb. 5, 1902.)

APPEAL—ASSIGNMENTS OF ERROR—BRIEFS.

Propositions under an assignment of error cannot be considered where no such assignment is copied in the brief.

Appeal from McLennan county court; G. B. Gerald, Judge.

Action by C. H. Hooper against G. H. Luedde and others. There was a judgment in favor of plaintiff, and defendants appeal. Reversed.

Pending appeal, questions were certified to the supreme court, for answer to which see 66 S. W. 55.

Henry & Stribling and Dyer & Dyer, for appellants.

FISHER, C. J. The answer of the supreme court to the questions certified in this case will cause a reversal of the judgment of the trial court. The trial court did not confine the evidence of value of the property sequestered to the time of the trial. As we construe the charge of the court, it, in effect,

permitted the jury to consider the evidence of value of the property at a time other than its value at the date of trial.

Plaintiff has on page 5 of his brief what purports to be a proposition under his first assignment of error, but there is no such assignment of error copied in the brief. Therefore the proposition will not be considered.

We do not think that there was any error in the ruling of the court complained of in the fifth assignment of error; and we think that the witness Goldsmith, whose testimony is complained of in the sixth assignment of error, had such familiarity with property of the kind in question as permitted him to state its value.

There appears on page 14 of appellants' brief what purports to be a proposition under the tenth assignment of error, but there is no such assignment of error copied in the brief. Therefore the proposition will not be considered.

If the judgment is subject to the objection urged in the fifteenth assignment of error, it doubtless will not be repeated upon another trial.

For the reasons stated, the judgment is reversed, and the cause remanded. Reversed and remanded.

MADISON v. MATTHEWS et al.¹

(Court of Civil Appeals of Texas. Jan. 29, 1902.)

TENANTS IN COMMON—ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY.

Occupancy of realty by a son inheriting his mother's community interest, payment of taxes, and making improvements, claiming to own the entire estate, for over 10 years, is not sufficient to show an ouster of his co-tenant, without evidence that such co-tenant knew of such claim, that any rents were collected, or when the improvements were made, whether before or after the mother's death, and during such occupancy the co-tenant frequently visited the premises, and was friendly to such son.

Error from district court, Bexar county; John H. Clark, Judge.

Action by Tong Madison against A. Matthews and others. There was a judgment for defendants, and plaintiff brings error. Reversed.

Jas. F. Boyles, for plaintiff in error. T. J. Newton, for defendants in error.

NEILL, J. On the 27th day of November, 1900, plaintiff in error, Tong Madison, who will hereinafter be called "plaintiff," filed his first amended original petition against defendants in error A. Matthews individually and as administrator of the estate of R. W. Wallace, deceased, and Laura Matthews, wife of A. Matthews, who will be hereinafter called "defendants," in the form of an action of trespass to try title to recover an undivided one-half interest in a certain tract

or parcel of land situated in the city of San Antonio, Tex., as well as one-half of the rental value thereof from the 1st day of December, 1890. The defendants answered by a plea of not guilty and the 10-years statute of limitation. The case was tried by the court without a jury, and the trial resulted in a judgment in favor of defendants, from which judgment this appeal is prosecuted.

On the 21st day of March, 1871, the plaintiff, Tong Madison, and Julia Madison were living together in the city of San Antonio, Tex., as husband and wife, and had continuously prior to that time been living together in such relation since their emancipation from slavery. On the day stated the property in controversy was, by a deed bearing that date, conveyed to them. From the date of the conveyance until about three months prior to the death of Julia Madison (which occurred in September, 1881) plaintiff and his wife occupied said premises as their residence. But about three months before his wife died, for his own convenience, he moved to a room on West Houston street, leaving his wife, her son, R. W. Wallace, her mother, Lucy Wallace, and sister Martha Perkins, in occupancy of the premises. The last three parties named were living on the premises when plaintiff's wife died, which was at the house of the defendant A. Matthews, and continued to reside thereon until the death of each, the time of which will be hereinafter stated. R. W. Wallace was the only surviving child of plaintiff's wife, Julia, and as such inherited her one-half community interest in the property in controversy. He died in Mexico on the 29th day of November, 1890. Lucy Wallace, plaintiff's wife's mother, died in 1893, and Martha Perkins, his wife's sister, died in 1897. The defendant Laura Matthews is a cousin of R. W. Wallace, and as his sole heir inherited whatever interest he had in the property in controversy at the time of his death. Under these undisputed facts plaintiff and R. W. Wallace became, upon the death of Julia Madison, tenants in common, each owning as such an undivided one-half interest in the property in controversy; and unless Wallace repudiated such tenancy, and he, or his cousin, Martha Perkins, by tacking her possession to his, acquired title to the property by virtue of the 10-years statute of limitation, plaintiff still owns such interest and is entitled to recover it in this suit. Prima facie, the possession of one tenant in common is the possession of all; consequently acts done upon the common property by one co-tenant, which, if done by a stranger to the title, would amount to disseisin, are susceptible of explanation consistently with the true title; and mere acts of ownership exercised by one co-tenant are not of themselves necessarily acts of disseisin, nor do they warrant a presumption of ouster. A tenant in common will not be permitted to claim the protection of the statute of limitations unless

¹ Rehearing denied February 26, 1902.

It clearly appears that he has repudiated the title of his co-tenant, and is holding adversely to it. Possession and payment of taxes on the property do not constitute the assertion of an adverse right. There must be something more. The acts relied upon by the tenant in common in showing an ouster of his co-tenant and the assertion of an adverse claim should be more certain and unequivocal in character than would be necessary in ordinary cases where there is no privity of estate between the parties claiming the property; and, in order to affect his co-tenant with his adverse holding, notice of such fact must be brought home to him either by information to this effect given by the tenant in common asserting the adverse right, or by such acts of unequivocal notoriety in the assertion of such adverse and hostile claim that there will be presumed to have been notice of such adverse right. *Phillipson v. Flynn*, 83 Tex. 582, 19 S. W. 136; *Wood, Lim. Act. (3d Ed.) § 266*; *Moody v. Butler*, 63 Tex. 210. But the doing of any acts by a co-tenant which may be referred to his right are not regarded as amounting to an actual expulsion, or as an ouster. *Wood, Lim. Act. (3d Ed.) § 266*.

We will now, in the light of these principles of law, consider the testimony upon which defendants rely to show an ouster of plaintiff as his co-tenant. The testimony reasonably tends to show that after his mother's death R. W. Wallace continued in possession of the property either by himself or through Lucy Wallace, Martha Perkins, and these defendants (all or some of them), as his tenants, until his death; that he paid the taxes on the land and claimed the entire property as his own during that time; but there is an entire absence of testimony tending to show that plaintiff ever heard or knew of Wallace's asserting a claim adverse to his title. The relation between him and Wallace continued friendly until the latter's death. During the occupancy of the premises plaintiff visited the parties living thereon, and had his washing done there. Yet no one ever heard Wallace, or any one who is said to have been his tenant, assert in plaintiff's presence any claim adverse to or inconsistent with his title to one-half interest in the property. True, it is said that he never claimed the property, but this goes for little in the face of a deed upon record which gave full notice to the world of his claim and interest. Until knowledge was brought home to him of the adverse claim of Wallace, there was no reason for his asserting his interest or claim in any other manner, for he had the right to assume, in the absence of the assertion of an adverse claim by Wallace, that his possession, as well as that of his tenants, was referable to his tenancy, and not adverse to the title of plaintiff as his co-tenant. The rental value of the property at no time during its occupancy by Wallace and those who it is

claimed were his tenants is shown. It may not have been much, for the parties occupying it paid nothing in the way of rent for its occupancy. So the fact that plaintiff received no rent during the time is of little, if any, pertinency. If Wallace could afford to permit the premises to be occupied without charging rent for the same, no reason is shown why plaintiff as his co-tenant should not do so too. If this were all that the testimony tended to show, our duty to reverse the judgment of the court, and render judgment here in favor of plaintiff, would be clear. But the defendant A. Matthews testified that Wallace and himself paid for all the improvements on the premises; that they built the house, wash sheds, stable, fences, and sidewalks around the property, and paid for the same. No evidence was introduced as to the value of the improvements, or as to what was paid for them. Nor is it shown when the improvements were made, whether before or after the death of plaintiff's wife, or, if after her death, what time afterwards. If the improvements were made before Julia Madison died, this testimony would not tend to show an adverse claim in R. W. Wallace to plaintiff's interest in the property. From plaintiff's testimony it might be inferred that the improvements were made prior to his wife's death. But, according to his testimony, if they were, they were not made by either Wallace or Matthews. Upon the questions as to when, by whom made, the extent and value of the improvements, the case does not seem to have been developed. From the situation and nature of the property it would seem that testimony could be produced which would settle these questions one way or the other. It has been held, if one co-tenant erects buildings upon the estate without the knowledge or consent of the other, and occupies it exclusively, and does upon the estate acts such as clearly and unequivocally indicate a claim of exclusive ownership, that this is an ouster of his co-tenant. *Wood, Lim. Act. (3d Ed.) § 266*. In our opinion, from the evidence before us, it is only upon this principle plaintiff's action can be defeated; and, as the evidence which might tend to sustain it was not developed upon the trial, we deem it our duty to reverse the judgment and remand the cause in order that it may be done.

Reversed and remanded.

GULF, C. & S. F. RY. CO. v. BRYANT et al.
(Court of Civil Appeals of Texas. Feb. 5, 1902.)

RAILROADS—CONSTRUCTION OF TRACK—NEG-
LIGENCE—PERSONS USING TRACK—LIABILI-
TY FOR INJURIES—CONDUCT OF PERSON IN-
JURED—FEAR INDUCING ACTS—INSTRUC-
TIONS—ASSUMING DUTY—QUESTION FOR
JURY—APPEAL—VERDICT OF JURY—REVIEW.

1. A railway company is liable for injuries sustained by persons lawfully on its tracks by

reason of negligence in the construction of its tracks.

2. A verdict of a jury on conflicting evidence will not be reviewed on appeal.

3. A railway company cannot, by permitting persons other than its own servants to move cars on a side track, or by consenting thereto, escape liability to a person injured through the negligence of such persons.

4. Where a person was injured while attempting to jump from a car standing on a side-track which he was loading, because of fear of injury by remaining in the car, caused by a belief that his car would be struck by another car coming down the side track, which was on a down grade, the defendant railway company is not relieved from liability by showing that when he jumped there was no necessity for his doing so, and that he would not have been injured had he remained in the car, as none of the passing cars struck it.

5. Where, in an action for personal injuries sustained while loading a car standing on a side track of defendant, the evidence showed that the person was loading the right car, it became immaterial whether any of defendant's servants pointed out the car to be loaded, or who pointed it out.

6. Where plaintiff alleged that he was injured while jumping from a car on a side track because of fear of being injured by moving cars negligently set in motion coming down the grade to his car, and defendant alleged that he jumped from the car to catch his team, which were starting to run away, an instruction that if the jury found that he left his team unhitched, and they had become frightened, and he jumped into the wagon and lost his foothold, and if such acts were negligence, and but for them the injury would not have occurred, defendant is not liable, is erroneous, as requiring the jury to find that the acts enumerated, if found, were the proximate cause of the injuries.

7. In an action for personal injuries sustained by jumping from a car through fear of being injured by moving cars striking the car, an instruction that it was the duty of the persons moving the cars to look along the track, to ascertain if any one was in danger, was erroneous, as assuming, as a matter of law, in the absence of a statutory duty, that it was their duty to so look, which was a question for the jury.

8. In an action for personal injuries sustained by jumping from a car through fear of being injured by moving cars striking the car, an instruction that defendant was not liable if a reasonably prudent person would not have jumped from the car onto a wagon to which an untied team was hitched, and when the team had started to move, was properly refused, as ignoring the issue of imminent peril and the person's reasonable belief of such peril.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by Nettie Bryant and another against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

The statement of the nature and result of the suit is correctly given in appellant's brief as follows:

This suit was instituted by John Bryant against the appellant and the McGregor Cotton Oil Company for personal injuries. Bryant died, and Nettie Bryant, his widow, and Clyde Bryant, his daughter, were substituted as parties plaintiff, and alleged that the injuries received resulted in the death of John Bryant. Appellees admitted that the general demurrer of the cotton oil company

was good, and on such admission the court sustained such general demurrer and dismissed the case against that company. The trial resulted in a verdict and judgment in favor of the appellees for \$5,000. Appellant moved for a new trial on substantially the same grounds as are assigned as error, which motion was overruled, and this appeal has been properly prosecuted.

Plaintiffs' petition substantially alleged: "That on September 25, 1899, John Bryant was in the employ of the McGregor Roller Mills, and that, as part of his duty, he was required to load and unload flour and other products from the wagon of said roller mills into cars on the track of appellant, and in the discharge of his duties, on the above-named date, he, with a load of bran on his wagon, went to the defendant railway company's track, at the usual place where he had been accustomed to loading bran, where he found an empty car on the track, and started to load the bran from his wagon into the car for the purpose of shipment, at which time an agent of appellant stopped him and said he was loading the bran in the wrong car, and directed him to load the bran into a box car standing on what is designated and known as the 'McGregor Cotton Oil Mill Track,' owned and controlled by appellant; and, following the instructions of said agent of appellant, he commenced loading the bran into the car; and, while so engaged, C. H. Murphy and T. K. L. Murphy, who were employes working for the McGregor Cotton Oil Mill, and who were in charge of, controlling, managing, and operating, as agents of the appellant, the cars on said track at the time, and they knowing (or could have known by the exercise of ordinary care) that Bryant was at work on another car standing on the same track with the one he was loading, and above the one on which he was loading (the track being on an inclined plane, and the said other car being higher than the one he was loading), the said employes and agents of the said defendant knew that a car started from said inclined plane toward the one where said John Bryant was would go at a very rapid rate of speed, and would strike the cars between it and the one said John Bryant was working in, and cause said other cars to strike the car said John Bryant was in; this said car being attached to the said other cars; and the striking of said cars by the one started by defendant's agents and employes would endanger the life of the said John Bryant. That the striking of the said car by one moving at such a rate of speed as the one started would do was calculated to cause great and serious injury to any one situated as said John Bryant was, and as said employes and agents of the defendant knew of at that time; but said agents and employes of defendant, disregarding all consideration for the safety and rights of the said John Bryant, and in a reckless, negligent, and careless manner,

and without giving any signals or notice of movement of said cars, went to said car standing above these others, and started it down said grade, and giving it such momentum that it struck the cars standing above, and attached to the one John Bryant was working in, and the striking together of said cars caused such a loud and terrific noise, and there being no one on said moving car to control it or manage or check its speed, it hit the other car with terrible and violent force, and created such a noise, caused by the bumping of the cars together, and the rapidity at which it was moving caused the said John Bryant to be greatly frightened, and caused him to fear that the said car which he was in would be thrown off the tracks, and thereby cause him great injury, and probably destroy his life. This condition caused the said John Bryant to attempt to alight from said car onto the wagon, and he did leave said car; but just as he landed on said wagon from said car the said team hitched to his wagon became frightened and put the wagon in motion, which, together with the movement of the car caused by the striking of it with the other cars that were in motion, caused him to lose his balance, and he was propelled to the ground and on the rocks with great force and violence, thereby greatly injuring said John Bryant, from the effects of which his death afterwards resulted. The plaintiffs allege and charge that the roadbed and track of the defendant the Gulf, Colorado & Santa Fé Railway Company, at the point where the said John Bryant was injured as alleged, and all along said spur track, had been negligently constructed in such manner as to constantly imperil the lives of the public, and especially said John Bryant, and others situated as he was at that time, in this: That it was constructed so that there was a steep up grade and inclined plane in the direction from where said John Bryant was injured to the point where the said cars were turned loose, and the negligence of the said defendant in so constructing its said track and roadbed caused the injuries and death of said John Bryant. These plaintiffs further allege and charge that the said defendant railway company was negligent in this: That it knowingly allowed and permitted and authorized the servants and employes of the defendant the McGregor Cotton Oil Mill to use, run, and operate its cars on said track, when it was known to said railway company that they were not experienced men in the operation of trains, and were incompetent to use and operate said cars with safety to the public, and especially the said John Bryant, and others engaged in the business which he was then employed at; and the said defendant railway company is liable for the acts of the said servant of the said McGregor Cotton Oil Mill, for the reason that they were permitted and authorized by the said railway company to

at any and all times, whenever requested by said McGregor Cotton Oil Mill, to use and operate said cars on said track for the benefit of both of said defendants herein. And the said defendant railway company, by acquiescence, had for many years prior to said injuries to said John Bryant ratified and confirmed their right to so use and operate such cars on said track, and had in all things adopted their employment in this way as the employment and acts of their own servants."

The facts show that the deceased was hauling bran for the McGregor Roller Mills, and he was directed by the mill bookkeeper to load a car with bran on defendant's road. He got a wagon load of bran and conveyed it to defendant's road, and was directed by one Dibble, an employe of defendant, on what track he would find a car to load the bran in, which was a switch of defendant's road for use of the McGregor Cotton Oil Company. He selected a car on the switch, and, while unloading his first load, Russell, superintendent of the oil mill, came out where deceased was at work unloading the bran, and spoke to him. Settler, an employe of the road, seemed to be taking the number of the cars, and he also came near where deceased was at work. Deceased was engaged in unloading his second load when the accident occurred. He was using trucks, rolling the sacks of bran back to the end of the car; his wagon standing by the car door, with the horses (two) hitched to the wagon, not tied. He knew it was about time for the local freight train to come in, and looked for it every time he went to the door. He was back in the car when the oil company's employes turned a car loose, and he (his testimony having been taken after suit, but before his death) testified that they (meaning cars) "bumped against my car." He continued: "I thought the local freight had run in without my knowledge, so I jumped out of the car onto my wagon, and fell off the wagon, and broke my left arm near the hand, and mashed my hip very badly. * * * I think one of the oil mill hands started the cars down the track that bumped my car and scared me. When the bumping of the cars frightened me, I ran to the door of the car and jumped onto my wagon. The side track where the car was standing was lower at the west end, and the cars started by the employes of the oil mill was higher up the track than where I was. There were several cars on the side track, and I think the car I was on was near the center of the string of cars." He says on cross: "The car that came down the track did not touch the car I was in, but it did collide with the other cars on the same track, and the bumping, rattling noise of the cars was what frightened me so that I jumped. I did not know no injury would come to me by remaining in the car, nor did I take time to theorize whether any danger

would come to me or not, but acted on the first impulse of the mind and jumped. * * * Just as I landed on the wagon, my team started, and I failed to gain my balance, and fell off and crippled myself. I was accustomed to loading and unloading cars on the track at McGregor; had been so engaged several years. * * * Of course, I intended to catch the team, and fell off before I got to the lines." He says: "The sudden bumping of the cars together was so unexpected to me that I was scared, and my first thought was to get out of the car. In fact, I don't remember that I took time to think, but ran to the door and jumped out." He was watching for the local, knowing it was about time for it to come in. He had just looked up the track, and had seen nothing of it, but did not know but that it had run in very rapidly and had struck the car standing on the track. He says: "My horses were not easily frightened by cars. Had used the same team a long while, and always left them standing as I did that day. * * * I was in the car when the cars began bumping, and I jumped, and my team jumped. Don't know for certain which one of us was frightened first." There was other testimony to the effect that no car reached the car deceased was on. The servants of the oil mill turned a car down the track, which, colliding with another car, sent it down the track near to the car plaintiff was on, if it did not strike it. Deceased brought this suit, and his depositions were taken, but he died before trial. It is not necessary to recite other testimony at this time, as that stated is sufficient to show the issues of fact.

Prendergast & Sandford and J. W. Terry, for appellant. D. G. Grantham, J. E. Yantis, and Thos. P. Stone, for appellees.

COLLARD, J. (after stating the facts). 1. We find no error in the overruling of defendant's general demurrer or special exceptions to the petition. If the track was negligently constructed, as alleged, and that condition occasioned the injuries alleged, defendant would be charged with such negligence.

2. Appellant contends that the verdict is contrary to the law, in that the great preponderance of the evidence shows that Bryant did not jump from the car because of fright and terror, but that he jumped onto the wagon to stop his horses, which had started to run away. The jury were the judges of the weight of the evidence and the credibility of the witnesses, and it is not the province of the court to direct what testimony the jury should believe or not believe.

3. It is insisted by appellant that the court should have granted a new trial because there was no evidence to warrant the finding that the parties who moved the car were the agents or servants of defendant, or that their negligence could render it liable. It was not necessary, in order to bind defend-

ant for the negligence alleged, that its agents and servants in its immediate employment turned the car loose on the incline, so causing injury to Bryant. The oil mill people were using the track and cars with the consent of the railway company, and the law is that a railway company cannot lease its road to another, without authority of statute, so as to relieve it from its obligation to the public. Without such authority, the railway company would be liable for all acts of persons to whom it confides the operation of the road. *Railway Co. v. Underwood*, 67 Tex. 592, 593, 4 S. W. 216; *Same v. Moody*, 71 Tex. 616, 9 S. W. 465.

4. It is claimed by appellant that the court should have granted a new trial because the verdict was contrary to the law and the evidence; the undisputed evidence showing that Bryant was never in danger on the car, and neither the employé of defendant nor of the mill company did anything that caused him any danger, and his injuries were not the result of anything done by the servants of the mill company or the railroad. And again it is insisted that the court should have granted a new trial because the evidence shows Bryant jumped from the car when there was no necessity therefor, without stopping to think and from unreasonable fright, without stopping to think and without taking any care, when the undisputed evidence shows he was in no danger, and the evidence shows he was guilty of contributory negligence, contributing to his own injury. In *Railway Co. v. Neff*, 87 Tex. 309, 28 S. W. 283, our supreme court quotes with approval language of the Alabama court in *Cook v. Parkham*, 24 Ala. 21, as follows: "That the death of the slave may have been the result of fright or want of presence of mind occasioned by circumstances of excitement, confusion, and danger, brought about by the negligent acts of the defendants, should not be imputed to him as a fault; nor can we regard it in any sense as misconduct if, under like circumstances, one should mistake the best means of safety, and lose his life in the effort to preserve it." In the *Neff Case*, our own supreme court say: "When prudence itself is destroyed, and judgment yields to sudden impulse,—when there is neither time nor capacity to reflect,—how can any one say what a man, prudent under ordinary circumstances, would do if he should be so situated? The rule is sound and just which holds the party guilty of negligence responsible for the result, if that negligence has caused another to be surrounded by such circumstances as to him appear to threaten the destruction of his life or serious injury to his person, whether that person be prudent or imprudent, if in an effort to save his life he makes a choice of means from which injury results, and notwithstanding it may turn out that if he had done differently, or had done nothing, he would have escaped injury altogether." The trial court in the

charge observed the rule laid down in the Neff Case, which is the law, and was warranted by the facts in so doing. So we do not believe the court should have granted a new trial on the ground that the verdict was against the law and the evidence.

5. There is no testimony that Bryant was loading the wrong car; hence it is immaterial whether defendant pointed out the car to him which he was loading, or who pointed it out to him. It was evidently the right car to load. The foregoing disposes of the eleventh assignment of error adversely to appellant.

6. The court instructed the jury to the effect that if defendant, through its employes, knew the employes of the oil mill were accustomed to move the cars near its mill in the manner in which they moved the car in this instance, defendant would be bound by the acts of the employes of the oil mill, and that if defendant's agent, Carl Dibble, at the time he stopped Bryant from unloading his wagon in the car where he first began unloading, near the depot, told Bryant to unload in the car on the mill switch at which he was injured, and that Bryant acted on such instructions in going to the switch to unload, then the act of Dibble in so directing would be the act of defendant. Again we repeat that there was no attempt to show Bryant was unloading in a wrong car when he was hurt, and it is of no consequence who told him to unload where he did; and there was no error in the charge detrimental to appellant, notwithstanding there may be no evidence showing appellant knew the mill employes were accustomed to move cars on the switch. Besides this, defendant would be liable for injuries caused by persons moving the cars with its consent.

7. It is insisted that the court erred in charging the jury as follows: "If you believe from the evidence that said Bryant was well acquainted with the situation of the said track and the cars, and that they were constantly being moved or liable to be moved on said track in such manner as to create a loud noise, and that such noise was calculated to frighten his horses and cause them to run away, and that he negligently left them unhitched and attached to his said wagon, and that, after his said horses became frightened and started to run, he carelessly, and without being frightened as alleged, jumped from the car at which he was at work onto his said wagon, without regard for his own safety, and in so doing lost his footing and balance and fell to the ground, and that such acts were the direct and proximate cause of the injuries received by him, and you further believe said conduct and acts on the part of said John Bryant were negligence on his part, and that but but for he would not have been injured, then you will find for the defendant, although you may believe that the defendant was guilty of the several acts of negligence charged by the

plaintiff." We must say that it was error to require the jury to find that the acts and conduct of Bryant enumerated, if found, were the proximate cause of the injuries he received. Such acts would necessarily be, if found to exist, the proximate cause of the injuries sustained. *Railway Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756; *Railway Co. v. McCoy*, 90 Tex. 265, 38 S. W. 36. In both the cases cited the supreme court reversed and remanded for a similar error.

8. We believe the qualification made by the court to a special charge asked and given was erroneous. The charge asked and given is as follows: "You are further charged that, before you can find for the plaintiffs under any theory of the case, you must believe from the evidence that the moving of the cars as alleged in plaintiffs' petition was the direct and proximate cause of the injuries to the said John Bryant; that is, you must believe from the evidence that the said persons moving the said cars ought to have foreseen that, as a result of such moving, the injuries, or some such similar injuries, to the said John Bryant, would probably result." The qualification is as follows: "In connection with the foregoing special charge, you are instructed that it was the duty of the persons moving said cars to have looked along the track in front of such cars to ascertain if any one was in danger of being injured thereby; and if you believe from the evidence that said persons, had they so looked down the track before starting said cars, could have seen by Bryant, by exercising that care which an ordinarily prudent person would have exercised under the same circumstances, then you will consider said special charge and the entire case as though the evidence showed that said persons moving the car saw said Bryant before they started said car in motion; and if a person of ordinary care and prudence would have foreseen that, as a result of so moving said cars, the said Bryant would probably be injured, then the persons moving said cars ought to have foreseen said result; but if a person of ordinary care and prudence would not have foreseen, as a result of such moving, that said Bryant would probably be injured, then the persons moving said cars ought not to be held to have foreseen such result." It was error to tell the jury, as in the qualification to the charge asked, that it was the duty of the persons moving the cars to have looked along the track in front of such cars to ascertain if any one was in danger of being injured thereby. That question should have been left to the jury. Unless a duty is statutory, it is wrong to charge the jury that such a duty is required. *Railway Co. v. Waller* (Tex. Civ. App.) 62 S. W. 554. The court should not tell the jury that certain specific acts were required of the persons moving the cars. *Calhoun v. Railway Co.*, 84 Tex. 229, 19 S. W. 341, and cases cited; *Railway Co. v. Box*, 81 Tex. 674, 17

S. W. 375. It is error for the trial judge to define duties, neglect of which would be negligence, in the absence of a statute defining such duties. *Railway Co. v. Lee*, 70 Tex. 496, 7 S. W. 857. See 2 Buckler, Civ. Dig. 527, citing numerous cases to the point. See, also, *Railway Co. v. Chapman*, 57 Tex. 82; *Railway Co. v. Wilson*, 60 Tex. 142; *Railway Co. v. Wright*, 62 Tex. 517.

9. It is assigned as error that the court refused the following instruction requested by defendant: "You are further charged that if you believe from the evidence that the said John Bryant left his team standing at or near the said car hitched to his said wagon, and untied or unsecured, to prevent the same from moving off and running away, and you further find that he jumped from the said car onto the said wagon after the said team had started to move off and run away, and you further believe that a reasonably prudent person, under all the facts and circumstances surrounding said occasion, would not have jumped from the said car onto the said wagon when the team was so untied and unsecured, and when the said team had so started to move off and run away, then and in that event you will find for the defendant." The requested charge ignored the issue of imminent peril, and Bryant's reasonable belief of such peril. The same may be said of requested charge No. 5, which the court refused.

10. The matter of notice referred to in the twenty-fifth assignment of error need not be discussed, as plaintiffs can give notice.

In the foregoing we have decided all material issues presented, and it is not necessary to notice such issues but once; the ruling necessarily being the same.

Because of the errors pointed out, the judgment of the lower court is reversed, and the cause remanded. Reversed and remanded.

HALL et al. v. READ et al.¹

(Court of Civil Appeals of Texas. Jan. 25, 1902.)

VENDOR AND PURCHASER — NOTES — ATTORNEY'S FEES — NOTICE — SUBSEQUENT PURCHASERS — WRIT OF ERROR — JURISDICTION.

1. Under Rev. St. art. 1389, requiring a writ of error to be sued out in 12 months from the rendition of the judgment, the court will assume jurisdiction under a writ of error sued out within a year after a judgment was entered as corrected, though more than a year has elapsed from the time the judgment was originally entered.

2. A lien for attorney's fees reserved in a purchase-money note secured by trust deed cannot be asserted against subsequent purchasers of the land, where the deed to their vendors and the trust deed properly described the note, except that no reference was made to the provision as to the attorney's fees, and such purchasers did not otherwise have notice of the lien.

3. Where a purchase-money note stipulating

for attorney's fees gives the holder the option to declare it due on failure to pay an installment of interest, and such option has not been exercised on previous defaults, and the principal was not due, the placing of the note with an attorney, together with insurance policies on the property, after its loss, for the collection of the insurance, is not sufficient to show that it was deposited with such attorney for collection, so as to require payment of attorney's fees.

Error from district court, Tarrant county; W. D. Harris, Judge.

Bill by B. F. Read and others against B. F. Hall and another. There was a judgment in favor of plaintiffs, and defendant Parlin brings error. Affirmed.

McCormick & Spence, for plaintiff in error. W. P. McLean and D. W. Humphreys, for defendants in error.

CONNER, C. J. This proceeding is upon writ of error prosecuted by W. H. Parlin from a judgment of the district court of Tarrant county perpetuating a writ of injunction sued out by defendants in error to restrain the sale of certain real estate situated in the city of Ft. Worth, which had been advertised therefor pursuant to the terms of a deed of trust executed by one Emory Wales to Frank L. Shackett to secure a principal indebtedness of \$8,000, evidenced by promissory note, of which Parlin afterwards became the owner, made by said Wales for the purchase money of the property advertised for sale. The judgment was also in favor of defendants in error for \$179.46, with interest thereon from the 4th day of February, 1896, at the rate of 6 per cent. per annum, as the sum in excess of said trust-deed indebtedness that had been paid thereon to plaintiff in error by defendants in error, as pleaded by them.

The judgment mentioned, on its face, reports to have been made and entered on the 14th day of March, 1900, and the petition for writ of error in this case was not filed in the district court until the 26th day of March, 1901. Apparently, therefore, the writ has not been sued out within 12 months from the rendition of the judgment, as required by article 1389 of the Revised Statutes; and hence a preliminary question as to our jurisdiction has arisen, that requires consideration. In answer to this apparent want of jurisdiction, plaintiff in error has filed an affidavit, which is not controverted, to the effect that while the trial was had and judgment was rendered and entered on said 14th day of March, 1900, it was then incorrectly entered, as to the amount that defendants in error were entitled to recover as overpayment; the amount as originally entered being some \$23 more than as now appears to have been adjudged. This error was discovered, and suggested to counsel for defendants in error, who agreed to the correction, and without motion therefor, but with the approval of the trial court, caused the judgment to be corrected so as

¹ Rehearing denied February 22, 1902, and writ of error denied by supreme court.

to show the true amount of recovery. This correction was so made on or after March 27, 1900. While perhaps not very clear on principle that we should do so, we have finally concluded, upon the authority of *Luck v. Hopkins* (Tex. Sup.) 49 S. W. 300, to entertain jurisdiction of the writ. In the case cited the supreme court takes occasion to say, in substance, among other things, that the period from which to compute the time within which a writ of error may be sued out is the date of the actual entry of the amended judgment, even though the amended judgment may be substantially the same as the judgment originally entered; and we think the proceedings here mentioned may be construed as fairly within the rule so announced. The judgment, in its corrected form, is the one before us, and the one to be enforced, if enforced at all. The judgment did not speak the true fact until the entry of the correction. The fact that the action taken was not upon motion therefor, as in the case of *Luck v. Hopkins*, should not, we think, be deemed material. It is conceded that the amendment was proper. The court would certainly have sustained a motion for correction, and, having approved and authorized the corrected entries, we think the effect substantially the same as if done upon motion. At all events, in view of our conclusions upon the merits, the question of jurisdiction becomes practically unimportant. We therefore proceed to the disposition of the remaining questions.

Defendants in error were, upon valuable consideration, subsequent purchasers of the property from Wales, "subject to the lien for \$8,000 secured by deed of trust superior to this title," as was recited in the deed to them; they not otherwise becoming parties to the original obligation of Wales to Shacklet. Said note for \$8,000 was dated December 10, 1890, and made payable by its terms five years after its date, bearing interest at the rate of 10 per cent. per annum; the interest payable semiannually as it accrued. The note also contained a provision for the payment of an additional 10 per cent. for attorney's fees in case the same was sued upon or placed in the hands of an attorney for collection. The deed of conveyance from Shacklet to Wales, among other things, correctly described said note, except that no reference was therein made to the provision for attorney's fees. This was also true as to the trust deed contemporaneously executed upon the land in question to secure the note. Said deed and trust deed were duly registered, defendants in error not otherwise having notice of said provision for attorney's fees. Said trust deed provided that, in the event default should be made in the payment of any installment of interest, the principal debt should at once become due and payable, at the option of the holder or holders of the note, and that the vendees of said property should keep the

house and improvements thereon insured for the benefit of the owner or holder of said note, and that in case of loss by fire the proceeds of the policies, or so much thereof as should be necessary, should be applied in liquidation of said indebtedness. Defendants in error paid the semiannual installments of interest with varying punctuality as they accrued, until the 10th day of June, 1895, at which date an installment was due, and was not paid at the time the building situated upon the lot in controversy was destroyed by fire, which occurred about the 2d day of July, 1895. The insurance on the destroyed property amounted to \$9,000, and the policies, together with said note, were in the possession of an agent of plaintiff in error. After the loss aforesaid, defendants in error promptly made all necessary proofs of loss, which were forwarded to said agent, who, in turn, soon thereafter, and several months before the maturity of the note by its terms, delivered said note, together with said policies of insurance and proofs of loss, to Messrs. McCormick & Spence, attorneys at law, who collected the full amount of insurance as stated, and applied the same in payment of said \$8,000 note and interest, and to a further sum of \$840 claimed by them to be due as attorney's fees. Said insurance was in excess of the principal and interest due upon the note. In the sum adjudged to defendants in error in this suit, but was insufficient to liquidate the principal, interest, and attorney's fees, as in fact applied by McCormick & Spence. Plaintiff in error, therefore, in August, 1896, caused the lot in controversy to be advertised for sale under the power contained in the deed of trust, whereupon defendants in error brought this suit to enjoin the sale, and for the balance alleged to be due them as overpayment on said debt.

The disposition required of us must depend upon the solution of two questions: It is insisted: First, that defendants in error were effected with notice of the provision of said note for attorney's fees, because, while the deed from Shacklet to Wales and said trust deed from Wales to Shacklet failed to recite such provision, they nevertheless described and identified the note so that the duty of inquiry devolved upon subsequent purchasers, and that, had defendants in error made the proper inquiry, full knowledge would have been obtained; second, that when said note was placed in the hands of McCormick & Spence, as hereinbefore stated, the attorney's fees became due, and a part of the indebtedness according to the tenor and effect of the note, and that plaintiff in error, therefore, had the right to insist upon the payment of attorney's fees, even though the right to enforce the asserted lien for their payment had been lost.

Upon the authority of *Dalton v. Rainey*, 75 Tex. 518, 13 S. W. 34, we find against

plaintiff in error on the first question stated. In that case it was distinctly held that a subsequent vendee of land was not affected with record notice of a provision for attorney's fees in a note given for the purchase money of the land, where the deed of the vendor, that had been duly and accurately registered, properly described the note as far as it purported to do so, but omitted such provision. It was there said, "In the absence of notice to the contrary, they [the subsequent vendees] had the right to assume [from the record] that the deed to their vendor correctly stated all of the unpaid consideration for which it was executed." This seems to be in accord with the law as stated in 1 Jones, Mortg. (4th Ed.) §§ 550, 551, et seq.; Wade, Notice (2d Ed.) § 174 et seq.; and Webb, Record of Title, § 147, and cases therein cited. We therefore conclude that the court properly declined to enforce the asserted lien.

We think the second question presented must also be determined adversely to plaintiff in error, and that the money judgment in favor of defendants in error must be sustained. The principal note was not due at the time it was placed in the hands of McCormick & Spence, unless we can say that plaintiff in error availed himself of the option therein given to so declare because of the failure to pay the installment of interest maturing June 10, 1895. There is no evidence whatever of the exercise of such option, save the mere fact that the note was placed in the possession of said attorneys. Is this of such conclusive character as requires us to reverse the court's finding, in effect, to the contrary? We do not think we can give such effect to such fact. No such option had been declared in the cases of previous defaults. No declaration of this purport was made after the default of June 10th by either plaintiff in error or his agent. No demand for payment was made, and the deposit of the note with the attorneys is entirely consistent with a purpose of convenience, merely. The primary duty devolving upon the counsel employed was evidently the collection of the insurance policies. The application of the collection to the note was a mere exercise of the right conferred by the trust deed to abate the original indebtedness in the contingency that occurred. We think the provision in the note for attorney's fees evidently contemplated a state of the case where the note had matured, and where there had been a subsequent failure or refusal to pay, and where it hence became reasonably necessary to deposit it with an attorney for collection, and where it had been so done. It was in no sense necessary that the note in question should have been deposited with McCormick & Spence. Plaintiff in error, with the same advantage, could have retained possession thereof. For his own security he had provided for his right to collect

and receive the insurance. If collected by the attorneys and delivered to their principal, the full purpose of their employment would have been accomplished, and it would then have been the duty of plaintiff in error—a duty he owed defendants in error—to apply the amount collected upon the note, without the imposition of an unnecessary burden. The right to so collect and to have the insurance so applied was a right conferred by defendants in error, and the collection of the insurance was for their benefit, and in effect for them. They took out the policies, were the real beneficiaries, and the payments made out of the proceeds were, in effect, as if otherwise voluntarily made by them. Under these circumstances, therefore, we do not think plaintiff in error discharged the burden of proof that originally rested upon him, and (to overturn the findings of the trial court) that yet remains upon him, to show that the note mentioned had matured, and had in fact, in the exercise of reasonable diligence, been deposited with attorneys for collection, in accord with the spirit of said provision. Plaintiff in error best knew the fact, if so it was; he failed to so testify, or produce other evidence than as stated; and we ought not now to be required to indulge in mere inferences.

We conclude that the judgment should in all things be affirmed, and it is so ordered.

MADDOX v. ADAIR et al.¹

(Court of Civil Appeals of Texas. Dec. 14, 1901.)

DEEDS—CONDITIONS SUBSEQUENT—PERFORMANCE—FORFEITURE—TRESPASSERS—RIGHT OF GRANTOR.

1. Where a grantor conveys realty on condition that, on the grantee's failure to establish and maintain thereon a seminary of learning, it shall revert, and he does not object to the school established as not being that provided for by the deed, he cannot insist on a forfeiture, after the discontinuance of the school, on the ground that the grantees failed to establish the school required by the condition.

2. Where a grantor conveys realty to be used for school purposes, in order to increase the value of adjacent property, on condition that, on the grantee's failure to establish and maintain the school, the premises shall revert, and a school is maintained until the grantee has disposed of his adjacent property, he cannot claim a forfeiture after discontinuance of the school, as the purposes of the condition were fulfilled.

3. The condition of the deed having been complied with, and the grantee's title perfected, the grantor cannot complain of the abandonment of the property and the intrusion of a trespasser.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by John W. Maddox against C. L. Adair and others, as trustees of the Shiloh Baptist Institute. There was a judgment

¹ Writ of error denied by supreme court.

for defendants, and plaintiff appeals. Affirmed.

Wilkins & Vinson and Charles Batsell, for appellant. Webb & Jones and D. B. Steed, for appellees.

TEMPLETON, J. Maddox sued C. L. & N. Adair, the city of Whitesboro, J. B. Blount, and 14 others, as trustees of the Shiloh Baptist Institute, an alleged defunct corporation. The suit was in the form of an ordinary action of trespass to try title, and the purpose of the suit was to recover a lot of land situated in the said city. The trustees pleaded, "Not guilty." The Adairs and the city pleaded, "Not guilty," and the three, five, and ten year statutes of limitations. A trial without a jury resulted in a judgment from which Maddox has appealed.

The trial judge filed conclusions of fact and findings of law. There is no statement of facts in the record. The appeal is prosecuted on the theory that, under the facts found by the court, judgment should have been entered for the plaintiff. We condense the findings of the trial judge, and will state substantially the material parts thereof: We find that Maddox owned the lot in controversy and a number of other lots adjacent thereto. On January 11, 1876, Maddox conveyed the lot in controversy to W. H. Trolinger and 23 others, as trustees of the Shiloh Baptist Institute. The deed recited a consideration of \$100 cash, and contained general covenants of warranty, and was in the usual form, except that it concluded with a clause reading as follows: "But should the said land fail to be used for the purposes for which it is sold, viz., the establishment and maintenance of a first-class seminary of learning thereon, then it shall revert to me, the said J. W. Maddox; and I, the said J. W. Maddox, have opened and will keep open a fifty-one feet street on the east of said premises, and a forty-feet street on the other sides of said premises." No part of the consideration stated in the deed was paid, and it was not intended that it should ever be paid. The real consideration was the enhancement in the value of Maddox's adjacent lots which it was anticipated would follow the establishment of the school provided for. Maddox appears to have held his other lots for speculative purposes. He is not shown to have been in any manner interested in educational or church work or in public charities. Maddox disposed of all his other lots, and of all property of every kind owned by him at Whitesboro, long prior to the bringing of this suit, and now has no interests at said place, and is not a citizen of the community. On November 19, 1876, the trustees to whom the lot had been deeded incorporated under the name of Shiloh Baptist Institute. In 1877 the institute erected a three-story house on the lot, and opened a school therein. The school was kept up until 1884, when, for some unexplained rea-

son, the institute ceased to conduct the school, and vacated the property. Thereupon the city of Whitesboro took possession of the property, and opened a school, which was maintained by the city until 1895, when it contracted with C. L. & N. Adair to take charge of the property and carry on a school. The Adairs taught school on the premises from that time until after this suit was instituted. In 1900 they quit, and the public free schools are now being conducted on the property in controversy. It is not shown what claim the city asserted to the premises, except that it was stated by counsel for the city on the trial hereof that it did not claim under Maddox's deed to the trustees. The city expended about \$1,000 in 1895 in improving the property. The institute was incorporated for 20 years, and its charter expired by limitation in 1896. Neither the institute nor the trustees thereof appear to have objected to the acts of the city, and it seems that there was no intention on the part of the institute or its trustees to ever again resume the management of the school or the possession of the property. During the seven years that the institute conducted the school it had a competent corps of teachers, and enjoyed a large patronage. The school conducted was what is known as a "high school," for teaching the higher branches of learning; that is, higher mathematics, Latin, natural science, etc. The public schools of the city were also taught under the management of the institute. The city, when it took charge, continued the school as before until 1893. In that year and in the succeeding year only a primary school was carried on. The Adairs maintained a school for the education of teachers generally; also a business department; and higher mathematics, Greek, Latin, higher English, and natural and mental science were taught. The premises have never been used except for school purposes, except that the upper story had been used and occupied by the Masons and Odd Fellows. The court appears to have heard evidence as to the meaning of the word "seminary," and concluded that it was used in its ordinary application,—to designate schools of high grade for young ladies, and also theological seminaries; that, in the broadest sense, it includes academies, colleges, and universities; that there was never established and maintained on the property in controversy a "seminary of learning," as that term would indicate, either in its ordinary application or in its broadest sense, but that there was established and maintained a high-grade school for the higher education of young men and women, except for the years 1893 and 1894, and since the retirement of the Adairs.

The appellant contends that the facts stated show a failure on the part of the grantees to establish and maintain the school provided for in the deed, and insists upon a forfeiture. The appellees claim, and the

trial court found, that the facts do not show a breach of the conditions of the deed, within the meaning of the contract.

By its terms, the deed conveyed an estate upon conditions subsequent. The title passed to the grantees, subject only to the conditions. The law is well settled that such conditions will be strictly construed, and substantial compliance with the conditions will prevent a forfeiture. The deed before us required (1) the establishment and (2) the maintenance of a first-class seminary of learning. It is conceded that a school was established, but it is denied that it was a first-class seminary of learning. The trial court found that the school established was a high-grade school for the higher education of young men and women, in which the higher branches of learning were taught by a competent corps of teachers to a large number of pupils. In common parlance, and in a broad and liberal sense, such a school may be properly included in the term "seminary," but in a restricted and technical sense it should not be so included. The definition of "seminary," as given in the Century Dictionary, is as follows: "A place of education; any school, academy, college, or university in which persons (especially the young) are instructed in the several branches of learning which may qualify them for their future employments; specifically, a school for the education of men for the priesthood or ministry." The construction necessary to prevent a forfeiture will be adopted, unless it is clear that such is not the intention of the parties. It appears that the grantor was not concerned in any particular system of education, and desired the establishment of a school only that the value of his other property might be enhanced. The record does not show that the establishment of a different school would have conduced more to that end. Maddox seems not to have objected to the school established as not being that provided for in the deed. He cannot now be heard to insist that the grantees failed to establish the school required by the condition, and is not entitled to a forfeiture on that ground. On the issue whether the school was maintained as required by the condition, the intention of the parties will control. In ascertaining the intention, it is proper to look to the circumstances surrounding the transaction. *Railway Co. v. Beeler* (Tenn. Sup.) 18 S. W. 891. Maddox desired the school to be established in order that the value of his property might be increased. This was the consideration for the conveyance, and he had no interest in having the school maintained for any other purpose. The condition requiring the maintenance of the school was therefore incorporated into the deed. Under these circumstances, the only reasonable inference to be drawn from the use of the word "maintenance" is that the school should be maintained until he had realized his expected

profits. When he sold his adjacent lot, he ceased to be concerned in the continuation of the school, and the purpose of the condition was accomplished. This construction is also in harmony with the language of the condition. Maddox might have required maintenance of the school permanently for a term of years, or until the happening of a particular event, but he did not. He simply provided for the "maintenance" of the school, and such a provision does not necessarily mean that it should be maintained perpetually. To give to this provision such a forced construction, and compel a forfeiture, is contrary to the policy of the law and the apparent intention of the parties. Again, the deed provides that, should the grantees fail to establish and maintain the school, the land should revert to the grantor. If the grantees maintained the school for a term of years, and, while they ceased to maintain it, they cannot be said, in one sense, to have failed to maintain it. Mr. Jones, in *Law of Real Property in Conveyancing* (2d ed. 1887), says: "Whether a forfeiture is incurred by the abandonment of the use specified in the condition, depends upon the terms and general purposes of the condition. If by a condition that certain buildings of a certain structure shall be permanently erected upon the granted land, it is manifestly simply that this land shall in good faith be selected as the site of such building structure, and that the same shall be erected upon the granted land, the condition is fulfilled by the erection of the building structure upon the land, and a use of it for a time for the purpose intended, though the use of it for this purpose is subsequently abandoned." In *Post v. Well* (N. Y.) 22 N. Y. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809, the grantor owned two estates or tracts of land, one of which he sold upon condition that a hotel or tavern should be erected thereon. Subsequently he conveyed both estates to trustees, presumably for the benefit of creditors. The trustees, apparently for the purpose of perfecting the title of the purchaser of the estate which he had sold, deeded the same to such purchasers; the condition being waived or iterated. The trustees then sold the remaining estate without condition, and accounted to the creditors and their principal. Afterwards a question arose whether the estate first sold was still burdened with the condition. It was ruled that the language of the deed, although importing a condition subsequent, should be construed as a covenant, in view of the fact that it was the evident intention of the grantor to protect his remaining property from depreciation in value by reason of the erection adjacent thereof of undesirable structures. Having parted with all his interest in both estates, he was no longer concerned in the condition, and it was held that no burden rested upon the title of the first purchaser. In this case, when Maddox disposed of his lots adjacent

the lot in controversy, the purpose of the condition was satisfied, and he had no further interest in the continued maintenance of the school. If the school was maintained for the required time, the title of the grantees became perfect and indefeasible. The burden was upon Maddox to show that the school provided for was not established and maintained for the required time, and this he has not done. If the conditions of the deed have been complied with, and the title of the grantees has been perfected, then Maddox is without any interest whatever in the property. In such case he cannot complain even of the intrusion of a trespasser, or of the malfeasance of the trustees in failing to discharge their duty to their constituents.

The proper judgment has been rendered, and it is affirmed. Affirmed.

Additional Opinion.

(Jan. 11, 1902.)

At the request of appellant, we adopt the findings of fact filed by the trial judge as the same appears in the transcript. We do not, however, adopt the trial judge's definition of the word "seminary," but adhere to our finding in that particular. We think that the substance of all the material findings is contained in the opinion, and that it is unnecessary to modify any statement appearing therein, further than has already been done.

CARPENTER v. CARPENTER et al.¹

(Court of Appeals of Kentucky. Feb. 27, 1902.)

WITNESSES — TRANSACTIONS WITH PERSON SINCE DECEASED—SUFFICIENCY OF EVIDENCE AS TO GENUINENESS OF SIGNATURE.

1. Where one of several heirs asserts a claim against the ancestor's estate, he is not a competent witness for himself as to any transaction or conversations had with the ancestor, unless the other heirs were present, and have testified in regard thereto.

2. The evidence being conflicting as to the genuineness of the signature to a note purporting to have been executed by the payee's father, since deceased, the chancellor's finding that the note was not genuine will not be disturbed.

Appeal from circuit court, Boone county. "Not to be officially reported."

Action by Butler Carpenter against W. P. Carpenter and others upon certain promissory notes. Judgment for defendants, and plaintiff appeals. Affirmed.

G. G. Hughes and W. S. Pryor, for appellant. Tolin & Gaunt and Lassing & Riddell, for appellees.

BURNAM, J. On the 28th day of March, 1894, William H. Carpenter divided among his three sons, C. C. Carpenter, W. P. Car-

penter, and Butler Carpenter, his entire landed estate, which consisted of about 477 acres of land, worth about \$30,000. In the division C. C. Carpenter got 190 acres, W. P. Carpenter 141 acres, and Butler Carpenter 146 acres. And on the — day of May, 1894, he was adjudged a lunatic by the county court of Boone county, and his son Butler Carpenter was duly appointed his committee; and on the 15th day of August, 1894, Butler Carpenter instituted a suit in equity in the Boone circuit court as committee of his father and in his own right against his brothers, William P. Carpenter and C. C. Carpenter, in which he alleged that his father was an imbecile and lunatic, and was induced by his son W. P. Carpenter to execute and deliver the deeds conveying his lands to his three sons; that they were without consideration, and were procured by fraud, misrepresentation, and undue influence on the part of W. P. Carpenter; that immediately after making the deeds W. P. Carpenter and his family began to mistreat their father, so that he was compelled to leave their house and go elsewhere to reside; and asked that the deeds be canceled, and that William H. Carpenter be restored to the possession of the lands. The defendants, in their answer, denied all the allegations of this petition, and on the 14th day of December, 1894, it was agreed by Butler Carpenter, in his own behalf and as committee of his father, and C. C. Carpenter and W. P. Carpenter, that the suit should be dismissed settled on these terms: W. P. Carpenter was to convey to Butler Carpenter five acres of land situated in Boone county, near Florence, and was to pay him the sum of \$100 in cash. After the death of William H. Carpenter in February, 1897, his son W. P. Carpenter qualified as his administrator, and in January, 1898, Butler Carpenter brought this suit against W. P. Carpenter as administrator and C. C. Carpenter and W. P. Carpenter in their own right, in which he alleged that he held three notes against his father,—one for \$800, dated October 29, 1881, upon which various credits were indorsed; one for \$200, dated the 11th of November, 1889; and the third for \$688.44, with two credits, the first for \$200, dated November, 1892, and the second for \$80, dated October 9, 1893,—and asked a personal judgment against W. P. Carpenter as administrator, and that the lands conveyed to his three sons in 1894 be subjected to their payment. The defendants, in their answer, first denied that their father ever signed either of the notes, or authorized his name to be signed thereto, or that he ever executed or delivered either of them. They also rely upon a number of other defenses, which it will be unnecessary for us to consider. The pleadings being made up by reply and proof taken, the chancellor dismissed plaintiff's petition, and he has appealed.

Appellant is not a competent witness as to

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

any transaction or conversations had with his father during his lifetime unless appellees were present, and testified in regard thereto. See subsection 2 of section 606 of the Civil Code. The burden of proving the genuineness of the signature of W. H. Carpenter to the obligations sought to be collected was upon appellant, and the testimony on this point is not conclusive. Only two witnesses testify, and the statements of both are to the effect that the signatures resemble that of W. H. Carpenter; whilst on the other hand, both of the appellees deny the genuineness of the signatures. And they and W. R. Terrell, a disinterested witness, testify that at the time W. H. Carpenter delivered the deed to appellant in 1894 he asked him if he had any claim against him; that appellant replied that he did not, but that he thought his father ought to pay the taxes on the tract of land on which he had been living, which belonged to his father, for some 15 years, which his father refused to do, remarking at the same time that the use of the land was certainly worth as much as the taxes thereon. If the notes sued on were bona fide claims against his father, that was the time to have demanded their payment, as he knew his father was practically disposing of his entire estate. And again, it is perfectly evident that the institution of the suit by appellant in 1894 was for the sole purpose of forcing his brother W. P. Carpenter to make a further division with him. This is conclusively shown by the agreement under which the suit was dismissed, and it is evident that if at that time he had had a valid, just, and unsatisfied demand against his father amounting to \$2,000, he would have asserted it as a ground for the relief sought in that proceeding. Appellant was at that time a poor man, dependent upon the charity of his father for a home. After a careful consideration of the whole record, we are of the opinion that the judgment is supported by the weight of evidence, and should not be disturbed.

Judgment affirmed.

C. F. ADAMS CO. v. SANDERS.¹

(Court of Appeals of Kentucky. Feb. 26, 1902.)

TRESPASS—CONTRACT GIVING RIGHT TO ENTER PREMISES TO RECOVER PROPERTY IF NOT PAID FOR.

The act of defendant corporation in entering upon the premises of plaintiff's husband to remove a clock which it had sold him under an agreement that it should have the right to enter for that purpose if he should fail to pay for the clock was not a trespass, the condition upon which it was to have the right to enter having happened; and plaintiff has no right of action therefor, though defendant's agent entered the room where she was sick in order to remove the clock, and thus caused her to become excited and to suffer.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Cora Sanders against the C. F. Adams Company to recover damages for trespass. Judgment for plaintiff, and defendant appeals. Reversed.

Pryor & Sapinsky, for appellant. Fred Forcht, Jr., and Zack Phelps, for appellee.

PAYNTER, J. Under a contract which authorized the appellant, through an agent, to enter upon the premises of D. A. Sanders to take and remove a clock therefrom, which it had sold him, and for which he had not paid, one Shannon, agent for appellant, went to his residence to get the clock. Sanders was not at home, and his wife was sick in bed. He knocked at the door, when Mrs. Wilkinson, a neighbor, visiting the house, came to it, and partially opened it. He inquired if she were Mrs. Sanders, and, being informed she was not, but being informed that Mrs. Sanders was sick, he entered the room, and said, "It is the clock I want," and then walked across the floor and took it; then addressed Mrs. Sanders, and said, "Are you sick?" He then told her to tell her husband to come to the store to see about the clock. After detailing the facts substantially as we have given them. Mrs. Sanders said that Shannon bulldozed her. Unless the acts and conversation amount to bulldozing, Mrs. Sanders' conclusion was erroneous. She claims that she suffered physically and mentally in consequence of the trespass and conduct of the agent. As we have said, the contract between the husband and appellant authorized it to obtain the peaceable possession of the clock. Entering upon the premises under circumstances detailed was not a trespass. *Ramey v. W. W. Kimball Co.* (Ky.) 58 S. W. 471; *Machine Co. v. Conner* (Ky.) 64 S. W. 841. It not being a trespass, then Mrs. Sanders could not recover, unless the agent inflicted an injury upon her, after entering upon the premises, by his conduct and manner of removing the clock. The mere fact that she may have become excited and suffered in consequence of the removal of the clock does not entitle her to recover damages, because the act of removing the clock was not a trespass, and no wrong for which she or her husband could maintain an action. The fact the agent may not have been graceful in the matter of making known his business would not give the appellee right to recover damages. The inquiry he made as to her illness indicated a kindly disposition and the purpose not to treat her rudely. We are of the opinion that the court should have given a peremptory instruction to find for defendant.

The judgment is reversed for proceedings consistent with this opinion.

BRASHEARS et al. v. DICKINSON et al.¹
(Court of Appeals of Kentucky. Feb. 27, 1902.)

JUDGMENT—ACTION TO VACATE—NEWLY-DISCOVERED EVIDENCE.

1. Plaintiffs are not entitled to have a judgment against them vacated on the ground that neither they nor their authorized attorneys were present at the trial, in the absence of anything to show a good reason for their absence.

2. The petition in an action to vacate a judgment on the ground of newly-discovered evidence does not state a cause of action unless it clearly and intelligibly sets out the issues submitted to the court in the original action, as the court cannot otherwise determine whether or not the alleged newly-discovered evidence is material.

Appeal from circuit court, Perry county.
"Not to be officially reported."

Action by R. S. Brashears and others against J. J. Dickinson and others to vacate a judgment. Judgment for defendants, and plaintiffs appeal. Affirmed.

R. O. Brashears, for appellants. J. J. C. Back, for appellees.

PAYNTER, J. This action was instituted to vacate a judgment of the Perry circuit court, rendered on September 23, 1896, in an action wherein the appellants were plaintiffs and the appellees defendants. The petition is voluminous, containing much repetition and unnecessary averments. Amended petitions were filed. We have found much difficulty, on account of the character of the pleadings filed, to determine the grounds upon which relief is sought. One seems to be that neither the plaintiffs nor their authorized attorneys were present at the trial. We have been unable to discover from the pleadings any good reason for their absence therefrom. The issues which were submitted to the court in the action wherein the judgment was rendered of which they complain are not clearly and intelligibly set out; therefore we are unable to determine whether the alleged newly-discovered evidence is material or not. We are unable to reach the conclusion that the petition states a cause of action. In our opinion, the court properly sustained a demurrer to the petition.

The judgment is affirmed.

HINKLE v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 26, 1902.)

CRIMINAL LAW—ESCAPE FROM OFFICER—INDICTMENT—SUFFICIENCY OF EVIDENCE TO AUTHORIZE CONVICTION—STATEMENT OF CASE TO JURY.

1. Under Ky. St. § 1338, providing for the punishment of any person who, while lawfully arrested, effects his escape from an officer, an indictment following the language of the statute is sufficient.

2. Where defendant accompanied a deputy sheriff, who had a warrant of arrest for him, into the presence of the magistrate who had

issued the warrant, and, being there called upon to surrender a pistol which he had in his possession, refused to do so, and by putting the officer in fear escaped from or left the place, he was guilty of the offense of escaping from the officer while lawfully arrested, though he had taken the pistol from a person with whom he had had a difficulty, and who was seeking to obtain another for the purpose of shooting him, as it must be presumed that the officer would have protected him from violence.

3. A judgment of conviction cannot be reversed on account of insufficiency of the evidence where there is any evidence tending to show guilt.

4. The attorney for the prosecution, in stating his case after reading the indictment to the jury, need not state in detail the character of the charge, or the evidence to be introduced in support thereof.

Appeal from circuit court, Knox county.
"Not to be officially reported."

George Hinkle was convicted of the offense of forcibly effecting his escape from an officer, and he appeals. Affirmed.

B. B. Golden, for appellant. Robt. J. Breckinridge, for the Commonwealth.

GUFFY, C. J. The defendant in this case was indicted, tried, convicted, and sentenced to six months' imprisonment in the county jail upon an indictment charging him with forcibly effecting his escape from an officer at a time when he was lawfully arrested, etc., and, his motion for a new trial having been overruled, he prosecutes this appeal.

The indictment reads as follows: "The grand jury of Knox county, in the name and by the authority of the commonwealth of Kentucky, accuses George Hinkle of the offense of forcibly effecting his escape from an officer at a time when he was lawfully arrested and in custody upon a charge for a violation of the criminal and penal laws, committed in manner and form as follows, to wit: The said Hinkle did, on the 5th day of December, 1900, in the county, circuit, and state aforesaid, and before the finding of the indictment herein, unlawfully and forcibly effect his escape and escaped from A. M. Hemphill, who was at the time a deputy sheriff of Knox county, Kentucky, and acting as such, who had the said Hinkle lawfully under arrest and in his custody as deputy sheriff, aforesaid, upon a charge of assault and battery upon the person of Harve Steele; against the peace and dignity of the commonwealth of Kentucky." The grounds relied upon for a new trial are, in substance: (1) That the court erred in overruling the demurrer to the indictment; (2) because the court erred in permitting incompetent evidence prejudicial to the defendant to go to the jury; (3) because the court erred in refusing competent evidence favorable to defendant, and offered by him; (4) because the court misinstructed the jury, and refused to properly instruct the same; (5) because the verdict is against the law and evidence; (6) because of the misconduct of the attorney for the commonwealth in the argument of the case; (7) because the court erred in over-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ruling defendant's motion, at the close of the plaintiff's evidence, to instruct the jury to find him not guilty, and in overruling defendant's motion to instruct the jury to find him not guilty at the close of all the evidence. This indictment was found under section 1338, Ky. St., which section reads as follows: "If a prisoner fined, on a sentence of imprisonment or to be whipped or under a capias escapes jail, or if a person lawfully arrested upon a charge for a violation of the criminal and penal laws forcibly or by bribery effects his escape from an officer, or guard, he shall be confined in jail not less than six nor more than twelve months." This indictment was evidently found under this section of the statute, and it has often been held that, where a statute creates an offense, an indictment following the language of the statute is sufficient. It therefore follows that the demurrer to the indictment was properly overruled. It is not necessary, in an indictment under this section, to set out by specific facts that the defendant was legally under arrest; nor is it necessary to state the acts by which the defendant effected his escape from the officer. We fail to see that the court erred as to the admission or rejection of testimony upon the trial of the cause. We deem it unnecessary to recite the testimony introduced in the action. We may, however, remark that the testimony upon the part of the commonwealth tends to show that the deputy sheriff, Hemphill, had a warrant for the arrest of the defendant, and that it was made known to the defendant that said Hemphill had such warrant, and that the defendant accompanied Hemphill to and in the presence of the magistrate who had issued the warrant, and that defendant had in his hands or in his possession a pistol, and, being required to surrender the same, refused so to do, and when the deputy sheriff attempted to take the pistol from him he (defendant) refused to surrender the same, and by demonstrations of violence, and by putting the officer in fear of personal injury, escaped from or left the place, and refused to surrender the pistol or submit himself to the control of the magistrate or the deputy sheriff. It is true that other evidence was introduced tending to show that a former deputy sheriff had assumed to place the defendant under arrest, and sent him to a different place to remain; but it does not appear that the first-named deputy sheriff (who was the father of the defendant) had any warrant for the arrest of the defendant. It also appears that the defendant claimed that one Steele, with whom he had had a difficulty, and from whom he had taken the pistol in question, was seeking to obtain and threatening to obtain a pistol for the purpose of shooting the defendant. This, in our opinion, does not constitute a sufficient defense for the defendant, and did not authorize him to escape from the deputy sheriff

who had the warrant of arrest, and who, in obedience to the magistrate, attempted to obtain control of the defendant and disarm him. The presumption must be indulged that the officer of the law would see to it that a prisoner under arrest was protected from violence. In addition to all this, the jury, who heard all of the testimony, must be presumed to have considered the evidence, and the most favorable view that can be taken in behalf of the defendant is that the evidence was conflicting, and under the provisions of the Code of Practice this court cannot reverse on account of the insufficiency of the evidence, if there be any evidence tending to show the defendant guilty of the offense charged. We fail to perceive that the attorney for the commonwealth was required to do more than he did in stating his case after reading the indictment to the jury, and it would seem that a plea of not guilty was entered. We are not aware of any rule of law that imperatively requires the attorney for the commonwealth to state more in detail the character of the charge or evidence to be introduced in support thereof.

Judgment affirmed.

GRIFFIN v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 27, 1902.)

INTOXICATING LIQUORS—SELLING IN QUANTITY LESS THAN FIVE GALLONS—INSTRUCTIONS TO JURY—PRETENSE OF SELLING BY WHOLESALE.

1. Under an indictment for selling liquor in quantities less than five gallons in violation of a local prohibitory law, it was proper to instruct the jury to find defendant guilty if they believed that he "either directly or indirectly" sold to the prosecuting witness whisky or brandy in less quantities than five gallons, the words quoted being used in the statute.

2. Under Ky. St. § 2570, providing that "no trick, device, subterfuge or pretense shall be allowed to evade the operation or defeat the policy of the law against selling spirituous, vinous or malt liquors without license, or in violation or evasion of any local option law prevailing in any county, town, city, precinct or municipality of this commonwealth," it was proper to instruct the jury to find defendant guilty if they believed that he "pretended to sell the witness ten gallons, and let him have it by the small."

3. The instructions referred to sufficiently presented defendant's side of the evidence, he having testified that the prosecuting witness was one of a crowd of persons who paid him \$20 for a keg of whisky containing 10 gallons, and that he turned the whisky over to them, and they divided it among themselves, and that he did not know how much any of them got, and that if they left any of the whisky on the premises he did not know it.

Appeal from circuit court, Knox county.

"Not to be officially reported."

Grant Griffin was convicted of the offense of selling spirituous liquors in violation of a local prohibitory law, and he appeals. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

B. B. Golden, for appellant. R. J. Breckinridge, for the Commonwealth.

HOBSON, J. Appellant, Grant Griffin, was indicted for selling to Charles Messer spirituous liquors in quantities less than five gallons, in violation of the local prohibitory law in force in Knox county. The proof by Messer was as follows: "I went to the defendant in Knox county, and told him I wanted a pint or quart of whisky, I don't remember which. He told me he could not sell whisky in less quantities than ten gallons. I then told him I would take ten gallons, but I could not take it all away with me at that time; but that I would buy the keg, and leave it there, and take it away as I wanted it. We agreed to this. I then had my bottle filled. I don't remember the size of the bottle, but I did not at that time take away as much as five gallons of the whisky; but I made several other trips to the place and took away of the whisky until I had taken ten gallons, but I did not take as much as five gallons at one time, and I paid for the whisky as I got it." The defendant then testified in his own behalf, contradicting the statements of Messer. He also stated that Messer was at his place one day with several other men. Some of the crowd paid him \$20 for a keg of whisky containing ten gallons, and he turned the whisky over to them. They divided it among themselves, and he did not know how much any of them got; but if they left any of the whisky there he did not know it. On this evidence the court instructed the jury as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant, Grant Griffin, in this county, and within one year before the finding of the indictment, either directly or indirectly sold to the witness whisky or brandy in less quantities than five gallons, you will find the defendant guilty as charged in the indictment, and fix his fine at not less than \$100 nor more than \$200." "If the defendant, at the time and place stated by the witness, pretended to sell the witness ten gallons, and let him have it by the small, he would be liable." "If you have a reasonable doubt of the defendant being proven guilty, you will find him not guilty." It is objected that the court used in instruction No. 1 the words "directly or indirectly." But these are the words of the statute creating the offense. Ky. St. § 2557. The indictment follows the statute, and the court, in drawing the instructions, followed the indictment. Sections 2570, 2571, Ky. St., are as follows: "No trick, device, subterfuge or pretense shall be allowed to evade the operation or defeat the policy of the law against selling spirituous, vinous or malt liquors without license, or in violation or evasion of any local option laws prevailing in any county, town, city, precinct or municipality of this commonwealth." Section 2570. "A conviction

for the offense of selling spirituous, vinous or malt liquors without license to do so, or for selling same in any county, town, city, precinct or municipality of this commonwealth where local option laws prevail, may be sustained against the person in possession of the premises on which said liquor is obtained, furnished, or disposed of in violation or evasion of law, if the following facts appear: A house, room, inclosure or other place where spirituous, vinous or malt liquors are furnished or obtained in violation or evasion of law, or where some device is used to dispose of, furnish or obtain such liquor in violation or evasion of law." Section 2571. The second instruction given by the court was warranted under these provisions. It is urged that the defendant's side of the evidence was not submitted to the jury; but we are unable to see that this is true. By the first instruction the jury were only authorized to convict if the defendant sold to the witness whisky or brandy in less quantities than five gallons, and by the second they were told that if, at the time and place stated by the witness, defendant pretended to sell him ten gallons, and let him have it by the small, he would be liable. These instructions seem to us to aptly submit to the jury the question whether Messer or the defendant had given the correct version of the transaction.

Judgment affirmed.

POWELL v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 26, 1902.)

INTOXICATING LIQUORS—LOCAL OPTION—SALE BY DRUGGIST WITHOUT LICENSE.

Though the local option law of 1886 applicable to Fleming county authorizes a druggist to sell liquor upon the prescription of a physician, such a sale made without the license required by Ky. St. § 4224, part of the general revenue law, is unlawful.

Appeal from circuit court, Fleming county.

"Not to be officially reported."

W. A. Powell was convicted of the offense of selling liquor without license, and he appeals. Affirmed.

J. D. Pumphrey, J. F. Maher, G. A. Cassidy, and W. G. Dearing, for appellant. R. J. Breckinridge, for the Commonwealth.

DU RELLE, J. Appellant was indicted for the offense of selling liquor without license in Fleming county. A demurrer to the indictment was sustained, but the judgment sustaining the demurrer was reversed in an opinion by Judge Burnam in *Com. v. Powell*, 62 S. W. 19. Upon the return of the case a trial was had resulting in the

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

conviction of appellant. It appeared that he had sold a pint of whisky on a prescription from a regular practicing physician of the county; that he had no license of any kind or description for the sale of liquor issued by either the state or county; that the local option law applicable to Fleming county, approved April 19, 1886 (2 Acts 1885-86, p. 17), was voted upon by the people of that county in August, 1886, and received a majority of the votes. Section 1 of the act makes the sale of liquor unlawful in that county, except as thereafter provided, and repeals all laws authorizing the county judge of the county or the trustees of any town therein to grant a license to retail liquor. Section 2 provides that "this act shall not apply to the procuring or use of wine for sacramental purposes, or to a regular resident practicing physician, who in good faith prescribes the same as a medicine to his patient or patients, or to the sale from a distillery," etc. Section 9 makes it unlawful for the county judge to grant a license to any person to sell liquor in said county after the governor approves the act until a vote upon the sale of liquors shall be taken. In *Com. v. Reynolds*, 89 Ky. 147, 12 S. W. 132, 20 S. W. 167, it was held, in substance, that the section applicable to practicing physicians protected druggists who furnished liquor upon the prescription of such physicians. That case, however, was decided prior to the passage of the act fixing the license to be paid by druggists. Ky. St. § 4224. Upon the former appeal of this case it was held that there was nothing in the local law inconsistent with the requirements of the revenue statute requiring a license to sell whisky in so far as druggists are concerned. It is insisted that section 9 of the act above quoted forbade the issuance of a license, and that, inasmuch as the *Reynolds* Case decided that liquor might be sold upon prescription, the section and the opinion taken together permitted the druggist, under such circumstances, to sell without license. But section 9 prohibited the issuance of license during the time only between the passage of the act and the taking of a vote in Fleming county, even if it could properly be construed to prohibit the issuance of a license under the revenue law subsequently enacted. The *Reynolds* Case, *supra*, seems to us to have no application to the case at bar, except in so far as it holds a druggist who sells whisky upon prescription is not within the prohibition of the Fleming county law. It has and can have no application to a violation by such druggist of section 4224, Ky. St., which is a revenue act. In our opinion, the *Reynolds* Case controls us to the extent of holding the sale by druggists on prescription is not prohibited by the local act. The revenue act requires the procurement of a license in order to lawfully make such sales. It necessarily follows that the issuance of a license

to make such sales is also not forbidden by the local act.

For the reasons given, the judgment is affirmed.

REED et al. v. REED et al.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

EXECUTORS AND ADMINISTRATORS—COMPENSATION OF EXECUTOR—ALLOWANCE TO COMMISSIONER—PARTIES TO APPEAL.

1. Ky. St. § 3883, providing that "the allowance to executors, administrators and curators shall not exceed five per cent. on all the amounts received and distributed," does not limit an executor to 5 per cent. on the cash distributed, but he is entitled to a reasonable allowance, not exceeding 5 per cent. on the entire personal estate, including that distributed in kind.

2. Where the personal estate of a testator distributed by the executor amounted to about \$80,000, and only about \$15,000 was cash, it was error to restrict the executor to an allowance of 5 per cent. on the latter amount, it appearing that \$500 additional would be reasonable.

3. The action of the trial court in fixing a commissioner's allowance cannot be reviewed on appeal where he is not a party to the appeal.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by P. B. Reed, executor of Mrs. Jane Reed, for a settlement of the estate of plaintiff's intestate. Judgment settling estate, and P. B. Reed and others appeal. Reversed.

Bodley, Baskin & Morancy, for appellants. W. W. Thum and J. D. Reed, for appellees.

HOBSON, J. On December 29, 1898, Mrs. Jane Reed died, leaving a personal estate amounting to something like \$80,000. By her will she devised her property, after a number of special bequests, to her four sons equally, and made appellant executor. He qualified, and filed this suit for the settlement of his trust. He sold part of the personalty. The amount of his sale, together with the cash on hand, amounted to \$15,571.83. The remainder of the personal estate he distributed to the devisees in kind. The court on final hearing fixed his allowance as executor at \$778.60, or 5 per cent. on the amount passing through his hands outside of the estate distributed by him in kind. Section 3883, Ky. St., is as follows: "The allowance to executors, administrators and curators shall not exceed five per cent. on all the amounts received and distributed: provided, that upon proof heard in open court, upon proper notice to the parties in interest, the court may make allowance when the executor, administrator or curator has in the proper discharge of his duties in attending to, administering and settling the estate in his hands, been required to perform extraordinary services; but such allowance

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

shall not exceed a fair compensation for the time occupied and expenses incurred in protecting, attending to, collecting and settling such estates and five per cent. on all the amounts received and distributed." In *Renick's Ex'r v. Renick*, 92 Ky. 335, 17 S. W. 1018, this court held that the words "all the amounts received and distributed" include the entire estate that the fiduciary is required to receive and pay over or divide among the persons entitled to it. We do not think the language of the statute or the legislative intent in enacting it would restrict these words to the actual cash passing through the executor's hands, and we therefore conclude that appellant was entitled to a reasonable allowance for his services in caring for and distributing the estate distributed by him in kind and for his services in the litigation before us on behalf of the estate. Without elaborating the reasons for this conclusion, we are of opinion that he is entitled to an allowance of \$500 as of date of his settlement in addition to the allowance made in the court below. We see no other error in the record. We cannot revise the action of the lower court in fixing the allowance to the commissioner, as he is not a party to the appeal. The allowance to the attorneys is reasonable in view of all the facts. The judgment of the court in the matter of the picture was not an improper solution of the vexed question.

Judgment reversed, and cause remanded for a judgment as herein indicated.

STEM v. WHITNEY et al.¹

(Court of Appeals of Kentucky. Feb. 26, 1902.)

BURDEN OF PROOF—HARMLESS ERROR.

1. In an action to recover on a contract for commissions for the sale of real estate, in which defendant alleged that the contract was procured through fraud, and after plaintiffs had negotiated a sale, the burden of proof was on defendant.

2. Where defendant, on whom was the burden of proof, was given the concluding argument to the jury, he cannot complain that the court first ruled that the burden was on plaintiffs, and required them to first introduce their evidence.

Appeal from circuit court, Kenton county. "Not to be officially reported."

Action by John Whitney & Co. against Arthur Stem to recover commissions for the sale of real estate. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. McD. Shaw, for appellant. Byrne & Read and B. F. Graziani, for appellees.

WHITE, J. The appellees brought this action to recover on an alleged contract for commissions for the sale of real estate. It is claimed that the appellant, Arthur Stem, agreed to and with appellees that he would

accept for certain property the net sum of \$21,700, and that any overplus for which the property might be sold would belong to appellees as commissions. The property was sold for \$22,800, and the difference, \$1,100, is claimed by appellee. Appellant admitted executing the contract agreeing to accept \$21,700 net for the property, but says that contract was obtained by fraud and misrepresentation, and after a bargain for sale had been made by appellees with the purchaser. Appellant conceded an indebtedness of the regular commissions at 2 per cent. which appellees declined. Appellees denied the alleged fraud, or that the contract was obtained after the property had been negotiated. A trial was had on the issues, which resulted in a judgment for appellees for \$1,100, as claimed. From that judgment this appeal is prosecuted.

The writing upon which the action is based is as follows: "Cincinnati, O., Feby. 17, 1899. Jno. Whitney & Co., Covington, Ky.—Gentlemen: I agree with you to make deed for the Covington property upon realizing \$21,700 net. Yours truly, Arthur Stem." And the other put in evidence reads: "Cincinnati, O., Feby. 17, 1899. Jno. Whitney & Co., Covington, Ky.—Gentlemen: I will sell my property, 16th & Russell Sts., for \$23,000, and include the floor, water-closets, plumbing, &c., placed by the Davis-Egan Co., at a cost of over \$4,000 (shafting, engine, &c., to be extra), one-fourth cash. Will pay all street improvements, taxes, and water rent due to date; give immediate possession if desired. Mortgage of \$6,000 can be assumed as part payment, which can be carried as long as wanted, or I will cancel same to make title clear. Will allow \$200 for broken rafter, glass, water pipes, &c. Should this be satisfactory, write a-to-morrow evening. Yours truly, Arthur Stem." It is conceded by both parties that the two writings bear their true date, and the one last copied was first written and signed, but there is a very sharp difference between the parties as to whether the one first above was written in the morning or afternoon of the 17th of February; it being agreed that the one first written was in the morning of that day. If appellees' contention be true, there was no opportunity to perpetrate fraud, as pleaded.

Counsel for appellant urge as cause for reversal but one action of the trial court as error; that is, the action of the trial court in assigning the burden of proof. The record shows that, at the beginning of the trial, appellees moved for an assignment of the burden. The court held the burden on plaintiffs. After the evidence of plaintiffs had been completed, the court concluded he had been mistaken, and then adjudged the burden on defendant. Appellant then introduced his testimony, and had the concluding argument to the jury. We cannot see how the appellant could have been prejudiced by

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this ruling. If the burden was on appellees, they were entitled to the closing argument, which they did not have. This was a ruling advantageous to appellant, and he cannot complain. If, on the other hand, the burden was on appellant, he should have introduced his evidence first. He should have disclosed his side of the case first. The ruling of the court on that theory was still advantageous to appellant, and he cannot complain. Under the pleadings, we think the burden on appellant, and the ruling of the court thereon was not prejudicial to him.

The instructions are more favorable to appellant than he was entitled to, and, the jury having found for appellees notwithstanding, their verdict will not be disturbed.

Judgment affirmed, with damages.

HOUSMAN'S ADM'R v. LONG.¹

(Court of Appeals of Kentucky. Feb. 27, 1902.)

APPEAL AND ERROR—INSTRUCTIONS NOT MADE PART OF RECORD—LIMITATION OF ACTIONS—PAROL UNDERTAKING OF DEPUTY SHERIFF TO ACCOUNT FOR TAXES COLLECTED.

1. The action of the trial court in refusing instructions cannot be reviewed on appeal in the absence of the instructions given.

2. Though an order of court shows that the court gave to the jury instruction "No. 1," to the giving of which both parties excepted, a paper copied into the record by the clerk, purporting to be that instruction, cannot be considered, as it is not identified by any order of court or bill of exceptions, and is in no way made a part of the record.

3. A sheriff's cause of action on a parol undertaking by his deputy to account for taxes collected accrued when the deputy quit the sheriff's service, and was barred after the lapse of five years from that time.

Appeal from circuit court, Graves county.
"Not to be officially reported."

Action by J. P. Long against the administrator of W. F. Housman on a duebill. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. T. Webb and R. E. Johnson, for appellant. Robertson & Thomas and Crutchfield & Palmer, for appellee.

HOBSON, J. Appellant's intestate, W. F. Housman, was sheriff of Graves county, and appellee, J. P. Long, was his deputy, at a salary of \$40 a month. Housman placed in appellee's hands taxes amounting to something over \$16,000 for collection. It was appellee's duty to pay over to Housman the money he collected without commission, as his salary covered all his services. On December 3, 1893, or about a month before appellee quit his service, Housman executed to

him the following writing: "Due J. P. Long three hundred and twenty dollars (\$320.00) for services as deputy sheriff." The proof shows that Long several times requested a settlement with Housman, and that he put the matter off. Finally Long employed John Crutchfield as attorney. Crutchfield saw Housman in regard to a settlement, and he said: "I am glad Long has employed you, as I think you and I can settle the matter; but I wish you would wait just a little while, as my money is now invested in the warehouse, and I can't get it for a short time." He also said in that conversation that Long held a duebill against him. About a year after this Houston died without having settled, and this suit was filed by Long to recover on the duebill. Appellant, as administrator of Housman, pleaded as a set-off the amount of the taxes placed in Long's hands for collection, alleging that he had failed to account for the money. On final hearing Long was charged with all taxes collected by him after the date of the duebill, but was not charged with anything collected before its date.

Complaint is made of the instructions of the court, but the record is not so presented as to enable us to pass upon them. An order of the court shows that the court gave to the jury instruction No. 1, to the giving of which both plaintiff and defendant excepted. It also shows that the defendant moved the court to give to the jury instructions A, X, and Y, which the court refused to give. Instructions A, X, and Y are made part of the record by a bill of exceptions; but whether the court erred in refusing these instructions we cannot determine, as instruction No. 1, which was given by the court, is not made part of the record. It is true the clerk has copied into the record a paper purporting to be this instruction, but as it is not identified by any order of court or bill of exceptions, and is in no way made part of the record, it cannot be considered. Aside from this, we are of opinion that the defendant's set-off was barred by limitation. It was based, according to the pleadings, on the parol undertaking of Long to account for the taxes he collected. According to the testimony he quit work for Housman in January, 1894. The suit was filed on April 30, 1900, or more than six years afterwards. When he quit the service of Housman it was his duty then to pay over all the money in his hands, and, if he failed to do so, a cause of action instantly accrued against him, and the statute began to run. There is nothing in the case to stop the running of the statute, and the claim was barred by limitation before the suit was filed. 19 Am. & Eng. Enc. Law (2d Ed.) 181.

Judgment affirmed.

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HUFFMAN et al. v. LESLIE.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

FRAUDULENT CONVEYANCES — GRANTEE'S KNOWLEDGE OF FRAUDULENT INTENT.

1. A deed executed by a debtor with intent to defraud his creditors is void as to creditors if the grantee had knowledge of the grantor's fraudulent intent, though he did not participate therein, and though he paid full consideration for the property.

2. Where a debtor immediately after judgment was rendered against her sold and conveyed to another for cash the only real estate she had, and on the same day collected the amount due her as distributee of her father's estate, the chancellor was authorized to conclude that she intended to defraud her creditors, and also that the purchaser had knowledge of the fraudulent intent, as she knew of the rendition of the judgment, and in a few hours thereafter became the wife of the debtor's brother.

Appeal from circuit court, Pike county.

"Not to be officially reported."

Action by J. W. Leslie against H. A. Huffman and others to set aside a conveyance as fraudulent. Judgment for plaintiff, and defendants appeal. Affirmed.

W. S. Pryor and Jas. Gobla, for appellants. R. T. Burns, for appellee.

BURNAM, J. In October, 1893, the will of A. W. Leslie, devising all his property of every kind, which consisted of a house and lot in Pikeville, Ky., and certain personal property of the value of about \$800, to his wife, Mary Leslie, and appointing her executrix thereof, without bond, was duly probated. In September, 1894, the appellee, J. W. Leslie, who held a note on the testator, A. W. Leslie, instituted a suit thereon against the devisee, Mary C. Leslie. A protracted litigation ensued, which resulted in a personal judgment against Mary C. Leslie in January, 1900, for the amount sued for, with interest and cost; and execution issued thereon in due course, which was returned by the sheriff, "No property found," in March, 1900. After the entry of the judgment, but before the issue of the execution thereon, Mary C. Leslie conveyed the house and lot in the town of Pikeville to the appellant Hester A. Huffman (then Connolly) for the recited consideration of \$800 paid in cash; and thereupon appellee instituted this suit in equity to subject the house and lot to his judgment, in which he alleges that this conveyance was made by Mary C. Leslie with the intent to cheat, hinder, and defraud the creditors of her deceased husband, A. W. Leslie, and especially to prevent him from collecting his judgment, and that the deed was accepted by the appellant Hester A. Huffman with full notice of the fraudulent intent of her grantor, and to aid her in covering up the property devised to her by her husband, for the purpose of avoiding the payment of the debts due and owing by him. All the ma-

terial allegations of the petition, in so far as it is sought to enforce the lien against the house and lot, were denied by Mrs. Huffman. Upon final submission the circuit court held the deed to Mrs. Huffman fraudulent, and subjected the property to the payment of appellee's debt, and Mrs. Huffman appeals.

Section 1906 of the Kentucky Statutes provides that "every gift, conveyance, assignment or transfer of, or charge upon any estate real or personal * * * with the intent to delay, hinder or defraud creditors * * * shall be void as against such creditors. * * * This section shall not affect the title of a purchaser for a valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." Under the statute, a purchaser without notice of the contemplated fraud, for a valuable consideration, will be protected, although the conveyance was made to him by the grantor with a fraudulent intent; but, if he knew of such fraudulent intent on the part of the grantor, he would not be protected, even though he paid the full value of the property, without any intention to aid the grantor in the fraud. The knowledge is the point on which the decision of the question must turn. See *Violett v. Violett*, 2 Dana, 323; *Summers v. Taylor*, 80 Ky. 429. Appellant resided in the same village with appellee and Mrs. Leslie, and had a general knowledge of the character of the litigation between them, and knew that, as a result of that litigation, appellee recovered a judgment against Mrs. Leslie on the morning of the day upon which she purchased the property. She testifies that, after the rendition of the judgment, Mrs. Leslie came to see her at her residence, and offered to sell her the property; that she at once consulted an attorney, who advised her that the title to the property was good, and that there was no lien or incumbrance thereon; that she then went to Mrs. Leslie's room and concluded the trade, paying her \$800 therefor in money, which she had drawn out of the bank for that purpose at Mrs. Leslie's request. It also appears that a few hours after the purchase she was married to T. N. Huffman, a brother of Mrs. Leslie. In addition to selling the house to Mrs. Huffman, Mrs. Leslie on that day collected from the executors of her father \$1,000 due her as heir at law. The facts in the case certainly show that Mrs. Leslie's purpose in these transactions was to place her property beyond the reach of her creditors, and it is hard to believe, under all the proof in the case, that appellant did not know that this was her purpose in making the sale. The relations of the parties, and the haste and secrecy which attended the transaction, can lead to no other conclusion; and, giving some weight to the judgment of the trial

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court as to the weight and credibility of the testimony, we do not feel justified in disturbing the judgment.

Judgment affirmed.

HOLLINS v. GORHAM.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

INSTRUCTIONS AS TO PUNITIVE DAMAGES—SEVERAL INSTRUCTIONS CONSIDERED TOGETHER—EXCESSIVE VERDICT.

1. In an action for assault and battery, an instruction authorizing the jury to award compensatory and punitive damages was not prejudicial because it failed to tell the jury that it could award punitive damages only in the event they believed the assault was made willfully and maliciously, as the jury was so told by another instruction, and it must be presumed that both instructions were read together.

2. A verdict for \$450 for an assault by a man upon a boy 12 years of age in a public park in the presence of others is not so excessive as to indicate passion or prejudice, though larger than the court would have returned, as the jury, being authorized to award punitive damages, had a large discretion as to the amount.

Appeal from circuit court, Logan county.
"Not to be officially reported."

Action by Walter Gray Gorham, by next friend, against G. M. Hollins, to recover damages for an assault and battery. Judgment for plaintiff, and defendant appeals. Affirmed.

Orewdson & Drake, for appellant. J. S. Hooker and M. F. Moore, for appellee.

PAYNTER, J. The appellee, Walter Gray Gorham, by his next friend, instituted this action against the appellant to recover damages for an assault and battery made upon him by the appellant. He admitted the assault, but justified it upon the grounds of self-defense. The proof failed to establish that the assault was made in self-defense. However, the court submitted to the jury the question as to whether it was so done. Under the first instruction, the jury was authorized to assess compensatory and punitive damages if the striking was not done in self-defense. By instruction No. 3, the court told the jury that it could only award punitive damages if the striking was done willfully and maliciously. It is insisted that the court erred because it did not tell the jury in the first instruction that it could only award punitive damages in the event the striking was done willfully and maliciously. It was the duty of the jury to consider both instructions, and presumably they did so. Had it been in better form to have embodied the substance of instruction No. 3 in No. 1, the appellant was not prejudiced by a failure to do so; nor could the jury have been misled, because the conditions upon which the jury was authorized to award punitive damages were clearly stated in a separate instruction.

Again, a reversal is asked because the verdict of \$450 is excessive. The assault was made without justification or without sufficient excuse. It was done in a public park in the presence of others. It was upon a boy 12 years of age. Before doing so, the appellant, a full-grown man, picked up a rock, and some testimony tends to show that he had it in his hand at the time he struck the appellee, but he did not strike him with the hand with which he held it. He was tried by a jury of his peers. They were the judges as to whether or not it was an aggravated assault. They were authorized to award punitive damages, and, having done so, we are not disposed to disturb the verdict. A jury has a large discretion in fixing the amount of its verdict where punitive damages may be awarded, and we are unwilling to say that the amount of the verdict indicates that it was induced by passion or prejudice of the jury. While we would not have awarded so large an amount as was given by the jury, still that fact would not justify us in setting aside the verdict and in ordering a new trial.

The judgment is affirmed.

MITCHELL v. STODDARD CO. BANK.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

APPEAL AND ERROR—PARTIAL TRANSCRIPT—SCHEDULE—REVERSAL OF JUDGMENT ON WHICH JUDGMENT APPEALED FROM WAS BASED.

1. A schedule not filed within 90 days after the appeal was granted was filed without authority of law.

2. A schedule filed on an appeal which was afterwards abandoned cannot be recognized on another appeal, taken more than a year thereafter.

3. Where the judgment appealed from was based on and merely intended to carry into effect another judgment, which has since been reversed, it must also be reversed.

"Not to be officially reported."

Petition for rehearing. Granted.

For former report, see 65 S. W. 839.

R. A. Mitchell and Hazelrigg & Ohenault, for appellant. W. M. Smith, for appellee.

HOBSON, J. The judgment appealed from herein was rendered on January 28, 1898. The appeal before us was sued out before the clerk of this court on January 19, 1900. No schedule was filed on this appeal. The partial transcript which is before us was made out on a schedule filed in the lower court eight months after the judgment was rendered, and an appeal granted by that court. That appeal was abandoned, and never taken. The schedule was not filed within 90 days after the appeal was granted, and was therefore filed without authority of law. The transcript before us is therefore not made out in accordance with the

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Code. A schedule filed on one appeal, which is afterwards abandoned, cannot be recognized on another appeal taken more than a year afterwards. *Geoghegan v. Beeler*, 9 Ky. Law Rep. 407; *Price v. Wills' Adm'r*, 9 Ky. Law Rep. 398; *Hackney v. Hoover* (decided Feb. 18, 1902) 67 S. W. 48.

Our attention is called in the petition for a rehearing to the fact that the judgment of January 28, 1898, was based on a previous judgment of the circuit court, and merely carried it into effect; and that on October 19, 1900, this court reversed the original judgment on which the judgment of January 28, 1898, was based, and adjudged that appellant was entitled to credit in the sum of \$8,115.75 in addition to the credits allowed him by the court. It is thus shown that the judgment before us is erroneous, as the judgment on which it was based has been reversed since it was rendered. We must assume the court followed the previous judgment, for it is so recited in the judgment of January 28, 1898. The court could not then give credit for the \$8,115.75, for the mandate of this court directing this to be done was not ordered for more than a year afterwards. The transcript of the former appeal has been made part of the record on this appeal. It therefore appears that the judgment appealed from is to this extent erroneous. The opinion heretofore filed is modified, and the affirmance on this branch of the case is set aside.

The judgment appealed from is, to the extent indicated, reversed, and cause remanded for a judgment and further proceedings not inconsistent with this opinion.

WATTS v. METCALF.¹

(Court of Appeals of Kentucky. Feb. 28, 1902.)

MECHANICS' LIENS—LIEN OF SUBCONTRACTOR—AUTHORITY OF AGENT.

1. Under Ky. St. § 2467, providing that no lien shall exist in favor of a subcontractor in case the contractor himself is not entitled to a lien, where the owner owed the principal contractor at the time the subcontractor's notice for lien was served, but afterwards resumed possession of the property because of the contractor's unnecessary delay in completing the work, and used the amount he owed the contractor in paying for finishing the work, as the contract stipulated he might do in that event, the subcontractor has no lien.

2. The architect, being the owner's agent merely to see that his contract with the builders was performed, had no authority to alter the contract, or to make a new one, and therefore could not bind the owner by a contract to pay the subcontractor.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by Thomas P. Watts against J. G. Metcalf to enforce a lien. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel B. Kirby, for appellant. Helm, Bruce & Helm, for appellee.

O'REAR, J. Appellee, as owner of a lot in Louisville, contracted with Kimbrel & Bro. to build a house on the lot. The contract provided for the superintendency of the work by an architect selected by appellee. Upon the architect's estimates of work done, 85 per cent. of the estimate was to be paid to the contractors. On the completion of the work the part of the price reserved was to be paid. If the contractor failed to do the work, or failed or neglected for an unreasonable length of time to prosecute the work, the owner was at liberty, upon 48 hours' notice to the contractors, to terminate the contract, take possession of the premises, complete the work, and apply whatever balance they owed on the estimates to paying for the cost of finishing the job. Appellant was a subcontractor doing the plumbing. The contractors having neglected the work, or delayed it unnecessarily, the owner elected to resume possession of the property, and to finish the building, as stipulated in the contract. Thereupon the subcontractor (appellant) gave notice of his services and claim of lien. Appellee contends that he was not then nor thereafter indebted to the principal contractor. Upon this point the proof is conflicting, and by no means satisfactory. We do not feel free, however, under the state of proof, to interfere with the chancellor's decision on that point.

Did the proprietor have the right to appropriate to the completion of the building such sum as he was owing the principal contractor when the subcontractor's notice for lien was served? It will be observed that section 2467, Ky. St. (in force when the rights of the parties to this suit attached, which was prior to the amendment of March 21, 1896), provides "no lien shall attach [to the subcontractor] unless notice in writing be given to the owner that a lien will be claimed; in such case it shall be the duty of the owner, if he, at the time of receiving such notice, is indebted to the contractor or subcontractor, to withhold a sufficient amount to satisfy the claim of the party so notifying him, provided his indebtedness be enough to pay the same; * * * but no lien shall exist in favor of such person in case the contractor himself is not entitled to a lien." The owner was entitled to have the benefit of his contract with the builders. The subcontractor's rights were dependent upon, and could not be greater than, the original contractor's. The owner had the right, therefore, to apply the balance in his hands owing the contractor, when the subcontractor's notice was given, to the completion of the job under the terms of the contract. This he seems to have fairly done.

By an amendment offered to be filed it

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was endeavored for appellant to recover, because, it was alleged, the architect in charge for appellee had agreed with appellant, if he would complete the work of plumbing, appellee would pay him, notwithstanding the contractor's quitting. It was not shown, but was denied by the appellee when testifying, that the architect had authority to bind appellee by such an agreement, if made. There was nothing in his duties making it even apparently within their scope for the architect to bind the owner by such an agreement. He was there as the owner's agent to see that his contract with the builders was performed, not to alter it or make new ones. The pleading was properly rejected.

On the whole case we see no grounds for reversal. Judgment affirmed.

WYETH et al. v. RENZ-BOWLES CO.¹

(Court of Appeals of Kentucky. Feb. 26, 1902.)

CORPORATIONS—NOTICE TO PRESIDENT NOT NOTICE TO CORPORATION—PURCHASER FOR VALUE—PAYMENT FOR GOODS IN SHARES OF STOCK—ESTOPPEL TO DENY OWNERSHIP—ATTACHMENT.

1. Where one of the organizers of a corporation turned over to the corporation a stock of merchandise, receiving in payment shares of the corporation, his knowledge of the fact that he held part of the goods as factor, merely, did not charge the corporation with notice of that fact; though he was president of the corporation.

2. The corporation, having paid for the goods in shares of stock, was not a purchaser for value, so long as the shares remained in the hands of the person from whom it bought the goods; and, having notice when it came to distribute its assets to stockholders that he did not own all the goods, it should have retained a sum sufficient to satisfy the claim of plaintiffs, the real owners of a part of the goods.

3. As plaintiffs, upon the destruction of the goods by fire, notified the corporation that they held policies of insurance covering their interest in the goods, but, at the earnest solicitation of the corporation, agreed to permit it to collect the entire insurance under a policy which it held, in order to save confusion and delay,—the understanding being that the corporation would pay plaintiff's claim out of the proceeds of the insurance,—the corporation is estopped to deny plaintiff's ownership of the consigned goods.

4. As it is not shown that plaintiffs knew of the intention to transfer the goods to the corporation, or knew of the transfer when it was made, or that the corporation has suffered by their failure to assert their claim sooner, they are not estopped to now assert their claim.

5. The fact that the attorney of plaintiffs, under a mistake, first brought suit against the consignee of the goods individually to recover the balance due them thereon, does not estop plaintiffs from now asserting their claim against the corporation, as that suit was dismissed when the mistake was discovered, and especially as the corporation did not change its position because of the error.

6. The fact that defendant corporation, having no property in the state subject to execution, was proceeding to a liquidation, and, while holding out deceptive assurances to plaintiffs, was distributing its net assets among its stock-

holders, was sufficient to authorize an attachment.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by John Wyeth & Bro. against the Renz-Bowles Company to recover the value of goods alleged to have been converted by defendant. Judgment for defendant, and plaintiffs appeal. Reversed.

John J. McHenry, Humphrey, Burnett & Humphrey, and Lem H. McHenry, for appellants. Kohn, Baird & Spindle, for appellee.

O'REAR, J. In April, 1898, F. J. Renz, who was then doing business as Renz & Henry, together with W. T. Bowles and J. B. Spradlin, organized the appellee corporation, the Renz-Bowles Company. Each of these parties were, before the organization of the corporation, engaged in the wholesale druggists and druggists' sundries business at Louisville, Ky.; the corporation taking over the wholesale drug business of Renz & Henry, and the druggist-sundries business of the Bowles-Spradlin Company. The corporation was capitalized at \$60,000, of which Renz took 350 shares in payment of his stock of merchandise, Bowles took 150, and Spradlin 100. The stock was represented as fully paid up and nonassessable. Some time prior to the organization of this corporation, appellants, John Wyeth & Bro., who were wholesale druggists or manufacturing druggists at Philadelphia, had consigned to Renz & Henry a stock of drugs valued at about \$5,000, under an agreement, in substance, that Renz & Henry were to take the stock and hold it as the property of the consignors. They were to make such sales of it to the consignees' customers as they could. Once a year the stock was to be invoiced, and the consignees were to pay according to a schedule price fixed upon it for such parts as had been sold. They had the right to order other goods to supply the place of those sold, which were to be held under like terms. They, however, were consigned or billed at 60 or 90 days. This mode of treatment of the account was continued for several years, up to the time of the organization of the corporation. At that time appellants' stock on hand and in the possession of Renz & Henry was of the value of about \$2,700. In the organization of the company, Renz turned over this stock to the corporation at an appraisement, taking in exchange for it and his other stock the shares of the corporation to the extent of \$35,000. The corporation paid him no money or other property for this exchange. It is in proof that Renz notified appellants of the transfer, but it is not shown that he told them that he was taking in exchange for their goods the stock of the corporation issued to himself; nor does it appear that he apprised them that the corporation would hold the consigned goods

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

on any other than the terms upon which Renz & Henry had taken them. In October, 1898, the stock of drugs and druggist sundries in the possession of appellee, including the consigned goods of appellants, were destroyed by fire. Appellee notified appellants of their destruction. Appellants at once asserted their claim to appellee that these goods were held upon consignment, and that they were appellants' goods; that appellants had insurance effected on its own behalf covering throughout the country their stocks of consigned goods; and that appellants would undertake to settle with the insurance company direct for their loss. Appellee urgently insisted, however, that it be permitted to settle the loss, claiming that its policies covered the goods, and that, if appellants' plan was pursued, it would result in probable confusion and consequent delay, and therefore to the loss of appellee. The negotiations thus carried on covered some weeks, finally resulting in appellants' agreeing to permit appellee to make proofs of the loss, and collect from the insurance company the value of these goods, with the distinct understanding that appellee was to pay within one week for their value to appellants, or to assign to appellants specific policies of insurance to the extent and amount of their unpaid bill. Various delays occurred in this settlement,—at least, were reported to have occurred,—by which the matter was postponed until February or March of the following year. Appellants all this time insisted upon the payment of their money or the assignment of the policies as per the agreement. Appellee at no time suggested any excuse for not doing so, other than that there was some delay in getting settlements with the insurance companies, and that as soon as it collected the money it would remit to appellants. These representations continued for a long time after appellee is shown to have collected at least \$40,000 or more of the insurance. Finally, when about all the insurance was collected, and when appellants' insistence had assumed an imperative form, threatening litigation and attachment, appellee for the first time disclaimed its obligation to appellants on account of this consigned stock, and claimed that it had bought the stock for value from Renz & Henry, and had fully paid for it, and that it was Renz's individual debt, for which the corporation would not be liable. It appears that before this, or at least before appellants' suit, appellee had collected so much of the insurance, the total of which was about \$62,000, that it was able to pay off all of its other debts, including \$1,000 to appellants on the liability for the consigned goods, and had made a distribution of several thousand dollars each to the stockholders, including Renz. When appellants learned of this, which they did, apparently, through other sources than appellee, they brought this suit against appellee, charging

the conversion of their consigned goods, and seeking to recover their value, after allowing the credit of \$1,000 above named, and took out attachments against its property, which were executed by garnishing the insurance companies that had not yet settled in full. Enough money was attached by this proceeding to satisfy appellants' claim, which was paid into court. It develops that the officers of appellee corporation were Renz, as president and manager, Bowles, as vice president, and Spradlin, as secretary. The case was tried without the intervention of a jury by a special judge, who dismissed appellants' petition, and directed the attached fund to be turned over to appellee.

It is the contestation of appellee that the arrangement between appellants and Renz & Henry was not in fact a consignment, but was a sale of the goods; that the alleged consignee was clothed with apparent title, with full right of sale on his own terms, and with absolute possession, without mark to indicate its nature as being different from its apparent one; that therefore appellee was not a factor, but the owner of the property, in fact, and to all intents and purposes. Were this a controversy between an innocent purchaser without notice of appellants' claim and appellants' dormant equity, we might be willing to agree to its view without further argument. But we do not consider this to be such a case. As between appellants and Renz, their agreement was enforceable; and so long as the property in question could be identified, or its proceeds could be certainly traced, their lien would be enforced. It is equally true that the agreement would likewise be enforced against others who acquired the property with notice of appellants' claim and title, or who had acquired it without having paid a valuable consideration. For appellee it is said that it was a purchaser for value and without notice. The testimony is that neither Bowles nor Spradlin is shown to have had actual knowledge, before the formation of the company and the issue of the stock to Renz, of the conditions upon which Renz held the Wyeth merchandise. It is furthermore shown that upon the formation of the company the 350 shares of the capital stock of appellee company were issued by it to appellee, who thereby and thereupon became its president, and owner of more than one-half of its capital. We are not inclined to rest our decision to any extent upon the fact that, because Renz was the president of appellee, it was thereby affected with notice of his knowledge in this particular transaction. For it may be fairly assumed that if he contemplated, as it is now claimed that he did, a fraud upon either appellants or appellee in exchanging appellants' goods to appellee, and taking the shares of stock to himself, he would not probably have divulged to the corporation the truth. We recognize the soundness of

the rule stated in 4 Thomp. Corp. §§ 5205, 5206: "It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject." What we do hold is that in that transaction appellee was not a purchaser for value.

For appellee it is argued that the exchange of its capital stock to Renz for the merchandise (the stock exchanged being the equivalent in value to the merchandise taken) was such a sale as satisfies the terms of the rule. Had Renz parted with this stock to another for value, so as to have made the corporation liable to Renz's transferee of the shares, there would have been much force in this argument; but, so long as the shares are in Renz's possession, the court is of the opinion that appellee corporation had actually parted irreclaimably with nothing of value. The certificate of the shares was but the evidence of the company's obligation to the shareholder that upon a liquidation of its affairs he would be entitled to participate in its surplus assets in the proportion that the number of shares represented by the certificate bore to the whole number of shares. As between the corporation and the stockholder in this particular transaction, the certificate did not represent property of the corporation. It was merely an evidence of the stockholder's title to a proportionate interest in the corporation's assets, subject to its debts. In the sense in which it is being treated of here, it was no more than, if, indeed, as much as, would have been the corporation's note for that sum of money to the stockholder, agreeing to pay him upon the liquidation of the company that much money. Pom. Eq. Jur. (2d Ed.) § 751. We therefore hold that when the corporation did liquidate, as it did in this case, after learning of the true state of the transaction between appellants and its stockholder, Renz, and after having learned of the nature of the title to the stock of drugs held by Renz, and transferred in part to it for a certificate of stock,—when it came to distribute the assets among its stockholders, Renz yet holding the identical stock issued to him in payment for these drugs,—it was the duty of appellee to withhold such sum as would satisfy the claim of appellants.

We are furthermore of the opinion that, under the facts shown in this case, appellee is estopped to deny either appellants' title to the consigned stock of drugs, or its liability therefor, and that by these facts: When appellants first learned of the affair, and notified appellee of their determination to present their claim to the insurer for indemnity against loss, at that time also asserting to appellee the nature and extent of their claim upon these consigned goods, they would have received, in every probability, ample indemnity and compensation from that source; but at appellee's solicitation,

and upon its assurance that it would collect the insurance, as a matter of accommodation to appellee, to save it the annoyance and delays and complications that might arise from pursuing any other course, appellants were induced to change their position for the worse, and appellee was enabled to, and did, profit thereby.

Under the facts shown in the record, the pleas in estoppel by appellee against appellants were not well founded. They were: (1) That appellants knew that Renz had sold and transferred this consigned stock to appellee, and stood by for some months, until the fire, without complaint. It is not shown that appellants knew of the transfer before it was made, or at the time it was made, or at any other time when it was their duty and opportunity to speak in protest against it; nor is it shown that appellee suffered anything thereby. (2) Under a mistake, not unnatural, and fully and satisfactorily explained, appellants' attorneys first brought suit against Renz individually to recover the balance owing on this stock of goods; but, upon learning of his error, they dismissed the action without prejudice. There was nothing in that transaction compromising to the present claim of appellants; nor could it, in any event, constitute a bar by estoppel, for it is not shown that appellee changed its position at all, or to any extent, because of that error. Each of the pleas of estoppel should have been denied.

We are furthermore of the opinion that appellee having no property in this state subject to execution, yet proceeding to a liquidation, and having settled with other creditors with something of a compromise, and, while holding out deceptive assurances to appellants, it distributed its net assets among its stockholders, these facts constituted grounds sufficient to sustain the attachment in this case.

Wherefore the judgment is reversed, with directions to sustain the attachment and the grounds, and for a new trial under proceedings consistent with this opinion.

WHAYNE et al. v. DAVIS et al.¹

(Court of Appeals of Kentucky. Feb. 26, 1902.)

CONSTRUCTION OF DEED—CONVEYANCE FOR LIFE OF GRANTOR—REVERSION TO HIS HEIRS—PARTIES TO ACTION—SALE OF LAND TO PAY DEBTS OF DECEDENT—TITLE OF PURCHASER—PRESUMPTION THAT LIEN DEBT IS BARRED BY LIMITATIONS—TAX SALE AS CLOUD UPON TITLE.

1. A deed conveying land to grantor's wife for the life of grantor, "and at his death to revert and reinvest in fee simple to his heirs at law, or devisees, should he leave a will," passed only a life estate, the grantor retaining the fee, which he had the right to convey to another so as to defeat his heirs.

2. The grantor having subsequently conveyed the land to others subject to a trust for the

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

payment of his debts, to an action by them after his death to settle his estate, and to sell the land to pay debts, neither his heirs nor the heirs of his wife were necessary parties, they having no interest in the land.

3. A debt which was a lien on the land, having been due more than 15 years, was presumptively barred by limitations; and therefore the fact that the holder of that debt was before the court only by constructive service of process furnishes to the purchaser at the decretal sale no ground of exception to the report of sale, especially as the creditor, though the debtor has been dead two years, has failed to present his claim, and must, by reason of his laches, be now required to look to the proceeds of sale, and not to the property.

4. Exceptions to the report of sale on the ground that there were tax liens on the property were properly overruled, as the taxes may be paid out of the proceeds of sale.

5. Tax sales of the property previously made were a cloud upon the title of the purchasers, and the court should, before confirming the sale, have determined the validity of those sales, or have taken some steps to protect the purchasers.

6. A judgment for the sale of a city lot which gives the street on which the lot is located, the beginning corner, and the frontage and depth, sufficiently describes the property.

Appeal from circuit court, Jefferson county; chancery division.

"Not to be officially reported."

Action by R. N. Davis and others against the heirs and creditors of David Davis and others to settle the estate of David Davis, and for a sale of land to pay debts. Judgment confirming sale of land, and T. H. Whayne and others appeal. Reversed.

McDonald & McDonald, for appellants. Geo. L. Everbach, C. H. Shield, and J. B. McCormick, for appellees.

WHITE, J. In November, 1893, David Davis executed and delivered to his wife, Sudie Shea Davis, a deed to certain property in Louisville, the habendum of which deed is as follows: "To have and to hold and to her use and control for and during the life of the grantor herein, David Davis, and at his death to revert and reinvest in fee simple to his heirs at law, or devisees, should he leave a will." The grantee, Sudie Shea Davis, died before the grantor; and after her death, on the 23d of September, 1897, David Davis executed a deed to R. N. Davis for the same property deeded to Sudie Shea Davis in 1893. This deed to R. N. Davis contains this explanatory clause: "This conveyance and contract is made by said first party, and to continue for and during his own life; and at his death remainder in fee is to be and become and is hereby conveyed in fee simple to R. N. Davis and his children, father and children in equal parts, subject only to the payment of any and all debts which are or may be due or unpaid by the first party hereto; and, should R. N. Davis not survive the first party hereto, then the remainder in fee simple is to pass to the heirs of R. N. Davis, second party hereto,—that is, to his children, who will be at law his legal heirs, in equal parts,— $\frac{1}{4}$ to each of his four

children. The intent of this deed as to remainder at the death of the first party hereto being that, if R. N. Davis survives said first party, then R. N. Davis becomes fee-simple owner of one equal part of the property above described, and each of his four children the same part, share and share alike, and equal with him." This action is by the grantee R. N. Davis, as trustee under the deed of September, 1897, and by all the grantees therein (Davis and his four children), to settle the estate of David Davis, and for a sale of the land to pay debts of David Davis, including a mortgage on the property. The defendants to the suit are the heirs at law of Sudie Shea Davis and of David Davis, and creditors of David Davis. Some of the heirs at law are nonresidents of this state, and were brought before the court by warning order only. The chancellor below construed the deed of 1893 to Sudie Shea Davis as conveying only a life estate during the life of the grantor, with a reversion or remainder to himself, and that, therefore, owning the fee, David Davis had the power and right to execute the deed of 1897 to R. N. Davis for himself and children; that, subject to the payment of the debts of David Davis, the grantees in the deed of September, 1897, took a fee-simple title. He therefore decreed a sale to pay debts of David Davis, which being had, these appellants became purchasers of different tracts, and filed exceptions to the reports of sale on the ground that they could not obtain title in fee; it being alleged: First, that the deed to Sudie Shea Davis conveyed the fee, and the title was in her heirs; second, that, if that position was not correct, the deed of 1893 conveyed the fee-simple title to the heirs of David Davis, and the title was in them. In either case the deed of 1897 was void and passed no title, because David Davis had no title. A third ground of objection was that these heirs at law, who were nonresidents, and only constructively summoned, were not precluded by the judgment and decree of the chancellor upholding the claim of R. N. Davis and children under the deed of 1897, as there is no authority to maintain an action to quiet title against one only constructively summoned. An exception presented by appellant Whayne is that on the property purchased by him there was reserved a vendor's lien in the year 1882, which had never been released or satisfied of record, and that the vendor, J. F. Montgomery, was proceeded against as a non-resident, and brought before the court by constructive process only; that there was no presumption that the vendor's lien had been satisfied, and for that reason a title in fee could not be made to him. All the appellants presented as ground of exception that there had been tax sales of the property, which was a cloud thereon, having been bid in for the state for some years, and by individuals in other years. Each and all

of these exceptions were overruled, and the reports of sale confirmed, from which this appeal is prosecuted.

We are of opinion that by the deed of 1893 from David Davis to his wife, Sudie Shea Davis, there passed from David Davis only an estate during his life, and that the fee simple was not conveyed at all, and did not pass to any person. That conveyance is to Sudie Shea Davis alone, as grantee. The estate conveyed to her is expressly limited to an estate for the life of the grantor, but to make this perfectly clear the draftsman adds, "and at his death to revert and reinvest in fee simple to his heirs at law, or devisees, should he leave a will." To take the words literally, "revert and reinvest" would necessarily mean that the title in fee was to return and be again in David Davis, and as he was to be, by the time fixed, dead, it was expected the title would pass, under the law of descent, to his heirs; but it was also contemplated that the grantor, David Davis, might desire it to go to others than as provided by law, in which case he could devise by will to whom the property should go. This shows a clear intent to keep the fee-simple title, after the expiration of the life estate created, at the disposal of David Davis, so that, instead of conveying the fee-simple title, the deed itself provides that the grantor may dispose of the fee as he may desire. This expression, in connection with the fact that there is no attempt to convey to any person the fee, is sufficient to show that David Davis retained the fee in himself. The case of *Alexander v. De Kermel*, 81 Ky. 345, is directly in point. The court there held that a conveyance to one for life, and then to the grantor's heirs, created a reversion in the grantor, and upon the death of the life tenant the grantor could devise the estate. That case was well considered, and is conclusive of the question. The only difference between that case and the one at bar is that the deed of *Alexander* was for a life estate, depending upon the life of the grantee, while here the estate depends on the life of the grantor. The reasoning and authority cited to support that case are equally applicable here. Upon reason and authority, therefore, we conclude that David Davis retained the fee to the property, or, rather, never conveyed it by the deed of 1893 to his wife; and therefore he had title, and could convey under the deed of 1897 to R. N. Davis the title in fee after the death of David Davis. Having reached this conclusion, it is unnecessary to determine who of the heirs at law of Sudie Shea Davis or of David Davis were before the court by constructive service, or the effect of such service in this case, as, in our opinion, R. N. Davis and his children were the owners in fee of the land, subject to the trust to pay the debts of David Davis, and they alone, with the creditors of David Davis, were necessary parties to this ac-

tion. This action seeks only to sell the property embraced in the deeds to Sudie Shea Davis in 1893, and also to R. N. Davis in 1897. Indeed, it appears that this is all the property David Davis owned. The heirs at law of Sudie Shea Davis and of David Davis had no right to or claim upon the land by reason of their relationship to either, and were not necessary or proper parties to the suit, unless they were creditors of David Davis, which does not appear.

The exception of appellant Wayne on account of the lien of Montgomery for purchase money was held insufficient because the lien debt had been due more than 15 years, and was therefore presumptively barred by limitation. The facts pleaded on this exception are that on October 15, 1882, Montgomery reserved a lien to secure the payment of two notes of \$137.50 each (the last one due October 15, 1884), and that Montgomery had not been actually served with process in this action, though made a defendant (being before the court only by constructive service), and that, for aught the record shows, this lien may exist on the land by reason of payments and new promises by David Davis, so as to take it out of the statute of limitation. The petition making Montgomery a party avers that the two notes had been paid by David Davis in his lifetime. We are of opinion that there was no error in overruling this exception. The presumption of law is that the debt of Montgomery is paid, and it is therefore provided that, on account of this presumption, 15 years will bar a recovery on the notes. True, this presumption may be rebutted by showing a new promise, or extension by payments. In this suit, which is in the nature of a suit to settle the estate of a decedent, and for a sale of realty to pay his debts, the lienholder, or possible lienholder, and creditor, is made a party, and constructively summoned to appear and present his claim, if any he has; and, besides, by the order of reference to the master to ascertain and report all debts owing by the decedent, notice to creditors was provided. Montgomery did not appear, although Davis had been dead over two years, and present a claim against the estate or that property. We conclude, therefore, in view of these facts, that, if Montgomery has a claim against the estate of Davis or against the property, he would now, after decretal sale, look to the proceeds of sale, and not to the property. Beyond the presumption of a bar of his claim by reason of the statute of limitation, he would be chargeable with such laches in presenting his claim against the estate or the property as would preclude a further claim against the real estate. We conclude that the purchaser, Wayne, got title free from the vendor's lien of Montgomery, if any existed, and that there was no error in overruling this exception.

To sustain the exceptions as to the cloud

on the title by reason of the tax sales, it was pleaded there were actions pending for possession of the property under the sales for the year 1897, and that there had been sales for 1898 to the state, and for 1899-1900 to certain persons, and for neither of these years had there been a redemption. It was further pleaded that taxes due the city of Louisville for the years 1894 to 1901, inclusive, which were liens on the property. The court, in overruling these several exceptions, held that the taxes due could be ascertained and paid out of the fund in court paid by the purchasers. In this conclusion the court was not in error, so far as the taxes were simply unpaid, and were outstanding liens against the property, or in actions to enforce the lien for city taxes. So far as these taxes were concerned, the court could direct the commissioner to pay off and satisfy the tax liens, which of itself would release or destroy the lien on the property. But as to that property sold for taxes, and as to which the limit of two years for redemption had run, the question presents a more serious phase. Likewise as to the tax sales for 1899-1900, for which there existed the right to redeem by the owner by paying the penalty. These tax sales were all clouds on the title, and the purchasers were entitled to be fully protected before being required to pay the purchase money over their objection. It may be that the tax sales were regular and passed title after the statutory period given in which to redeem had expired. If so, no provision for redemption could be made by the court out of the purchase money paid in, for the reason that no right of redemption then existed. The court, at least, should have consolidated the cases seeking to collect the taxes and to obtain possession of the property under the sales with this case, and adjudicated the matter before confirming the reports of sale, or should have in some way brought the matters before the court for determination before or at the time of the judgment of confirmation of the sales to appellants.

The exceptions of appellant Heissman relate only to the description of the lots he purchased. We are of opinion that the description given of the lots purchased by Heissman is sufficient in each case to identify the property sold. The description is: "Beginning in the south line of Eddy street, at a point $291\frac{3}{12}$ feet west of the southwest corner of 19th and Eddy streets, running thence with the south line of Eddy street 25 feet; thence back southwardly at right angles to Eddy street 63 feet, more or less." This describes a lot 25 by 63 feet on Eddy street, and gives the beginning corner. There can hardly be a dispute about the location, from the description given. The exceptions were all submitted as on demurrer, and the ruling of the court as on demurrer held each and all insufficient. The facts pleaded therein were taken as true, and the

exceptions were adjudged insufficient by the lower court.

For the reasons given supra, we conclude there was no error in adjudging the exceptions of Heissman to be insufficient, and in confirming the sale to him; but as to the other appellants the court erred in adjudging the exceptions insufficient, and confirming the sales to appellants Whayne, Heeb, Patton, and Schopp. Wherefore the judgment as to appellant Heissman is affirmed, but as to appellants Whayne, Patton, Heeb, and Schopp the judgment of confirmation is reversed, and the cause remanded for further proceedings consistent herewith.

POSTELL v. CRUMBAUGH.¹

(Court of Appeals of Kentucky. Feb. 27, 1902.)

HUSBAND AND WIFE—LIABILITY OF WIFE AS HUSBAND'S SURETY—SUFFICIENCY OF CONSIDERATION AS TO WIFE.

Where husband and wife signed a note jointly, the word "Principal" appearing after the wife's name, when the fact was that the note was executed for the purpose of taking up a note executed by the husband with another as surety, the wife was surety, merely, and was therefore not bound, though a mare for which the note was originally executed had been taken to a farm on which husband and wife jointly were carrying on the business of breeding thoroughbred horses; it appearing that the mare was still the property of the husband.

Appeal from circuit court, Christian county.

"Not to be officially reported."

Action by Peter Postell against Ida B. Crumbaugh on a promissory note. Judgment for defendant, and plaintiff appeals. Affirmed.

John Feland and J. T. Hanberry, for appellant. Joe McCarroll, for appellee.

HOBSON, J. Appellee, Ida B. Crumbaugh, while the wife of S. R. Crumbaugh, gave a note to appellant, Postell, signed by her as principal, and by her husband as surety, to take up a note which her husband had previously given to Postell, with one Williams as surety; Williams being unwilling to stand longer on it. When sued on this note, she pleaded her coverture. The circuit court held the defense bad, but on appeal to this court it was held good, and the judgment reversed. The court, after quoting section 2127, Ky. St., said: "It is admitted here that under the terms of this statute, she is not liable, but it is claimed (and it was so held below) that she has been guilty of such fraudulent conduct as to estop her from relying on the statute made for her protection. These are not disputed facts, and, admittedly, the only thing the wife did was to sign the notes at her husband's request. It is true, the word 'Principal' appears written after her name, and the word 'Surety' after

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

her husband's name. But this could not have deceived Postell. He knew this was not in fact the true state of case. In transactions of this kind the courts must look to the substance; and, whatsoever the parties themselves may designate or name the undertaking of the wife, if it in fact be an attempted assumption by her of the debt of another, she must be held not liable, unless she binds herself in the statutory mode. Any other course will speedily result in a nullification of the statute." *Crumbaugh v. Postell*, 49 S. W. 334. This case followed *Russell v. Rice*, 44 S. W. 110. In the subsequent case of *Bank v. Stitt*, 52 S. W. 950, the wife had assumed a debt of the husband to the bank, and executed her note to it, on its surrendering its note to her, at the request of the bank, to obtain a loan from it to her. She was held not liable on the note. See, also, to the same effect, *Milburn v. Jackson*, 52 S. W. 949. On the return of this case to the circuit court, it was tried again, and the court, following the above cases, gave judgment in favor of the defendant. On this trial, proof was introduced showing that the husband bought a mare of Williams, and borrowed of Postell the money to pay for it; Williams going his security in the note to Postell. This was about the year 1898. The mare was taken to a farm on which she and her husband jointly were carrying on the business of breeding thoroughbred horses at the time the note sued on was given, which was after the enactment of the present statute. The mare was on the farm at the time she signed the note, and it is insisted that she received a consideration for the assumption of the debt, and cannot rely on her coverture in avoidance of the note. According to the evidence, the mare was the property of the husband. She was bought by him, and the debt was his. The wife was in no wise liable for the debt before the execution of the note sued on. By it she assumed the debt of the husband. If the statute may be evaded by simply changing the form of the transaction, as where she signs the note as principal, and he as her surety, instead of his signing as principal, and she as his surety, according to the real truth, its purpose would be defeated.

Judgment affirmed.

McKINLEY v. McKINLEY.¹

(Court of Appeals of Kentucky. Feb. 28, 1902.)

STATUTE OF FRAUDS—DEED EXECUTED PURSUANT TO PAROL CONTRACT—CONSIDERATION.

1. A vendor by parol contract having elected to make a deed rather than repay the consideration paid him, the deed is not void under the statute of frauds.

2. Though the bargain is an unequal one, yet,

as there was a consideration, and no force or duress is shown, the deed will not be set aside.

Appeal from circuit court, Harrison county.

"Not to be officially reported."

Action by W. M. Moore, next friend of Geo. W. McKinley, against John Q. McKinley, to set aside a deed. Judgment for defendant, and plaintiff appeals. Affirmed.

Swinford & Webster, for appellant. Jewett & Jewett, for appellee.

WHITE, J. This is an action brought by W. M. Moore, as next friend of Geo. W. McKinley, to set aside a deed executed by Geo. W. McKinley to appellee, John Q. McKinley. For cause of action, the petition alleges that appellant is an old man, illiterate, as well as infirm by reason of his age, and the deed sought to be canceled was obtained without consideration, by fraud and by force and threats of personal violence. The deed recites a consideration of \$100, but the petition alleges that this recital is false and untrue; that in fact there was nothing paid, or promised to be paid. The answer denies there was any fraud, force, or threats of violence used to induce appellant to sign and acknowledge the deed, but says it was executed freely and voluntarily, and in consideration of \$100 theretofore paid for and on behalf of appellant, and at his instance and request, by Joshua McKinley, father of appellee, and that at the time of such payment appellant had agreed to execute the deed to the land to Joshua McKinley; that by agreement, and for a consideration, Joshua McKinley had directed the deed to be made to appellee. The answer denied the mental incapacity of appellant to execute such instruments. To this answer there was a reply of denial. Upon these issues, proof was taken, and, on hearing, the chancellor dismissed the action and denied relief; hence this appeal.

The deposition of appellant, Geo. W. McKinley, was taken on the issues, and from that deposition we conclude that he had sufficient mind to know and understand the nature of the transaction and business at hand when he signed the deed. The answers are clear and decisive that he did know what he was doing; that he objected and protested, and refused to sign the deed. He attempts to relate what occurred there, as well as the day the survey was made, when he helped carry the chain. By his deposition alone, we think the question of mental incapacity is taken out of the case.

On the question of force or threats of violence, consideration, and fraud, the proof shows that Joshua McKinley had paid for his brother, Geo. W. McKinley, appellant, \$100, on an execution, and for which appellant had agreed in parol to deed to Joshua this 10 acres of land embraced in the deed. The deed to Joshua had never been made, nor had appellant repaid the \$100. By an

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

arrangement between Joshua McKinley and appellee, his son, the land was to be conveyed to appellee. A survey was made to obtain description, in which appellant assisted as chain carrier, and showed the corners. The deed was executed after supper at the home of Joshua McKinley. When appellant objected to signing the deed, Joshua demanded payment of the \$100 due. Appellant, being unable or unwilling to pay the money, signed and acknowledged the deed. The land is shown to be worth \$150 to \$200 at the time of the deed, but the exact amount of the money due to Joshua, counting legal interest, does not appear clearly. Interest had run for several years, however. It is not clear that the consideration paid to appellant is unreasonably low for the land, and as it seems to have been in performance of a contract previously made, when Joshua McKinley paid the agreed consideration, there can arise no question of the statute of frauds. *Hunter v. Simrall*, 5 Litt. 62; *Gaines v. Conn's Heirs*, 2 J. J. Marsh. 107. While appellant could not have been compelled to convey, because of the statute, the question cannot arise here, as the contract to convey has been fully executed by the conveyance which this action seeks to cancel because of force and duress. Appellant elected to make the deed rather than repay the consideration paid him, and, while it may have been an unequal bargain, we are of opinion there was no force or duress shown; nor is it true that there was no consideration.

There appears no error, and the judgment is affirmed.

MATHERS v. MATHERS.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

ESTOPPEL—ACQUESCENCE IN DEED—KNOWLEDGE OF TRUTH.

Where land was devised to C. with a provision that, in the event of his death without children, it should go to T., a deed executed by the father of T., an infant, conveying the land to C., and warranting the title against the claim of T., does not operate as an estoppel upon T., though he was present and acquiesced in the making of the deed, as the grantee knew the state of the title, and was not misled by anything that T. did.

Appeal from circuit court, Nicholas county.

"Not to be officially reported."

Action by Charles W. Mathers against Taylor B. Mathers to quiet title to land. Judgment for defendant, and plaintiff appeals. Affirmed.

Hargis & Duncan, for appellant. Kennedy & Williamson, for appellee.

HOBSON, J. Barton W. Mathers had two children,—Walker and Silas W. Walker died before his father, leaving a son, Charles W. Mathers. The father died in the

year 1889, and by his will devised to appellant, Charles W. Mathers, the grandson, 80 acres of land, with this qualification: "But in the event of the death of my said grandson Charles W. Mathers without heirs of his body, then and in that case the said eighty acres of land to descend to, and become the property of, my grandson Taylor Barton Mathers." Taylor Barton Mathers, the appellee, was the son of Silas W. Before the probate of the will, Silas W. Mathers, on February 2, 1889, executed a deed to Charles W. Mathers, by which, "in consideration of one dollar, and other good and valuable consideration moving him thereto," he conveyed to Charles W. Mathers the 80 acres of ground. The deed contains these words: "And the purpose and object of this conveyance being to invest said C. W. Mathers with whatever title and interest which said Silas W. Mathers may now have in said eighty acres of land, and to convey to him an indefeasible title in fee simple thereto, except as against said C. W. Mathers' heirs of his body, and to protect and indemnify said C. W. Mathers against the claim or demand of any one claiming or to claim the same under the will of B. W. Mathers, deceased, save and except the heir or heirs of said C. W. Mathers' body in being at the time of his death. The said S. W. Mathers does by these presents warrant and forever defend said land herein conveyed, and the title thereto, unto said Charles W. Mathers, his heirs and assigns, against the claim or demand of any or all persons claiming or to claim by, through, or under him, or by, through, or under the claim or demand of Taylor Barton Mathers, son of said Silas W. Mathers, his heirs or assigns, forever." After this, on February 11, 1889, the will was probated. On July 18, 1889, appellant, Charles W. Mathers, filed this suit against appellee, Taylor Barton Mathers, alleging in his petition that he had the legal title to, and was in the peaceable possession of, the 80 acres of land; that Taylor Barton Mathers was setting up claim to it, and giving it out in speeches that he owned it, and that Charles W. Mathers had only a life estate in it. He alleged that the deed above referred to was made by Silas W. Mathers by and with the consent and approval of appellee, and that he stood by and acquiesced in the making of the deed, and thereby caused appellant to accept it, and to believe that he was getting a good value for the land, and part with a large and valuable consideration to appellee's father, Silas W. Mathers. By all of which he pleaded that appellee was estopped to deny the validity of appellant's absolute ownership of the land, or to set up any claim under the will. He alleged that his title was quieted, and that he was thereby prevented from selling or disposing of the land, which was his in absolute fee simple. He prayed the quieting of his title, and that appellee be re-

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quired to release all claim thereto. A copy of the deed and will were made a part of the petition. Appellee demurred to the petition, and, appellant failing to plead further, the petition was dismissed.

By the will of Barton W. Mathers a contingent remainder is vested in appellee, Taylor Barton Mathers, in the 80 acres of land; for, if Charles W. Mathers shall die without heirs of his body, then the property, by the terms of the will, is to go to appellee. His rights in the land, so far as appears from the petition, were well known to appellant when he accepted the deed from Silas W. Mathers, appellee's father. There is no allegation in the petition of any fact sufficient to bind appellee by any covenant contained in this deed. It is insisted that he is estopped by the deed, because it was made with his consent and approval, and he stood by and acquiesced in the making of the deed. As appellee is not bound by the deed, the only principle upon which he could be held bound under the allegations of the petition would be an estoppel in pais. But it does not appear from the petition that appellant did not know the true state of the title, or that he was misled in any way by anything that appellee did. The rule is clear that the person who claims the benefit of an estoppel in pais must show that he was ignorant of the truth, and the estoppel never arises where he knew the facts. *Bigelow, Estop.* p. 570; *Brant v. Iron Co.*, 93 U. S. 337, 23 L. Ed. 927; *Walt v. Gover* (Ky.) 12 S. W. 1068. It appears from the record that appellee was only 14 years of age when this deed was made; and, aside from this, appellant, knowing the provisions of the will, must be held to have accepted the deed from Silas W. Mathers relying on the warranty of the grantor, and with full knowledge that appellee was not a party to the transaction, and not bound by it directly in any way. What effect the warranty in that deed might have upon appellee, if he received the assets from the estate of Silas W. Mathers, is a question not now presented. Judgment affirmed.

FT. WORTH & D. C. RY. CO. v. MASTERSON et al.

(Supreme Court of Texas. March 6, 1902.)

RAILROADS—REFUSING TO RECEIVE CATTLE—QUARANTINE AGAINST TEXAS FEVER—VALIDITY.

1. Under Rev. St. 1895, art. 5043c, providing that the commission provided for in article 5043a may establish quarantine lines against Texas or splenic fever for the protection of the live stock of the state, as qualified by article 5043k, providing that any quarantine line fixed by such commission against such disease shall "conform" to the federal quarantine line established by the United States department of agriculture, a state quarantine line against such disease, which was not identical with a federal line, which had also been established, was void.

2. The existence of a void state quarantine line against infected cattle will not justify a railroad company in violating the provisions of Rev. St. 1895, art. 4535, requiring all railway companies to receive freight from connecting lines, and to transport it to destination or to the next connecting line, by refusing to receive and transport cattle consigned on a through bill of lading issued by another company to a point within such void quarantine line, but which defendant company would only have had to carry to a connecting point not within such line.

Certified questions from court of civil appeals of Second supreme judicial district.

Action by R. B. Masterson against the Southern Railway Company and another, in which the Ft. Worth & Denver City Railway Company was impleaded by defendants, upon questions certified to supreme court.

Stanley, Spoons & Thompson, for appellant. W. P. McLean and D. W. Humphreys, for appellees.

BROWN, J. The court of civil appeals for the Second supreme judicial district has certified to this court the following statement and question:

"The above-styled case is pending before us on an appeal from a judgment in favor of appellee and against appellant for damages because of its refusal to receive and transport two cars of cattle shipped from Leighton, Alabama, on a through bill of lading to Seymour, Baylor county, Texas, made by the Southern Railway Company. The cattle were hauled over the Southern Railway and connecting lines to Ft. Worth, and were there tendered to appellant by the Cotton Belt Railway (which road hauled them into Ft. Worth), to be carried and delivered to appellant's next connecting line of railroad in the direction of said place of destination. Appellant's line of railroad connected with the Wichita Valley Railroad at Wichita Falls, and the latter is the only railroad running to Seymour. It was an independent line of railroad. In carrying said cattle en route to Seymour appellant would necessarily have delivered or tendered them to said Wichita Valley Railroad at Wichita Falls. On being tendered the cattle at Ft. Worth by the Cotton Belt Railway, appellant refused to receive them on the ground that there was in force a quarantine line against Texas fever established by the live stock sanitary commission of Texas, which quarantine was fixed along the east line of Baylor county, and lay between Wichita Falls and Seymour. Appellant's line of railroad between Ft. Worth and Wichita Falls did not cross said quarantine line, nor in any wise infringe on the same. Appellant proposed to receive said cattle from its said connecting line, the Cotton Belt Railway, and to carry them to Wichita Falls, under a new contract by which the cattle were to be consigned to the owner at Wichita Falls, but refused to receive them under the through bill of lading, and refused to receive them to be carried to its connecting line at Wichita Falls. Appel-

lee declined to make a new contract, as proposed by appellant. The cattle were unloaded by the Cotton Belt at Ft. Worth in consequence of the refusal of appellant to receive them, and were sold by the latter company as provided by law. At the time referred to, there was established and in existence another quarantine line against Texas fever by authority of the secretary of agriculture of the United States, which was west of Baylor county, and which was not crossed by the railroad in going from Ft. Worth or Wichita Falls to Seymour. The difference between the said two quarantine lines was that the state quarantine line placed Archer, Throckmorton, and Baylor counties in the protected territory, and the national line left them on the outside of said protected territory. The restrictions and regulations pertaining to each line prohibited the transportation of cattle from territory south and east of the respective lines to territory north and west of said lines. Each of said lines provided alone against Texas or splenic fever. Appellee Masterson's ranch was west and north of the federal line, and in King county. Seymour was the nearest railroad station to said ranch.

"Appellant was not a party to the contract of shipment, and was only liable, if at all, by reason of being an intermediate connecting line in the chain of railroads between the initial and terminal points of said haul. Article 4535, Rev. St. 1895, provides, in substance, that every railroad in this state must receive freight from connecting lines when tendered, and transport the same to destination, if on its line, and, if beyond its line, to the next connecting line. Assuming that this statute applied to the transaction under consideration, unless an exception existed in the fact that the state quarantine line against splenic fever or Texas fever justified the refusal to receive the shipment when tendered to appellant at Ft. Worth, the question arose as to the validity of the state line, and, if valid, whether the appellant was justified in its refusal to take the shipment in view of the fact that the quarantine line was located beyond its haul of the same. The evidence in the record shows that Masterson, before purchasing the cattle, made inquiry of the Southern Railway Company at Leighton as to whether there were any quarantine restrictions in the way of shipping them through to Seymour. He purchased the cattle upon the assurance of said company that there was no quarantine line to prevent the cattle being carried directly through to Seymour. He brought this action against the Southern Railway Company and the Cotton Belt for his damages, alleging substantially a breach of warranty on the part of the Southern Railway because of stoppage of the shipment on account of the quarantine. These defendants impleaded appellant as a party defendant, alleging that its refusal to receive the cattle was illegal, because the

ground of refusal, to wit, the said state quarantine line, was insufficient, because the state sanitary commission had no authority to establish said line east of Baylor county, it being different from the national line; second, because, if valid, appellant could have carried the cattle to the next connecting line en route to destination without in any wise violating said quarantine. These two defendants prayed for judgment over against appellant for whatever sums plaintiff might recover against them. Plaintiff, by supplemental petition, adopted that part of said two defendants' answers, and prayed in the alternative against the Southern and Cotton Belt Railways for his damage, if there existed a legal quarantine, and, if not, then against appellant for his damages.

"The foregoing facts and issues rendered the validity or invalidity of the said state quarantine line the controlling question as to the liability of appellant. It becomes material, in determining the question of the validity of that line, to decide whether the power conferred in article 5043c, Rev. St. 1895, upon the live stock sanitary commission of Texas, to protect the domestic animals of this state from contagious or infectious diseases of a malignant character, is limited by article 5043k, requiring conformity with the federal line in establishing a quarantine line against Texas or splenic fever only. Under the articles named, has the state commission power or authority to establish a quarantine line against Texas or splenic fever, different in its location from the one established by the national authorities against Texas or splenic fever? And was the quarantine line established by the state authorities east of Baylor county void because of a want of authority to make said line? Do articles 5043c and 5043k prohibit the state commission from making a quarantine line against Texas or splenic fever different in respect to its location from that established by the secretary of agriculture against Texas or splenic fever? And in this case was appellant warranted and justified in its refusal to receive and carry said shipment to its next connecting line en route to Seymour?"

The articles of the Revised Statutes referred to in the question read as follows:

"Art. 5043c. It shall be the duty of the commission provided for in article 5043a to protect the domestic animals of this state from all contagious or infectious diseases of a malignant character, whether said diseases exist in Texas or elsewhere, and for this purpose they are hereby authorized and empowered to establish, maintain and enforce such quarantine lines and sanitary rules and regulations as they may deem necessary. It shall also be the duty of said commission to co-operate with live stock quarantine commissioners and officers of other states and territories, and with the United States secretary of agriculture, in establishing such in-

terstate quarantine lines, rules and regulations as shall best protect the live stock industry of this state against Texas or splenic fever," etc.

"Art. 5043k. Any quarantine line that may be fixed by the live stock sanitary commission against Texas or splenic fever shall be so fixed as to conform to the federal quarantine line established, or that may be established, by the United States department of agriculture."

By the first-quoted article, the commission was directed to co-operate with the "United States secretary of agriculture," but, after four years' experience, that law was changed by the enactment of article 5043k, whereby the power of the commission to establish a quarantine line against "Texas or splenic fever" is limited to "conformity" with the line established or to be established by the "department of agriculture for the United States." It was the intention of the legislature, in the enactment of article 5043k, to take from the commission discretion in fixing a quarantine line against Texas or splenic fever, and to require the commission to adopt the line then established or which might thereafter be established by the department of agriculture of the United States. The word "conform" was used in the sense of "comply with," "adopt." The purpose was to make one line. We cannot conceive how the commission could fix the line so as to conform to a line established by the "United States department of agriculture" except by adopting the latter line. If this was not the intention, why require conformity to lines which might thereafter be fixed by officers of the United States?

We answer: The line established by the commission of Texas, not being in conformity with the line established by the department of agriculture of the United States as quarantine against "Texas or splenic fever," was without authority of law and void.

Article 4535, Rev. St., provides: "All railway companies doing business in this state shall be and they are hereby required to receive from all other railway companies with which they may connect at the state line of this state, or at any place within this state, or at any or all places where they may cross the line of any other railway doing business or operating a line of railway in this state, all freights and passengers coming to it from such connecting line and destined to points on its line, or to points beyond its line to any other line of railway with which said line may connect or cross, and shall transport the same over its said line to destination, if on its line, or to the next connecting or cross line in the direction of destination, if beyond its line, without delay or discrimination in favor of or against the line from which such freight or passengers are received," etc. By the terms of this statute, the appellant was required to re-

ceive the cattle from the Cotton Belt Railway, and to carry them to the connecting line at Wichita Falls, which would have been required to receive the cattle from the appellant.

We answer further: The existence of the quarantine line established by the sanitary commission of Texas afforded no justification to the appellant for refusing to receive and carry the cattle of the appellee to Wichita Falls.

We, however, do not intend to intimate that, if that line had been valid, its existence would have excused the refusal to carry the cattle to a point not within the forbidden territory. That question is not certified.

CITY OF DALLAS et al. v. DALLAS CONSOL. ELECTRIC ST. RY. CO.

(Supreme Court of Texas. March 6, 1902.)

MUNICIPAL CORPORATIONS—TAXATION OF STREET RAILROADS—FRANCHISES—ORDINANCES—POWER TO EXEMPT FROM TAXATION—APPEAL—FAILURE TO ASSIGN ERROR—WAIVER.

1. The charter of the city of Dallas (section 118) authorized the council to levy taxes upon the franchises and all other property of street railroads; section 135 authorized them to regulate the making of tax lists for taxation of all property within the city limits, and to collect taxes thereupon; while section 134 authorized them to assess the property and shares of "corporations, companies, banks, and such other institutions" as the same were assessed by the state law in such cases provided. *Held* that, construing section 134 in the light of the statutes in force when it was adopted relating to assessment of banking corporations, together with the course of legislation on that subject providing for a special method of taxing banking corporations, it was not intended to limit the power conferred by sections 118 and 135 to tax street railway company franchises to the manner in which they were taxed by the state, but merely to give the council power, if they wished to do so, to adopt the special state laws as to taxation of banking and like corporations.

2. Where a city, by ordinances, imposed upon a street railway company, as a condition for the granting of its city franchises, annual payments called "bonus," "franchise tax," etc., which were not based on any property valuation, its power to impose an ad valorem tax upon such franchises, as authorized by its charter, was not thereby taken away, since, even granting that the ordinances imported a contract of exemption from taxation, there being no legislative authority for such exemption, such contract would be void.

3. Any error in a ruling of the trial court cannot be reviewed in supreme court when not assigned as error in the appellate court.

Error to court of civil appeals of Fourth supreme judicial district.

Suit by the Dallas Consolidated Electric Street Railway Company against the city of Dallas and others. From a decree of the court of civil appeals (65 S. W. 201) reversing a decree in favor of the city, defendants bring error. Reversed.

W. T. Henry and J. J. Collins, for plaintiffs in error. Wood & Hudson and Finley, Etheridge & Knight, for defendant in error.

GAINES, C. J. This case was brought to the court of civil appeals of the Fifth supreme judicial district by a writ of error, and was transferred to the court of civil appeals for the Fourth district. The opinion of the latter court gives a clear and succinct statement of the case, which we adopt, and which is as follows: "Plaintiff in error, the Dallas Consolidated Electric Street Railway Company, instituted this suit to enjoin the city of Dallas and Ford House, its tax collector, from collecting a certain tax imposed by said city on its franchise as a street railway. The cause was tried by the court, and resulted in a judgment dissolving the temporary injunction theretofore granted, and in favor of the city on its plea in reconvention for the sum of \$2,865.50. There being no statement of facts in the record, the findings of fact made by the trial judge must necessarily be adopted by this court as the facts proven on the trial. Plaintiff in error is a private corporation chartered by the laws of Texas, and permitted by the ordinances of the city of Dallas to operate its line of railway on certain streets. In the ordinances granting that right the street railway company was required to pay annually to the city certain fixed sums, designated in some of the ordinances as a 'franchise tax' and in others as a 'bonus,' and in others it is not given any specific name. The aggregate of the sums fixed in the ordinances amount to \$2,600 or \$2,700 annually. These sums were fixed regardless of the value of the property. It was also provided in the ordinances that all policemen and firemen of the city, while on duty, should be carried free of charge; and plaintiff in error has also been compelled by the city to pave and repair the pavement on the streets on which its cars are operated, the expense for such work to plaintiff in error during the years 1898 and 1899 amounting to \$3,000. An ad valorem tax was levied on the property of every description of plaintiffs in error for the years 1898 and 1899, and it rendered for taxation all of its property except the franchise, and the franchise was added to the list of property by the city assessor. The property rendered by plaintiff in error consisted of its real estate and all its tangible personal property. The contest in this case is over the sum of \$2,865 imposed by the city on what is denominated the 'franchise to operate and maintain lines of street railway' over certain streets." The trial court held that the plaintiff (the Dallas Consolidated Electric Street Railway Company) was liable for the tax, and dissolved the injunction. The court of civil appeals reversed this judgment, and rendered judgment for the plaintiff, making the injunction perpetual.

The leading question in the case is: Did the charter of the city of Dallas authorize the assessment of the franchise of a street railway company as a separate item in the

rendition of its property for taxation? Construing our general laws in reference to the method of rendering the property of railroad companies for taxation for state purposes, we held in the case of *State v. Austin & N. W. R. Co.*, 62 S. W. 1050, 94 Tex. —, that the franchise of a railroad was not assessable as a separate distinct entity from its physical property. But we neither held that such franchise was nonassessable, nor that under the statutes then in question its value was not to be estimated in determining the valuation of the property of the company for the purposes of taxation. Here we have a different question. The city of Dallas is incorporated by special law, and the question is whether the charter of the city authorizes the tax upon the company's franchise and its assessment as a separate item of property. The provisions of the charter which, as we think, bear upon the question, are as follows:

"Sec. 118. The city council shall have power to levy and collect the ordinary municipal taxes upon the roadbed, rights, franchises, and all other property of street railroads of every kind, whether their motive power be steam, horse, mule, electricity, or otherwise."

"Sec. 134. The city council shall have power to assess the property and shares of corporations, companies, banks, and such other institutions as the same are now or may be assessed by the state law in such cases made and provided, and shall have full power to enforce the collection of such taxes in such manner as by said council may be deemed necessary.

"Sec. 135. The city council shall have power by ordinance to regulate the manner and mode of making out tax lists, inventories and appraisements of property therein, and to prescribe the oath that shall be administered to each person on rendition of his property, and prescribe how, when and where property shall be rendered, and prescribe the number and form of assessment rolls, and fix the duties and define the powers of city assessor, and adopt such measures as the council may deem advisable to secure the assessment of all property within the city limits, and collect the tax thereupon, and may provide a fine and imprisonment, or either, for all persons neglecting, failing or refusing to render their property for taxation."

It is clear that the part of section 118 just quoted authorizes a tax upon the franchise of a street railway company. If section 135 be detached from its context, it is equally clear, as we think, that its only proper construction should be that the city council were empowered to require the assessment of such franchise to be made either as a part of the tangible property of the corporation, and to be estimated in assessing the value of the whole, or to be separately assessed, and valued as a distinct

article of property. The language, "to regulate the manner and mode of making out tax lists, inventories and appraisements of property therein, * * * and prescribe how, when and where property shall be rendered," of itself hardly admits of any other construction. But it is contended on behalf of the defendant in error that section 134 shows that such was not the meaning; that it makes manifest that the purpose was to require the assessment to be made in conformity to the law for assessing state taxes. If this contention could be sustained, and if a street railway be real property, and its franchise of a use of the streets a part of the realty, the present case should be determined by the ruling in the case of *State v. Austin & N. W. R. Co.*, *supra*. But we are of opinion that such was not the purpose of the legislature. The terms of the section, literally construed, are not mandatory. The language is, "the city council shall have the power to assess," etc., not that they shall assess. It has been held, however, that the word "may," which is ordinarily a word of permission, and not of command, when used with reference to the function of a public officer, may imply a duty and may make the law mandatory; and the thought suggests itself that the same rule should apply in a case like the present, where, instead of using the words "shall" or "may," the language is "shall have the power to" do a certain act. But, if the rule be applicable in such a case, the construction must ultimately depend upon what was the intent of the legislature, as deducible from the nature and subject-matter of the statute, its context, and other laws referred to therein. That the section is not mandatory is shown by the next section (135), which, as we have seen, confers the power upon the council to prescribe the manner of rendering and assessing property for the purpose of taxation by the city. This is made the more apparent when we consider the statutes of the state then in force for assessing the property of certain corporations, together with the history of the legislation upon that subject. Under the Revised Statutes of 1879 the property of a corporation, as a general rule, was assessed in the name of the corporation, and the corporation paid the taxes thereon in the same manner as an individual. Article 4688. This applied to banking corporations. In 1885—presumably for the reason that such corporations were evading the law, or had some undue advantage under it—the statute was amended as to companies incorporated for banking purposes, and it was provided, in effect, that such corporations should render for taxation their real estate only, and that the shareholders should render their respective shares in the corporations, and should pay the taxes thereon. The shareholder, in estimating the value of his shares for taxation, was allowed a proportionate deduction for the value of real

estate rendered by such corporation itself. Laws 1885, p. 106. This law has ever since been continued in force. Rev. St. 1895, art. 5080. Besides, under the Revised Statutes of 1879 (article 4684), every banker, broker, dealer in exchange, and stock jobber was required, in listing his property, to furnish a more specific statement as to his money, credits, and liabilities than was required of the ordinary taxpayer. The same law, with some amendments, relating especially to national banks, exists to-day. Laws 1896, p. 87. In the light of these laws, let us carefully note the language of section 134, "The city council shall have power to assess the property and shares of corporations, companies, banks and such other institutions as the same are or may be assessed by the state laws," etc. It being the general rule under the state law that a corporation should render for taxation and should pay the taxes upon all its property subject to taxation, and exception having been made in case of banking corporations requiring them to render only their real estate, and the shareholders to render their shares, it is evident that in conferring power upon the city council "to assess the property and shares of corporations" the legislature had in mind the exception as to banking corporations, and that it was their purpose to authorize the assessment of the shares of such corporations in the manner of assessments under the state law. The words "are or may be" also indicate that it was the intention to confer the power to follow the state law in case an exception should thereafter be made as to any other class of corporations. The mention of "banks and such other institutions" (meaning, as we think, such other institutions of a like character) also tends to show that the purpose was to authorize the council to require such institutions to make the same character of statement as to their assets and liabilities as was required of such institutions under the statutes we have previously cited. The purpose of these statutes was, not to confer special privileges upon banking corporations, bankers, and the like, but was to impose duties upon them so as to prevent evasions of the law and to secure that equality and uniformity of taxation which the constitution enjoins. Hence, in our opinion, the legislature, in enacting section 134 of the charter of the city, did not intend to make it obligatory, but to grant a discretionary power. But we also think that the section does not apply to any other corporations, except such as were made by the state law subject to especial requirements as to the mode of assessing their assets. Our conclusion upon this branch of the case is that the city council had the power to require the franchise of a street railway company to be assessed separately from its tangible property.

But it is insisted on behalf of defendant in error that since, under the ordinances by

which defendant in error acquired the right to operate its line over the streets of the city, it is required to pay an annual sum for the privilege, it cannot be held liable to pay a tax for the franchise. In other words, the contention seems to be that the sums required to be paid annually are a franchise tax, or are in lieu of such tax, and that the exaction of the tax now in question is double taxation. As to that matter the findings of the trial court are as follows: "(2) Its (meaning the plaintiff's) right so to operate over the streets upon which its cars were being run in the years 1898 and 1899 was secured to it by its charter and by certain ordinances of the city of Dallas and of the city of East Dallas, a municipal corporation which was annexed to the city of Dallas in the year 1889; each of said ordinances granting the right only as to the street or streets or parts of streets named in such ordinances. (3) By the terms of some of said ordinances the street railway company is required to pay annually to the city a certain fixed sum of money for the privilege therein granted; and in some of these ordinances the fixed annual charge so imposed is called a 'franchise tax,' in others it is called a 'bonus,' and in still others it is simply imposed without being called by any name. It is not stipulated in any of these ordinances that the said annual charge therein imposed shall be in bar of nor in lieu of an ad valorem tax on plaintiff's property, or any part thereof. The aggregate of these fixed annual charges is between \$2,600 and \$2,700 per annum." It is clear that the ordinances which simply impose the annual payment as a condition of the grant and those which call such payment a bonus do not import a contract for exemption from taxation of the franchises granted. As to those in which the annual payments are called a franchise tax, the construction is not so clear. But we hardly think that such designation of itself is sufficient to show such clear and unmistakable purpose to contract for an exemption from taxation as the authorities hold necessary to show a contract for such exemption. *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. Ed. 595. But we are not called upon to decide that question in this case. It was held by this court in the case of *City of Austin v. Austin Gaslight & Coal Co.*, 60 Tex. 180, 7 S. W. 200, that, in the absence of legislative authority, a city had no power either to exempt property from taxation or to contract for a commutation of taxes legally assessable upon it. We have been referred to no provision in the charter of the city of Dallas or that of East Dallas which gives such authority, and we take it for granted that none exists. It would seem, however, that the fact that the defendant in error is required to pay a sum annually for the use of the street is an important matter to be considered in assessing the value of its franchise. It is evident that a fran-

chise burdened with such an exaction is not as valuable as it would be did no such burden exist. But the question of the correctness of the valuation is not before us in this case.

But the point is also made that the assessment in this case is also illegal for the reason that, as the court finds, the franchises were not assessed in the name of the plaintiff company, but in that of the companies to whose rights it has succeeded. But the defendant in error was the appellant in the court of civil appeals, and failed to assign the ruling upon that question in that court. Therefore the error, if error it were, was waived, and the question is not before us for determination.

For the reasons given, we are of the opinion that the judgment of the court of civil appeals should be reversed, and that of the district court should be affirmed, and it is accordingly so ordered.

DENNIS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

FENCES—INJURIES—LANDS PROTECTED—CRIMINAL RESPONSIBILITY—CONSTRUCTION OF STATUTES—NOTICE OF INTENTION TO REMOVE—EFFECT.

1. Pen. Code, art. 794, providing that any person who shall injure the fence of another, or shall willfully leave open any gate leading into the inclosure of another, or shall knowingly cause any hogs or other stock to go within the inclosed lands of another, or shall tie or stake out to graze within inclosed land of another any animal, shall be punished, protects, not only inclosed lands on which agricultural products are raised, but other lands as well.

2. Under Pen. Code, art. 797, providing that any person who is the owner of any fences connected with or adjoined to any fences owned by another person may withdraw his fence from the fence of another person upon giving a six-months notice in writing of his intention to separate his fence, a person who, after the expiration of six months after the time of giving such notice, cuts loose his fence from the fence of another, and thereby injuring the latter's fence, is not guilty of a violation of article 794, prohibiting the breaking or injuring the fence of another.

Appeal from Hood county court; Phil Jackson, Judge.

Jim Dennis was convicted of injuring another's fence and appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged under that portion of article 794, Pen. Code, which provides: "If any person shall break, pull down or injure the fence of another, without his consent, * * * he shall be fined any sum not less than ten nor more than one hundred dollars, and in addition thereto may be imprisoned in the county jail not exceeding one year." He was convicted, and his punishment assessed at a fine of \$10. ed by Google

The evidence discloses that the alleged owner of the fence, Jim Hiner, was notified by appellant in writing, in accordance with the terms of article 797, Pen. Code, that he desired to withdraw and separate his fence from that of Hiner. This notice was given to the father of Jim Hiner, requesting him to withdraw his (Hiner's) fence from that of appellant. Subsequent to the notice, appellant constructed a cross fence between the land owned by himself and that owned by Hiner, which adjoined, putting, as he claims, his fence two feet inside the line, and on his land. Subsequent to the expiration of the six months, appellant cut the fence, which resulted in this prosecution. There seems to be two main propositions relied upon by appellant for reversal: (1) That article 794, upon which this conviction was obtained, was enacted for the purpose of protecting land on which agricultural products are raised; (2) that, after the expiration of the six months' notice in writing, he had the right to cut the fence of the party to whom the notice was given, in order to relieve himself from the joint fence. In our opinion, the first of these contentions is not sound. One of the clauses in article 794 clearly bears the construction claimed by appellant in regard to inclosed lands upon which agricultural products are being grown; but this article may be violated in other ways, as an inspection of the statute clearly indicates. If a party breaks or pulls down or injures the fence of another, without his consent, he is guilty under this statute; or if he shall, without the consent of the owner, open and leave open any gate leading into the inclosure of another, he is guilty; or if he shall knowingly cause cattle, hogs, mules, and horses or other stock to go within the inclosed lands of another, without his consent, he is guilty; or if he shall tie or stake out, or cause to be tied or staked out, to graze, within inclosed lands not his own, and without the consent of the owner, any horse, mule, or other animal, he is guilty. So it will be seen that by this clause of the statute, if a party breaks, pulls down, or injures the fence of another, without his consent, he comes within the denunciation of this article.

The second proposition contended for—that is, after the expiration of the notice of six months given in writing the party giving it would have the authority to withdraw his fence from the party to whom the notice is given—is correct under the statute. Article 797, Pen. Code, is as follows: "Any person who is the owner or part owner of any fences connected with or adjoined to any fences owned in part or in whole by any other person, shall have the right to withdraw or separate his fence or part of fence from the fence of any other person or persons in this state; that such person who desires to withdraw or separate such fence from the fence of any other person

shall give notice in writing to such person, his agent, attorney or lessee, of his intention to separate or withdraw his fence or part thereof for at least six months prior to the time of such intended withdrawal or separation." A notice in writing was given. Subsequent to the expiration of the six months, appellant cut his fence loose from that of the prosecuting witness. Under this phase of the law appellant would not be guilty of any offense in cutting his fence loose from that of the adjoining fence owner. There is no punishment denounced for such act, and the law would seem to authorize such action.

The judgment is reversed, and the cause remanded.

EARL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

INTOXICATING LIQUORS—SALE TO MINOR—EVIDENCE—SUFFICIENCY.

The prosecuting witness, in a prosecution for selling liquor to a minor, was only 17 years old when he purchased the liquor, but was 5 feet 10 or 11 inches in height, weighed 160 to 165 pounds, and had been shaving for about one year. Witnesses for the state testified that his appearance indicated that he was only 18 or 19 years old, but witnesses for the defendant testified that the appearance of the prosecuting witness indicated that he was 21 years old. The prosecuting witness testified that he was asked as to his age by defendant after the sale of the liquor, but the two companions of the witness at the time of the sale testified that he was asked his age before the sale, and stated in reply that he was 21. Held sufficient evidence of defendant's knowledge of the age of the prosecuting witness, or of reasonable grounds to believe that he was a minor, to sustain a conviction.

Appeal from Hood county court; H. D. Payne, Special Judge.

Hal Earl was convicted of selling liquor to a minor, and he appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of selling liquor to a minor, and fined \$25.

This is a fact case, no legal questions being presented. The evidence shows that the purchaser was a minor; that he walked into appellant's saloon, in company with two friends, and ordered the drinks; that there was no written consent or authority from the parents for appellant to sell him whisky. The minor was 17 years of age in September prior to the sale in the following January, he weighed about 160 or 165 pounds, was about 5 feet and 10 or 11 inches in height, and had been shaving for one year. The father of the minor, as well as the witness Bryant, testified that, independent of the boy's age, his personal appearance indicated him to be 18 or 19 years old. Witnesses for the defense testified that he had the appearance of being 21 years of age. Prosecuting

witness testified that immediately after he had purchased the whisky and treated his two friends appellant asked him if he was of age, and was informed that he was. The two witnesses for defense who drank with the minor testified that appellant asked the minor as to his age before the purchase of the intoxicants. The question, then, as to appellant's knowledge of the minority, or reasonable belief of the minority, of the prosecuting witness, was the issue, and practically the only issue, upon which the jury were called to pass. If the jury believed the appearance of the boy at the time appellant sold the whisky indicated to appellant his age to be 18 or 19 years of age, their verdict would be justified. If they believed the statement of the prosecuting witness that appellant did not ask as to the boy's age until after the sale of liquor, and that, therefore, he knew, or had reason to believe, that the boy was under 21 years of age at the time, the question was unnecessary, and that the question itself indicated that appellant believed the boy was under 21 years old. While the evidence leaves it a very close question, yet, under all the circumstances, we do not believe we would be justified in setting the verdict aside.

The judgment is affirmed.

Ex parte GRAHAM.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

CRIMINAL LAW—FORMER JEOPARDY—VOID JUDGMENT.

A former trial for a crime, wherein the proceedings were void because of the disqualification of the judge, will not support a plea of former jeopardy.

Appeal from district court, Robertson county; Sam R. Scott, Special Judge.

Habeas corpus on relation of Eugene Graham. From a judgment remanding him to custody, relator appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Relator applied for the writ of habeas corpus before Hon. Sam R. Scott, special judge duly appointed by the governor to try this case. The hearing was originally had in Falls county, bail being denied. The case was appealed to this court, and reversed, the application being ordered heard in Robertson county. Ex parte Graham (Tyler term, 1901) 64 S. W. 932. In pursuance of that order the case was heard in Robertson county, bail being denied, and relator remanded to custody, and this appeal is prosecuted.

It appears that relator has heretofore been tried, the jury finding him guilty of murder in the second degree. At that trial Hon. John L. Goodman presided as special judge. Upon the appeal of the case we held that

the judge was disqualified, and because of his disqualification the judgment was reversed. On that appeal we said: "The trial judge being disqualified, as indicated above, the whole proceeding became an absolute nullity, the judgment void, and the cause stands upon the docket of the district court of Robertson county as if the proceeding complained of in this record had never occurred." Graham v. State, 63 S. W. 558, 2 Tex. Ct. Rep. 822. A void judgment would not sustain a plea of former jeopardy to any offense. Ogle v. State, 63 S. W. 1009, 2 Tex. Ct. Rep. 960. The constitution authorizes bail in all cases where the proof is not evident. We have carefully examined this record, and considered the evidence adduced, and are of opinion that the judgment of the lower court denying relator bail is correct.

The judgment is affirmed.

COLLINS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

ASSAULT WITH INTENT TO KILL—EVIDENCE—ADMISSIBILITY—WITNESSES—IMPEACHMENT—HARMLESS ERROR.

1. Where a witness for the defense, in a prosecution for assault with intent to murder, accompanied the defendant to the field where the prosecuting witness was working, and where the difficulty occurred, but there is no evidence that defendant knew that the witness had a pistol two days before that on which the difficulty occurred, the fact of the witness' possession of the pistol at that time is not admissible as tending to show that the witness was acting with defendant in the commission of the crime.

2. Where there is nothing in a prosecution for assault with intent to murder to show that a witness for the defense was acting with defendant in the commission of the crime, or to show any connection between threats to kill a third person which the witness is claimed to have made, but which he denies, such threats are immaterial, and it is error to allow the impeachment of the witness thereon.

3. The impeachment of a witness on an immaterial matter in a criminal case is not harmless error.

Appeal from district court, Wood county; J. G. Russell, Judge.

Bud Collins was convicted of assault with intent to murder, and he appeals. Reversed.

F. J. McCord and M. D. Carlock, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years.

Bill of exceptions No. 5 complains that the state was permitted to prove by John Linley that he was with Will Willbanks on Saturday evening before the difficulty Monday, and saw said Willbanks with a pistol. Appellant objected to this testimony on the

ground that it was immaterial,—had no connection whatever with the case; that it was an effort on the part of the state to impeach the witness Willbanks on an immaterial issue; and because the proper predicate had not been laid while the witness Willbanks was on the stand, he having previously testified in the case. The record before us discloses the fact that Willbanks and defendant Bud Collins went to the field where prosecuting witness Dean was plowing and the difficulty ensued. The theory of the state appears to have been that Willbanks and Collins were acting together at the time this difficulty occurred; but we fail to discover any evidence to indicate any knowledge on the part of appellant of the fact that Willbanks had a pistol on the Saturday before, and we do not think it was pertinent testimony going to establish that they were acting together at the time of the commission of the crime. This testimony should not have been admitted.

Bill of exceptions No. 6 complains of the following: That while the witness Cherry was on the stand testifying as a witness the state, on cross-examination, asked said witness if he did not tell Tom Jeff Linley at his house on Sunday morning before the difficulty some one who lived in half a mile of his (Cherry's) house had bought a horse, and that some one was stealing Willbank's corn, and that he (Cherry) was going to kill them. The witness answered that he did not say anything of the kind. Subsequently Tom Jeff Linley was placed on the stand, after this predicate had been laid, and testified that said Cherry had made said statement to said Linley. Appellant objects to this testimony, because it was an effort on the part of the state to contradict the witness Cherry upon an immaterial point. We think appellant's contention is correct. This testimony was clearly immaterial, and could serve but to prejudice the rights of appellant before the jury. There is nothing in this record to show that Cherry and appellant were acting together, or how or in what way the acts and declarations, or even animus, of Cherry towards other parties could be used to prejudice the rights of appellant in the trial of this case. This statement appears to have been made by Cherry on Sunday morning before the difficulty, and there is no connection shown by said declaration and statement that in the remotest degree connects appellant with said declaration or statement. The record before us shows that Cherry was a material witness for appellant, and the impeachment of said witness upon an immaterial matter is not harmless error. *Price v. State* (Tex. Cr. App.) 43 S. W. 96. The rule in reference to impeachment is that it is only when a witness' statement out of court is in regard to such matters as are relevant to the issue on the trial that witnesses can be introduced to contradict the testimony of said witness. *Walker*

v. State, 6 Tex. App. 576; *Johnson v. State*, 27 Tex. App. 163, 11 S. W. 106; *Mitchell v. State*, 38 Tex. Cr. R. 170, 41 S. W. 816. Applying the foregoing rule to the evidence admitted, we take it that the trial court committed an error in admitting in impeachment of witness Cherry the evidence complained of in the bill, since it was not relevant to any issue on the trial, and was solely calculated to prejudice the rights of appellant.

In the view we take of this case, it is not necessary to pass upon other assignments of error. For the errors discussed, the judgment is reversed, and the cause remanded.

HEFNER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

RAPE—EVIDENCE—ADMISSIBILITY—RE-EXAMINATION OF WITNESS.

1. In a prosecution for rape, a witness' testimony, on redirect examination, that all the women in the neighborhood were afraid of defendant, was inadmissible, though on cross-examination defendant asked witness if he and others were not trying to get defendant out of the community, in order to get defendant's home (he having testified that he was living in defendant's home, etc., and wanted defendant out of the community), and though the redirect testimony was given as a reason for wishing to be rid of him.

2. In a prosecution for rape, a witness for the state testified, on cross-examination, that he had stayed with defendant on a certain night before the alleged crime; that in the morning defendant tried to make witness admit that he had been to the prosecutrix's bed, and took him to task for it, and was mad about it. *Held*, that though it was proper for the state, on re-examination of witness, to show that defendant was not angry with him, but with his (defendant's) wife, witness' testimony that he heard defendant curse his wife, and call her a "damu pot-gutted bitch," was inadmissible.

Appeal from district court, Erath county; W. J. Oxford, Judge.

R. A. Hefner was convicted of rape, and appeals. Reversed.

Parker, Carlton & Carter, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of 15 years.

During the trial the witness I. Powell was permitted to testify that he lived in the same community with defendant, and where the alleged rape is said to have occurred, and that all of the women in that neighborhood were afraid of defendant. Numerous objections were urged to this. The court adds quite a lengthy qualification to this bill, giving his reasons for admitting the testimony, among others that upon cross-examination defendant asked him if he had not been trying to get him (defendant) out

of the country prior to the charge of rape, and if he had not conspired with others in regard to sending defendant to the penitentiary, and if he had not in fact been trying to get rid of defendant in order to get defendant's home. These were all denied by witness. He was then asked if he and others were not trying to get appellant out of that community. Witness answered in the affirmative. He was then asked if he had not, since his arrest and incarceration in jail, become the owner of defendant's property, and was then living on it. He answered this in the affirmative. He was then asked if his testimony was not fabricated for the purpose of getting defendant out of the community, and becoming the owner of his property. This he answered in the negative. Then, on redirect examination, the state asked the witness what his reason was for stating to defendant's counsel and others that he wanted defendant out of the community; and he answered, because defendant frequently became intoxicated, was troublesome when drinking, and that all the women in the community were afraid of him, and that this was the reason for desiring him out of the community. The cross-examination of this witness took rather a wide range, but it was with reference to impairing his credit before the jury. The opposing side may follow up these matters by all legitimate means. However, we are of opinion that the objection to the testimony that all the women in the community were afraid of defendant was well taken. We do not think this had any bearing upon the issues in the case.

State's witness Baremore testified that "on Saturday morning, before the night of the alleged carnal knowledge of defendant with the prosecutrix, witness was at the house of defendant, and heard the defendant curse his wife, and call her a damn pot-gutted bitch; that defendant was rearing around mad." This was objected to on various grounds. The court files quite a lengthy explanation of his action in admitting this testimony, in which it is stated that Baremore, on cross-examination by appellant, testified that appellant was mad when he got up in the morning; that Baremore had stayed all night with him; that by questions propounded to Baremore appellant had tried to make Baremore admit that he (Baremore) had been to the bed of the prosecutrix the night previous to the morning in question, and that appellant was taking him to task on account of this conduct, and was mad about it; that the state was then, on re-examination of this witness, permitted to go fully into everything that was said, for the purpose of showing just why defendant was enraged, "and whether he said anything of consequence to Baremore on that occasion." The state's theory was that appellant was not mad with Baremore, but was addressing his angry remarks

to his (appellant's) wife. Appellant subsequently testified, as shown by this explanation, that he saw Baremore at prosecutrix's bed that night; saw her put down her clothes just as Baremore left her; and he was mad about that next morning, and talked roughly to Baremore, and did not speak so to his wife. While it was proper for the state to show by legitimate testimony that appellant was mad with his wife, and not with Baremore, still the evidence introduced was not admissible. The condition of the defendant's mind on the occasion stated, under the circumstances, could be shown; but the language used towards his wife was not necessary to be shown, and this character of testimony, under the circumstances of this case, was harmful, and tended to arouse the passion and prejudice of the jury against appellant. It was sufficient to have left the matter to the jury, without these remarks, as to whether appellant was mad with Baremore on account of the conduct imputed to him, or whether his anger was against his wife. The remarks of the district attorney upon this matter are made the subject of another bill of exceptions.

For the errors indicated, the judgment is reversed, and the cause remanded.

JEMISON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

HOMICIDE—ABSENT WITNESSES—RIGHT TO CONTINUANCE.

A homicide occurred at a negro entertainment at which defendant was present. Several gambling transactions were going on, and at one of them decedent was killed. Defendant attempted to show that he was not in the immediate vicinity at the time, and requested a continuance for absent witnesses. One of them was near the place of the killing; another was gambling with decedent at the time; a third was to testify that she was talking to defendant at the time, about 35 feet away; another that decedent had refused to pay her a small sum of money, and she went around the north end of the house, and complained to the negro with whom she had been dancing; that he immediately started toward where she had left decedent; that shortly afterwards the shots were fired. A witness for the state testified that the guilty party came from the north end of the house in company with another negro, who accused decedent of having some one else's money. Another absent witness was to testify that after the shooting defendant gave witness his pistol; that it was given to the officers later without change in its condition. A constable testified that witness gave him a pistol said to be defendant's; that it was a .45 caliber, and had not been recently fired. The wounds were apparently inflicted by a .38-caliber ball. *Held* error to refuse a first application for a continuance.

Appeal from district court, Hunt county; H. C. Connor, Judge.

Leach Jemison was convicted of murder, and appeals. Reversed.

J. P. Yates, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 20 years.

The question of race discrimination was raised on a motion to quash the indictment. The testimony upon this question is very unsatisfactory, but the weight of it indicates there are very few negro jurors in the county. The present superintendent of public instruction of the county, as well as another witness who had previously held that office, indicate that there are practically no negro jurors in the county competent to serve as grand jury men; the latter stating only four within his knowledge, and two of them had since died. One or two of the witnesses place the number far in excess of this, but the statements are very general. It occurs to us that if, as a fact, there are negro voters in that county who are competent to serve as grand jury men, the witnesses who testify to the facts should certainly know who they are. Where it is easily shown that there are a sufficient number of negro voters in the county who are competent jurors this might not be necessary; but where the testimony covers a range of from two to three hundred grand jurors, to a minimum number of two only, the facts should be more explicit, so the courts may intelligently pass upon that phase of the testimony. It would hardly be held discrimination against the negro race in the selection of jurors by commissioners if there are no negro jurors in the county, or so few in number as to practically amount to none. As the judgment will be reversed upon another proposition, we suggest that this matter be made sufficiently explicit for the court to decide, should it become necessary upon another trial. Out of abundance of caution, it is advisable to procure another indictment, and avoid any further trouble along this line.

Appellant moved a continuance of the cause for the want of the testimony of several witnesses. The evidence places it beyond question that the killing occurred at a negro entertainment; that outside the house there were several different gambling transactions going on, at one of which the killing occurred. There were quite a lot of negro men and women present in and about the house and around where the killing occurred, and about the grounds in the immediate neighborhood of the homicide. The state's case was that appellant did the killing. Appellant's theory, as shown by such testimony as he had at the trial, was that he was not immediately at the scene of the killing, and was in no way connected with it. There were two parties to the transaction,—the slayer and the slain. The evidence adduced shows the absent witnesses were present, and some of them in immediate proximity to

the difficulty. Frank Wicks, one of the absent witnesses, was near the place where the shooting occurred. Hamp Gilmore was gambling with deceased when the shooting occurred, and was nearest to the absent witness, Mary Smith, was to prove that she was talking to appellant at the time of the shooting, about 35 feet from the homicide. Some of the absent witnesses were expected to prove the state's case. By Matt Shaw he expected to prove that deceased had had a controversy with appellant, and that he had refused to give appellant a small sum of money immediately after the homicide; that deceased refused to give her, whereupon she left the place where the shooting was going on, went around the house to the north, and told the negro man who she had been dancing of her trouble, and asked his assistance; that this negro man immediately left her, and went in the direction of where she had left defendant. A very short time the shots were fired, and killed deceased. Fred Williams testified that the party who did the shooting came around the west side from the north end of the house, in company with another negro, who accompanied him, just before the shooting, of some one else's money. The witness testified that he did not understand whether it was Matt Shaw or Matt Shaw's brother who was accused of having killed deceased. The state's witness, McLendon, testified that Matt Shaw had a conversation with deceased about some money just before the shooting. By Coleman Smith, the occupant of the house where the entertainment was, and where the killing occurred, it was expected to be proved that shortly after the shooting appellant gave Smith his pistol, and assigned appellant as the reason that the officer would be there to investigate the shooting, and he did not want to be arrested for carrying a pistol; that the pistol was delivered to the officers in the same condition in which it had been delivered by the witness Coleman Smith to constable McElmurry, who went to the house to investigate the matter and make an arrest. He testified that Coleman Smith gave him the pistol, and that he said to be the one delivered to the defendant; that he examined this pistol, and found it to be a 45-caliber Colt's, and that there was no evidence of it having been recently discharged. This was very shortly after the shooting. The wounds, under the evidence, seem to have been inflicted by a 38-caliber ball. McElmurry's testimony is substantiated by Robertson and Hays Wimberly, who being the first application for continuance should have been granted. If these facts are true, or if the jury believed them true, appellant was entitled to an acquittal on the theory that he did not fire the shot that killed deceased. They are very material.

The judgment is reversed, and the case remanded.

DUFFY v. STATE

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

CRIMINAL LAW—IMPEACHING EVIDENCE—ASSAULT WITH INTENT TO MURDER—MITIGATING CIRCUMSTANCES—EVIDENCE.

1. Where, at the trial for assault with intent to murder, testimony that a witness for defendant had declared that the prosecutor had not been cut too bad, but that his throat ought to have been cut, was introduced for the purpose of showing a bias on the part of the witness in favor of defendant, it was not necessary to limit such testimony to the purpose for which it was admitted.

2. Where accused was lying in wait for the prosecutor, and pursued him across the street, and attacked him with a large knife, accompanied by threats indicative of a purpose to murder, it was not error, in a prosecution for assault with intent to murder, to fail to instruct on aggravated assault, though it be conceded that a prior altercation had taken place between defendant and the prosecutor in which the latter was the aggressor; the prosecutor in that altercation having committed no battery upon defendant, and also a cooling time having elapsed between that event and the subsequent assault.

Appeal from district court, Victoria county; Jas. C. Wilson, Judge.

Tom Duffy was convicted of assault with intent to murder, and appeals. Affirmed.

Geo. M. Thurmond, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal. Bills of exception Nos. 1, 2, and 3 relate to the failure of the court to limit the testimony as set out in said bills. We have carefully examined said bills, and, in our opinion, the testimony is not of that character which requires a limitation by the court. All of the testimony appears to have been introduced for the purpose of showing a bias on the part of the witness in favor of appellant, and prejudice against the prosecutor. There is no evidence of this witness as to some other offense against appellant, of which he might be convicted, nor do the bills embrace evidence which might be used by the jury for some other purpose than impeachment. True, it is shown one of the witnesses stated that he told a party that prosecutor had not been cut too bad, but had been cut good; that it was his opinion "the son of a bitch's throat ought to have been cut." His evidence states the fact of cutting, which was hearsay; but it was not objected to on that account, and it could not have been material on the issue as to whether or not prosecutor was cut, because this was not controverted. It was only of the character that would tend to show that witness was very much prejudiced against prosecutor, and could be used for no other purpose, except possibly to show that prosecutor was a scoundrel, and

this would not injure appellant. The rule on the subject of limiting testimony is as follows: "The general rule is that whenever extraneous matter is admitted in evidence for a specific purpose incidental to, but which is not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise a strong, undue, or improper influence upon the jury as to the main issue, injurious and prejudicial to the rights of the party, then it becomes the imperative duty of the court in its charge to so limit and restrict it as that such unwarranted results cannot ensue, and the failure to do so will be radical and reversible error." *Maines v. State*, 23 Tex. App. 570, 5 S. W. 123; *Wilson v. State*, 37 Tex. Cr. R. 64, 38 S. W. 610; *McGee v. State* (Tex. Cr. App.) 43 S. W. 512.

Appellant objected to the failure of the court to charge on aggravated assault, and also excepted to the refusal of the court to give a number of requested charges on that subject. We have examined the record carefully, and fail to see any element of aggravated assault in the case. Even if it be conceded that in the first altercation between the parties in the saloon the prosecutor was the aggressor, still the evidence here fails to show any adequate cause, because there was no battery causing pain or bloodshed, and, besides, cooling time had elapsed between this event and the subsequent pursuit and assault by appellant of the prosecutor. In our view, however, of the facts prosecutor was not the aggressor in the saloon, but appellant provoked what occurred there, evidently for the purpose of having an opportunity to wreak his malice. Nor was there anything attending the assault by appellant on the prosecutor, Bailey, in the street, that would suggest manslaughter had death occurred. The evidence shows that he lay in wait around the saloon for a considerable time, waiting for Bailey to emerge; that when he did so he pursued him across the street, down the sidewalk, out into the street, and back on to the sidewalk, with the intent to commit a battery on him. The testimony shows in this connection that he must have had his knife, which was a large one, opened in his hand, and ready; for as soon as Bailey turned to face him he made an attack on him with his knife. There is no aggravated assault in the case, but simply an unprovoked attack, characterized by a purpose, judged both by appellant's acts and words, to kill and murder prosecutor. There was no self-defense in the case, and no necessity to charge on threats, though the court gave a charge predicated on threats in connection with self-defense. The jury gave appellant the lowest punishment, and he should consider himself fortunate, for this record would abundantly support a greater punishment.

The judgment is affirmed.

GRESHAM v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

JUDGE-DISQUALIFICATION—CONSANGUINITY—WAIVER—CONSENT.

1. Under Code Cr. Proc. art. 606, which is a copy of Const. art. 5, § 11, providing that "no judge * * * shall sit in any case * * * where the accused * * * may be connected with him by consanguinity or affinity within the third degree," a judge is disqualified to sit in a criminal case where his grandfather was brother to defendant's grandmother.

2. Where a judge is disqualified to sit in a criminal case because of consanguinity to defendant, the consent of the parties cannot remove the incapacity of the judge, or restore his competency, against the express provisions of Const. art. 5, § 11, and Code Cr. Proc. art. 606.

Appeal from Hood county court; H. D. Payne, Special Judge.

Newt Gresham was convicted of libel, and appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was charged by indictment with libel, upon trial was convicted, and his punishment assessed to a fine of \$100.

In the view we take of this record, it is only necessary to consider on question, to wit. that raised by the first bill of exceptions, as follows: "That Hon. H. D. Payne was elected special judge because of the sickness of Hon. Phil Jackson, the duly elected and qualified judge of said county court; and the above styled and numbered cause being called for trial by said special judge, H. D. Payne, and it being made known by said special judge that he was related to the defendant Newt Gresham both by consanguinity and affinity, and it appearing that the relationship between said special judge and defendant is as follows: The grandfather of said special judge and the grandmother of the defendant were brother and sister, and that the said special judge married his (said special judge's) cousin, granddaughter of his (said special judge's) grandfather,—defendant claimed that the relationship existing between defendant and said judge disqualified said judge from trying said case, and for that reason objected to his trying it," etc. The court appends the following explanation to the bill: "The court was under the impression that he and defendant were fourth cousins until the jury was impaneled, and he discovered that he and defendant were third cousins; that is, the court's mother and defendant were second cousins. Then the court retired the jury and explained the facts to defendant and counsel for defendant and the state, and asked that another person try the case. Defendant and his counsel said they would not agree to anything. Then the court proceeded to try the case." Article 606, Code Cr. Proc., provides: "No judge or

justice of the peace shall sit in any case where he may be the party injured, or where he has been of counsel for the state or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree." This provision is a copy of Const. art. 5, § 11. This clearly renders the judge trying this case disqualified from sitting in the same. Furthermore, the consent of parties cannot remove a judge's incapacity, or restore his competency, against the express provisions of the law and the constitution, which were designed not merely for the protection of the parties, but for the general interests and due administration of justice. *Abrams v. State*, 31 Tex. Cr. R. 449, 20 S. W. 987; *Chambers v. Hodges*, 23 Tex. 104; *Gains v. Barr*, 60 Tex. 676. The judge being disqualified under the law and constitution renders absolutely null and void the judgment herein. This being true, we do not deem it necessary to pass upon any other question involved.

The judgment is accordingly reversed, and the cause remanded.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

HOMICIDE—EVIDENCE—STATEMENTS WHILE UNDER ARREST—CHARGE—SELF-DEFENSE—PROVOKING DIFFICULTY—INTENT OF DEFENDANT.

1. Under the statute requiring a warning before any statement made by one under arrest can be introduced in evidence, such a statement cannot be introduced to contradict the testimony of one on trial for crime, who, when asked on cross-examination if he did not deny his name while under arrest, answered "No," though he answered such question without objection.

2. Where defendant on trial for homicide claimed self-defense, a charge that if the jury believed that defendant sought the meeting with deceased for the purpose of provoking a difficulty with him, with intent to take his life, or to do him such injury as might probably result in his death, "defendant would not be permitted to justify on the ground of self-defense, even though he should thereafter have been compelled to act in his own defense," was erroneous, since his purpose and intent, alone, unaccompanied by any act, would not deprive him of the right to defend himself.

Appeal from district court, Grimes county; J. M. Smither, Judge.

Warren Johnson was convicted of manslaughter, and appeals. Reversed.

W. W. Meachum, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at four years' confinement in the penitentiary.

The state introduced Cross Baker, who testified: That he went to the calaboose and found defendant there; "and I asked him if

he knew me, and he said 'No.' I then asked him if his name was Warren Johnson, and he said 'No.' I then told him that he need not deny that his name was Warren Johnson, and he said that was his name. I did not know him myself at the time. I had never seen him before, but I had a man to identify him. That, during all the conversation with me, defendant was under arrest." This testimony was introduced by the state in rebuttal of defendant's testimony that he had not denied his name to Cross Baker. Defendant moved to exclude this testimony from the jury because it appeared that at the time he was under arrest and in the calaboose, and it was therefore inadmissible even to prove that defendant denied his name, or to impeach his credibility as a witness, for which purpose the district attorney stated he offered said testimony. The court overruled the motion, and to the bill appends this explanation: "J. C. Baker, sheriff of Grimes county, was put on the stand by the state and testified to having arrested defendant in Travis county, for the purpose of proving defendant's flight after the alleged homicide. Afterwards defendant, while on the stand as a witness, stated in answer to a question propounded to him by the district attorney that when he was under arrest and in the station house at Austin, Travis county, he did not deny his name to Baker, and, pointing to Baker, in the court room, said, 'Did I, Mr. Baker?' After this the state put Baker on the stand to contradict defendant on this point, whose testimony and its effect were fully explained and limited to the jury in the charge of the court." It appears from the foregoing explanation that the learned trial judge seems to have thought the testimony admissible, because, without objection, appellant had answered the question of the district attorney, on cross-examination, as to whether he had denied his identity, and that this fact made admissible the proof on the part of the state by the sheriff that while under arrest he did deny his name. The fact that defendant did not object to testifying on cross-examination to statements made while under arrest would not be a predicate or authority on the part of the state to introduce testimony either to impeach him on said statement, or to prove statements made while under arrest without warning as required by the statute. It was improper for the district attorney to ask defendant if he had not denied his name while under arrest. If defendant made no objection to said question, this would not authorize the state to introduce the sheriff to testify to statements made while under arrest. We have held that this statute requiring warning before defendant's statements under arrest can be introduced gives perfect and complete immunity to defendant, and such testimony is not admissible, without warning, either for the purpose of impeachment or as original testimony. *Wright v. State*, 36 Tex. Cr. R. 427, 37 S. W.

732; *Ware v. Same*, 36 Tex. Cr. R. 597, 38 S. W. 198; *Morales v. Same*, 36 Tex. Cr. R. 234, 36 S. W. 435, 846.

Appellant objects to the following portion of the court's charge: "If you believe that defendant shot Gus Fuqua as a means of defense, believing at the time that he was in danger of losing his life or of serious bodily injury at the hands of the said Gus Fuqua, then you will acquit defendant, unless you further believe from the evidence, beyond a reasonable doubt, that defendant sought the meeting with said Gus Fuqua for the purpose of provoking a difficulty with said Gus Fuqua, with intent to take the life of said Gus Fuqua, or to do him such serious bodily injury as might probably end in the death of said Gus Fuqua; and if you so believe from the evidence, beyond a reasonable doubt, then you are instructed that, if defendant sought such meeting for said purpose and with such intent, defendant would not be permitted to justify on the ground of self-defense, even though he should thereafter have been compelled to act in his own self-defense, but if he had no such purpose and intention in seeking to meet said Gus Fuqua, if he sought to meet him, then his right of self-defense would not be forfeited, and he could stand his ground and defend himself by the use of such means of defense as the facts and circumstances indicated to be necessary to protect himself from danger, or what reasonably appeared to him at that time to be danger." Appellant objected to this charge on the ground that the same is upon the weight of the evidence, as applied to the facts of this case, and inapplicable to the facts of this case introduced in evidence before the jury. These objections are well taken. The mere fact that appellant may have sought the meeting with deceased for the purpose and with the intent to bring on a difficulty would not, per se, forfeit the right of self-defense. The law is that if he sought deceased for the purpose of provoking a difficulty, and did some act or made some declaration calculated to provoke a difficulty, then his right of self-defense would be forfeited. If appellant sought deceased and did said act or made said declaration for the purpose of bringing on a difficulty and thereby killing deceased, then appellant would be guilty of murder. If he did not bring on the difficulty for the purpose of killing deceased, but his own wrongful act, as stated above, brought on said difficulty, then, if the killing ensued on the part of appellant, he would be guilty of manslaughter. We have on various occasions discussed the law in reference to this matter, and have uniformly held that the bare intent to provoke a difficulty will not authorize a charge on provoking the difficulty. *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17; *Tollett v. Same* (Tex. Cr. App.) 55 S. W. 575; *Young v. Same*, id. 333.

For the errors discussed the judgment is reversed and the cause remanded.

BAINES v. STATE.

(Court of Criminal Appeals of Texas, Feb. 19, 1902.)

HOMICIDE — ASSAULT — TRIAL — DISQUALIFICATION OF JUDGE — EVIDENCE — DECLARATIONS — IDENTITY — BAD FEELING BETWEEN PARTIES — HARMLESS ERROR — ARGUMENT — ALLUSION TO FORMER CONVICTION — BILLS OF EXCEPTIONS — SUFFICIENCY FOR REVISION.

1. A judge is not disqualified because he had proposed to assist the prosecution, as counsel, for a certain fee, which was never arranged or agreed to be paid.

2. In a prosecution for assault with intent to murder, an objection to prosecutrix's testimony that she found some of her clothing with oil poured on it was not well taken; the circumstances tending strongly to show that it was done by accused, who, from the evidence of the prosecutrix and her sister, was the only person in the house at the time.

3. Bills of exceptions to the admission of testimony that a prosecutrix twice testified before the grand jury cannot be revised where they do not show what her testimony was.

4. In a prosecution for assault with intent to murder, the state was properly permitted to show by the prosecutrix, who was hostile toward it, the state of feeling existing between her and accused.

5. In a prosecution for assault with intent to murder, it was competent to show that ground near the house where the assault occurred appeared on the next morning to have been disturbed, as if some one had been there, without first identifying the tracks as defendant's, and showing that he had disturbed it.

6. Evidence that either when called on, next morning after prosecutrix was shot, or without being called on, accused refused, without apparent reason, to help witnesses hunt for tracks of the guilty person, or to assist them in searching for evidence, was material.

7. Witnesses may testify that footprints observed about the scene of an assault with intent to murder appeared to be the same as defendant's, though no measurement thereof was made.

8. In a prosecution of accused for shooting his sister-in-law, it was competent to show the character of shot taken out of the pocket of a pair of pants which were found at his house, and which a witness stated belonged to accused.

9. It was also competent for a witness to testify that a piece of paper exhibited to him in court looked like the same piece that was gotten at defendant's residence on the morning after the shooting, and that he believed and took it to be the same piece of paper which was shown to have been taken from the pants pocket of defendant; the piece having been turned over to a witness, and by him handed to the district attorney.

10. Where defendant attempted to show by a witness that there was no motive for his shooting the witness' daughter, on the ground that good feeling existed between all the parties, it was competent for the state to show that differences did exist between them.

11. An assault with intent to murder occurred after dark in midsummer, and, if accused was guilty thereof, he must have gone from his house, some three miles, and, after the deed was accomplished, must have gone rapidly back to his home. *Held*, that evidence that his shirt was found hanging in his room the next morning in a wet or damp condition was material.

12. Where the theory of the state was that accused shot prosecutrix because he was defeated in his attempts to seduce her, and in support thereof it produced evidence of a number of circumstances tending to show such attempts, it was competent for it to show that the

feeling existing between them was bad, and that she did not like him, especially as she showed herself to be a reluctant witness.

13. An officer testifying to a declaration by the accused stated that he warned him after his arrest, and told him that anything he might say to him might be used against him as evidence. *Held* adequate, and to authorize the admission of the statement made thereafter.

14. In a prosecution for assault with intent to murder, in which an alibi was set up by defendant, evidence of defendant's declaration, made after his arrest, tending to show that at the time in question there was no one at his home but himself, was pertinent to meet such defense, as showing that it was an afterthought and fabricated.

15. In a prosecution for assault with intent to murder, witnesses, in identifying accused as being in a certain room where they were sleeping some time before the shooting occurred, were properly allowed to identify him by his broken arm, and having it in a sling, which, it seems, was his condition at the time.

16. A violation of the inhibition contained in Code Cr. Proc. art 823, against the allusion in argument to a former conviction, does not constitute reversible error, if it is evident that it was unintentional, and the matter was referred to accidentally, and for no ulterior purpose.

Appeal from district court, Erath county; W. J. Oxford, Judge.

Dock Baines was convicted of an assault with intent to murder, and he appeals. Affirmed.

Daniel & Keith, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for three years. This is the second appeal; the former appeal being reported in 61 S. W. 119, 312, 1 Tex. Ct. Rep. 816. The facts on this trial are substantially the same as on the former trial, except several witnesses testified on this trial who did not testify on the former. But the state's theory and the defendant's were the same on both trials.

In the motion for new trial, appellant, for the first time, raises the question as to the qualification of the judge to try the case; the ground of disqualification, as urged by him, being that the judge, before he came on the bench, was of counsel in the case. To support this motion, appellant relied on the affidavit of J. O. Freeman, who testified, in effect: That he went to the office of W. J. Oxford to employ him. After consulting with him in regard to the case, he made a contract with him as to what his fee would be to assist in the prosecution of defendant, and \$75 was agreed on as the fee. That the said Oxford advised affiant that he thought defendant could be convicted of making an assault in disguise, and defendant given a heavy penalty for the offense. That said Oxford advised affiant that he believed defendant guilty, and could prosecute defendant to conviction, and that, after relating to Oxford the circumstances against defendant, the said Oxford advised affiant

as aforesaid. That afterwards affiant was advised not to employ private counsel to prosecute defendant, and he failed to pay said Oxford the fee agreed upon, and let the matter drop. The state controverted the grounds of disqualification, introducing witnesses who were present at the alleged transaction between said J. O. Freeman and W. J. Oxford, to wit, W. J. Oxford, Eli Oxford, and Lee Oxford; the latter not being related to the judge. These witnesses flatly deny the employment of said Oxford as an attorney. They state, in effect: That Freeman was drinking at the time he came into Oxford's office, and spoke about employing him; asked him what he would take as a fee, and he replied, "One hundred dollars." Freeman then said that his neighbors proposed to help him raise the fee, if they could agree on it, and that Oxford then told him he would take \$75 if the fee was made up in that way. That Freeman may have told Oxford something about the case. Oxford himself did not remember. That Freeman told him he knew appellant was guilty of that offense, and guilty of burning his barn, and wanted him prosecuted. That he gave no advice about the case, and that Freeman never returned to employ him. That some time afterwards he asked him about it, and he said that he had conferred with the district attorney, who said he did not need any help to prosecute the case; that he had dropped the matter. The other two witnesses corroborate the judge in his statement. The state also introduced Dr. Burger, who testified that some time after Freeman's daughter was shot he had three different conversations with him about employing Judge Oxford. In the first conversation, Freeman told him the neighbors were going to make up the money to pay an attorney. The next time Freeman told him he did not know about it, and the last time he said positively he had not employed and was not going to employ an attorney, but was going to let the case take its course. In addition to this, the state introduced a number of witnesses who testified that the reputation of J. O. Freeman for truth and veracity was bad. On this state of case, the court thought he was not disqualified, and refused to recuse himself. Appellant insists that under the rule laid down in the Graham Case, 63 S. W. 558, 2 Tex. Ct. Rep. 821, the judge was disqualified to try the case; the only ground of similarity being that the matter of fee was discussed in both, but no fee ever paid. In the Graham Case it was shown by appellant that Judge Goodman consulted with other attorneys of appellant in regard to the case. We do not understand that the judge, in his testimony, denied consulting with appellant's attorneys; but he stated, however, that he considered the consultation rather as a friend of one of the lawyers who was related to appellant, than as an attorney in the case. He admitted

that he went to the jail to see appellant, and did not deny that appellant may have there talked to him about the case, but stated, if he did so, that it was voluntarily made by him, without any consultation or even inquiry on his part; that he went there for the purpose of arranging the fee. In this case the witnesses for the state testified emphatically that there was no employment, and no advice given; that, at most, there was only on the part of the judge a proposition to take a certain fee, but this fee was never arranged or agreed to be paid. On this state of facts, we do not believe this case comes within the rule as laid down in Graham's Case, supra. If it be conceded that Freeman's testimony showed an employment, and advice given, this was contradicted, and his testimony overwhelmingly controverted by that offered on the part of the state. If a judge could be disqualified on this character of evidence, then in every case where an attorney should be spoken to, and, in response to the question of fee, should state what amount he would take to prosecute or defend a case, and such attorney should afterwards be elected judge, and what had previously transpired should afford a ground of disqualification, it would follow, in order to disqualify a judge, it would only be necessary to show that he had previously been asked what he would prosecute or defend the case for. We do not believe that any case has gone to that extent. There was no error in the refusal of the trial judge to recuse himself.

Appellant, by his first bill of exceptions, raises the question as to the admissibility of the testimony of Minnie Freeman to the effect that on one occasion, as she returned with appellant from a fortune teller's whither they had gone, appellant offered to put his arm around her waist, and put his arm on the back part of the buggy, but never said a word. This was objected to by appellant on the ground that it was too remote from the time of the shooting to show any motive whatever. It might be replied to this bill, in the first place, that it does not state the time when this occurred. Accordingly, we cannot tell how remote it is. That it was admissible, as showing motive, if not too remote, we do not understand to be questioned. The motive relied on here by the state, as we gather from the record, was an attempt on the part of appellant to seduce prosecutrix, Minnie Freeman, who was a girl about 16 or 17 years old at the time, and the sister of his wife. The record tends to show that his attempts in this direction extended over a considerable lapse of time. Evidence tending to show motive, though remote, if connected or manifesting any bearing upon the issue, was admissible; its weight being a matter for the jury. *Dill v. State*, 1 Tex. App. 278; *Jones v. Same*, 4 Tex. App. 436; *Rucker v. Same*, 7 Tex. App. 549; *Early v. Same*, 9 Tex. App. 476.

The objection to the testimony of Minnie Freeman to the effect that she found some of her clothing with oil poured on it was not well taken. The circumstances tend strongly to show that this was done by appellant. From the evidence of both Minnie and her sister Lena, appellant was the only person at the house at the time; the other members of the family being in the field at work, or away from home.

Over appellant's objections, the state was permitted to show by Minnie Freeman the state of feeling existing between her and appellant. That is, the state asked the witness what the state of feeling was between her and defendant, and she replied: "It is just like it has always been. If he is the one that shot me, it is hard; if he ain't, it ain't. If he is the one, I want him to suffer for it; and, if he ain't, I don't." The objections to this are that it was immaterial to show the state of feeling between appellant and the witness. The court explains this by showing that the witness was hostile toward the state. Under these circumstances, we think it was proper for appellant to have asked the question, and to have proved directly by the witness what her feelings toward defendant were, but we do not understand the witness to so testify. Indeed, her testimony is of a noncommittal character, and we fail to see how it could injure appellant.

It is shown that appellant objected to the state showing that the witness Minnie Freeman was brought before the grand jury after she had formerly testified before that body. It is not shown, however, what she testified on either occasion, so the bill is not in a condition to be revised.

We have no doubt that it was competent to show that the ground near the house appeared on the next morning to have been disturbed, as if some one had been there. It was not necessary to identify appellant's tracks there, and show that he had disturbed it, before such evidence could be adduced. It was merely necessary to show that the signs indicated some one had been there.

Witness Gordon testified that while they were looking for tracks, in order to determine who the guilty party was, defendant did not help them to hunt for tracks or anything. This was objected to simply on the ground that it was not material. It occurs to us that this objection is not well taken. Indeed, the bill does not disclose the circumstances or conditions under which appellant was called on to help look for tracks, and in that respect it is defective. However, his failure to assist the parties who were searching for evidence might, under circumstances, be very material as a criminative fact against him. His sister-in-law had been shot the night before by a would-be assassin. The neighbors were engaged in the search to find evidence which might lead to the detection and punishment of the guilty party. If he was called on under such circumstances to

aid them, and refused, it might be a circumstance against him; or if he was not called on, but, without assigning any reason, failed or refused to assist his neighbors in searching for evidence, then such failure might become an inculpatory circumstance.

By bills of exceptions Nos. 7 and 9, appellant called in question the action of the court permitting certain witnesses to state as to the similarity of tracks found between the place of the shooting and appellant's house with those of appellant's tracks. The witnesses merely state that the tracks looked to them to be the same; that they did not measure them; they looked like appellant's. This testimony was objected to because no measurement was made of the tracks, and consequently there was no certainty that it was the track of appellant, and the testimony was irrelevant and immaterial. We think the objection that no measurement was made by these witnesses of the tracks would go rather to the weight than to the admissibility of the testimony. If the tracks appeared to the witnesses to be similar, and they looked to be the same size as those made by appellant, then the evidence would be admissible. See authorities cited on page 688, subd. "D," White's Ann. Code Cr. Proc. Besides, the court, in its explanation, shows the tracks were sufficiently identified.

In our opinion, it was competent to show the character of the shot taken out of the pocket of appellant's pants at his house. The witness shows they were taken out of the pants pocket of Baines, at his home; that the pants were in the cradle, near the little bed there. The objection that the pants were not better identified is not well taken. The witness stated that they were Baines' pants.

We also believe it was competent for the witness Joe Gordon to testify that the piece of paper exhibited to him in court looked like the same piece of paper that was gotten at Baines' residence on the morning after the shooting, and he believed it was the same piece of paper; that he took it to be the same piece of paper. The fact that he could not state positively that it was the same paper would not render the evidence inadmissible. The paper is shown to have been taken from the pants pocket of the defendant; and it was further identified as the piece of paper turned over to Harve Keith, and by Keith handed to the district attorney.

The state proved that the witness J. O. Freeman, father-in-law of appellant, had previously had some differences with appellant. This was objected to on the ground that it was immaterial. The court explains this by stating that defendant had proved by the witness that the best of feeling had always prevailed between himself and family and defendant, and that thereafter, on cross-examination, the state was permitted to prove the matters set out in the bill. That is, as we take it, defendant attempted to show by this

witness there was no motive for appellant shooting Minnie Freeman, daughter of witness, on the ground that good feeling existed between all the parties. Therefore it was competent to prove that differences existed between them. However, if we look to the testimony of this witness himself, it is favorable to defendant, because he testified that all of the differences had been amicably adjusted. It could not prove hurtful to him.

The state was permitted to prove by Mrs. Freeman that on the morning after the assault and shooting of Minnie Freeman at her house, which was some three miles from appellant's house, she found appellant's shirt hanging in his room; that it was damp. It occurs to us that this was a material circumstance against appellant. The shirt was identified as his. It was damp on the morning after the shooting, the shooting having occurred about 8 o'clock the night before. This was on the night of the 8th or 9th of August,—midsummer. The weather was evidently warm, and, if appellant did the shooting, he walked from his house, some three miles, to the house where prosecutrix lived, and after the deed was accomplished he must have gone rapidly from there back to his home. Evidently the clothes he wore would show some evidence of the trip, and we regard the fact that his shirt was found hanging in his room the next morning in a wet or damp condition as a material circumstance against him.

The state was permitted to show by Mrs. Freeman that prior to the shooting the feeling between Minnie Freeman, her daughter, and appellant was bad; that she had known for some time that Minnie did not like Baines. This was objected to on the ground that it was not shown defendant knew of this state of feeling, if it existed. The court explains the introduction of this testimony as follows: That defendant had proved by this witness that he had always been very kind to the entire Freeman family, buying them books, clothes, and other things, and that this kind of feeling prevailed between the members of the family and defendant; and on cross-examination the state was permitted to interrogate the witness as set out in the bill. We think, aside from the court's explanation, that it was competent for the state to show the feeling existing between Minnie Freeman and defendant was not good; that she did not like him. It will be borne in mind that the theory of the state was that appellant shot Minnie Freeman because she would not yield to his wishes; and on this line the state introduced a number of circumstances tending to show an attempt on the part of appellant to seduce Minnie Freeman, such as his attempt to put his arm around her waist on one occasion when they were alone together, and his proposition to buy her dresses and to furnish her a horse and buggy if she would run away with him; and but a short time before the shooting,

when appellant took her with his family on a trip, he went to her bed, where she was sleeping with his wife, evidently for the purpose of tampering with her, as the evidence shows that she remonstrated, and told him if he did not let her alone she would waken his wife. In connection with all these circumstances, we think it was competent to show that the state of feeling was not good on her part toward him, especially as she showed herself to be a reluctant witness.

If there was anything in the talk between the witness McCoy and the witness Smith at a former term of the court, the bill does not make it manifest. This conversation is not stated between these parties, and is not in a shape to be revised.

We believe it was perfectly competent for the state to prove, as was done by the witness Harve Keith, that he warned defendant after he had arrested him, and that he told him that anything he might say to him (witness) could be used and might be used against him as evidence. This warning, we think, was adequate, and authorized the statement of appellant, made thereafter, "that on the night of the shooting he was at home by himself, and how could he prove out of this business; that he did not shoot the girl, but who can he prove it by, when there was nobody at home but himself." This testimony was relevant as a declaration of appellant after he had been duly warned, and pertinent to meet the defense of alibi set up by him, showing that his alibi was an afterthought and fabricated, because by this testimony he was shown to be at home by himself.

It occurs to us that the identity of defendant as being in the room where Lena Freeman and Minnie Freeman were sleeping some time in June, 1900, before the shooting, was sufficiently shown to authorize this testimony. True, the witnesses identify appellant by his broken arm, and having it in a sling, but it seems this was his condition at that time. These observations would also cover the next bill, with reference to the testimony of Minnie Freeman on the same subject. Although she did not know who it was, her companion, it seems, did identify him by his broken arm.

Appellant complains that F. H. Chandler, an attorney for the prosecution, used the following language in his speech to the jury: "The witness McCoy stands ready to do anything that he is called on to do in this case. According to his own testimony, he signed a ready-made affidavit sent to him by defendant's counsel, and there is no evidence that McCoy dictated the affidavit, or knew what he was expected to swear to until the date he signed and swore to it, without altering or changing the same in any particular." Here search was made by counsel among the papers of the case, and the district attorney was asked for the affidavit referred to, and informed counsel that the same was lost.

And then said Chandler turned to the jury and said: "Anyhow, gentlemen, I refer to the affidavit of the witness McCoy, attached to the motion for new trial." This language was objected to by defendant's counsel on the ground that the state was referring to the fact that defendant had before been tried, and that he had applied for a new trial. We presume that appellant seeks to avail himself of the inhibition contained in article 823, Code Cr. Proc., which provides, that "the former conviction shall be regarded as no presumption of guilt; nor shall it be alluded to in the argument." While, strictly construed, the statute would appear to prohibit the barest allusion to a former conviction, yet we do not take it that this would constitute reversible error. *Campbell v. State*, 35 Tex. Cr. R. 160, 32 S. W. 774; *Brantly v. Same* (Tex. Cr. App.) 59 S. W. 892. Evidently the intent and purpose of the statute was to guard appellant against the use by the state of his former conviction as an evidence of his guilt, and it may be that any intentional allusion to a former conviction ought to afford ground for reversal; but where it is evident there was no intention to allude to a former conviction, and the matter was referred to accidentally and for no ulterior purpose, in such case it ought not to afford ground for reversal. In this particular case the record incidentally shows on the examination of witnesses that there had been a former trial, yet that is not considered ground for reversal, and the jury were as well informed of the former trial by that means as by the mere reference to the former trial which appears to have been accidental on the part of counsel.

We have examined the record carefully in this case, and, in our opinion, there is no such error as should cause a reversal. The facts amply support the verdict, and the judgment is affirmed.

HOUSTON, B. & N. RY. CO. v. POLLARD.

(Court of Civil Appeals of Texas. Feb. 20, 1902.)

RAILROADS—OBSTRUCTION OF STREET —NEGLIGENCE.

Where a railroad company tore up the pavement at a point where its road intersected a street, and left stones lying at the place without any signal light to show their presence, as required by an ordinance, violation of the ordinance constituted negligence, rendering the company liable to a cyclist injured by colliding with the stones.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by Hal G. Pollard against the Houston, Brazos & Northern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. H. Davenport, for appellant. S. B. Ehrensverth and J. V. Meek, for appellee.

GARRETT, C. J. On March 8, 1900. at night, while traveling down Congress street, in the city of Houston, on a bicycle, the appellee ran into some stones at the intersection of Congress and Emanuel streets, and fell, and was hurt. He sustained damages from the injuries received to the amount of the verdict and judgment. It is contended on appeal that there was no evidence to show that the appellant was in any way connected with the presence of the stones in the street. Without setting out the evidence, we think it sufficiently appears therefrom that the appellant was at work on its line of railway at the intersection of the streets mentioned, and had torn up the pavement, and left the stones lying at the place, and that they were dangerous to persons passing along the street. There was no signal light to show the presence of the stones, as was required by an ordinance of the city, and the appellant was negligent in failing to have out the required signal of danger. The judgment will be affirmed.

Affirmed.

NOWLIN v. HALL.

(Court of Civil Appeals of Texas. Feb. 26, 1902.)

PUBLIC LANDS—TRESPASS TO TRY TITLE— TRIAL—EVIDENCE—BURDEN OF PROOF —JURY QUESTION.

1. The plaintiff in trespass to try title between applicants to purchase school lands, whose title has been disallowed by the commissioner of the general land office, has the burden of proving that he had not, previous to his application, purchased from the state the amount of land fixed by statute as the maximum amount which one person could purchase.

2. The verified application of plaintiff to purchase the lands, which recites that he has purchased no other lands from the state, does not authorize the court in trespass to try title to find such fact as a matter of law, as the certificate, even if prima facie evidence of all the facts stated therein, is the testimony of an interested party, which the jury may discredit.

3. The statute providing that bona fide owners and actual residents of land may purchase additional lands contiguous or within a radius of five miles of the purchaser's home place, does not authorize the purchase of additional lands at the time of the purchase of the land intended as a home, but the applicant must be an actual owner and resident on the latter land at the time of purchasing the additional lands.

On rehearing. Modified and affirmed.

For former opinion, see 66 S. W. 116.

KEY, J. It is earnestly insisted by counsel for appellee that this court committed error in holding that the proviso in the statute limiting the quantity of land that an actual settler is entitled to purchase placed the burden upon appellee (who was plaintiff in the court below) to show that he had not previously purchased from the state the quantity of school land one person is permitted to purchase. We have reconsidered the question, but have found no reason for changing the ruling complained of. The

case of *Culberson v. Blanchard*, 79 Tex. 491, 15 S. W. 700, relied upon by counsel, is not in point. In that case the application to purchase had been accepted, and the statute as it then existed declared such sales valid unless suit was brought by the state within one year to set aside the sale. In this case the plaintiff's application to purchase had been rejected. True it is, if he belonged to the class of persons authorized by statute to purchase school lands, and had not previously exhausted his right to purchase, and complied with the provisions of the statute regulating the sale of such lands, then he acquired such right to the land, or equitable title, as would enable him to maintain his action of trespass to try title; but the burden rested upon him to show every fact necessary to establish his equitable right, and in order to do that it was necessary for him to show that his claim was fair and just, and not prohibited by the statute itself, whether the prohibition be in the form of a proviso or otherwise. This case does not come within that class of cases in which a plaintiff is not required to prove a negative. That rule does not apply for two reasons: First, because the plaintiff is asserting an equitable title that has been disallowed by the commissioner of the general land office, and must, therefore, show that, tested by every essential provision of the statute, he is entitled to the land; and, second, the negative referred to is a matter peculiarly within his knowledge, and no hardship would be imposed by requiring him to prove it. We think our construction of the statute here involved is supported by the principle announced and applied in *Blum v. Looney*, 69 Tex. 1, 4 S. W. 857.

The further point is made that, as the plaintiff stated in his verified applications to purchase the two tracts of land that he was not, either as assignee or original purchaser, the owner of any other land purchased from the state, and as there was no testimony to the contrary, it was proper for the court, in charging the jury, to assume the facts to be as stated in the application, and not submit that issue to the jury. We cannot indorse this contention. The plaintiff's applications to purchase were admissible in evidence for the purpose of showing that he had complied with the requirements of the statute regulating the sale of school lands; but, while this is true, we do not understand, when such an application is placed in evidence, that it will be prima facie evidence of all the facts stated therein. If this were true, then when a plaintiff puts in evidence his application to purchase it would be prima facie evidence of the fact that he was an actual settler upon the land at the time of filing his application to purchase. If the ex parte affidavit of the plaintiff contained in his applications to purchase can be regarded as evidence tending to establish all the facts therein stated,

still, as he was an interested witness, the jury, being the judges of his credibility, were not compelled to give credence to his testimony, although it may have been uncontradicted. *Railroad Co. v. Johnson*, 23 Tex. Civ. App. 192, 55 S. W. 772, and cases there cited.

This disposes of the motion for rehearing. However, in our former opinion one point was decided against appellant upon a misunderstanding of the record, for which the writer was chiefly responsible. The plaintiff's applications to purchase both sections of land were made on March 15, 1900, and filed in the land office March 19, 1900, and both were rejected by the commissioner of the land office because the land had been previously sold. The defendant claimed under one Buchholz, who had previously filed applications to purchase the two tracts of land; but the one claimed by Buchholz as his home section was awarded to him first, and several days thereafter the other section was awarded to him. The writer got these applications and the action of the commissioner thereon confused, and, upon the theory that the awards referred to were made upon the plaintiff's applications, we held that he was the owner of section No. 2, his home section, at the time his application to purchase No. 1 was considered and approved by the commissioner of the land office; and for that reason it was held that he was within the purview of the statute which authorizes an actual, bona fide owner of and resident upon land to purchase other land contiguous to or within a radius of five miles of his home place. But, as a matter of fact, the plaintiff, Hall, was not the owner of his home section at the time he made application to purchase the other section, and we are now satisfied that he was not entitled to purchase the latter. Our ruling on this question in the former opinion was rested in part upon the action of the commissioner in awarding the land, and we fell into error in supposing that it was awarded to the plaintiff. But if it be true, as contended by counsel for the plaintiff, that the action of the commissioner in approving or rejecting an application to purchase is wholly immaterial, still the fact remains that no one except an actual owner of and resident upon land is entitled to purchase additional lands under the statute referred to; and, after further consideration, we are satisfied that he must be such owner of his home place at the time he makes application to purchase the additional land. In other words, we come back to the principle discussed in the first part of this opinion. The state owns certain lands, which it places upon the market to be sold, not to every one who may desire to purchase, but to certain designated classes of persons; and those who have not obtained legal title to such lands, and assert title thereto by reason of compliance with the statute regulat-

ing the sale thereof, must bring themselves within the terms of the statute, and show compliance with all of its requirements, otherwise they acquire no right to the land. *Terry v. Dale*, 65 S. W. 51, 3 Tex. Ct. Rep. 149. Hence we are now of opinion that the plaintiff failed entirely to show any right or title to section No. 1, and that the court should have directed a verdict for the defendant as to that tract of land, and to that extent our former opinion is modified.

MUMME v. McCLOSKEY.¹

(Court of Civil Appeals of Texas. Jan. 29, 1902.)

TRESPASS TO TRY TITLE — DEFENSE — EVIDENCE — ADMISSIBILITY — SUFFICIENCY — IMPROVEMENTS — SUBROGATION.

1. Proof of the prior possession of real estate being sufficient to sustain trespass to try title as against a mere trespasser, error assigned in the admission of evidence concerning plaintiff's title will not be considered on appeal.

2. Where land belonging to another is sold for taxes against J., who was a trespasser thereon, the judgment, deed, and writ of possession are inadmissible in trespass to try title brought by the real owner against the tax purchaser in possession, as such evidence, though considered in connection with evidence that J. held possession of the land and returned the same for taxation, and though the tax purchaser considered J. as the owner thereof, is insufficient to show that the purchaser is not a mere trespasser, and will not support a plea of improvements in good faith.

3. Where a tax sale of land is void for the reason that the land is not the property of the person for whose taxes it is sold, the tax purchaser, on the recovery of the property by the owner in trespass to try title, will not be subrogated to the rights of the state for taxes paid, or be entitled to be reimbursed from the owner.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

Trespass to try title by Catherine McCloskey against Theo. Mumme. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

Action of trespass to try title, brought by appellee against appellant, to recover 187 acres out of an original survey of 640 acres, No. 369, originally granted to Samuel Swartwont, assignee, and for damages. From a judgment in favor of appellee for the recovery of the premises and \$120 damages this appeal is prosecuted.

The undisputed evidence shows that Patrick McCloskey bought the 640-acre survey, of which the land in controversy is a part, in 1872, and with his wife, Catherine (appellee), immediately went into possession thereof. Patrick died in 1880. From the time he bought up to his death he remained in possession of the land, and in 1885 inclosed the entire tract by a fence, which inclosure has been continuously maintained to the present time. After his death his wife, appellee, continued in possession and actual occupancy of the premises until in February,

1900, when the appellant, without her consent, entered upon and took possession of the part of the survey in controversy. It appears from the pleadings of the parties that appellant went in possession of the land under a sheriff's deed, made to him by virtue of a sale under a decree of foreclosure of an alleged lien for taxes on the premises rendered in favor of the state against one James McCloskey by the district court of Atascosa county on the 4th day of October, 1897. The appellee was neither a party to, nor had any notice of, the proceedings in which the decree was rendered under which appellant purchased. It does not appear that James McCloskey, against whom the decree was rendered, ever had or claimed any interest in the land. On the contrary, it is shown that he had no interest or claim in or to any part of it. He never rendered the land for taxes either for himself or any one else. But it is indisputably shown from the evidence that the appellee was in actual possession of the premises when the decree against James McCloskey for taxes was entered, as well as when the land was sold thereunder and entered upon by appellant, cultivating and claiming the same as her property. The evidence shows that during the time possession of the premises was withheld by appellant from appellee its rental value was \$120.

T. M. West, for appellant. T. F. Shields, for appellee.

NEILL, J. (after stating the facts). 1. As proof of appellee's prior possession entitled her to recover against appellant, who is a mere trespasser (*Lockett v. Glenn* [Tex. Sup.] 65 S. W. 482; *Watkins v. Smith*, 91 Tex. 592, 45 S. W. 560), it is unnecessary for us to consider any of the assignments of error in relation to the admission in evidence of her title papers.

2. Had the judgment rendered in favor of the state against James McCloskey foreclosing the lien on the land, the deed made by the sheriff to Mumme by virtue of the sale thereunder, and the writ of possession issued after the sale in his favor, been admitted in evidence, proof, in connection with such documents, that James McCloskey held possession of the land, had rendered it for taxes, and that appellant considered McCloskey its owner, would not have relieved him from the attitude of a trespasser, nor have supported his plea of improvements in good faith. "The existence of good faith is a fact to be established by evidence of other facts tending to show that the person asserting it at the time he made improvements on the land believed himself to be the owner and had grounds for such belief such as would ordinarily be satisfactory to one unlearned in the law, but of ordinary intelligence, after having made such inquiry as the law presumes every person desiring to buy land will make as an ordinarily prudent

¹ Rehearing denied February 28, 1902, and writ of error denied by supreme court.

man for his own protection ought to make." *Holstein v. Adams*, 72 Tex. 490, 10 S. W. 560. The testimony offered would not tend to disclose title or semblance of title in appellant. "That defendant, Mumme, considered James McCloskey the owner of the land," appears to be the sole source of good faith on which he relies. This amounts to nothing. *Armstrong v. Oppenheimer*, 84 Tex. 367, 19 S. W. 520. Therefore the court did not err in refusing to admit the judgment, deed, and writ of possession above referred to in evidence.

3. Appellant being a stranger to the title, and having purchased at a void tax sale, equity will not subrogate him to the rights of the state for taxes paid, nor entitle him to be re-imbursed by the owner in a suit brought by her to recover her property. *McCormick v. Edwards*, 69 Tex. 106, 6 S. W. 32; *Eustis v. City of Henrietta*, 90 Tex. 468, 39 S. W. 567; *Broxson v. McDougal*, 70 Tex. 64, 7 S. W. 591; *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467; *Furche v. Mayer* (Tex. Civ. App.) 29 S. W. 1099. Therefore the court did not err in overruling appellant's special exception to appellee's petition, nor in refusing to render judgment in his favor for taxes alleged to have been paid by him on the land.

There is no error requiring a reversal of the judgment, and it is affirmed.

WALSH v. FORD.¹

(Court of Civil Appeals of Texas. Dec. 7, 1901.)

VENDOR AND PURCHASER—NONPAYMENT OF PURCHASE PRICE—VENDOR'S LIEN—RESCISION OF SALE—RECOVERY OF LAND—ESTOPPEL—CONDITIONS PRECEDENT—JUDGMENTS—RES ADJUDICATA.

1. Where a deed recites as its consideration one note for \$550, which note is expressly made a second vendor's lien on the property, and ten notes for \$120 each, which notes are expressly made a first vendor's lien, and the vendee accepts title thereunder, he will not be heard to attack the recitals of the deed and defeat the lien by showing that the last-mentioned notes were not given for the purchase money, but to secure a loan made to him by the vendor.

2. An owner of land agreed to sell it to defendant for \$550, and to loan him \$1,200 to erect a house thereon, notes to be given for both amounts, and the \$1,200 to be made a first vendor's lien and the \$550 a second vendor's lien. The \$1,200 was advanced and used as agreed, \$500 being so used before the execution of the deed, which retained the contemplated liens. *Held*, that the whole sum was, in effect, given in payment for the property, and the owner accordingly retained the legal title until all the notes were paid, and his rights were, therefore, superior to any homestead rights acquired by defendant.

3. The owner, by collecting the \$550 and half the remaining \$1,200, and by permitting defendant to make improvements on the land, could not be estopped to rescind the sale on nonpayment of the balance.

4. A vendor of land, whose deed retains a lien for the unpaid purchase money, may, on his

vendee's default, bring trespass to try title, and recover the land, without returning the part of the purchase price which has been paid.

5. A third person sold land to defendant, reserving a vendor's lien for the unpaid purchase money, and transferred the notes evidencing the same to the J. Co. The notes not being paid, the company's receiver, and afterwards the company itself as substituted plaintiff, brought trespass to try title to recover the land. Prior thereto, in 1898, J. himself had brought trespass to try title against defendant, the answer in that suit setting up the same defenses as in the later suit, but further pleading that plaintiff relied on a trustee's sale made at defendant's request; that the sale had never been consummated, or the trustee's deed delivered. The last defense was established, and verdict directed for defendant. *Held* not to sustain a plea of res adjudicata, the parties in the later suit not being the same, and the issues there not having been determined in the earlier action.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Suit by T. W. Ford, receiver, against James I. Walsh. Judgment in favor of the J. B. Watkins Land & Mortgage Company, substituted plaintiff, and defendant appeals. Affirmed.

J. C. Muse, for appellant. A. T. Watts, for appellee.

BOOKHOUT, J. Suit in trespass to try title by T. W. Ford, receiver of the J. B. Watkins Land & Mortgage Company, filed February 6, 1900, against James I. Walsh as defendant. The receivership being terminated pending this suit, the J. B. Watkins Land & Mortgage Company substituted itself as plaintiff herein in lieu of T. W. Ford, receiver, and thereafter prosecuted this suit as plaintiff for its own benefit. Trial by jury resulted in a verdict for the J. B. Watkins Land & Mortgage Company for the property in controversy, consisting of a house and lot in the town of Oak Cliff, the verdict being directed by the court under a peremptory charge. Judgment in accordance with the verdict. The defendant, James I. Walsh, has appealed.

The issues presented by the answer were:

(1) The petition of T. W. Ford, receiver, alleged that on the 30th of March, 1889, M. J. Dart conveyed the lot in controversy to James I. Walsh. That the purchase money was evidenced by ten promissory notes executed by Walsh to Dart, each for the sum of \$120, of date March 30, 1889, and payable to the order of M. J. Dart on or before 24, 30, 36, 42, 48, 54, 60, 66, 72, and 78 months from date, respectively, each bearing interest at 9 per cent, payable semiannually, and alleged that said deed expressly reserved a vendor's lien to secure the payment of the notes; that thereafter, before the maturity of said notes, M. J. Dart indorsed each of said notes to the J. B. Watkins Land & Mortgage Company, and it became the owner of the same; that Walsh has paid five of said notes, and that five are unpaid; that on August 28, 1896, M. J. Dart conveyed the legal and superior title in him by virtue of said vendor's lien notes

¹ Rehearing denied January 11, 1902, and writ of error denied by supreme court.

to the J. B. Watkins Land & Mortgage Company, who thereby became invested with the legal title to the property; that on January 25, 1900, the receiver, Ford, declared the sale rescinded because of the nonpayment of the last five of said notes. Then followed the usual allegations of trespass to try title, and the allegation that a dwelling and out-houses were situated upon said lot, alleging the rental value of the property to be \$15 per month.

(2) The defendant, by first amended original answer, filed June 5, 1900, pleaded a general denial and not guilty, and in paragraphs 4 and 5 of said answer alleged that on and prior to March 1, 1889, M. J. Dart was the owner of the lot described, and that on the said date the defendant, Walsh, contracted with him for the purchase of the lot for the sum of \$550, purchase price thereof, and also contracted at the same time for a loan of \$1,200 from said M. J. Dart, the agent of the J. B. Watkins Land & Mortgage Company, to be secured upon said lot contracted to be purchased; that it was agreed that the borrowed money in the sum of \$1,200 should be a first lien upon the lot, and that the \$550 purchase money for the lot should be a second lien thereon; that thereafter, on March 30, 1889, M. J. Dart conveyed the lot to the defendant, Walsh, in accordance with said agreement, and that the said Walsh executed to M. J. Dart a note for \$550, the purchase price of the lot, which was made a second lien by the terms of the deed, the same payable to M. J. Dart, and also executed the ten notes of \$120 each described in the plaintiff's petition, which said notes were executed in order to secure the \$1,200 which had been loaned and agreed to be loaned by the said Dart to the said Walsh, which said notes were, by the terms of the deed, constituted a first lien upon the lot; that in fact the \$550 note represented the purchase price of the lot, and that said ten notes for \$120 each was but the method employed by M. J. Dart in securing the loan of the said \$1,200 aforesaid, and in fact constituted but a mortgage lien as security for their payment, and in no sense represented a part of the purchase money; that M. J. Dart was the general agent of the J. B. Watkins Land & Mortgage Company, engaged in lending money in Texas, and that said Dart, acting as the agent of said company, loaned to the defendant, Walsh, \$1,200 out of the money of said company, and was acting for said company as its agent in making said loan, and, in order to secure said loan, procured the execution of said ten notes for \$120 each by the defendant, which notes were to be transferred to said company to secure it in said loan aforesaid, and was but the method pursued and adopted to evidence and secure the loan, and that said Dart did in fact transfer said ten notes to the J. B. Watkins Land & Mortgage Company, which company had full notice and knowledge that said ten notes formed no part of the purchase

price of the property, and were but a mortgage to secure the repayment of the money so loaned; that the said Dart, in making said loan and transferring said notes to the company, was acting as its agent, with full authority, and that said company had full knowledge and notice that said ten notes represented a loan, and were not vendor's lien notes in fact when the company acquired them, and that in fact said notes represented only a mortgage lien on the property; that the first five of said ten notes were duly paid off; that the first of the five unpaid notes matured September 30, 1893, and the last matured September 30, 1895, and were barred by limitation more than four years prior to the institution of this suit; that the notes, not being for purchase money, did not constitute a vendor's lien, and that no superior title was vested either in Dart or said company by virtue of said notes which would enable the plaintiff to rescind the sale or assert the superior title to the property; that the defendant, Walsh, had been continuously in possession from a time prior to the date of said deed of March 30, 1889, and, said notes being barred by limitation, the plaintiff was not entitled to a foreclosure of any mortgage lien by reason of the notes.

(3) In paragraph 6 of said answer the defendant pleaded homestead, alleging that he was a married man, and the head of a family, on and prior to the 1st of March, 1889, when he contracted to purchase said lot from Dart, and then designated it as his homestead, and proceeded to improve it for occupancy as such with the \$1,200 borrowed as heretofore alleged by erecting a dwelling house and other improvements thereon, and at the time of the execution of said deed on March 30, 1889, had expended of said \$1,200 not exceeding one-half thereof in such improvements, and immediately upon the execution of the deed occupied the property as his homestead, and has so occupied it continuously as such, having no other homestead; and that said property did not exceed in value \$2,000, and was situated in Oak Cliff, Tex.

(4) In paragraph 7 of said answer the defendant pleaded that the \$550 vendor's lien note representing the purchase money of the lot had been transferred to said company, together with the ten notes described; that he had paid to said company the \$550 note and the first five of the \$120 notes, aggregating \$1,150, besides the interest from date to their respective maturities; that the said company ratified and confirmed the purchase of the property by the defendant; and that he had expended \$200 in other improvements; and that the company were estopped, having confirmed the sale and collected the money alleged, from disaffirming the sale, and asserting title to the property, and that their remedy was by foreclosure on their mortgage lien.

In the eighth paragraph of his answer

the defendant pleaded an estoppel against the plaintiff, for that the issue of title, as alleged in the petition, is settled and res adjudicata, because on June 8, 1898, J. B. Watkins, for the use and benefit of the J. B. Watkins Land & Mortgage Company, and of the plaintiff as its receiver, filed suit against this defendant, James I. Walsh, in trespass to try title, to recover the same identical property in controversy in this suit; that the same issues in controversy in this suit were in controversy and presented in said cause No. 17,191, and judgment rendered adversely to the said J. B. Watkins, who was acting for the J. B. Watkins Land & Mortgage Company and the receiver herein. And appellant, by his trial amendment, further alleged that J. B. Watkins was the alter ego of the J. B. Watkins Land & Mortgage Company, and did business under that name, and owned all of the stock, assets, and property of the J. B. Watkins Land & Mortgage Company. The defendant prayed for cancellation of the notes by reason of limitation, and removal of cloud from his title, and in the alternative for an adjustment of equities as set forth in his answer. By proper proceedings the J. B. Watkins Land & Mortgage Company was substituted as plaintiff in lieu of T. W. Ford, receiver. The special demurrers Nos. 1, 2, 3, and 4 of the J. B. Watkins Land & Mortgage Company contained in its first supplemental petition filed December 1, 1900, were sustained as to paragraphs 4, 5, 6, 7, and 8 of the defendant's first amended original answer. The court charged the jury peremptorily to return a verdict for the plaintiff.

1. Appellant groups his first and second assignments of error. In the first he complains of the action of the court in sustaining the special demurrer to the fourth and fifth paragraphs of his answer. In the second he complains of the action of the court in refusing to permit him to prove under his plea of not guilty that the notes described in the petition were not for purchase money, but were in fact for a loan of the J. B. Watkins Land & Mortgage Company, and that said vendor's lien notes was a method employed to secure said debt by said company with full knowledge of the facts, and that defendant has had continuous possession of said property since the date of said notes. The averments in paragraphs 4 and 5 of the answer show that on March 1, 1889, M. J. Dart was the owner of the lot described in the petition, and on that date he contracted with the defendant to sell him the land for \$550, and at the same time, and as a part of said contract, he agreed to loan defendant \$1,200, said Dart at that time being the agent of the J. B. Watkins Land & Mortgage Company; that, in order to secure said purchase money and said borrowed money, it was agreed that said \$1,200 should be a first vendor's lien

upon the lot and the \$550 should be a second lien; that, in accordance with this agreement, said M. J. Dart conveyed said lot by warranty deed to the defendant, which said deed is of record in Book 104, pages 148-150, Records of Deeds of Dallas county, Tex., to which reference is made; that the consideration recited in the deed is certain notes, to secure which a vendor's lien is specially retained. All of said notes bear interest at the rate of 9 per cent. per annum until maturity, and 12 per cent. after maturity until paid. The last ten notes were, by the deed, made a first vendor's lien upon the lot. There was no allegation of fraud or mistake in the recitals in the deed. Thus it will be seen, from the averments of the answer, that the deed through which the defendant derives title to the property requires the payment of the notes described therein, and expressly retains a vendor's lien to secure the same. The deed expressed the terms upon which defendant took title. Under its terms defendant took title to the lot burdened with the liens specified in the deed. Having accepted title under these terms, he cannot now be heard to attack the recitations in the deed for the purpose of defeating the notes and the lien. Paragraphs 4 and 5 of the answer were insufficient to defeat plaintiff's cause of action, and the court did not err in sustaining exceptions to the same. *Berry v. Boggess*, 62 Tex. 241; *Wright v. Campbell*, 82 Tex. 391, 18 S. W. 706; *Doty v. Barnard*, 92 Tex. 104, 47 S. W. 712; *Jones v. Male* (Tex. Civ. App.) 62 S. W. 827. If, however, there was error in sustaining the exception, then, under the facts shown in the record, such error was harmless. The defendant had pleaded not guilty, and under this pleading he tendered the evidence which he sought to have admitted under the defenses specially set out in paragraphs 4 and 5 of his answer. The court declined to admit the evidence, to which the defendant excepted, and took his bill of exceptions, and has preserved therein the testimony sought to be introduced. Said testimony is to the effect that on March 1, 1889, M. J. Dart owned the lot in controversy, and was at that time the agent of the J. B. Watkins Land & Mortgage Company. On that date it was verbally agreed between said Dart and appellee, Walsh, that Dart would sell the lot to Walsh for \$550, and loan \$1,200 to Walsh with which to erect a house on the lot; that the \$1,200 was to be secured by a first vendor's lien upon the lot and the \$550 was to be secured by a second lien thereon; that, in accordance with the agreement, Walsh contracted for the erection of a house upon the lot, and Dart advanced the money as payment was required for the erection of the same; that at the time the deed was made Dart had advanced about \$500, which was used in the payment for said house. After the deed was made, the

balance of said \$1,200 was advanced by Dart and paid out by appellant for the erection of said house, which was completed about April 1st, on which date Walsh, with his family, moved into said premises, and they have since occupied the same as their homestead. Walsh was, on March 1, 1889, a married man and the head of a family, and designated the lot as a homestead when he made the verbal contract. In pursuance of said agreement Walsh executed the notes recited in the deed, and a deed of trust on the lot to secure the same. Dart executed a deed for the lot on March 30, 1889, in accordance with the verbal contract. The deed recited that it was made in consideration of the payment of the notes, which are fully described. The mortgage company had full knowledge of all these facts. It was admitted that all the notes described in the deed had been paid, except six, for \$120 each, maturing, respectively, 48, 54, 60, 66, 72, and 78 months from the date of the deed. These notes were barred by limitation when the suit was instituted. It is conceded that appellant never had title to the lot prior to the making of the contract which culminated in the execution of the deed. In this respect this case is distinguishable from the case of *Williamson v. Huffman* (Tex. Civ. App.) 47 S. W. 276, upon which appellant mainly relies. The evidence tendered shows that when the verbal contract was made it was agreed, as a part of the contract, that \$1,200 was to be loaned by the vendor, Dart, to the vendee, Walsh, for the purpose of erecting a house upon the lot; that notes were to be executed by Walsh for the \$550 and the \$1,200, and a deed executed by Dart in consideration of said notes and a vendor's lien retained to secure the same. It further shows that this sum was advanced and used in constructing a house upon the lot, \$500 being so used prior to the execution of the deed. These facts show that all the notes were, in effect, given in payment for the property. They represent the value of the property after Dart's money had been used to improve the lot. The parties so treated the notes, and the deed expressly retained a vendor's lien on the property to secure all of the notes. Appellant's homestead rights were subordinate to his title under the deed. It follows that the evidence tendered by appellant to prove the allegations in paragraphs 4 and 5 of the answer did not make out a defense, and hence the sustaining the demurrer to said paragraphs, if error, was harmless. The action of the court in excluding this evidence is not reversible error, for the result must have been the same had the evidence been admitted.

2. It is contended that the court erred in sustaining the plaintiff's special exception to the seventh paragraph of the defendant's answer, wherein the defense of estoppel was interposed to the plaintiff's recovery; the contention being that appellee, having col-

lected the original purchase price of the first five of the \$120 notes in money, and permitted appellant improvements, was estopped to rescind even though the unpaid notes shew a vendor's lien notes. There is no such contention. The notes were the consideration to Dart in part of the consideration stipulated in title by the terms of said deed were a vendor's lien upon the property. Appellant tendered the notes, with the superior title to the property, to the plaintiff. Appellant failed to pay the notes, and that they are barred by limitation. *Eq. Jur. § 805.*

3. Again, it is insisted by appellant that the court erred in sustaining the exception to the eighth paragraph of the answer, wherein he alleged that he had the greater part of the indebtedness in the deed, and that plaintiff could rescind the sale without doing equity by returning back the money paid. That is not to rescind, but to recover the money on the ground that plaintiff has a superior title. Appellant did not tender the balance and ask that he be permitted to rescind. He was not entitled to the purchase money paid by him. *Co. v. Boon, 73 Tex. 555, 11 S. W. 5 v. Moreman, 84 Tex. 601, 20 S. W. 1.*

4. Appellant's seventh assignment of error complains that the court erred in its verdict by instructing a verdict for the plaintiff for that the evidence was sufficient to sustain the issue of estoppel and rescind as presented in the ninth paragraph of the answer. The evidence showed that J. B. Watkins filed a suit in trespass to title against appellant for the lot in controversy, said suit being filed in the court of Dallas county. The answer to said suit consisted of a general demurrer, denial, and special answers to the same matters contained in the answers in this suit, and further that the plaintiff in that suit relied on the trustee's sale made at the request of the defendant, Walsh, and said sale had been consummated, and the trust deed had never been delivered. The law was established, and the court directed a verdict for the defendant, Walsh. A writ of *habeas corpus* was brought by Ford, receiver of J. B. Watkins Land & Mortgage Company, and is based on the superior title of the defendant by Dart to the said company. The defendant was discharged during the pendency of the suit, and the company substituted as plaintiff. The parties to this suit are the same as those to the former suit, and the issue in this suit was not the issue in the first suit, and hence was not determined therein. The judgment in that suit is shown by the record. *Cook v. Bush, 115 Tex. 115; Girardin v. Dean, 49 Tex. 7; Horton v. Hamilton, 20 Tex. 611.*

James, 81 Tex. 381, 16 S. W. 1087; Nichols v. Dibrell, 61 Tex. 541; Philipowski v. Spencer, 63 Tex. 607. We conclude that the evidence was insufficient to show an estoppel, or to sustain defendant's plea of res judicata, and hence the court did not err in instructing a verdict for the plaintiff.

We find no error in the record, and the judgment of the court below is affirmed. Affirmed.

GIBBS et al. v. ASHFORD et al.¹

(Court of Civil Appeals of Texas. Jan. 23, 1902.)

STREETS—DEDICATING AND ACCEPTANCE—MANDAMUS—PARTIES.

1. Dedication of a street and its acceptance as such by the city is shown by evidence that ever since the laying out of the city it was known and recognized by the public and the city authorities as a public street; that the original owner recognized it by calling for it in conveyances; that the city, in demanding rent for its use for private purposes, made no claim to a right therein except by virtue of its status as a street; and that the council adopted a map showing it, as the official map of the city.

2. Persons occupying a street under contract with a city are necessary parties to mandamus proceedings by abutting property owners to remove obstructions.

Error from district court, Walker county; J. M. Smither, Judge.

Mandamus proceedings by Mrs. S. E. Gibbs and others against J. G. Ashford and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Hume & Hume and Ball, Dean & Humphrey, for plaintiffs in error. Hutcheson, Campbell & Hutcheson, for defendants in error.

PLEASANTS, J. Plaintiffs in error brought this suit in the district court of Walker county, for themselves and for the benefit of the public, for mandamus to compel the defendants in error, the mayor and board of aldermen of the city of Huntsville, in said county, to open an alleged street in said city known as "Tyler Street," and to remove the obstruction from a portion of said street described in the petition. The allegations of the petition, except in the matters hereinafter discussed, are sufficient to entitle plaintiffs to the relief prayed for, and it is unnecessary to set them out at length. The defendants' answer contained general and special exceptions to the petition, and denied knowledge of the dedication, by any one having authority, of the locus in quo as a street, or its acceptance as such by the municipal authority of Huntsville; affirmed that said property had been held and used by the city for 25 years as ordinary property, not as a street; that same was unfit for use as a street, and could only be made suitable for such use

by a large expenditure of money; and that in their official judgment it was not necessary to open said street. Said answer further avers, in substance, that if said property described in plaintiffs' petition was ever a street of said city the city council had, in the exercise of their discretion, changed and altered the location of same 25 years ago, and that said street was now located at a different place from that described in the petition. On the trial in the court below all exceptions were overruled, and upon a hearing of the case on the merits judgment was rendered for the defendants, and plaintiffs' suit dismissed.

The city of Huntsville is incorporated under the general municipal incorporation law of this state, and the defendants were the duly elected and qualified mayor and board of aldermen, and as such constituted the city council of said city. Huntsville was laid off in blocks and lots and streets more than 50 years ago, but no map of said city has ever been recorded in the deed records of Walker county. An old map introduced in evidence by plaintiffs, and shown to be more than 50 years old, shows Tyler street to be located as claimed by plaintiffs. This map has been referred to in deeds conveying property in said city for more than half a century, and a copy of this map was adopted by the city council in 1895 as the official map of said city, and filed with the county clerk, but, not being properly authenticated, was never recorded. Tyler street, as shown upon this map, extends east and west through said city, and crosses Main, Burton, and Travis streets, which run north and south. West of Main street, and to the city limits, Tyler street has been used as a public street for many years, and has been kept in repair by the city council. East of Main street Tyler street has never been worked or repaired by the city authorities, and has never been used to any considerable extent as a highway, either for vehicles or persons on foot, and between Burton and Travis streets the state of Texas has inclosed said street as a part of the penitentiary grounds, and it is admitted had acquired title to same prior to the institution of this suit. The depot of the International & Great Northern Railroad Company is situated about the center of the block south of Tyler street, and between Main and Burton streets, and there is a street or roadway leaving Tyler street at its intersection with Main, and running diagonally across the railroad block past the depot, and terminating in Burton street. This roadway has been used by the public as a street for a number of years, and has been recognized as such by the city authorities, and been kept in repair by the city. No order of the city council altering or changing Tyler street is shown to have been made. The appellants own property, fronting on the north side of Tyler street, between the pen-

¹ Rehearing denied, and writ of error denied by supreme court.

penitentiary inclosure and Main street. The deeds to this property call for Tyler street. Several parties are in possession of portions of Tyler street between the penitentiary inclosure and Main street, and have placed obstructions thereon consisting of fences, stables, a cotton platform, and a lumber yard. These obstructions prevent the use of the street as a public thoroughfare, and cut off appellants' means of egress and ingress to their property. Some of these obstructions have been in the street since 1880. In 1887 the mayor of the city required the parties then in possession to attorn to the city, and pay a nominal rent for the use of the street. This custom has been continued by the city authorities, and the parties now in possession pay rent to the city. At its intersection with Burton street Tyler street is crossed by a large gully, and there are arms of this gully extending into Tyler west of Burton, and it would cost a considerable sum to place this portion of the street in good condition for use by vehicles. Prior to the bringing of this suit appellants made application to the city council to open Tyler street from Main to Travis, and have all obstructions removed therefrom. This application was refused by the council on the ground that, in its judgment, it would be impracticable, unnecessary, and a useless expense to open said street. The amended petition on which the case was tried only asks for mandamus to compel the opening of the street between Main and the penitentiary inclosure, and the removal of the obstructions from that portion of said street. This petition alleges that various private parties are in possession of the portion of the street sought to be opened, and own the fences, buildings, and structures which are asked to be removed, but said petition does not make the persons so alleged to be in possession of said street parties to this suit.

Without considering the various assignments of error in detail, we are of opinion that the conclusion of the trial court that Tyler street had never been dedicated as such by the original owner of the land, and had never been accepted by the city in such manner as to fix its status as a public street of the city of Huntsville, finds no support in the evidence, and cannot be sustained. It is true no formal dedication or acceptance is shown by the evidence, but the evidence does show that ever since the city was first laid out Tyler street has been known and recognized by the public and by the city authorities as one of the public streets of the city. As far back as 1848 we find the original grantee of the land on which the city of Huntsville is situated recognizing Tyler street as claimed by the appellants by calling for same in conveyances made by him. The city authorities, in asserting the right to demand rent for the use of the property, made no claim to any right in same except by virtue of its status as a public

street of the city, and the minutes of the council show that it has always been dealt with as such, and the adoption by the council of the map showing Tyler street as claimed by the appellants, as the official map of the city, was an affirmative recognition by the city of the status of the street as claimed by the appellants. Our conclusion is that the evidence establishes beyond question that Tyler street, as claimed by appellants, is a public street of the city of Huntsville.

We are further of the opinion that the evidence fails to show that the city council ever exercised, or attempted to exercise, its right to change or alter said street.

Such being our conclusion of fact, it follows that the city council had no authority to lease said property, or to consent to its use for any other purpose than that of a public highway, and mandamus would lie to compel the council to perform its plain statutory duty and remove obstructions placed or maintained in the street by it or under its authority, if the petition had made the parties in possession of the street and claiming rights therein parties to the suit. It seems to be well settled that a petition for mandamus is insufficient if it fails to make all persons asserting any claim in the subject-matter of the suit parties to the suit, and this is true, even though the petition alleges that the adverse claim is void. In the case of *Tabor v. Commissioners*, 20 Tex. 521, the supreme court say: "If there were no other objection to the application for the writ of mandamus in this case, the fact that there are other claimants to the land who are not parties to the proceedings would furnish ground for refusing it. The averment that their claims are void will not relieve the matter of the difficulty, for this court will not undertake to adjudicate their claims, whether void or not, when the claimants are not parties to the suit."

It is true the petition in this case alleges that the parties in possession of the street only claim rights therein under a void contract with the city council, and the evidence in the case seems to sustain this allegation; but, as said by Judge Smith in the quotation above made, we cannot adjudicate the claim of persons who are not parties to the suit. The petition shows that several private parties are in possession of the property and asserting a claim thereto, and upon purely ex parte allegations and testimony as to what the claim of such parties is we cannot adjudicate their claim nor order the city council to disturb their possession without giving them their day in court. *Commissioners v. Smith*, 5 Tex. 471; *Chappell v. Rogan* (Tex. Sup.) 62 S. W. 539.

Appellees by cross assignment of error complain of the action of the trial court in not sustaining a general demurrer to the petition on the ground that all the parties interested in the subject-matter were not parties to the suit. This assignment we think

should be sustained, and, while we do not concur in the conclusions of law and fact found by the trial court, a correct result was reached in ordering the cause dismissed, and the judgment will be affirmed.

Affirmed.

GULF, C. & S. F. RY. CO. v. WISHART.

(Court of Civil Appeals of Texas. Feb. 20, 1902.)

RAILROADS—OVERFLOWING LAND—EVIDENCE—INSTRUCTIONS.

1. A landowner having sued a railroad for overflow of his land, claiming that the closing of a culvert and construction of a ditch caused the water to back up on the land, evidence that the land was low and flat, and had overflowed before the company threw up the embankment and closed the culvert, is admissible, not only to show the character of the land, but for all purposes, as tending to show a complete defense.

2. Instruction to find for defendant, if plaintiff's land was subject to overflow after defendant railroad put in a culvert, and before it filled it up and cut a drain along its right of way for purpose of draining adjacent lands, or if the ditch drained plaintiff's land as well as the culvert did, while correct as to the last part, is erroneous in the first part, in denying recovery if the land was at all subject to overflow before the filling of the culvert and construction of the drain.

Appeal from Burleson county court; E. B. Porter, Judge.

Action by James Wishart against the Gulf, Colorado & Santa Fé Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. R. Heslep and J. W. Terry, for appellant.

GARRETT, C. J. As we are of the opinion that the judgment of the court below should be reversed for the error of the trial court in giving the instruction as hereinafter shown, we will not pass upon the sufficiency of the evidence to support the verdict of the jury. Wishart brought the suit against the railway company to recover damages for the overflow of land. It was claimed that the closing by the defendant of a culvert in the roadbed and the construction of a ditch to run the water off caused the water to back up on the land of the plaintiff and overflow it. On the part of the defendant evidence was introduced to show that the land was low and flat, and that water stood upon it whenever it rained, notwithstanding the presence of the railroad track, and evidence had been received to show that the land had overflowed before the defendant threw up the embankment and stopped the culvert. In his charge to the jury the court limited the effect of such testimony to the purpose only of showing the character of the land,—whether it was level or low or otherwise. This was clearly error, because the evidence was admissible for all purposes, as it tended to show a complete defense to the plaintiff's

cause of action. From this instruction the jury might have been misled into the belief that it would not have been a defense to the suit if the land was subject to overflow before the road was built, or if it was as much subject to overflow while the culvert was open as it was after the culvert was closed and the ditch had been constructed.

The defendant requested the following special instruction: "If you believe from the evidence that plaintiff's land was subject to overflow after the defendant put in the culvert and prior to the time the defendant filled up said culvert and cut the ditch along its right of way for the purpose of draining the land adjacent thereto, or if you believe from the evidence that said ditch drains plaintiff's land as well as the culvert did prior to the time that defendant filled it up, you will find for the defendant." If the filling of the culvert, and substituting for it the ditch, did not increase the overflow of plaintiff's land, then he ought not to recover; but the first part of the instruction denies recovery if the land was at all subject to overflow before the filling of the culvert and the construction of the ditch. The last part of the charge is correct. It would have been proper to have given the jury an instruction such as requested, with the modification indicated as to the increase of the overflow, as it would have been pertinent to the facts and have placed the issue clearly before them. It is unnecessary for any practical purpose on another trial to pass upon the assignment of error as to the manner of making the statement of facts by the trial judge. For the error indicated, the judgment of the court below will be reversed, and the cause remanded for another trial.

Reversed and remanded.

FLETCHER et al. v. WILLIAMS et al.¹

(Court of Civil Appeals of Texas. Jan. 18, 1902.)

WILLS—PROPERTY SUBJECT TO DISPOSITION—PROCEEDS OF LIFE POLICY—LEGATEE—INSURABLE INTEREST.

1. One may be made the legatee of the proceeds of a life insurance policy taken out by the testator on his own life, though having no insurable interest in the life of the testator.

2. The proceeds of a life insurance policy payable to the executor, administrator, or assigns of the insured, becoming a part of his estate on his death, may be disposed of by his will; Rev. St. art. 5334, expressly recognizing the right of every competent person to devise any part of his estate.

3. The fact that the possession of a will was intrusted to the legatee of the proceeds of an insurance policy on the testator's life would not invalidate the bequest.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Suit by John T. Fletcher and others against Ellen R. Williams and others to set aside an instrument probated as the last

¹ Rehearing denied February 15, 1902, and writ of error denied by supreme court.

will of George D. Fletcher, deceased. From the judgment rendered the plaintiffs appeal. Affirmed.

Green & Blanton, for appellants. Davis & Garnett, for appellees.

CONNER, C. J. The facts of this case are brief. In substance, they are that in August, 1889, George D. Fletcher took out a policy of insurance for \$1,500 in the Washington Life Insurance Company of New York, upon his own life, "payable to James A. Fletcher, the father of said George D. Fletcher, if living at the death of said George D. Fletcher; but, if not living at the death of said George D. Fletcher, then it shall be payable to the said George D. Fletcher's executors, administrators, or assigns." James A. Fletcher died in 1893; and George D. Fletcher on December 25, 1895, executed an instrument in writing, directed to the officers of said insurance company, of the following tenor: "Gainesville Station, Texas, Decr. 25, 1895. To the Officers Washington Life Insurance Co. of New York, N. Y.—Dear Sirs: Since the death of my father, James A. Fletcher, beneficiary of life policy No. 65,481, premium \$56.10, it becomes proper that I name a beneficiary in his stead; and I hereby will and direct that in case of my death the benefit of policy No. 65,481, amounting to \$1,500, together with all dividends that may be due thereon, be paid in full to my benefactress, Mrs. Ellen Rice Williams, at No. 20 Scott Ave., Gainesville, Texas, and that she be permitted to sign any and all documents that may be required to secure to herself the full payment of said \$1,500, and dividends accruing thereon." It appears that this instrument was delivered to Mrs. Ellen Rice Williams, who was in no degree dependent upon or related to him, by George D. Fletcher, and that she kept possession thereof until after his death, which occurred in a railway accident July 8, 1900, whereupon said instrument was duly probated as the last will and testament of George D. Fletcher. The evidence further shows that George D. Fletcher paid all premiums due, and retained possession of said policy of insurance among his other papers and personal effects, where it was found after his death. On the trial below it was adjudged that appellants, who are the surviving next of kin and heirs of George D. Fletcher, have no interest in the proceeds of said policy, which had been deposited in the registry of the court by the insurance company; that Ellen Rice Williams was entitled, as legatee of George D. Fletcher, to such proceeds, subject, however, to the payment of the debts against his estate by appellee Gates, who had been duly appointed administrator of George D. Fletcher's estate, with said will annexed; and the clerk was directed to deliver said proceeds to said administrator. From this judgment, appel-

lants, the Fletchers, have prosecuted appeal.

The vital question presented, and which we have to decide, is whether a valid devise can be made of an insurance policy taken out by a testator, and in terms made payable to his "executors, administrators, or assigns." It must be made to one in no manner or form dependent upon or related to such person. This precise question does not seem to have before arisen in our state. At least we have been unable to find where the question has been directly determined by our courts. We are of opinion, however, that the question must be answered in the affirmative. We think that the judgment must be affirmed. We have insisted with much force by the opinion of the counsel representing appellants that, in the case of Ellen R. Williams was not dependent upon or related to George D. Fletcher, without insurable interest in his life. It was therefore, by the policy of the company, prohibited, under the circumstances, covering any part of the proceeds of the policy, to the exclusion of George D. Fletcher's heirs; and they cite, as sustaining their contention, the cases of *Cheeves v. State*, 28 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 338; *Coudell v. Woodward* (Ky.) 29 S. W. 274; *v. Knights of Honor*, 68 Tex. 361, 4 S. W. 274; *Goldbaum v. Blum*, 79 Tex. 638, 10 S. W. 564; *Insurance Co. v. Hazlewood*, 12 S. W. 338, 12 S. W. 621, 7 L. R. A. 211, 21 St. Rep. 893. These cases establish the principle in general terms, that a person cannot have an insurable interest in the life of another person, not be the beneficial owner of a policy of insurance on the life of such other person, and whether the policy in the first instance was taken out in the name of the noninterested party, with or without the consent of the assured, or whether he acquired the policy by assignment. The cases cited, however, do not distinguish from the case at hand in that here the noninterested party, who took out the policy, did not pay the premiums, was not the beneficiary in the policy, and asserted no right thereto as assignee. The general rule, however, has its foundation, it is said, in the public policy of the law to prevent incitement to murder. Should contracts of insurance with assignments of policies to persons not interested in the continuance of the life of the person insured, be enforceable as contracts? It is evident, as stated in some of the authorities, that the temptation to murder would be presented to a person "who has a large and whose conscience is not clear." But in the case before us the respondent Williams asserted, and that was sustained by the judgment below, had its foundation after the termination of the life of the insured. "For where a testament is made, it must also, of necessity, be made by a living testator. For a testament is of force only when the testator is dead; otherwise it is of no effect at all while the testator liveth."

the language of inspiration, as also the effect of all judicial authority. Until the death of the assured, and, indeed, until the due probate of the will, Mrs. Williams could have no legal assurance that she would profit by the death of George D. Fletcher. It was within his power and discretion at any time to make other disposition of the property, and Mrs. Williams could by no means be certain that this had not been done. His murder by her with such end in view, as has been held, would constitute an insuperable objection to a recovery by her. Page, Wills, § 687. There is a clear distinction in the authorities between policies of insurance payable to a designated beneficiary, and those made payable to the "executors or administrators" of the insured. The proceeds of policies of the latter class become part of the estate of the insured at his death, and, in our judgment, may, as in case of other property, be disposed of by will, as is expressly held in the following authorities: Page, Wills, § 136; *Golder v. Chandler* (Me.) 32 Atl. 734; *Fox v. Senter* (Me.) 22 Atl. 173; *Stoelker v. Thornton* (Ala.) 6 South. 680, 6 L. R. A. 140.

It is insisted that, because the testamentary instrument quoted was delivered to and kept by Mrs. Williams, the reason of the rule invoked by appellant applies with equal force in the case before us. In addition to what we have said, we add that we know of no case, and none has been cited, holding that mere knowledge of the contents of a written will on the part of the legatee will invalidate a devise otherwise valid. The case of *Stoelker v. Thornton*, supra, was a case somewhat similar to the one before us, and it was there held that a devise of insurance policies was not invalidated by reason of a previous attempt to transfer them to the legatee. No successful contest of the will of George D. Fletcher has been made, and, whether his reason therefor be deemed sufficient or otherwise, he having testamentary capacity, as we must assume, his will must be carried into effect.

Our statute (Rev. St. art. 5334) expressly recognizes the right of every person competent to make a will to devise any part of his estate, and we think the devise in the present instance must be upheld. The trial court's conclusions of fact and law are therefore adopted, and the judgment affirmed.

HOUSTON & T. C. R. CO. v. GOODYEAR.
(Court of Civil Appeals of Texas. Feb. 17, 1902.)

CARRIERS OF PASSENGERS—NEGLIGENCE—
DUTY TO ANNOUNCE STATIONS.

A railroad company, in the absence of a statute requiring it to announce on its passenger trains the arrival of such trains at stations, is not negligent, as a matter of law, in failing to make such announcement.

Appeal from district court, Grimes county; Hon. J. M. Smither, Judge.

Action by N. Goodyear against the Houston & Texas Central Railroad Company for personal injuries alleged to have been caused to plaintiff's wife by the negligence of defendant. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Buffington & Buffington and Frank Andrews, for appellant. W. W. Meechum, for appellee.

PLEASANTS, J. This suit was instituted by appellee to recover damages from appellant for alleged injuries to appellee's wife, charged to have been caused by the negligence of appellant in failing to stop its train at College Station a reasonably sufficient time to allow his wife, who was a passenger on the train, to debark therefrom with safety, and in failing to announce on the train its arrival at said station. The appellant answered by general denial and special pleas of contributory negligence. The trial of the case in the court below by a jury resulted in a verdict and judgment for the plaintiff in the sum of \$2,500. The conclusion we have reached as to the proper disposition of this appeal renders it unnecessary to make any statement of the facts, further than to say that, upon all the issues raised by the pleadings, the evidence was conflicting.

The fifth and sixth paragraphs of the charge submitted to the jury by the court below are as follows:

"The law required the defendant to stop the passenger train upon which Mrs. Goodyear is alleged to have been a passenger at College Station,—a station on its road,—and announce on said train its arrival at said station, and to remain at a stop at said station a reasonable time for passengers on said train for said station to debark without danger of injury or accident from said train.

"Failure on the part of the defendant company to perform the duty required of it, as explained in preceding paragraph herein, would, in law, constitute negligence; and if the company was guilty of such negligence, and Mrs. Goodyear was injured as the direct and proximate consequence thereof, and plaintiff was not guilty of contributory negligence (regarding which you will herein-after be instructed), then the defendant company is liable in damages therefor."

Appellant assails this charge on the ground that it is a charge upon the weight of the evidence, in that it instructs the jury that the failure of appellant to stop its train for a reasonably sufficient time to allow passengers to debark therefrom in safety, or the failure to announce on the train its arrival at the station, was negligence per se. We think this objection to the charge is valid and must be sustained. Unless the act alleged to be negligent is prohibited by stat-

ute, or is one as to the negligent character of which reasonable minds cannot differ, the issue of negligence must always be left to the jury. We have no statute in this state requiring railroad companies to stop their trains at stations a sufficient time to allow passengers to debark therefrom without danger of injury, nor requiring that the arrival of a train at a station shall be announced on the train; and while it would seem that reasonable minds could not differ as to the negligence of the appellant in so failing to stop its train, the evidence as to whether the train was stopped a reasonable time was conflicting, and it cannot be said that reasonable minds could not differ on the question as to whether the failure to announce the arrival of the train was negligence. This charge clearly instructs the jury that they might find for the appellee if they found that appellant failed to announce the arrival of the train, and plaintiff's wife was injured as a consequence thereof, without negligence on her part. This is affirmative error, which requires a reversal of the case. *Railway Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272; *Railway Co. v. Williams*, 70 Tex. 159, 8 S. W. 78; *Railway Co. v. Rogers*, 91 Tex. 55, 40 S. W. 956.

We think none of the remaining assignments, complaining of errors in the charge, and of the refusal of the trial court to give special instructions requested by appellant, presents any material error, and said assignments are therefore overruled.

The assignment attacking the judgment as being contrary to the evidence and excessive in amount is not passed upon, because to do so would require an expression of opinion on the facts, which, in view of another trial, would not be proper.

For the error in the charge indicated above, the judgment of the court below is reversed, and the cause remanded. Reversed and remanded.

SMITH v. CARROLL et al.

(Court of Civil Appeals of Texas. Feb. 15, 1902.)

JUSTICES OF THE PEACE—JURISDICTION—SUBJECT-MATTER—VALUE—JUDGMENTS—VALIDITY—NEW TRIAL—INJUNCTION.

1. A justice of the peace had no jurisdiction of an action on a debt for \$170, and to foreclose a mortgage lien on property of the value of more than \$200.

2. Rev. St. 1895, art. 1652, authorizes a justice of the peace to grant a new trial only on written motion, and after notice to the opposite party; and article 1656 provides that but one new trial shall be granted. After a judgment for defendant, plaintiff obtained a new trial; and, after a second trial with the same result, plaintiff made a verbal motion for a new trial, which was heard and granted without notice to defendant. *Held*, that a judgment for plaintiff on the third trial was void.

3. Defendant was entitled to an injunction restraining enforcement of the judgment, and was not driven to his remedy by appeal.

Error from Dallas county court; Kenneth Foree, Judge.

Bill by C. F. Smith against N. A. Carroll and others to enjoin enforcement of a judgment. From a decree in defendants' favor, plaintiff brings error. Reversed.

H. S. Crawford, R. S. Baker, and W. A. Rhea, Jr., for plaintiff in error.

TEMPLETON, J. P. E. Rape sued C. F. Smith in the court of N. A. Carroll, a justice of the peace, on a debt of \$170, and to foreclose a mortgage lien on two horses, and a lease on 100 acres of land. The mortgaged property was then of the value of \$300, and was of that value when the case was disposed of in the justice's court. A trial resulted in a verdict and judgment for the defendant. On motion of the plaintiff, a new trial was granted. The second trial resulted as did the first. The plaintiff made a verbal motion for another new trial, which was heard and granted without notice to the defendant. The justice then tried the case a third time,—the defendant not being present or represented at such trial,—and rendered judgment in favor of the plaintiff for the recovery of the debt sued on, and for the foreclosure of his lien on all of the mortgaged property. Process was issued to enforce said judgment, and was placed in the hands of W. N. Noles, a constable, who levied on the aforesaid property. Smith thereupon brought this suit against Rape, Carroll, and Noles, in the county court, to enjoin the enforcement of said judgment, on the ground that the same was void. A temporary injunction was granted, but on final hearing it was dissolved, and all relief denied. Smith has appealed.

In *Cotulla v. Goggan*, 77 Tex. 32, 18 S. W. 742, it was held that a justice's court had no jurisdiction of a suit to foreclose a mortgage lien on property of the value of more than \$200. The decision in that case was followed by this court in *Schwartz v. Frees*, 31 S. W. 214. Under these authorities, the justice's court had not jurisdiction of the suit of Rape against Smith, as the mortgage sought to be foreclosed therein covered property of the value of \$300. As the court had no jurisdiction of the case, the judgment rendered in favor of Rape, which Smith seeks to enjoin, was void. A want of jurisdiction of the subject-matter of a suit is fatal to the validity of the judgment.

The judgment was void on another ground. Our statutes authorize a justice of the peace to grant a new trial only upon written motion, and after notice to the opposite party. Rev. St. 1895, arts. 1652, 1654. It is further provided that but one new trial shall be granted to either party. Article 1656. In *Aycock v. Williams*, 18 Tex. 393, a judgment was rendered in favor of the defendant, in a suit pending in a justice's court. The justice granted the plaintiff a new trial, without

giving notice of the application to the defendant. Subsequently the case was tried in the absence of the defendant, and judgment was rendered in favor of the plaintiff. The defendant applied for certiorari. The court said: "After the rendition of final judgment by the justice, his power and jurisdiction over the cause and the parties ceased. He could only reacquire jurisdiction to re-examine the case upon application for new trial; and, upon this application, notice to the adverse party was necessary to give jurisdiction of his person. Notice was not given, and the court subsequently had not jurisdiction to grant the new trial, or take any further action in the case. The only notice which was given was after the new trial had been granted. But the statute requires notice to be given of the application. The judgment, having been rendered when the justice had not jurisdiction, was void."

The judgment of which Smith complains in this case was void, and he is entitled to be relieved against it. The question is whether he should have appealed, or whether he might have relief by injunction. In *Aycock v. Williams*, supra, it was declared to be clear that injunction would lie in such case. We believe this to be a sound proposition of law. The trial court doubtless reached the opposite conclusion upon the authority of *Railway Co. v. Wave*, 74 Tex. 47, 11 S. W. 918. We think that case can and should be distinguished from the one at bar. In that case *Wave* had brought numerous suits against the railway company in the justice's court upon different causes of action, some involving more and some less than \$20. He obtained judgment in all the cases, and the railway company applied for an injunction against them all on the ground that the same were rendered without legal citation. It was held that the citations were defective and the judgments void, but that the applicant was entitled to injunction only as to the cases involving less than \$20, and that it should have appealed in the other cases. It may be conceded that in such case the remedy by appeal offered efficient relief. Had appeals been prosecuted the judgments complained of would have been superseded, and in the county court the railway company could have had the cases tried on their merits, and this was all which it had a right to demand. In this case the situation of the parties was altogether different. The justice had not jurisdiction of *Rape's* suit against Smith, and presumably the judgments against him were based on that ground. The attempt of the justice to grant a second new trial was illegal and void, and the second judgment was not affected by such action. That judgment was and is valid and binding, and all matters of which the court had jurisdiction which were there considered and determined were finally concluded. Smith was entitled to rely and insist upon the said judgment as being con-

clusive upon all questions which the justice's court had authority to settle in that suit,—it not having been appealed from by *Rape*,—and was not bound to appeal from the void judgment against him, and by such appeal reopen the issues which had been adjudicated. Suppose Smith had appealed. The transcript from the justice court would have shown that the only valid final judgment rendered in that court was in favor of Smith, the appellant. Would the county court have dismissed the appeal on the ground that *Rape*, and not Smith, was the proper party to appeal? If so, Smith could not be required to appeal. Suppose the county court had taken jurisdiction of the case. What issues could have been tried? Would the court have determined that the justice had erred in attempting to set aside the judgment in favor of Smith, and in rendering judgment in favor of *Rape*, and entered decree to that effect? This could not be done, as trials in the county court on appeals from the justice courts must be *de novo*, and the county court has no power to revise the rulings of the justice. Suppose, then, that the county court had tried the case on its merits. The first question to be determined would have been whether the justice court had jurisdiction of the cause of action sued on. That very question had been settled by the second judgment in the justice's court in Smith's favor, and that judgment was still valid and binding, unless superseded by Smith's appeal. Manifestly, Smith ought not to be bound to appeal, and thereby vacate a judgment in his favor. If the appeal would not have had the effect to supersede Smith's judgment, then the county court would be retrying an issue which had been finally adjudicated, and from which there was no appeal. We do not mean to lay down the proper rule of practice in such cases. The argument is made to show that the remedy by appeal was doubtful, uncertain, and complicated. The mere fact that a possible remedy at law exists will not prevent a resort to equity. In *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 904, it is said: "In courts administering both law and equity, like ours, the rules denying an injunction when there is a remedy at law should not be applied as rigidly as at common law, where the issuance of the writ in equity was, to a certain extent, an invasion of the jurisdiction of another tribunal." And it was intimated in that case that article 2989, Rev. St. 1895, authorizes an injunction, though the legal remedies available should be held adequate within the rule denying an injunction in such cases at common law. It is declared that the writ may issue when it appears (1) that the applicant is entitled to the relief demanded; and (2) that, in order to give such relief, the restraint of some act is necessary. This case comes literally within the terms of this declaration. Smith was in legal possession of the property the constable was or-

dered to seize, and was entitled, at least against the writ he complains of, to hold the property undisturbed. It was necessary to restrain the constable and the parties controlling the writ, in order to relieve Smith against the threatened invasion of his rights. It may be that he could have secured such relief by an appeal. But we have seen that the legal remedy, if one existed at all, was doubtful, and the proper practice uncertain, and that a resort thereto involved, possibly, a surrender of Smith's rights under a valid judgment. The remedy in equity was direct, simple, and efficient. We do not believe that the remedy by appeal, even if appeal would lie in such case, was plain, adequate, and efficient, under the settled rules which prevail in this state, and our conclusion is that the trial court erred in refusing the relief sought.

The judgment of the county court is reversed, and judgment will be here rendered granting to the plaintiff in error the injunction applied for. Reversed and rendered.

WAFF et al. v. SESSUMS et al.¹

(Court of Civil Appeals of Texas. Feb. 20, 1902.)

EMANCIPATED SLAVES—MARRIAGE—COMMUNITY PROPERTY—DISTRIBUTION.

Where slaves cohabiting together continued to live together as man and wife after their emancipation, their marital status became legal, entitling the wife and her children to property acquired during the existence of such relation as against children of another woman with whom the husband cohabited.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by Harry Waff and others against Lucy Sessums, alias Waff, and another. There was a judgment in favor of defendants, and plaintiffs appeal. Affirmed.

James R. Masterson and Ingham S. Roberts, for appellants. E. P. Turner, for appellees.

GARRETT, C. J. This action was brought by the appellants against the appellees for the recovery of lots 9 and 10, block 331, in the city of Houston. The appellants claim title to the lots as the children and heirs of William Waff, who died in 1900, and Betty Waff, who died in 1888; and the appellees claim as the wife and son of William Waff. The issue depends upon the legitimacy of two slave marriages. William Waff and Betty and Lucy were slaves prior to their emancipation, June 19, 1865. The evidence showed that William and Betty were married after the manner of slaves in the city of Houston during the year 1859, and cohabited until 1861 or 1862, when the master of William moved to another county, thereby separating him from Betty, and that about that

time William married Lucy. William cohabited with Lucy until after they were emancipated and until his death. It was also shown that after emancipation he returned to his relationship with Betty, and had children by her. The appellants, Harry and Dave Waff and Mahala Oliver and Annie McCowan, were children of Betty; Dave and Annie having been born after emancipation. The appellee Ben Waff is the son of William by Lucy. In 1866 William Waff bought the property in controversy, and moved upon it with Lucy, and occupied it with her as a home, living with her as man and wife until his death, in 1900; and after his death Lucy and Ben Waff remained in possession of the lots, claiming them as their property. The trial judge found that, notwithstanding the fact that William Waff resumed his relations with Betty, he did not give to her among his race the same public recognition that he did to Lucy, though to some he represented that she was his wife, and that towards the end his connection with her became more transitory in its nature. Betty never lived at William's residence, which was the property in controversy. We are of the opinion that the marriage between William and Lucy was validated by their continuing to live together as man and wife after emancipation. Cumby v. Henderson, 6 Tex. Civ. App. 519, 25 S. W. 673. We agree with the trial court that the appellants failed to make out their case by a preponderance of the evidence.

The judgment will be affirmed. Affirmed.

WILSON v. TYLER COFFIN CO. et al.

(Court of Civil Appeals of Texas. Feb. 27, 1902.)

PROMISSORY NOTE—PARTIES—INTERVENTION—CORPORATIONS—ASSUMPTION OF LIABILITY—EVIDENCE—PREJUDICIAL ERROR.

1. In an action on a note made by a corporation, a third party, alleging that he had sold the corporation to another person, not a party to the suit, covenanting to protect the purchaser from any liabilities of the company in excess of a certain sum, in which the note in suit was not included, was not, under the facts, a necessary or a proper party, and was erroneously allowed to intervene.

2. Plaintiff having a right to try the issues unembarrassed by the presence of the intervenor, and free from the influence of his personality in defendant's favor, the error in permitting him to intervene was not harmless.

3. Testimony by the person to whom the intervenor sold the corporation that the intervenor told him at the time of the sale that the corporation only owed a certain amount, and that plaintiff's claim was not included therein, was irrelevant, and its admission for the purpose of showing how defendant treated plaintiff's claim was prejudicial error.

4. In an action on a note signed on behalf of a corporation by the president thereof, plaintiff claimed that after the execution of the note the corporation became indebted to the president, and agreed that, if he would credit the amount of the note upon its indebtedness to him, the corporation would become responsible for the note. Held, that the burden was upon

¹ Rehearing denied, and writ of error denied by supreme court.

plaintiff to show that the defendant corporation had, for a valuable consideration, assumed the payment of the note.

Appeal from district court, Smith county; J. G. Russell, Judge.

Action by John M. Wilson against the Tyler Coffin Company and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

H. M. Whitaker, for appellant. Duncan & Jones, for appellees.

PLEASANTS, J. This suit was brought by appellant against the appellee the Tyler Coffin Company, a corporation organized and chartered under the laws of the state of Texas, to recover upon three promissory notes, for the sum of \$500 each, alleged to have been executed by said appellee on the 11th day of October, 1897, and due, respectively, 6, 12, and 18 months after date, with interest from date at the rate of 8 per cent. per annum. The defendant corporation answered by general demurrer and general denial, and by special plea, in which it is averred that the notes sued on were not executed by it, or by any person authorized to execute same for it, and that said notes were without consideration and void as to said defendant; that the debt for which said notes were executed was the individual debt of Charles T. Bonner, and, if he ever executed the notes in the name of the defendant, the same were without consideration, and were intended as accommodation paper to said Bonner, and the execution of same was ultra vires. This plea is sworn to by J. L. Daniel, as president and general manager of the defendant corporation. The appellee C. B. Beck intervened in the suit, and made himself a party defendant, alleging that he had sold to J. L. Daniel the Tyler Coffin Company, and that by the terms of the sale he had covenanted to protect the said Daniel against any outstanding debts or liabilities of said company in excess of the sum of \$605.50, due certain named creditors of the company, and that, in event judgment should be rendered in this suit against said company in favor of plaintiff, he would be liable for the amount of such judgment. The plaintiff filed a supplemental petition, in which it is alleged, in substance, that subsequent to the execution of the notes sued on, which notes were executed by Charles T. Bonner as president, and in the name of the Tyler Coffin Company, said defendant company became indebted to the said Bonner in a sum largely in excess of the amount of said notes, and, the authority of the said Bonner to execute the notes being questioned by the company, it was agreed by and between said Bonner and Thomas A. Johnson, the then president and general manager of the company, that, in consideration of the said Bonner crediting the indebtedness of the company to him with the amount due upon said notes, the defendant company would

assume the payment of the notes due plaintiff, which agreement was duly carried out by said Bonner, and the payment of the notes duly assumed by the defendant corporation. Upon due and full consideration. The defendant company filed a supplemental answer to the intervention of defendant Beck, and prayed that, upon the allegation contained in the answer of said intervener, it have judgment over against him, in event judgment should be rendered in favor of plaintiff against said company. This defendant also filed a supplemental answer in reply to plaintiff's supplemental petition, in which the two-year statute of limitation is pleaded in bar of plaintiff's right to recover upon the alleged assumption of the payment of the notes sued on by said defendant. Plaintiff filed a motion to strike out the intervention of the defendant Beck on the ground that he was not a necessary or proper party to the suit. This motion was overruled by the court, and upon a trial of the case by a jury a verdict and judgment were rendered in favor of the defendants.

Appellant, by his first assignment of error, complains of the action of the trial court in overruling the motion to strike out the answer in intervention of appellee Beck. From the foregoing statement of the pleadings, it appears that J. L. Daniel was not a party to this suit, and neither the plaintiff nor the defendant corporation was a party to the contract under which appellee Beck claimed the right to intervene. Under this state of facts, we know of no rule of law which could have authorized the court to permit the intervener, over the objection of either party to the suit, to intrude himself into the controversy. His alleged interest in the subject-matter of the suit does not arise from any contingent liability on his part to either party to the suit, and in no event could any judgment have been rendered against him. It is true, the defendant corporation asked judgment over against him in event judgment was rendered against it in favor of plaintiff; but no facts are alleged by said defendant which would entitle it to such judgment, and certainly the facts set up by the intervener show no liability on his part to said defendant, contingent or otherwise. Such being the state of the pleadings, it is clear that had the judgment of the court below been in favor of the plaintiff, against the defendant corporation, no judgment could have been rendered in favor of the corporation against the intervener. The mere fact that the result of this suit would incidentally affect the liability of the intervener upon a contract to which the parties to this suit are strangers gives him no right to interfere in the controversy between the plaintiff and the defendant. We are of opinion that the intervener in this case was neither a necessary nor a proper party to this suit, and the court below erred in overruling plaintiff's motion to strike out the answer. *Burditt v. Glascock*, 25 Tex. Supp.

45; *McKee v. Coffin*, 66 Tex. 310, 1 S. W. 276. We cannot say that the error of the trial court in permitting the appellee Beck to intervene in the suit was harmless. Plaintiff had the legal right to try the issues between the defendant and himself unembarrassed by the presence of the intervener as a party to the suit, exerting the influence of his personality in favor of the defendant; and we think the ruling of the trial court refusing him this right is such error as will require the reversal of the case.

The court below permitted the witness Daniel to testify, over plaintiff's objection, that, when he purchased the stock of the defendant company from the appellee Beck, said Beck represented to him that the corporation only owed about \$600, and that no mention was made of the plaintiff's claim. This testimony was objected to by the plaintiff on the ground that it was hearsay and wholly irrelevant, and a private agreement made between witness and the intervener, which could not throw any light upon the question of the liability of the defendant for the debt sued on, and could in no manner affect such liability. It appears from plaintiff's bill of exceptions to the admission of this evidence that the trial court announced that he admitted same for the purpose of showing how the defendant corporation treated the debt sued on. We think the objections to this testimony should have been sustained, because it was not relevant to any issue in the case. The purpose for which this evidence was offered is not apparent, and, but for the announcement of the trial court that it was admitted for the purpose of showing how the defendant corporation treated plaintiff's claim, we would be disposed to hold that, while the evidence was immaterial, its admission was harmless. It is, we think, clear that any representation made by Beck as to the indebtedness of the defendant corporation could in no way affect plaintiff's claim, or tend to throw any light upon the question as to whether the corporation had assumed the payment of the notes sued on, and the admission of such evidence by the court for the announced purpose of showing how the corporation regarded the notes was harmful error; and appellant's assignment which challenges the ruling of the court in overruling his objections to the admission of this testimony must be sustained.

In view of another trial of the case, it would not be proper for us to express any opinion upon the facts, and appellant's assignment in which the verdict of the jury is assailed on the ground that it is unsupported by the evidence will not be considered. The remaining assignments contained in appellant's brief are, we think, without merit. Under the pleadings in the case, the burden was upon appellant to show by a preponderance of the evidence that the defendant corporation had, for a valuable consideration, assumed the payment of the notes sued on,

and the trial court did not err in giving the jury.

For the errors before indicated, judgment of the court below will be reversed, this cause remanded for a new trial, and it is so ordered. Reversed and remanded.

MARSTON v. YAITES et al.

(Court of Civil Appeals of Texas.
1901.)

MORTGAGES—SALE UNDER DEED NOTICE OF SALE—STATUTES—REVISION BY REVISED STATUTES

1. The language of Laws 1889, providing for notice of a sale under a deed was that "notice shall be given as required in judicial sales," and the notice required in judicial sales was by posting being required on the property or statute as to judicial sales was in 1895 so as to require, in addition to notice to be mailed to the property owner if he did not live in the county where the property was situated. The act as to trust deeds amended act as to judicial sales was in the Revised Statutes without change, one as article 2360, and the other 2366. *Held*, that the word "now" in 1889 referred to the law of judicial sales existing, and did not include the amendment thereof, and hence no notice of sale under a trust deed was required to be mailed to the owner, who lived in the county.

2. The word "now," as used in 1889, and carried forward in Rev. St. could not be construed to refer to judicial sales at the time the Revised Statutes went into effect, since, under Rev. Stat. Title, § 19, providing that the Revised Statutes, so far as they are the same as the laws of the state then in effect, should be construed as continuations thereof, the Revised Statutes did not re-enact, but simply continued the statutes as to the two kinds of sales then existing.

Appeal from district court, Fannin County, Georgia.
Ben H. Denton, Judge.

Action of trespass to try title. Yaites against Edwin S. Marston and others. From a judgment in favor of defendant Marston appeals. Reversed.

F. W. Bartlett, for appellant.
Duncan and Taylor & McGrady, for appellees.

BOOKHOUT, J. This was an action of trespass to try title, which was brought by the appellee J. M. Yaites against the appellant Edwin S. Marston, and the appellee A. Cullor, and in which judgment was rendered for the plaintiff. The land in controversy was conveyed to appellee J. M. Yaites by a deed dated October 28, 1895, and from that date until December 11, 1900, Yaites was in possession of the land. On the same day, to wit, October 28, 1895, Yaites, joined by his wife, conveyed the land to J. W. Bartlett, trustee, to secure the debt of that date, made to the New England Trust Company, for a part of the price of said land. Said deed in

¹ Rehearing denied February 22, 1901.

ferred on the trustee a power to sell the land in controversy after default, and upon the request of the holder of the note. The trustee on May 1, 1900, acting under the said power of sale, sold the land in controversy to appellant, Edwin S. Marston, and thereupon executed his deed as such trustee to said purchaser. Said sale was made after default, and upon the request of the holder of the note, and in time, place, and manner of sale, conformed to the power of sale, and to the requirements of the act of July 6, 1889. No personal notice, however, was given to J. M. Yaites, though the trustee and the New England Loan & Trust Company and the holder of the note knew that he resided in, and that his post-office address was, Whitewright, in Grayson county, Tex. Said Yaites did not know that the trustee was about to sell the land, nor that it was advertised for sale, until after the sale was made.

The question presented by this appeal is, does the law require that a trustee, in making sale under a deed of trust executed in 1895, in addition to the posting of written or printed notices at three public places in the county where the land is situated, shall also give notice of the sale to the maker of the deed of trust? In 1889 the legislature passed an act prescribing the mode and manner of making sales under trust deeds. By the terms of this act it was provided that "notice shall be given as now required in judicial sales." Laws 1889, p. 143. The notice required by statute in the making of judicial sales at that time was "by posting up written or printed notices thereof at three public places in the county, one of which shall be at the door of the court house of the county." This statute was subsequently twice amended. The first amendment was made in 1893, by Laws 23d Leg. p. 11, c. 15. It was again amended in 1895. See Laws 24th Leg. p. 168, c. 110. This last amendment was in force when the Revised Statutes of 1895 went into effect. By its terms, in addition to the three written or printed notices required under the statute in force in 1889, it provides, substantially, that, if the defendant in execution resides out of the county in which the land is situated, the officer shall mail him a notice of sale, directed to his post office, if known to such officer. The maker of the note and grantor in the deed of trust did not reside in Fannin county, in which county the land described in the deed of trust was situated, but he resided in Grayson county. His post-office address was known to the trustee and to the beneficiary in the trust deed. No notice was mailed to him. It will be seen that by the act of 1889 it was provided that "notice shall be given as now required in judicial sales." The effect of this reference was to incorporate in the act of 1889 that part of the statute then in force prescribing the mode and manner of making judicial sales. *Suth. St. Const. § 257; End. Interp. St. §§ 50, 153.* The act of 1889, prescribing

the mode of making sales under trust deeds, and the statute of 1895, amending the law governing sales under execution, are carried forward in the Revised Statutes,—the first as article 2366, and the last as article 2366. No change is made in the statutes in the revision.

It is contended by appellees that the word "now," as used in article 2369, should be construed as having reference to the law in force governing judicial sales at the time the Revised Statutes went into effect. As before stated, the effect of the reference in the law of 1889, "that notice shall be given as now required in judicial sales," adopted in that act the statute then in force prescribing the form of notice in judicial sales. An act which adopts by general reference the whole or a portion of another statute means the law as existing at the time of the adoption, and does not include subsequent additions or modifications of the statute so adopted, unless it does so by express or strongly implied intention. *End. Interp. St. § 85, note 107; Suth. St. Const. § 257; Darmstaetter v. Maloney, 45 Mich. 621, 8 N. W. 574; Schlaudecker v. Marshall, 72 Pa. 200; Knapp v. City of Brooklyn, 97 N. Y. 520; U. S. v. Paul, 6 Pet. 141, 8 L. Ed. 348; Kendall v. U. S., 12 Pet. 524, 9 L. Ed. 1181; In re Heath, 144 U. S. 94, 12 Sup. Ct. 615, 36 L. Ed. 358.* In the case of *Darmstaetter v. Maloney* the charter of the city of Detroit provided that "the assessor * * * shall be and is hereby vested with the powers and duties as supervisor, as provided by the laws of this state," etc. The court held that subsequent changes in the duties of supervisors did not affect the assessor of Detroit. In discussing the question the court uses the following language: "The case falls under the rule that a piece of legislation for a particular city which adopts, under general words of reference, a specific regulation in a separate general law, is not to be taken as adopting prospectively the future alterations in the provisions of the general law so appropriated, unless the intention thereof is express or strongly implied." In the case of *Schlaudecker v. Marshall*, *supra*, the court was called upon to construe an act giving the board of licensors for Erie county "the same power and authority to grant licenses in the said city of Erie as the court of quarter sessions, by law, now has." It was held that the authority of the board was to be ascertained by the law as to the quarter sessions at the passage of the act, and not by amendments subsequently made to that law.

Again, counsel for appellees contend that it was the intention of the legislature, in adopting the Revised Statutes, that the word "now," as used in the statute of 1889, and carried forward in article 2369, meant the statute prescribing the notice required in making judicial sales in force at the time the Revised Statutes went into effect. This contention conflicts with the provisions of

section 19, "Final Title," Rev. St., providing that the provisions of the Revised Statutes, so far as they are the same as statutes of this state in force at the time said Revised Statutes shall go into effect, shall be construed as continuations thereof. This court, in February, 1901, held in the case of Judd v. State, 62 S. W. 543, construing section 19 of the final title of the Revised Statutes, that the including of an act in the Revised Statutes was not a re-enactment, but merely a continuation, thereof. The same view was afterwards adopted by the supreme court in an opinion delivered by that court April 8, 1901, in the case of Insurance Co. v. Walker, 61 S. W. 711. See, also, Compton v. Holmes (Tex. Sup.) 63 S. W. 621.

We conclude that the language of article 2369, Rev. St., that "notice shall be given as now required in judicial sales," meant such notice as was required at the time the act went into effect, in 1889. It is admitted that the notice of the trustee's sale under which appellant purchased complied with the terms of the statute prescribing the notice required in making judicial sales at the time this act went into effect. It follows from this holding that the court below erred in not rendering judgment for appellant. Under our holding, it is not necessary for us to pass upon the question raised by appellant's second assignment of error.

For the reasons indicated, the judgment of the trial court is reversed, and judgment here rendered for appellant for the land sued for. Reversed and rendered.

On Motion for Rehearing.

(Feb. 22, 1902.)

When the opinion was prepared in this case, we were not aware that the questions involved had been passed upon by the court of civil appeals for the Fourth district. Hence no reference was made in our opinion to the case of Swain v. Mitchell, 66 S. W. 61, 3 Tex. Ct. Rep. 408. The first notice we had of that opinion was received from its publication in the Texas Court Reporter of December 7, 1901. The same conclusion is announced in that case as was reached by us in this case. The questions decided in this case and in the case of Swain v. Mitchell came before the court of appeals for the First district, and that court arrived at a different conclusion. Fischer v. Simon, 66 S. W. 882, 3 Tex. Ct. Rep. 432. Subsequently a rehearing was granted, and that court certified the case to the supreme court, and the supreme court holds in accordance with this opinion and the opinion of the court of appeals for the Fourth district. Fischer v. Simon, 66 S. W. 447, 4 Tex. Ct. Rep. 89. We deferred action on this motion, awaiting the opinion of the supreme court on the certified case.

The motion for rehearing is overruled.

WETZ v. WETZ.¹

(Court of Civil Appeals of Texas
1902.)

DIVORCE—ASSIGNMENTS OF ERROR—PREMATURE ADJOURNMENT FOR NEW TRIAL—CONCLUSION OF LAW AND FACT—ARGUMENT OF REFUSAL.

1. Rev. St. art. 1018, provides that appellant shall file assignments of error specifying the grounds on which he claims that all errors not distinctly specified are waived. Rules 22-27 of the courts of civil appeals also require that the assignments of error specify the grounds on which they are made. *Held*, that an assignment of error in which the action of the court in overruling demurrer and special exceptions is assigned is not sufficient.

2. Under rule 29 of the court of civil appeals providing that an assignment of error must be accompanied by its appropriate proper statements shall be regarded as an assignment complaining that the court erred in granting a divorce, to the acts of ill treatment without sufficient proof to admit such proof, not accompanied by a statement, will not be considered.

3. An assignment that "the court erred in granting a divorce to the plaintiff" without proof fails to show that she was entitled to a divorce, and because the testimony shows that she was not entitled to a divorce, and that the judgment was clearly the law and the evidence, is too general and will not be considered.

4. Assignments that the court erred in granting the custody of the children to the defendant, without showing that the defendant was better fitted to have the custody, and who was best fitted to care for them, and in refusing to hear proof that the plaintiff was not fitted, will be overruled. If the defendant was not made to appear by bill of exceptions, otherwise that the court refused to hear proof, and it does not appear that the defendant was unfit, and it is shown that the children were in the unhappy relations was due to the cruel treatment of the oldest child, and that the defendant had very little means, and that the wife were in bad health.

5. Assignments of error complaining that the court erred in adjourning over the time for which the term had expired, thus depriving defendant of the right to file his motion for a new trial, or in granting the adjournment, and giving only 50 minutes to prepare and have exceptions signed, and without passing upon the motion for a new trial, will be overruled without prejudice where a motion for a new trial was filed and bill of exceptions filed before adjournment, the adjudge himself discharging the motion for a new trial, and where the bill of exceptions showed that the defendant had more than two hours to prepare it and his motion for a new trial was overruled.

6. If a party objects to the conclusion of the court in response to his motion for a new trial, he must move for a motion for additional conclusions of law and fact, which he desires a finding.

7. In order to have the action of the court reviewed for a refusal to file conclusions of law and fact, a motion for additional conclusions of law and fact should be taken.

8. An assignment that the court erred in refusing to hear argument from the defendant in support of his conclusion of the testimony will be overruled where the bill of exceptions fails to show that the court refused to hear argument from the defendant, and where the defendant requested to argue the case, to the action of the court in deciding the case without argument.

¹ Rehearing denied.

9. An assignment that the court erred in granting a divorce because there was no proof in the record that plaintiff was a bona fide resident of the state, or that she had resided in the county for six months, will not be reviewed where the motion for new trial failed to call the question to the attention of the trial court.

Appeal from district court, Ft. Bend county; Wells Thompson, Judge.

Action by Alma Wetz against Adolph Wetz. Judgment for plaintiff, and defendant appeals. Affirmed.

Slyfield & Davidson, for appellant.

GARRETT, C. J. The appellee, Alma Wetz, brought this suit in the district court of Ft. Bend county for a divorce from the appellant, Adolph Wetz, on the ground of cruel treatment, with a prayer for the custody of their two minor children, Ada and Olga. The appellant answered both the original petition and the first amended original petition with general and special exceptions. The original petition was probably bad on general demurrer, but the first amended original petition alleged a cause of action good on general demurrer.

The special exceptions will not be considered, because they are not presented by a proper assignment of error. The second assignment of error, which seeks to have them reviewed, is too general, being addressed to the action of the court in overruling the general demurrer and special exceptions. Rev. St. art. 1018; Rules Cts. Civ. App. 22-27 (20 S. W. vii., xiii.).

There is no statement under the third assignment of error which complains of the action of the court in permitting the plaintiff to prove specific acts of ill treatment without sufficient allegations to admit such proof, and the assignment must be regarded as abandoned. Rule 29 (47 S. W. v.).

An assignment that the judgment is contrary to the law and the evidence is too general. *Ackerman v. Huff*, 71 Tex. 317, 9 S. W. 236. The fourth assignment of error is not more specific than the one in the case just cited, and numerous other cases that might be cited. It is that: "The court erred in granting a divorce to the plaintiff, because the proof fails to show that she was entitled to a divorce; and, second, because the testimony clearly shows that she was not entitled to a divorce. The judgment was clearly contrary to the law and the evidence." Being too general, it will not be considered.

The fifth assignment complains of the action of the court in awarding the custody of the children to the plaintiff without hearing evidence as to what the interest of the children demanded, and who was mentally, physically, morally, and financially best able and best calculated to have control of them; while the sixth assignment complains that the court erred in refusing to hear proof that the plaintiff was neither mentally, physically, nor financially able to have the care and

control of the children; and the thirteenth assignment assigns as error the awarding of the custody of the children to the plaintiff, because the record shows that no proof such as is required by article 2987 of the Revised Statutes was offered, nor was there any evidence heard as to the prudence and ability of the parents, as required by said article. This assignment, however, will not be considered, because it does not appear in the record and does not present fundamental error. It is not made to appear by the bill of exception or otherwise that the court refused to hear evidence touching the fitness of the respective parties to have the custody of the children. It was developed on the trial of the case that there were two children of the marriage,—little girls of very tender age. There was nothing in the evidence to show that their mother was an unfit person to have charge of them, while it did appear that the chief cause of the unhappy relations between the plaintiff and defendant was the defendant's cruel treatment of the oldest child. It was shown that the defendant had very little means, which was presumably community property. He and his wife were both in bad health. The action of the court in awarding the custody of the children does not appear to be without evidence, and it does not appear that the court refused to receive evidence upon the matter. These assignments will be overruled.

The seventh, eighth, and ninth assignments of error complain of the action of the court in adjourning one week before the time for which the term might last had expired, thus depriving the defendant of the benefit of his motion for a new trial, and by hurrying the adjournment, and giving the defendant only 50 minutes to prepare and have his bill of exceptions signed, and without passing upon his motion for a new trial. It does not appear that the defendant sustained any injury by the action of the court as complained of. A motion for a new trial was filed, and a bill of exceptions was prepared and signed and filed before the adjournment was made. And while there is no order in the record by which the motion for a new trial is in terms overruled, it was discharged by the adjournment of the court. Rev. St. art. 1374. The bill of exceptions reserved to the action of the court shows that defendant's counsel had more than two hours in which to prepare the same and prepare the motion for a new trial.

If the defendant objected to the conclusions filed by the court in response to his motion for conclusions of law and fact to be filed, he should have pointed out in a motion for additional conclusions the facts which he desired a finding upon. His assignment of error is that the court erred in not filing its conclusions of fact and law separately, as requested by the defendant; the paper filed as such being neither a conclusion of fact or law. In order to have the action of the trial

judge reviewed for a refusal to file conclusions, a bill of exceptions should be taken. *Hess v. Dean*, 66 Tex. 663, 2 S. W. 727; *Callaghan v. Grenet*, 66 Tex. 240, 18 S. W. 507. The reason for such rule is that the attention of the trial judge may never have been called to the motion for conclusions. In this case the attention of the court was not called to any objection by the defendant to the conclusions filed.

The eleventh assignment of error is that the court erred in refusing to hear argument of the defendant upon the conclusion of the testimony. All parties in civil cases have the right to be heard by counsel in argument whenever a question of fact is submitted to the jury or the evidence is conflicting. Rev. St. art. 1299; *Nesbitt v. Walters*, 38 Tex. 576; *May v. Hahn*, 22 Tex. Civ. App. 365, 54 S. W. 416; 2 Enc. Pl. & Prac. 600; 1 *Sayles*, Tex. Civ. Prac. § 548. But the bill of exceptions fails to show that the court refused to hear argument, or that counsel for defendant requested to be allowed to argue the case, or that the defendant excepted to the action of the court in deciding the case without hearing argument. The bill shows that, after the evidence of both parties had been introduced, the court, without giving the defendant time to argue the case and present his authorities, immediately rendered judgment in favor of the plaintiff, and then the defendant asked the court to give him time to file a motion for a new trial, which the court refused, stating that he intended to adjourn at 12 o'clock; and defendant then asked for time to prepare his bills of exception, and the court replied he would give until 12 o'clock, to which the defendant excepted because the time was too short, and the term could last another week, and the case should not be hurried in any such manner. It appears from the qualification of the bill by the trial judge that the decision of the court was rendered at 11:15 o'clock a. m., and that court did not adjourn until 2 o'clock p. m. This bill reserves no exception to a refusal to hear argument, but only to a refusal to give time to file a motion for a new trial, and sufficient time to file a bill of exceptions. The assignment of error must be overruled.

It is assigned as fundamental error in the judgment—there being no assignment upon the question in the record—that there is no proof in the record that the plaintiff was an actual bona fide inhabitant of the state, or that she had resided in the county of Ft. Bend six months next preceding the filing of her suit. This can hardly be regarded as fundamental error, but the motion for a new trial filed by the defendant fails to call this question to the attention of the court. There may have been such proof in the evidence, and it may have been inadvertently omitted from the statement of facts. Notwithstanding the fact that a case has been tried by the court without a jury, a question of fact can-

not be reviewed in the appellate court unless it has been called to the attention of the court below in a motion for a new trial. *Railway Co. v. Douglass*, 87 Tex. 297, 28 S. W. 271; *Same v. Douglas*, 7 Tex. Civ. App. 554, 27 S. W. 793. And although the court in this case may not have passed on the motion for a new trial, no injury is shown, since it did not question the proof of the facts as to the plaintiff's being a bona fide inhabitant of the state and a resident of the county for six months.

No error having been properly presented requiring a reversal of the judgment of the court below, it will be affirmed. Affirmed.

LAAS v. SEIDEL.¹

(Court of Civil Appeals of Texas. Feb. 4, 1902.)

ADMINISTRATION—TITLE TO PROPERTY—RIGHT OF ACTION BY DEVISEE—SUIT ON NOTE—PARTIES—PLEADING—DEFENSES.

1. Under Rev. St. art. 1869, providing that, on the death of a person, title to his property shall immediately vest in his heirs and devisees, subject to the rights of his executors to subject the property to the payment of debts, an heir or devisee cannot maintain an action to recover property belonging to the estate unless it is alleged and proved that there are no debts and no necessity for administration, or that administration has closed, or that the suit is necessary to preserve the estate, or that the executors have failed or refused to perform their duties.

2. A mere allegation that the estate is solvent is insufficient to show that administration is unnecessary.

3. A complaint averred that at decedent's death defendant was indebted to him in the sum of \$500, evidenced by a promissory note; that decedent bequeathed to plaintiff's wife \$300, to be paid out of said note, the remaining \$200 to be paid decedent's wife; that the note was in the possession of decedent's wife; that defendant, designing to get possession thereof, falsely represented to the latter that if she would surrender it he would pay plaintiff's wife the \$300; that neither plaintiff nor his wife knew of or consented to such surrender. Held, that the suit was on the note, and not on the promise to pay made to decedent's wife.

4. A devisee of \$300 out of a \$500 note, if entitled to sue on the note, should make the devisee of the balance thereof a party defendant, so that the judgment may be a complete protection to the maker against further litigation thereon.

Appeal from Austin county court; Jno. P. Bell, Judge.

Action by Adolph Seidel against E. C. Laas. Judgment for plaintiff, and defendant appeals. Reversed.

W. C. Henderson and C. G. Krueger, for appellant. Searcy & Garrett and J. H. Shelburne, for appellee.

GILL, J. This suit was brought by Adolph Seidel, the appellee, against E. C. Laas, the appellant, to recover \$300 out of a \$500 note alleged to have been due the estate of C. W. Laas, deceased; the \$300

¹ Rehearing denied.

having been devised to Nellie Seidel, wife of Adolph Seidel, by the will of C. W. Laas. The petition alleged that plaintiff's wife was the daughter of C. W. Laas, deceased, and that appellant was his son; that C. W. Laas died November 16, 1899, leaving a will, which was duly probated; that, at the death of C. W. Laas, appellant was indebted to his father in the sum of \$500, evidenced by a promissory note payable to his father (its date was alleged to be unknown, but it was averred to be past due at the date of the institution of this suit); that deceased, by the terms of his will, bequeathed to the wife of plaintiff \$300, to be paid out of said note, —the remaining \$200 to be paid to Marie Laas, the surviving wife of deceased; that at the time of the death of C. W. Laas the note was in the possession of Marie Laas, his wife; that defendant, designing to get possession of the note and defraud plaintiff's wife out of the \$300, falsely represented to Marie Laas that, if she would surrender the note in question to him, he would pay plaintiff's wife the amount due out of the note; that thereupon the note was delivered to him, and he has refused to pay plaintiff's wife the sum named; that neither plaintiff nor his wife knew of the surrender of the note, nor did they consent thereto. There is an allegation that the estate of C. W. Laas was solvent, but no allegations are present to the effect that no administration is pending and none necessary, nor any other allegation which would authorize the maintenance of the suit in their own right. Neither of the executors named in the will was made a party as such. Defendant's answer contained general and special exceptions. He also pleaded in bar that the estate of his father was indebted to him, specifying the amounts, and that this and certain credits on the note in question were sufficient to discharge the indebtedness to the estate. He further alleged that Mrs. Marie Laas had surrendered the note to him in consideration of the fact that it had been discharged by reason of the above-mentioned items and credits. She was made a party to the suit on the prayer of defendant, and he sought judgment against her in case judgment should be rendered against him. He pleaded the statute of limitations, also, in bar of plaintiff's suit. Mrs. Marie Laas appeared and answered by general denial. The court overruled defendant's exceptions to the petition, sustained plaintiff's exceptions to the answer, and struck out all of the answer except the general denial and plea of limitation. Mrs. Marie Laas was dismissed from the suit over defendant's objection. A trial by jury resulted in a verdict and judgment for plaintiff for \$300 and interest. From this judgment defendant prosecutes this appeal.

The action of the court in overruling defendant's general demurrer and first and second special exceptions is assigned as error. Appellant, by the first special exception,

questioned the sufficiency of the petition because it appeared from its allegations that the cause of action was not against defendant, but against the estate of C. W. Laas. We are of opinion the exception should have been sustained. While it is true that upon the death of a person the title to his property vests at once in his heirs or the devisees under his will, it is also true that this title is subject to the rights of the administrator or executor to subject the property to the payment of the debts of decedent and the expenses of administration. Rev. St. art. 1869. For this purpose he had the right to the possession of the estate as against the heirs or legatees. Hence the rule that an heir or devisee cannot maintain an action for recovery of property belonging to the estate unless it is alleged and proved that there were no debts and no necessity for administration, or that administration had closed, or that the suit was necessary to the preservation of the estate, and that the executor or administrator had failed or refused to discharge his duty. *Richardson v. Vaughan*, 86 Tex. 93, 23 S. W. 640; *Northcraft v. Oliver*, 74 Tex. 163, 11 S. W. 1121; *Lee v. Turner*, 71 Tex. 264, 9 S. W. 149; *Webster v. Willis*, 56 Tex. 471. Here none of these allegations are present. The proof is silent upon the question, and we understand this objection to be involved in the exception urged.

There are two apparent reasons why the suit should not be permitted to proceed in its present form: First, the judgment rendered would not be a bar to a suit by the executors for the collection of the note; and, second, to permit the judgment to stand, Mrs. Marie Laas, not being a party, would, perhaps, have the right to subject the defendant to a second suit for her \$200 interest in the note. It is true, under the facts of this case, she might be estopped to maintain a second suit, having suffered a dismissal from this suit without objection, and having testified that she had given defendant her interest in the note. But the fact remains that she answered by general denial, and that the judgment, on its face, does not bind her. If it be true, as alleged, that defendant obtained the surrender of the note by Mrs. Marie Laas on a promise to pay to plaintiff's wife her interest therein as fixed by the will, these facts did not change the nature of the defendant's liability to the estate. The note was but the evidence of his indebtedness to the estate, and the surrender thereof by the widow of deceased did not extinguish his liability. The executor might still have recovered the whole amount. It does not appear from the allegations that the widow acted in her capacity as survivor; nor could she have exercised her rights as such, having accepted under the will. If the facts existed rendering necessary an administration or the handling of the estate by the executors for the payment of debts, the alleged transaction between defendant and

the widow of deceased was without force. The suit having been brought before the time for administration expired, a necessity for administration is presumed, unless the contrary be alleged and proved. The mere allegation that C. W. Laas died solvent does not meet this requirement. We think the court erred in refusing to sustain the exception.

It is contended, however, that this suit is not upon the note, but upon the alleged promise of defendant made to Mrs. Marie Laas to pay \$300 of the note to plaintiff's wife. In the first place, we do not regard this as a proper construction of the pleadings. The allegation was that neither plaintiff nor his wife assented to or approved the alleged transaction. The note itself was still evidence, and the best evidence, of the debt. This was recognized by plaintiff in his allegation that the note was in the hands of defendant, and, unless produced, secondary evidence of its contents would be used; and, in the second place, the defendant had the right, as above shown, to resist a recovery by plaintiff unless the right to sue in such a way as to bind the estate, and discharge him fully and finally from liability on the note, had been averred. If there is in fact no necessity for administration, the proper practice would seem to be for plaintiff to sue on the note, and allege the necessary facts, making the widow, to whom the will devised the balance of the note, a party defendant. In such a case the judgment would be a complete protection to defendant against further litigation on the note. In such a suit his liability would be upon the note. The right of plaintiff to maintain the suit would rest upon the terms of the will and the absence of necessity for administration. The alleged promise to Mrs. Laas to pay to plaintiff's wife the \$300 bequeathed to her would be evidence of his liability on the note, and would strongly tend to rebut defendant's allegation that the note had been discharged. The promise would not serve as an independent basis for the suit; for Mrs. Marie Laas, though in possession of the note, was at no time liable for the bequest. It had at no time been her duty to enforce the collection of the note. Should the note prove valueless by reason of the insolvency of defendant, or by reason of being barred by limitation, the bequest to plaintiff's wife would be worthless. Against the suit brought by plaintiff in the form suggested, the plea of payments, credits, and offsets would be as effective as if interposed against the executors themselves. Of course, if there was no liability to the estate, there could be none to the legatees.

This brings us to a consideration of the assignment that the court erred in sustaining exceptions to defendant's plea of offsets, payments, and credits. If the offsets appeared on the face of the answer to be barred by limitation, or were not properly item-

ized, the exceptions were properly sustained. It is not necessary for us to pass upon these questions. They can be determined upon another trial, under well-settled rules of law; and if the pleas, in their present form, are not sufficiently specific, the defect will doubtless be cured by amendment. We can imagine no state of facts under which the defendant would be entitled to recover over against Mrs. Marie Laas under the pleadings as they stand. But in any event the court erred in dismissing Mrs. Marie Laas from the suit, for the reasons given in a previous part of this opinion.

We do not deem it necessary to consider the remaining assignments. They present no error likely to occur on another trial.

For the errors indicated, the judgment is reversed and the cause remanded, so that plaintiff, by proper amendment, may allege the facts, if they exist, which will authorize him to maintain the suit. The motion to dismiss appeal because the judgment does not dispose of all the parties was taken with the case. Mrs. Laas, the party not disposed of by the terms of the judgment, appears by bill of exception to have been dismissed from the case. The motion was therefore overruled. Reversed and remanded.

GEORGI v. JUERGEN et al.

(Court of Civil Appeals of Texas. Feb. 22, 1902.)

TRUST DEED—SALE UNDER POWER—NECESSITY OF NOTICE.

It is not necessary to give written notice to the debtor in a sale of real estate under a trust deed.

Appeal from district court, Harris county; C. E. Ashe, Judge.

Action by H. Paul Georgi against Charles Juergen and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

H. Paul Georgi and E. P. Turner, for appellant. E. P. & Otis K. Hamblen and W. H. Scott, for appellees.

GILL, J. This suit was brought by the appellant, Georgi, against W. M. Kelman and C. Juergen, to set aside a sale of lands made by W. M. Kelman as trustee under a trust deed, and bought in by Juergen at such sale. The sale was attacked on the grounds (1) that the trustee advertised and sold all the lands in bulk, though there were several distinct tracts included in the deeds of trust; (2) because the property sold for a grossly inadequate price; and (3) because the trustee failed to give appellant written notice of the proposed sale, as required by the statute governing judicial sales of land. The court tried the cause without a jury, and rendered judgment for appellees. The grounds upon which the action was based are urged here as a reason for reversal.

To the complaint that the trustee advertised together separate tracts of real estate included in different trust deeds to secure different debts, and sold the tracts together, the answer is, the record does not so show. The statement of facts consists of the testimony of appellant. Nothing else therein appears. The judgment was rendered on his evidence and there is nothing in it authorizing the setting aside of the sale. That it is not necessary to give written notice to the debtor in sale of real estate under trust deeds has been recently decided by the supreme court. *Fischer v. Simon*, 66 S. W. 447, 4 Tex. Ct. Rep. 39.

The judgment is affirmed. Affirmed.

BRUMBY v. BOYD et al.¹

(Court of Civil Appeals of Texas. Feb. 14, 1902.)

TEMPORARY INJUNCTION — DISSOLUTION — FINAL DECREE—ASSIGNMENT AS ERROR—HOUSTON CITY HEALTH OFFICER—VACANCY IN OFFICE—APPOINTMENT BY MAYOR—APPOINTMENT BY BOARD OF ALDERMEN—PUBLIC POLICY—APPOINTMENT OF HEALTH INSPECTOR—DOUBLE HOLDING OF OFFICES—DE FACTO OFFICER—VOID APPOINTMENT—INJUNCTION BY PRIVATE CITIZEN.

1. The dissolution of a temporary injunction cannot be assigned on appeal as error, after the rendition of a final judgment adverse to appellant, and necessarily involving a dissolution of the temporary injunction had it been continued, where appellant has not filed a supersedeas bond.

2. Under Sp. Laws 1897, p. 54, constituting the charter of the city of Houston, and providing that in case of a vacancy in any elective office the council, upon nomination by the mayor, shall fill the vacancy by selecting some person by a majority vote of the aldermen, the power to fill vacancies is vested in the council, consisting of the mayor and board of aldermen; and the mayor has no power to fill a vacancy by his individual appointment, though the council is not in session.

3. The fact that the mayor and board of aldermen might fail to agree upon the person to fill such a vacancy, and that the office would in consequence remain vacant, cannot operate to permit, on the ground of public policy or necessity, an appointment by the mayor without the concurrence of the aldermen.

4. The board of aldermen, without the consent of the mayor, cannot authorize a person to perform the duties and receive the compensation of health officer, as that is virtually an appointment to office by the aldermen alone, which, under the charter, is beyond their powers.

5. A board of aldermen cannot, over the mayor's objection, authorize a health inspector to perform the duties and receive the compensation of health officer of a city, as such action virtually constitutes him health officer, and vests him with two offices, contrary to the constitution.

6. Where an appointment to office is not merely irregular or informal, but is absolutely void, the appointee, though attempting to discharge the duties of the office, is not an officer de facto.

7. A private citizen cannot enjoin an appointee from discharging the duties of health officer of a city on the ground that his appointment is illegal, the matter being one which affects the public generally, and not the individual particularly.

Appeal from district court, Harris county: Wm. H. Wilson, Judge.

Suit by W. M. Brumby against J. G. Boyd, wherein John D. Woolford intervenes as defendant. From a judgment in favor of defendants, plaintiff appeals. Affirmed in part and reversed in part.

O. T. Holt, L. B. Moody, and L. R. Bryan, for appellant. Stewart, Stewart & Lockett, for appellees.

PLEASANTS, J. This is a suit for injunction, brought by appellant in his official capacity as a health inspector of the city of Houston and acting health officer and the alleged de facto head of the health department of said city, also in his individual behalf as a citizen and taxpayer of said city, against the appellee J. G. Boyd, seeking to restrain said Boyd from in any manner attempting to discharge the duties of health officer of said city, or from in any manner interfering with the discharge of the duties of said office by appellant. The petition was presented to Hon. Wm. H. Stewart, judge of the Tenth judicial district, on November 23, 1901, who on said date granted a temporary injunction as prayed for. The petition was filed in the district court of Harris county (Fifty-Fifth judicial district) on November 24, 1901, and on the following day appellee Boyd filed his original answer and cross bill against appellant, setting up that he was the legally appointed health officer of the city of Houston, and praying that the writ of injunction theretofore issued by the judge of the Tenth judicial district be dissolved, and that a temporary injunction be issued restraining appellant from in any manner interfering with the discharge of the duties of health officer of the city of Houston by said appellee. On the 26th of November, 1901, John D. Woolford intervened in said cause in his capacity as mayor of the city of Houston, and adopted as part of his answer and cross bill the said answer and cross bill of appellee Boyd, and alleged that he, as mayor of said city, had the right to appoint said Boyd, and had appointed him, to the office of health officer of said city, and asked that he, as the chief executive officer of said city, be granted a writ of injunction against appellant as prayed for by said Boyd. On the 26th day of November, 1901, the Honorable W. H. Wilson, judge of the Fifty-Fifth judicial district of Texas, in which said cause was pending, on his own motion vacated and set aside said temporary injunction granted by the Honorable William H. Stewart, and set said application for an injunction down for hearing on the 28th of November, 1901, together with the cross bill on behalf of the appellees, Boyd and Woolford. On the 28th day of November, 1901, the case, coming on to be heard before the court, was submitted to the court without a jury for final hearing and judgment on the facts as set out in the petition.

¹ Rehearing denied.

answers, and affidavits. Upon this hearing the court below refused the prayer of appellant for an injunction, and rendered judgment granting an injunction to the appellees, Boyd and Woolford, as prayed for by them.

The following are the material facts in the case, as found by the trial court; said findings of facts not being excepted to by either party, and no statement of facts appearing in the record:

"Conclusions of Fact.

"(1) That at the last municipal election in April, 1900, Dr. J. B. Massie was duly elected health officer of the city of Houston, and qualified and acted as such till his death, 23d August, 1901.

"(2) April 24, 1901, Dr. Massie became incapacitated by sickness to perform the duties of health officer, and requested Dr. Brumby to perform such duties for him and in his place, which Dr. Brumby did, in addition to his personal duties as health inspector, till the death of Dr. Massie; his performance of said duties being acquiesced in.

"(3) From the 24th of April, 1901, to the 15th of October, 1901, when the motion following was passed over the protest of the mayor (the mayor declaring said motion out of order, and an appeal being taken from his ruling and sustained, one of the aldermen putting the motion), Dr. Brumby continued as before Dr. Massie's death to perform the duties of health officer. Up to the time of the passage of said motion the mayor acquiesced in the performance of said duties by Dr. Brumby, but did not acquiesce in any claim of Dr. Brumby to be the health officer, as prior to that time Dr. Brumby made no claim to be 'the health officer' of the city of Houston.

"(3½) Proceedings of the council of date October 15, 1901, are hereto attached. From the minutes of the city council of the city of Houston, Tuesday, October 15, 1901: 'Motion by Alderman Thompson that, in view of the fact that the city is without a health officer, and that the health department is one of great importance, and that same should be under the temporary control of some one competent to manage said department pending the election of a successor to Dr. J. B. Massie, deceased, it is moved that Dr. W. M. Brumby is hereby authorized to do and perform the duties of said office until same is filled in accordance with the city charter, and that he receive for such services the sum of \$150 per month. The mayor ruled the motion out of order. Alderman Thompson appealed from the decision of the chair, and called upon the secretary to read the new ordinance constituting rule 18a of the rules of order, recently passed, which provides that an appeal may be taken from the decision of the chair, and that any alderman may put the motion to the council if the appeal is sustained. Alderman Thomp-

son then put the motion, "Shall the decision of the chair stand as the decision of this council?" The decision was not sustained by a vote of 7 to 8; Aldermen Tuffly, Bennett, and Mueller voting aye. The appeal having been sustained, Alderman Thompson put his original motion, and it was carried on a vote of 9 to 1; Alderman Tuffly voting no. The mayor then gave notice of veto of this action of the council.' On October 23, 1901, the mayor presented to Dr. Brumby a formal objection to his performing the duties of health officer.

"(4) On the — day of October, 1901, Woolford, as mayor of Houston, filed a petition for injunction against Brumby (No. 31,318), which being heard in chambers, the court declined to issue the temporary writ of injunction, and the case stood over for trial on the merits.

"(5) On November 20, 1901, in a vacation of the city council, when same was not in session, the mayor of Houston appointed Dr. J. G. Boyd health officer of the city of Houston until the next regular meeting of the city council, in form substantially the same as the appointment of November 26, 1901, hereafter set out.

"(6) On November 22, 1901, Woolford dismissed said petition, cause No. 31,318, from the docket.

"(7) On November 20, 1901, Dr. J. G. Boyd, after his appointment, entered the office in which were the records of the health officer of Houston, and took therefrom a portion of the books and records, and a portion of the furniture belonging to the health department of the city of Houston, and removed them to another room occupied by Dr. Boyd in acting as health officer under the appointment before named by the mayor.

"(8) Dr. Brumby is recognized as the proper person to perform the duties of health officer by the majority of the council. Dr. Boyd is recognized by the mayor; by five of the seven health inspectors of the city of Houston, who report to him for duty; Dr. Brumby and Mr. Mat Railey, another inspector, not recognizing any authority in Dr. Boyd. At the date of the filing of the petition herein Dr. Boyd had charge of the pest house, and is recognized by the post-office authorities and St. Joseph's Infirmary. Dr. Boyd has also filed affidavits of numbers of physicians of the city, showing their recognition of him. And there are also affidavits of a number of physicians of the date of the petition for judgment filed by the mayor in cause No. 31,318, showing that up to that date they had recognized Dr. Brumby as authorized to perform the duties of health officer.

"(9) On November 22, 1901, Dr. Boyd had possession of the pest house, when Dr. Brumby went there with a friend, and vi et armis took possession of same, and remained in possession a few hours, till, upon order of the mayor, the police department of the

city of Houston retook possession, and turned same over to Dr. Boyd.

"(10) At a meeting of the council on November 25, 1901, J. G. Boyd was nominated by the mayor to the council as health officer, and one alderman voted to confirm and eleven against confirmation. Thereupon the mayor, in same form as before, on November 26, 1901, in vacation of the council, again appointed Boyd to fill the position till the next meeting of the council, said appointment being in form as follows: 'Houston, Texas, November 26th, 1901. By the power conferred upon me by law as mayor of the city of Houston, Texas, I hereby appoint Dr. J. G. Boyd, of Houston, Texas, to fill the position of health officer of the city of Houston, now vacant, until the next regular meeting of the city council of the city of Houston, at which time I shall present the name of said Dr. J. G. Boyd for confirmation by the city council. Until the next regular meeting of the city council, and until some one has been nominated by the mayor and confirmed by the city council, the said Dr. J. G. Boyd will take charge of the health office of the city of Houston, and all the goods, books, and appurtenances belonging to the office of health officer of the city of Houston, and is hereby authorized for such period to discharge all the duties required of the health officer. All health inspectors of the city are hereby directed to report to the said Dr. J. G. Boyd for duty, and shall act under his direction and control. No requisition for supplies, medicine, or expenses of said health department will be recognized by me as mayor of the city of Houston unless signed by the said J. G. Boyd. In testimony whereof I have hereunto set my hand, and have caused the city secretary to attest the same and affix the seal of the city of Houston, this 26th day of November, A. D. 1901. J. D. Woolford, Mayor of the City of Houston. [Seal.] Attest: A. Lipper, Secretary of the City of Houston.'

"(11) Dr. Brumby was appointed health inspector June 20, 1899, and qualified and is still acting as such, and is one of the present incumbents of that office.

"(11½) That both Dr. Brumby and Dr. Boyd are capable physicians, in good standing, either well qualified to occupy the office of health officer.

"(12) This case being under advisement by the court some time, it was agreed by the attorneys for all parties that the court should enter final judgment upon the merits upon the petitions, answers, interventions, and affidavits or evidence, and that the court should enter judgment on the state of facts existing November 28, 1901, when the case was heard, as if the judgment on the merits had then been rendered."

Appellant's first assignment of error complains of the action of the trial judge in dissolving upon his own motion, and without

giving the 10-day notice required by the statute, the temporary injunction granted by the judge of the Tenth judicial district. It would seem that the action complained of was unwarranted by law, but, as presented by this record, the question as to whether or not appellant was injured thereby and is in position to complain of same depends upon the question as to whether he was entitled to an injunction against the appellee Boyd. The necessary effect of the final judgment of the court below rendered on the merits of the case being a dissolution of the temporary injunction theretofore granted by the judge of the Tenth judicial district, and appellant not having filed a supersedeas bond on his appeal from said judgment, he has failed to preserve his apparent right to have said temporary injunction continued in force during the pendency of this appeal. The question presented by this assignment being immaterial to any issue in the case as presented by the record, the assignment cannot be sustained.

The judgment of the court below is assailed by the appellant upon the following grounds: "First. Because the court erred in holding that the mayor of Houston could, without the concurrence of the board of aldermen, temporarily fill a vacancy in an elective office. Second. Because the court erred in holding that the city council, through its ordinance, could not legally require and authorize the plaintiff, Brumby, as health inspector, to discharge the duties of health officer pending the filling of the vacancy in said office by the city council on the nomination of the mayor as required by the charter. Third. Because the court erred in holding that the defendant Boyd was either *de jure* or *de facto* health officer, and therefore legally entitled to discharge the duties of health officer of the city of Houston. Fourth. Because the court erred in holding that plaintiff, Brumby, was not *de facto* health officer, and therefore not entitled to discharge the duties of health officer of the city of Houston." We will consider these objections in the order in which they are presented.

The right or authority to select and appoint public officers is one of the highest prerogatives of sovereignty, and the delegation of such authority by the sovereign power must be clearly shown by the person claiming the right to exercise same. The power to appoint officers—excepting, perhaps, those who are to assist him in the discharge of his personal executive duties—is not inherent in the chief executive, but must exist, if it exist at all, by virtue of the authority conferred upon him by the sovereign power. Mayor, etc., of *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *State v. Swift*, 11 Nev. 128; *Collins v. State*, 8 Ind. 344; *Mechem*, Pub. Off. § 108. It follows that, unless the sovereign power, the people, have, through the act of their legislature granting a char-

ter to the city of Houston, conferred upon the mayor of said city the power to appoint a health officer to temporarily fill the vacancy in said office, caused by the death of Dr. Massie, he has no such power, and any appointment made by him is absolutely void. To determine this question, we must look to the charter of said city, which defines the powers conferred upon the mayor and other officers provided for said city by said charter. The portion of the charter under which this authority is claimed is found in section 10 of said instrument, and reads as follows: "In case of a vacancy in any elective office, from whatever reason, the council, upon nomination by the mayor, shall fill the vacancy by the selection of some person by a vote of a majority of the aldermen elected and qualified." Sp. Laws 1897, p. 54. It cannot be contended that this language in express terms confers upon the mayor the power, without the concurrence of a majority of the aldermen, legally expressed, to make an appointment to fill a vacancy in an elective office; and we think it equally clear that no such authority can be implied from said language. Conceding, for the sake of argument, that the intent and meaning of the language used is identical with the provisions of our state and federal constitutions conferring upon the chief executive the power to appoint certain officers "by and with the advice and consent of the senate," or providing that the appointment shall be made by the executive "and confirmed by the senate." It still fails to authorize the executive to make a temporary appointment in the recess of the confirming or concurring body. The power to make such temporary appointments by the president or by the governor is expressly conferred either by the legislative body or by the constitution itself, and does not arise by implication from the general power to make appointments by and with the advice and consent of the senate. Const. art. 4, § 12; section 1769, Rev. St. U. S. We think it is clear from the language of the charter above quoted that the mayor has no authority to fill a vacancy in an elective office, and that such authority is vested solely in the city council. The selection of the person to fill such vacancy must be by the council, which is composed of the mayor and board of aldermen. Neither can act in the matter independent of the other, and no legal appointment, temporary or otherwise, can be made unless concurred in by both the mayor and a majority of the board of aldermen. The nomination by the mayor is only the initial step in making the appointment, and the appointment becomes complete only when concurred in by a majority of the aldermen. Mechem, Pub. Off. § 114, and authorities there cited. The fact that the person selected must be nominated by the mayor deprives the aldermen of the power to select any one who is not satisfactory to the mayor, but it does not give the mayor power

to make an appointment without the concurrence of the aldermen, in violation of the plain provision of the charter. But it is urged that upon the failure of the mayor and board of aldermen to agree upon a suitable person the right of the mayor to make a temporary appointment would arise from public policy, which requires that a vacancy in a public office should be filled. The public welfare or the dictates of sound public policy may often properly influence courts in the decision of doubtful questions affecting the interests of the public, but cannot authorize the disregard of a plain legislative command, and the highest public policy is subverted by the refusal of the courts to sanction the exercise by public officers of powers not conferred upon them by law. It is true that the law does not favor a hiatus in office, and the welfare of the citizens of Houston demands that the vacancy in the office of health officer of said city should be filled; but the city council of said city, to whom alone the authority to fill such vacancy has been delegated, having so far failed to perform that duty, and there being, as before shown, no inherent power in the mayor to make such appointment, the office must remain vacant until filled in the manner prescribed by the law. This is a deplorable condition of affairs, and one which the legislature evidently did not contemplate would ever exist, or provision for the same would have been made in the charter. We think appellant's first objection to the judgment of the court below is valid, and must be sustained.

The second objection, which is, in effect, that the action of the council in authorizing the appellant to perform the duties of health officer was legal, cannot be sustained. Dr. Brumby is one of the health inspectors of the city of Houston,—an office of emolument, created by the charter of said city,—and to allow him to hold both the office of health inspector and health officer is a violation of a plain provision of the constitution of this state. The law looks to substance, rather than form, and the action of the board of aldermen in authorizing Dr. Brumby to perform the duties of health officer and to receive the compensation of such office is to make him virtually the health officer, and the provision of the constitution above mentioned cannot be evaded by merely omitting to designate him as health officer. As before pointed out, the vacancy in the health office, which is an elective office, can only be filled, under the charter of the city of Houston, by the mayor and board of aldermen acting together as the city council; and to say that the aldermen, without the consent of the mayor, can authorize the appellant to perform the duties and receive the compensation of health officer of said city, is to say that they can fill the vacancy in said office in violation of the provision of the charter by appointing a person to said office who had not been nominated by the mayor.

The third and fourth objections made by appellant to the judgment may be considered together. We are of opinion that neither the appellant nor the appellee Boyd can be regarded as the de facto health officer of the city of Houston, because of the fact that the appointments under which they claim to hold said office are not merely irregular and informal, but absolutely void, and neither has any colorable right to the office. That one whose only claim to an office is under a void appointment is not a de facto officer, but a mere intruder, is well settled. *Blen-court v. Parker*, 27 Tex. 558; *Land Co. v. Laigle*, 59 Tex. 344.

A suit cannot be maintained by a private citizen to enjoin an injury which affects the public generally, but which inflicts no special wrong on him individually. *City of San Antonio v. Strumberg*, 70 Tex. 366, 7 S. W. 734; *Caruthers v. Harnett*, 67 Tex. 131, 2 S. W. 523.

Our conclusions being that neither the appellant nor the appellee Boyd is de jure or de facto health officer of the city of Houston, and neither of them having shown any special injury which would entitle him to an injunction, the petition for injunction filed by each should be dismissed. The right of the appellee Woolford, as mayor, to enjoin the illegal exercise of the duties of health officer by the appellant is not questioned by appellant, his contention being that he is legally in the possession of said office and in the discharge of the duties of same.

From the conclusions reached by us upon the issues presented by this appeal as indicated in this opinion, it follows that the judgment of the court below refusing to grant a writ of injunction in favor of appellant and granting such writ to the appellee Woolford should be affirmed, and that portion of the judgment granting an injunction to appellee Boyd should be reversed, and judgment here rendered dismissing the cross bill of said appellee; and it is so ordered.

GOLDSTEIN v. COCKRELL.¹

(Court of Civil Appeals of Texas. Feb. 13, 1902.)

HUSBAND—RIGHT TO EARNINGS OF MINOR SON—RELINQUISHMENT.

Third persons conveyed land to a husband, the consideration being paid out of the earnings of a minor son, and it being understood that the land was to be the wife's separate property. The son from the time that he was 17 years old had worked for himself and had paid his own way through a school of pharmacy. In a suit to cancel a subsequent deed of the land made by the husband to a purchaser with notice, the wife testified that the deed was made to the husband so that he could execute the purchase-money notes, which the parties would not permit her to execute, because she was married, and that the son told her he would take care of the notes. The husband told one witness that the property belonged to

his wife, and that his son had bought it for her. Held that, though ordinarily a father is entitled to the earnings of his minor son, the evidence sufficiently showed that the land in question was bought by the son with the intention of making it the wife's separate property, and that the husband had assented thereto, and therefore it belonged to her.

Error from district court, Harris county; John G. Tod, Judge.

Action by Sarah C. Cockrell against S. Goldstein. Judgment for plaintiff, and defendant brings error. Affirmed.

Stevens & Marshall, for plaintiff in error. Perryman & Kottetvitz, for defendant in error.

GARRETT, C. J. This action was brought by Sarah C. Cockrell, as plaintiff, against S. Goldstein, as defendant, to cancel a deed executed by the husband of the plaintiff by which he undertook to convey to the defendant a parcel of land. The petition alleged that the land was the separate property of the plaintiff and that the defendant had knowledge of that fact when he bought it. From a judgment in favor of the plaintiff the defendant has sued out a writ of error to this court. The evidence shows that the Texas Savings, Real Estate & Investment Association conveyed to A. G. Cockrell, the husband of the plaintiff, for a recited consideration of \$1,100, to be paid in 72 monthly installments, 2¾ acres of land situated near the city of Houston in Harris county, and that of this tract A. G. Cockrell conveyed to S. Goldstein, the defendant, 15,000 square feet. A. G. Cockrell died before the bringing of this suit. The consideration for the 2¾ acres conveyed to A. G. Cockrell, all except a small part thereof, which was the separate means of the plaintiff, was paid out of the earnings of their minor son Abbott, and although the deed was taken to A. G. Cockrell it was understood at the time of the purchase of the land that it was for the benefit of the plaintiff, as her separate property, and for a home; and the son, who was earning a salary for personal services as clerk in a drug store, told his mother that he would pay the installments of purchase money for her. The husband was conducting a small grocery business, and sold the part of the land in controversy to the defendant for goods; and when he was about to make the sale the plaintiff told the defendant that the land was her separate property; that her husband did not own it; and that she would not sign the deed. Cockrell said to Goldstein, "You will have to talk to her, but I don't think she will agree to make the trade. Will have to send the stuff back." The defendant replied that the title was in the name of the husband, and that he would take the risk. There is no direct evidence that the father had emancipated his son; but there are sufficient circumstances to sustain the verdict of the jury that he had done so, and that the payment of the purchase

¹ Rehearing denied.

money of the land was for the benefit of the plaintiff, with the assent and approval of the husband. From the time he was 17 years of age the son was at work for himself. Much of his salary was paid to his parents, but he left home and went to New Orleans and got employment in that city and paid his own way through a school of pharmacy in which he graduated. It appears from the testimony of the plaintiff that the land was bought by her with the view of making it her property, and that the deed was taken to her husband so that he could execute the notes, which they would not let her execute because she was a married woman, and that her son told her that he would take care of the notes. It was shown that the husband had stated to the witness Grant that the property belonged to his wife and that his son had bought it for his mother to have a home. Therefore, while ordinarily the father is entitled to the earnings of his minor son, and property purchased with them is community property that may be conveyed by him without the consent of the wife, yet the father may relinquish his claim to them by emancipation of the son, or he may give them to the separate use of his wife, as he could give to her other property. From the evidence it is quite clear that the land in controversy was bought with the intention of making it the separate property of the plaintiff, and that her husband assented to the payment of the purchase money by his son for her benefit. Such being the state of the evidence, it was not error for the court to fail to charge the jury that although they might find from the evidence that the property in controversy was purchased with money which was given by Abbott Cockrell to his mother, Sarah Cockrell, they should find for the defendant. *Schuster v. Jewelry Co.*, 79 Tex. 183, 15 S. W. 259, 23 Am. St. Rep. 327; *Washington v. Washington* (Tex. Civ. App.) 31 S. W. 89; *Granrud v. Rea*, 59 S. W. 841, 1 Tex. Ct. Rep. 43; *Morris v. Kasling*, 79 Tex. 147, 15 S. W. 226, 11 L. R. A. 398.

There being no error in the judgment of the court below it will be affirmed. Affirmed.

ST. LOUIS S. W. RY. CO. OF TEXAS v. BALL

(Court of Civil Appeals of Texas. Feb. 15, 1902.)

CARRIERS—RAILROADS—INJURIES TO PASSENGER—POSITION ON PLATFORM—VIOLATION OF COMPANY RULE—NEGLIGENCE—REQUESTED INSTRUCTIONS—CHANGE BY COURT—EFFECT—INJURIES TO PHYSICIAN—DAMAGES—EVIDENCE—ADMISSIBILITY—SUFFERING CAUSED BY PLAINTIFF'S NEGLIGENCE—RECOVERY—WITNESSES—CONCLUSIONS—IRRESPONSIVE ANSWER—STRIKING OUT—LEADING QUESTIONS.

1. In an action against a railway for injuries to a passenger while standing on the platform of a moving train, an instruction that it is not negligence of itself for a passenger to stand on

the platform of a car, but it is for the jury to determine from all the circumstances of the case whether or not plaintiff was guilty of negligence, is improper, as calculated to mislead the jury, as standing on the platform of a moving train may or may not be negligence, which is to be determined by the jury from the circumstances of the particular case.

2. Requested instructions, which assumed negligence on the part of plaintiff in standing on the platform and in violating a rule of the railway, were incorrect, since neither is negligence per se, but both are for the determination of the jury.

3. The evidence being conflicting as to whether plaintiff was warned that it was dangerous to go out or remain on the platform, so that his being there was contributory negligence, or whether he was on the platform at the invitation of the conductor, under which circumstance his being there would not necessarily be negligence, the court should have instructed concerning contributory negligence, special charges having been asked calling his attention to the omission to so charge.

4. A requested charge that, if the jury believed that plaintiff was standing on the platform, and the porter, at the time of opening the car door, did not actually see that plaintiff was leaning against the door, and that plaintiff began to fall backward, and that the porter, in order to prevent plaintiff's falling, shut or attempted to shut the door, and thereby plaintiff was injured, the injury was the result of an accident, for which defendant was not liable, was incorrect in assuming that plaintiff was leaning against the door, the evidence being conflicting on that point, and in telling the jury without qualification that the shutting of the door to prevent the fall, if done for that purpose, would prevent a recovery.

5. An instruction that if the jury believed that the plaintiff was standing on the platform, and the porter, at the time of opening the car door, did not actually see the plaintiff, and that he could not have seen plaintiff by the use of reasonable diligence, and that plaintiff was leaning against the door, and that plaintiff began to fall backward, and that the porter, in order to prevent plaintiff from falling, shut or attempted to shut the door, whereby plaintiff was injured, the injury was the result of accident, for which defendant was not liable, is erroneous in telling the jury without qualification that the shutting of the door to prevent the fall, if done for that purpose, would prevent a recovery, and that, if the porter could not have seen plaintiff by the use of reasonable diligence, the injury was the result of accident.

6. The issue being whether, if plaintiff was leaning against the car door, the porter knew that fact, or had reason to anticipate it, and whether the porter in closing the door used proper care, the jury should have been told that, if they believed that plaintiff was leaning against the door, and at the time it was opened the porter knew or had reason to anticipate that plaintiff was so leaning, and that when the door was opened the plaintiff started to fall, and the porter closed the door to prevent such falling, and in so closing the door used the care that an ordinarily careful and prudent person would have used under the circumstances, then plaintiff could not recover.

7. It is error for the court to change a requested charge by inserting matter without the consent of the party asking it, and give it as a charge of that party.

8. In an action by a physician for injuries to his fingers such that he could not successfully perform an obstetrical operation, a physician residing in a different town than that of plaintiff, to which plaintiff intended to remove, cannot testify what proportion of his practice in the locality of his residence is obstetrical cases, there being no evidence on which a comparison could be based as to the amount of

obstetrical practice done at the respective places of residence of the plaintiff and the witness, and no way of estimating what proportion of the obstetrical practice plaintiff would receive at witness' place of residence if he located there.

9. In an action for personal injuries it was error to refuse defendant's requested charge that for all suffering, mental or physical, which plaintiff could have prevented by the exercise of prudence and reasonable care, treatment, and attention to his injured fingers, he could not recover anything; and if the jury believed from the evidence that plaintiff's bone felon was not bruised and injured at the time of the accident to his other hand they would not consider the bone felon or the condition of the hand on which it was, or the suffering endured therefrom, in arriving at their verdict, whatever their findings as to the accident to the other hand, there being some slight evidence that the bone felon was not bruised, and that it had been neglected.

10. Where, in an action for injuries, a witness was asked if he knew the extent of the injuries sustained by plaintiff while on the defendant's train, and to describe them in detail, and also as to whether he observed any evidence of plaintiff's sufferings from such injuries, and, if so, as to what they were, it was error to refuse to exclude the witness' answers that plaintiff was suffering intense pain from the accident, and his hand was in a very bad condition; for such answers were mere conclusions, and not responsive to the questions.

11. The questions were not leading.

Appeal from district court, Dallas county; T. F. Nash, Judge.

Action by J. G. Ball against the St. Louis Southwestern Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Reversed.

E. B. Perkins and Perkins & Gilbert, for appellant. Henry & Henry and Mathis & Freeman, for appellee.

RAINEY, C. J. Appellee sued to recover for personal injuries alleged to have been occasioned to him by the negligence of appellant's servants. We take from appellant's brief the following statement of the pleadings, which is sufficiently full and comprehensive for an understanding of the issues raised, viz.: "Plaintiff alleges that on the 17th of September, 1899, he was a passenger on appellant's train from Commerce to Carrollton, and was in a very nervous condition, suffering from a bone felon; that the conductor had told him the train did not stop at the depot at Carrollton, but would run to the crossing, where plaintiff would have to get off, about 200 yards from the depot, and, after leaving Plano, said conductor told appellee that he wanted him to be ready, and when the train whistled to get up, and go out of the coach on the platform, so he could get off without delaying the train; that presently the whistle blew for a station, and, appellant having failed to announce the name of it, appellee, believing that it was Carrollton, went out on the platform; that the negro porter came out of the door in a rushing manner, and shoved plaintiff to the left, and at the same time violently closed the door, and caught

three fingers between the door and the door facing, and thereby caused the alleged injury; that plaintiff made a great effort to release his fingers, and in doing so threw out his right hand, on the little finger of which the bone felon was, and struck it against the iron railing around the car platform, thereby causing great injury, etc.; that he was a physician, and, his fingers being injured, he cannot successfully perform obstetrical operations; that he was earning \$250 per month, and by reason of his injuries he was damaged to the amount of \$16,000." Appellant answered by general demurrer, general denial, and that appellee contributed to his own injury by refusing to keep his seat in the car when there were ample accommodations, and, after repeated requests from the conductor to remain inside the coach and off the platform, refused to do so, but willfully persisted in standing on the platform while the train was in rapid motion, and after notice that it was dangerous, and when he was not near his destination, and after the conductor had told him to keep his seat, and he would advise him when he reached his destination; that appellee negligently failed to care for or procure treatment for his fingers for several days after the accident, and his negligence greatly aggravated his condition, and further aggravated it and the bad condition of his blood by the excessive use of intoxicants. Appellee recovered judgment for \$500.

The court charged the jury that "it is not negligence of itself for a passenger to stand on the platform of a car, but it is for you to determine from all the circumstances of case whether or not plaintiff was guilty of negligence." This charge is complained of on the ground that it is upon the weight of the evidence. The charge is not free from criticism. Standing on the platform of a moving train may or may not be negligence, which is to be determined by the jury from the circumstances of the particular case. The statement that it was not in itself negligence was calculated to mislead the jury. Nor do we think the error was cured by the remainder of the paragraph, for it does not specifically tell the jury that they were to determine from the evidence whether or not standing on the platform was negligence, but it was for them "to determine from all the circumstances of the case whether or not the plaintiff was guilty of negligence." The jury may have construed this as meaning that standing on the platform was not negligence, but that other circumstances were to determine the question of negligence. The learned trial judge doubtless had the correct rule in mind, but he failed to properly express it. As expressed, it was calculated to mislead the jury.

Various special charges were requested by appellant's counsel which defined contributory negligence and attempted to apply the law to the facts on this issue. The charge

of the court was general, and did not define contributory negligence, or charge affirmatively on this issue applying the law to the evidence. Appellant introduced evidence in support of its plea of contributory negligence to the effect that appellee had been warned by the conductor that it was dangerous to go out on the platform; that it was contrary to the rule of the company; and for him to keep his seat, and he would be told when his station was reached. The charges requested were not, in our opinion, correct in assuming that it was negligence on the part of appellee in standing on the platform and in violating a rule of the company. Neither is error per se, but for determination by the jury. *Bonner v. Glenn*, 79 Tex. 531, 15 S. W. 572; *Railway Co. v. Connell*, 66 S. W. 246, 3 Tex. Ct. Rep. 933, and authorities cited. But said charges were sufficient to call the attention of the court to the defenses pleaded and the evidence relating thereto, and the court should have properly instructed the jury, applying the law to the evidence. If appellee was warned as stated, and being on the platform was dangerous, and his being there was, under the circumstances, negligence, and the proximate cause of the injury, then he was guilty of contributory negligence, and the jury should have been so told. If he was on the platform at the invitation of the conductor, as stated by him, then his being there was not necessarily negligence. The evidence was conflicting, and it was a question for the jury to determine from the evidence which theory was correct, and the court should have submitted the defenses of appellant, grouping the facts, especially as special charges were asked calling his attention to the omission. *Railway Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058; *Neville v. Mitchell* (decided Jan. 25, 1902) 66 S. W. 579, and authorities there cited.

The following special instruction was requested by appellant, viz.: "If the jury believe from the evidence that the plaintiff was standing on the platform, and the porter, at the time of opening the door, did not actually see the plaintiff was leaning against the door, and that plaintiff began to fall backward, and that then the porter, in order to prevent plaintiff's falling, shut or attempted to shut the door, and thereby plaintiff was damaged or injured, then the injury was the result of an accident, for which defendant was not liable." The court modified it by interlineations so as to read: "If the jury believe from the evidence that the plaintiff was standing on the platform, and the porter, at the time of opening the door, did not actually see the plaintiff, and that he could not have seen the plaintiff by the use of reasonable diligence, and that plaintiff was leaning against the door, and that plaintiff began to fall backward, and that the porter, in order to prevent the plaintiff from falling, shut or attempted to shut the door,

and thereby plaintiff was damaged or injured, then the injury was the result of an accident, for which the defendant was not liable." The interlineation consisted in the insertion of the following language, "And that he could not have seen the plaintiff by the use of reasonable diligence." This was duly excepted to, and the proper assignment of error made thereon. We are of the opinion that the court erred in interlining the charge as stated. As a general rule, the court should give or refuse the charge as requested. It is improper to change a charge requested without the consent of the party asking it, and give it as a charge of the party requesting it. We are of the opinion, however, that the charge given and the one requested were incorrect. The requested charge assumes that appellee was leaning against the door. The evidence conflicts on this point. The porter testified that appellee was leaning against the door when it was opened, while appellee testified that the porter opened the door, and pushed him to one side, and closed the door, which caught his fingers, etc.; and also in telling the jury without qualification that the shutting of the door to prevent the fall, if done for that purpose, would prevent a recovery. The charge given was erroneous in this last particular, and also in the language interlined. The issue on this point was whether or not, if appellee was leaning against the door, the porter knew that fact, or had reason to anticipate that he was so leaning; and whether or not the porter, in closing the door, used the care that an ordinarily careful and prudent person would have used under the circumstances. The jury should have been told, in substance, that if they believed from the evidence that appellee was leaning against the door, and at the time it was opened the porter knew or had reason to anticipate that appellee was so leaning, and if they further believe that when the door was opened the appellee started to fall, and the porter closed the door to prevent appellee from falling, and in so closing the door the porter used that care that an ordinarily careful and prudent person would have used under the circumstances, then plaintiff could not recover.

Appellant's fourth assignment of error is: "The court erred in admitting appellant's witness Dr. Blackburn, who resided at Carrollton, in Dallas county, Texas, to testify what proportion of his practice in the locality of his residence was obstetrical cases, over the objection of appellant; that it was not confined to the territory in which appellee practiced, there being no testimony to show the relative density of population, the time when either community was settled, the size of the towns or the neighborhood within their respective ranges of practice, nor any other reasonable means of comparison." This testimony, we think, was inadmissible. The appellee did not live at Carrollton, nor

was there any evidence upon which a comparison could be based as to the amount of obstetrical practice done at the place where appellee was residing and that done at Carrollton. Appellee testified that he intended locating at Carrollton, but that he had not done so, and there is no way of telling or estimating what proportion of the obstetrical practice he would receive at that place if he did locate there.

The court erred in refusing appellant's eighth requested charge, which was: "For all the suffering, if any, either mentally or physically, which plaintiff could have prevented by the exercise of prudence and reasonable care, treatment, and attention to his fingers that were hurt, if any, by the negligence of defendant's servants, he cannot recover anything; and if you believe from the evidence that plaintiff's bone felon was not bruised and injured at the time of the accident, then you will not consider the bone felon, or the condition of the hand on which the bone felon was, either then, thereafter, or now, or the suffering he may have endured therefrom, in arriving at your verdict, whatever may be your findings as to the accident on the other hand of plaintiff." There was slight evidence tending to show that the bone felon was not bruised, and that it had been neglected. Though slight, in our opinion the evidence was sufficient to require the charge requested.

Appellant complains of the action of the court in refusing to strike out and exclude the following interrogatories and answers of a witness: "Int. 8. State, if you know, the extent of the injuries sustained by plaintiff while on said train? If so, then describe them in detail. Did you observe any evidence of plaintiff's suffering from said injuries? If so, what were they?" The witness answered: "Plaintiff was suffering intense pain from the accident. I noticed his hand was in a very bad condition." The witness testified by deposition, and the proper motion was made to suppress. The court erred in overruling the motion to exclude the answers. The objection that the questions were leading is not tenable. The witness did not answer the interrogatory as to knowledge and state facts as to the injury, but his answers were mere conclusions, and not responsive to the interrogatories as propounded.

For the reasons set forth, the judgment will be reversed, and the cause remanded. Reversed and remanded.

CROMER v. SGITCOVICH.

(Court of Civil Appeals of Texas. Feb. 20, 1902.)

NEW TRIAL—FAILURE TO APPEAR—EXCUSE—SUFFICIENCY.

A showing that the attorney for the defendant was absent and engaged in the courts of another county at the time of the rendition

of a judgment against his client, on an ex parte hearing, and could not be present without loss to both client and attorney, but which does not show that defendant did not know of the attorney's absence, or could not have been present at the trial, or relied on the attorney being present, is not a sufficient excuse for the failure to appear, to authorize a new trial, though coupled with allegations showing a defense.

Appeal from district court, Galveston county; Wm. H. Stewart, Judge.

Suit by Mike Sgitcovich against Caroline Cromer for debt and the foreclosure of a lien on real estate. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

H. W. Rhodes, for appellant. Maco Stewart, for appellee.

GARRETT, C. J. The judgment of the court below was rendered upon an ex parte trial in the absence of appellant and her counsel in the district court for the Tenth judicial district on June 4, 1901, against the appellant in a suit for debt and foreclosure of a lien on land. On June 26, 1901, the appellant filed a motion for a new trial which was substituted and amended by a motion filed July 1, 1901. The grounds for the motion were the unavoidable absence of her attorney and a meritorious defense. It appears from the affidavit of the attorney that he was absent from the county of Galveston engaged in the courts of another county, and could not be present without great loss to himself and injustice to his client. The case was set down for trial, a jury demanded by the defendant, and notice of the date of trial published in the Galveston News. An offer to go to trial at the pending term was made by the appellant. The defense sworn to was that an extension of the note sued on had been made on payment of the interest, and that the suit was prematurely brought, and for that reason the appellant was not liable for the 10 per cent. attorney fees taxed against her in the judgment. The excuse offered for the absence of the attorney is not sufficient. It is really no excuse; and it does not even appear that the appellant did not know of her attorney's absence, and that he could not be present, or that she relied upon his being present when the case should be called for trial. There was no error in overruling the motion for a new trial, and the judgment will be affirmed.

Affirmed.

FISCHER et ux. v. SIMON.

(Court of Civil Appeals of Texas. Dec. 3, 1901.)

TRUST DEEDS—POWER OF SALE—WRITTEN NOTICE—VALIDITY OF SALE.

Acts 1889, p. 143 (Rev. St. 1895, art. 2360), provided that notice of a sale of real estate under a trust deed should be given "as now required in judicial sales." The statute as to ju-

dicial sales in force at the time when the article was enacted did not require personal service of notice on defendant in execution. The act adopting the Revised Statutes in 1895 provided that "the provisions of the Revised Statutes, so far as they are substantially the same as the statute in force at the time when Revised Statutes shall go into effect, * * * shall be construed as continuations thereof and not as new enactments of the same." *Held*, that article 2369 was not re-enacted by the adoption of the Revised Statutes, but continued in force, and the statute in force as to judicial sales in 1889, rather than a subsequent statute requiring service of notice on a defendant in execution, is applicable to a sale under a trust deed, and no service on the maker is necessary.

Appeal from district court, Washington county; Ed R. Sinks, Judge.

Action by J. H. Simon against F. Fischer and wife. There was a judgment in favor of plaintiff, and defendants appeal. Affirmed pursuant to answer of supreme court to certified question.

See 66 S. W. 447.

Beauregard Bryan, for appellants. Searcy & Garrett, for appellee.

GILL, J. This was a suit in trespass to try title, brought by appellee, J. H. Simon, to recover of F. Fischer and his wife, M. Fischer, about $6\frac{1}{2}$ acres of land in the city of Brenham, Washington county, Tex. Appellants answered by plea of not guilty, general denial, and specially that the tract of land in question was a part of their business homestead. Appellants further answered that appellee claimed title by purchase made at trustee's sale under a deed of trust, with power of sale, and that the sale was void because no written notice of the proposed sale was served on him as required by the law governing such sales, and was void, also, because the deed of trust made to secure a debt was upon land which was a part of their homestead. Appellants prayed that the sale be declared void, and the cloud upon their title be removed. Appellee replied, denying the appellants' allegations, and further alleging that appellants had sequestered the land, executing sequestration bond as required by law, and prayed judgment for damages. A trial before the court without a jury resulted in a judgment in favor of appellee for the land, and against appellants and their sureties on the sequestration bond for \$32.50, the rental value of the land for one year.

There is no statement of facts in the record, but the trial court found the facts to be as follows: "In January, 1898, defendant F. Fischer and one H. Knittel, now deceased, executed and delivered to V. A. Williams a deed of trust on the land described in plaintiff's petition, in which T. B. Botts was named as trustee, to secure certain indebtedness due by said Fischer to said Williams, evidenced by their promissory note. That thereafter, on Aug. 12, 1898, said Botts, as trustee, upon the re-

quest of said V. A. Williams, duly advertised said land for sale for the time and in the manner required by law, as provided in article 2369, Rev. St. 1895, and sold same at public auction at the court-house door in Brenham, Washington county, Texas, on the first Tuesday in September, 1899, at which sale the plaintiff became the purchaser for a valuable consideration of \$320 paid by him to said trustee, and received from him a deed to said land. That said Fischer had oral notice of said sale, but no written notice was served on him, and his attorney gave notice at the sale that it had not been served on him, and that the land was his business homestead. Both parties claimed under a common source by agreement in open court. The rental value of the land is \$32.50 per annum. Said land was sequestered by plaintiff, and replevied by defendants, with Wm. Buechel and Frank Doberst as sureties." It was further found that the land was no part of the homestead of appellants. On this state of facts, the trial court found that the failure on the part of the trustee to give appellant F. Fischer written notice of the contemplated sale did not invalidate the sale, for two reasons: First. Because article 2369, Rev. St. 1895, controlling sales under powers conferred by trust deeds, provides that "notice shall be given as now required in judicial sales." The statutes then in force governing judicial sales did not require written notice to the execution debtor. The law in force at the time the sale in question was made required that in judicial sales the defendant should have written notice in addition to the published notice required by law. The court held that the word "now," as used in article 2369, supra, made the act controlling judicial sales in force at the date of the passage of article 2369 a part of it, and, as the subsequent amendment of the article in regard to judicial sales made no reference to article 2369, the rules now applicable to judicial sales do not apply to sales under trust deeds. Second. If the law required written notice to appellant, the failure to give it was a mere irregularity; that the sale should not be void, but voidable, and could not be attacked collaterally. If either of the reasons given is sound, the judgment should be affirmed. We are of opinion, however, that the word "now," occurring in article 2369, should be read and given its meaning in the light of the context and the apparent purpose of the legislature as gathered from the entire article, which is as follows: "All sales of real estate made in this state under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated. Notice shall be given as now required in judicial sales and such sale shall be made at public vendue between the hours of 10 a. m. and 4 p. m. of the first Tuesday in

any month: provided that when such real estate is situated in an unorganized county such sale shall be made in the county to which such unorganized county is attached for judicial purposes, and where such real estate is situated in two or more counties the sale may be made in any county where any part of the real estate is situated after notice as required in judicial sales has been given in every county in which any part of such real estate is situated." Looking to the evil to be remedied, and the entire context, we think it fairly appears that the word "now" was not intended to have the significance sought to be given it by appellee, and that the evident purpose of the legislature was to bring all sales under powers within the control of the laws governing judicial sales in force at the time of the execution of the power. The article applicable to judicial sales in force at the date of the passage of article 2369, *supra*, has been repealed, and is superseded by article 2366. The life of the article in force at the date of the enactment of article 2369 cannot be preserved by the mere presence of the word "now." The other article was on a different subject, and was in no sense written into article 2369. The old article, having been repealed, might become a forgotten law; and it is unreasonable to suppose the legislature intended that parties making deeds of trust should through all subsequent time bear in mind the provisions of a repealed article not in terms bearing either directly or remotely on the subject of sales under powers. The law of judicial sales in force at the date of the passage of article 2369 is not brought forward in the Revised Code of 1895, and is not now in force for any purpose. We think the maker of the trust deed must be held to have had in mind the law of judicial sales when he made the instrument, and intended that the acts of the trustee should be governed by the law of judicial sales concurrent with the instrument.

This brings us to inquire into the soundness of the second reason given by the trial court for his judgment. That a trustee must, in the execution of the power, conform strictly to the terms of the instrument from which his power is derived, and that any material departure therefrom will render his act void, is well settled. *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967; *Boone v. Miller*, 86 Tex. 74, 23 S. W. 574; *Loan Agency v. Gray* (Tex. Civ. App.) 34 S. W. 650; *Howard v. Fulton*, 79 Tex. 231, 14 S. W. 1061. In this case, if the deed of trust contained a provision that the trustee should sell as under execution, then the trustee was bound to follow the terms of the law strictly, for it became of a part of the maker's expressed intention. If no such provision was present, then the law itself became a part of the instrument by implication, and the trustee was likewise

bound. *Kerr v. Galloway* (Tex. Sup.) 64 S. W. 858. And where the statute so directs, its terms must be strictly followed. 26 Am. & Eng. Enc. Law, p. 915. The law governing execution sales required that notice in writing of the intention to sell should be served on the appellant, and the trial court finds that it was not done. It is true, he found that verbal notice was given, and that appellants' attorney was present at the sale, but when this verbal notice was given is not shown. Appellant, when the deed of trust was made, may have regarded this as a very important right, for between the date of notice and the day of sale he may have been able to find means of satisfying the debt and preventing the sale of his property. The law also gave him the right to demand that notice of sale be published in some newspaper, and this may have been to him a valuable right.

The purchaser, Simon, had notice on the day of and prior to the sale of this dereliction on the part of the trustee. It follows, therefore, that the sale must be held void, unless the contention of appellee can be upheld, to the effect that the law, in placing such sales under the rules governing judicial sales, brought into operation as to them the rules governing the setting aside of judicial sales. But that this contention is unsound, we have no question. A mere irregularity will not serve to render void a sale under execution, and it has been held that defective notice is a mere irregularity. Such sales are upheld on collateral attack on grounds of public policy. *Morris v. Hastings*, 70 Tex. 26, 7 S. W. 649. On the contrary, the trustee acts only through the deed of trust; his authority being derived from no other source. So independent of all other authority is this power, that he may exercise it even after the debt for the security of which it was given is barred by limitation, and at a time when the courts, for that reason, may not enforce either the debt or the execution of the trust. His authority is special, not general; and, under an instrument such as the one under discussion, no latitude can be given him in the exercise of the power, since, under the terms of the instrument, nothing was left to his discretion.

We are of opinion the judgment should be reversed and the cause remanded, and it is so ordered. Reversed and remanded.

(March 6, 1902.)

At a former day of this term the judgment in this case was reversed and the cause remanded. For opinion, see 3 Tex. Ct. Rep. 432. Thereafter we certified the controlling question to the supreme court; our holding being in conflict with the decision in *Swain v. Mitchell*, 66 S. W. 61, 3 Tex. Ct. Rep. 406, by the court of civil appeals at San Antonio. Our judgment of reversal was set aside pending an answer to the question certified. The

answers uphold the decision *supra*, with which our opinion conflicted. 66 S. W. 447, 4 Tex. Ct. Rep. 39.

The nature of the case and the facts necessary to be stated are contained in our former opinion and the certified questions. The other assignment presents no error. It is therefore unnecessary to do more than to order that the judgment of the trial court be in all things affirmed, which is accordingly done.

BLYTHE v. CRUMP et al.

(Court of Civil Appeals of Texas. Feb. 15, 1902.)

CHATTEL MORTGAGES—REMOVAL OF PROPERTY OUT OF STATE—NOTICE TO CITIZEN OF OTHER STATE—INNOCENT PURCHASER—PRIORITY OF MORTGAGES—DESCRIPTION OF PROPERTY

1. A mortgagee's lien on personalty follows the mortgaged property into another state to which it is removed without his knowledge or consent.

2. A mortgagee of personalty was not at fault in failing to give notice of the mortgage, by registration or otherwise, to the citizens of another state into which the property was removed, where sufficient time therefor did not elapse between the removal and a sale of the property to a person without notice.

3. An innocent purchaser of personalty incumbered by a mortgage takes title subject to the lien, where the mortgagees are not negligent in respect to giving notice.

4. Horses mortgaged in Arkansas were brought by the mortgagor into this state, and mortgaged to another party as security for supplies which were to be furnished. Before all the supplies were furnished, the mortgagees acquired notice of the first mortgage, and afterwards the horses were sold by the mortgagor to the first mortgagee, who took them back to Arkansas and there sold them to defendant. An action to foreclose was brought by the second mortgagees, in which defendant filed a claim of ownership. *Held*, that a judgment for plaintiffs, without a determination of the priority of the mortgages, should be reversed; that being the controlling question.

5. A chattel mortgage describing the property as "two gray mares" contains a sufficient description, where second mortgagees had actual notice as to the mares referred to.

Appeal from Bowie county court; A. S. Watlington, Judge.

Action by Crump Bros. against S. Vandiver to foreclose a chattel mortgage, in which A. S. Blythe filed a claim of ownership to the property. From a judgment in favor of the plaintiffs, Blythe appeals. Reversed.

J. Q. Mahaffey, for appellant. H. W. Vaughan, for appellees

TEMPLETON, J. On April 2, 1898, W. W. Shuptrine sold two mares to Sam Vandiver for \$160. The sale was on credit, and Vandiver executed his note for the purchase price, and secured same by a mortgage on the mares. The transaction took place in Miller county, Ark., where the mares were situated, and where Shuptrine and Vandiver resided. The mortgage was duly reg-

istered in said state and county on January 16, 1899, but was never registered in Texas. In the latter part of February, 1899, Vandiver came to Bowie county, Tex., looking for work. He brought the mares with him, with the knowledge and consent of Shuptrine. He applied to Crump Bros. for a job, and on March 4, 1899, contracted with them to make and haul railroad ties; they agreeing to furnish him with supplies during the term of the contract. He gave a mortgage on said mares to secure the money to be advanced and the supplies to be furnished, and the mortgage was promptly registered in Bowie county, where the mares were, and where the work was to be done. Crump Bros. had no notice at that time of Shuptrine's mortgage, but learned of the same soon afterwards. Under the said contract Crump Bros. advanced and furnished to Vandiver money and supplies to the amount of \$358.29, of which amount the sum of \$161.54 was advanced after June 21, 1899. Vandiver paid on said account the sum of \$140.86 on July 21, 1899, and \$115 on September 4, 1899; leaving a balance of \$102.91, which is still unpaid. Shuptrine's debt not having been paid, he brought suit thereon against Vandiver in Bowie county, Tex., on June 21, 1899. He sought a foreclosure of his mortgage, and caused a writ of sequestration to be issued and levied on the said mares. Vandiver replevied the mares, the sureties on the replevy bond being procured and indemnified by Crump Bros. The suit is still pending. About September 1, 1899, Vandiver delivered the mares to Shuptrine in consideration of \$20 cash and a credit of \$160 on the debt he was owing to Shuptrine. The mares were immediately taken by Shuptrine to Arkansas, without the knowledge or consent of Crump Bros., and there sold to A. S. Blythe on September 9, 1899, in consideration of three notes,—two for \$50 each, and one for \$60,—due, respectively, in 30, 60, and 90 days. The notes were negotiable, and were transferred to a bank, and have been paid to the bank by Blythe. At the time he bought the mares, Blythe did not know of the mortgage to Crump Bros.; but the jury found he had knowledge of sufficient facts to put him upon inquiry as to the title to said property, which would have led to a discovery on his part of the said mortgage. On September 12, 1899, Crump Bros. brought suit in a justice's court in Bowie county, Tex., against Vandiver on the balance owing by him to them. The suit was to foreclose the mortgage, and they caused the said mares to be seized under a writ of sequestration. On the next day Blythe filed his affidavit and claim bond, asserting title to the mares, which were thereupon turned over to him. Crump Bros. prosecuted their suit against Vandiver to judgment, a foreclosure of their mortgage being secured. They also recovered judgment in the justice's court against Blythe in the claim case, and he appealed

to the county court. A trial there resulted in another judgment for Crump Bros., and Blythe has appealed to this court.

The appellant insists that the finding of the jury that he had constructive notice of the Crump Bros. mortgage was not warranted by the evidence. An examination of the statement of facts shows that the evidence upon this point is not very convincing. However, there is evidence tending to show that an ordinarily prudent man would have been excited to inquiry; and it is not improbable that such inquiry, when once begun, would have led to a knowledge of such facts as would have prevented a reasonably cautious person from purchasing the mares from Shuptrine. But even if Blythe bought without notice, it does not follow that he would be entitled to recover. The lien of Crump Bros. was valid and binding, and followed the mortgaged property into Arkansas; the property having been removed to that state without their knowledge or consent. They were not at fault in failing to give notice of their mortgage, by registration or otherwise, to citizens of that state, as they did not have time to do so after the removal and before Blythe's purchase. Blythe, having bought property incumbered with a valid lien, and the lienholders not having been negligent in respect to giving notice, took title subject to the lien, even though he may have been an innocent purchaser. The proposition is well settled by authority. *Bank v. Morris* (Mo.) 21 S. W. 512, 19 L. R. A. 146, 35 Am. St. Rep. 754; *Hornthall v. Burwell* (N. C.) 13 S. E. 721, 13 L. R. A. 740, 26 Am. St. Rep. 556; *Kanaga v. Taylor* (Ohio) 70 Am. Dec. 62, and note to case last cited. On the principle stated, Shuptrine's lien on the mares was not lost when Vandiver brought them to Texas; and Vandiver held the same, after the removal to this state, subject to Shuptrine's lien. However, as Shuptrine consented to the removal, a purchaser or incumbrancer here for value, and without notice of his lien, would be entitled to be protected against it. When Crump Bros. took their mortgage, they had no notice of Shuptrine's lien; and, in so far as they were incumbrancers for value before they received such notice, their mortgage was superior to his. The case does not appear to have been tried on this issue as to the superiority of liens, and we are unable to satisfactorily determine from the record whether Crump Bros.' lien to secure the debt sued on was superior to Shuptrine's lien. The larger part of Vandiver's account with Crump Bros. appears to have been made after they had notice of the Shuptrine mortgage, and it is not clearly shown whether it was necessary for them to make such advancements under their contract with him, and in order to secure that part of the account already created. Again, it will be remembered that Vandiver had made certain payments on his account with Crump Bros.,

and it is not shown how the payments were applied. If the advancements made by Crump Bros. after they had notice of Shuptrine's mortgage were not necessary to protect them against a breach of their contract with Vandiver, or to save them against a loss of prior advancements, they could not be held incumbrancers for value, without notice, as to such advancements. And if the payments made were applied, either by law or the parties, to the extinguishment of that part of the account created before they knew of Shuptrine's mortgage, their lien for advancements made subsequent to notice could be held superior to his lien only in the event it was shown that they were compelled to make such advancements to protect themselves. We think that the decision of this question (that is, which was the superior lien) is necessary to a proper disposition of this case. It appears that the mortgaged property was of value less than the debt owing by Vandiver to Shuptrine. By the sale to Shuptrine, Vandiver conveyed to him whatever rights he had in the mares. At the time of the sale he held the animals subject to both mortgages, but he was entitled to possession, and could dispose of the property to the first mortgagee in satisfaction of the debt secured by the mortgage, if the sale did not have the effect to defeat some superior right of the second mortgagee. If Shuptrine's mortgage was superior to that of Crump Bros., and his debt more than sufficient to consume the property, then he came lawfully in possession. Being legally in possession, and holding a prior lien for an amount greater than the value of the property, his right to the property was superior to any right held by the junior mortgagee. Even if it should be held that the second mortgagee would have the right to pay off the first mortgage and then enforce his own, he could not disturb the first mortgagee, lawfully in possession of property of value less than the debt secured, until satisfaction of the first mortgage had been made or tendered. Crump Bros. have never offered to pay the debt due Shuptrine, in any contingency. Therefore, unless they can show that the mares are worth more than Shuptrine's debt, or that his lien is inferior to theirs, the equity of the case is against them. Blythe by his purchase from Shuptrine acquired the title of his vendor, and could assert the same in any manner Shuptrine could have done, had he not sold the animals in controversy.

The appellees insist that the Shuptrine mortgage was void because the property mortgaged was not described therein with sufficient certainty to identify the same from other like property. The property is described as two gray mares sold by Shuptrine to Vandiver. We think that the description given is sufficient, when aided by available parol proof, to identify the particular mares intended to be mortgaged. Crump Bros. ap-

pear to have had actual notice as to what mares were referred to, and were not, therefore, misled by the description.

The judgment is reversed, and the cause remanded. Reversed and remanded.

ST. LOUIS S. W. RY. CO. v. KELTON.¹

(Court of Civil Appeals of Texas. Feb 14, 1902.)

RAILROAD ENGINEER—ACTION FOR INJURY—COLLISION—DUTY TO FURNISH SAFE TRACK—OPEN SWITCH—ASSUMPTION OF RISK—FELLOW SERVANTS—EVIDENCE—SLEEPY SWITCH TENDER—KNOWLEDGE OF COMPANY.

1. Plaintiff, at the time he was injured in a collision, was a locomotive engineer, 45 years old, with 15 years' experience, and earning \$135 a month. His face, hands, and legs were scalded so that the skin peeled off; his left foot was crushed so that the flesh slipped off, causing him to lose two toes and the free use of such foot; his left arm was dislocated at the shoulder; and he was permanently incapacitated from following his vocation. He was injured in his hip and back, his shoulder shrunk, his arm became almost useless, and his eyesight was impaired. He could not walk without limping and suffering pain, and his injuries caused him great suffering, his hip always paining him in cloudy weather. He knew no business except railroading. *Held*, that a verdict for \$13,500 was not excessive.

2. In an action for injuries in a railroad collision, a general allegation that plaintiff was caught and crushed in the wreck, etc., was sufficient, in the absence of objection, to admit evidence as to an injury to his hip, although the general allegation of injury was followed by a statement of injuries to specific parts, which did not include the hip.

3. In an action for injuries, an averment that plaintiff's leg was crushed and dislocated was sufficient to admit evidence of an injury to his hip.

4. Plaintiff, a locomotive engineer, employed by the defendant railroad company, was injured in a collision caused by the negligence of a brakeman in leaving open a switch which it was his duty to operate. The brakeman belonged to the crew of the train with which plaintiff's train collided, and there was evidence that his negligence was due to his being so much in need of sleep that he fell asleep while on duty. *Held*, that plaintiff's knowledge that defendant sometimes sent out brakemen who needed sleep would not charge him with assumption of risk, since defendant's duty to furnish a safe track could not be avoided merely because plaintiff may have known that it was sometimes negligent.

5. Testimony of a witness that she saw the brakeman just before he started on his trip, and that he "looked bad and worried," and that it "seemed it was all he could do to walk," was admissible to show that the brakeman was in need of rest.

6. The testimony of a witness that he was present in the office of the train dispatcher, whose duty it was to send out crews, when the dispatcher was requested to allow the brakeman to lie off and rest, was admissible to show that defendant had notice of the brakeman's condition.

7. Ignorance of the brakeman's condition would not relieve defendant from liability for its failure to have the track in a safe condition.

8. The brakeman was the agent of the company to see that the switch was properly set, and not plaintiff's fellow servant.

Appeal from district court, Smith county; J. G. Russell, Judge.

Action by J. A. Kelton against the St. Louis Southwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

E. B. Perkins and Marsh, McIlwaine & Fitzgerald, for appellant. Johnson & Edwards, for appellee.

GARRETT, C. J. The appellee brought this suit against the appellant to recover damages for injuries received by him in a collision on appellant's railroad. On September 7, 1900, while the appellee was in the employment of the appellant as a locomotive engineer on one of its passenger trains, a switch was left open through the negligence of a brakeman, also in the employ of the appellant, and a train which appellee was in charge of ran into the switch, and collided with the head of a freight train, which had been side-tracked for the purpose of letting the passenger train pass, and received the injuries complained of. The brakeman belonged to the crew in charge of the freight train, and was charged with the duty of opening and closing the switch, and seeing that it was properly set. The appellee was injured through the negligence of the appellant without fault on his part. His injuries were very severe, and he suffered greatly. He sustained damages to the extent of \$13,500, the amount of the judgment rendered by the court below upon the verdict of the jury.

By the third, fourth, and fifth assignments of error the amount of the verdict is complained of as excessive. Appellee was a locomotive engineer, and had been following that vocation on appellant's line of railway for 15 years. He was 45 years of age at the time he received the injuries, and was strong and in good health, and was earning \$135 a month. His face, hands, and legs were scalded and burned by the escaping steam. His left foot was crushed, and he has lost two of his toes and the free use of his foot. His left arm is dislocated at the shoulder, and he is permanently incapacitated from following his avocation as locomotive engineer. He received injuries in his hip and back, and suffered greatly from the burning and scalding of his face, hands, legs, and foot. The skin peeled off his face and hands and slipped off his leg, and the flesh slipped off from his foot. He limps in walking, and cannot walk much without his ankle paining him. His shoulder has shrunk, and his arm has no strength in it, and is of but little use to him. His eyesight also is injured, and he suffers pain in his hip during cloudy weather. He knows no other business than railroading, and there is nothing in that line that he can do now. We do not think that the verdict should be disturbed.

The first and second assignments of error

¹ Rehearing denied.

ror raise the question of the sufficiency of the pleadings to recover for injuries to the hip. Evidence was received without objection that appellee's hip was hurt, and pained him, and the court charged the jury, as set out in the first assignment upon the measure of damages, that they might take into consideration any pain and suffering sustained as the direct result of the injuries; and the appellant, as appears from the second assignment, requested the court to instruct the jury that, in the event they should find for the appellee, not to allow him anything for injury, if any, to his hip. It is contended that there is no allegation in the petition that would sustain a recovery for injury to the hip. The allegations in the petition were that "there was a violent collision of said trains, and by reason thereof plaintiff was violently thrown and hurled against the said engine and parts of said machinery, and against said wreck and tender and the ground, and plaintiff was caught and crushed in said wreck, and his * * * leg was crushed and mangled, and the same dislocated; that plaintiff's back and side were wrenched, bruised, and injured; that the hot water and steam escaping from the engine severely scalded and burned plaintiff's * * * legs * * * and body; that plaintiff's * * * leg still remains mashed and broken, crushed, stiff, and deformed, and by reason thereof plaintiff is unable to use said * * * leg, * * * and will never have the use of same; that plaintiff is rendered a cripple for life on account of said injuries, and the same are permanent; that the said injuries to plaintiff's back and side are severe and permanent; and by reason of the said scalds and burns the skin and flesh of plaintiff peeled off and sloughed away; that by reason of the said injuries plaintiff has suffered, still suffers, and will ever suffer great physical and mental pain and torture, and plaintiff is and will ever be wholly incapacitated and prevented from performing manual labor, or to follow his occupation, and he is now and will always be a cripple, and is and will always be wholly incapacitated from earning a livelihood." In the case of Railroad Co. v. Bibolet, 57 S. W. 974, this court held that the allegation that the appellee's "body was bruised and battered." in the absence of a special exception, was sufficient to admit proof of an injury to the arm, although there were allegations in the petition of specific injuries. An application for writ of error was refused by the supreme court, and we think the case decisive of the question here presented. We are also of the opinion that the averment that the leg was crushed and dislocated would admit of proof of injury to the hip, as the wrestling of the ball at the end of the thigh bone from the hip socket would naturally involve the hip and cause injury to it. We do not think that the charge authorizes the recovery of double

damages, or that it assumes that the appellant's servants were negligent. The charge in question is a fair presentation of the measure of damages, and is confined to the issues of the case.

The evidence showed that the act of the brakeman in leaving the switch open was probably the result of his being in need of rest and falling asleep at the time he started out on the trip on which the collision occurred; and the appellant requested the court to instruct the jury that, although they should believe such to be the case, and should further believe that the appellant was guilty of negligence in sending him out in that condition, still if they should believe from the evidence that appellee knew that trainmen or brakemen were at times sent out in that condition, he would, by continuing in the employment of the appellant, assume the risk, although he did not know that such a man was in charge of the switch. This instruction was correctly refused. The doctrine of assumed risk has no application to the case. The appellee did not know that such person was in charge of the particular switch, and his knowledge that at times the appellant negligently sent out on duty brakemen who were in need of rest and sleep could not affect him with knowledge that there was a train side-tracked at that switch, and that the brakeman in charge of the switch was in such condition as to render him unfit for duty and apt to leave the switch open. It was the duty of the appellant to furnish a safe track, and liability for its negligent failure to do so cannot be defeated on the ground that the risk had been assumed because its employees may know that it is sometimes negligent in that respect. If the doctrine of assumption of risk should be applied to the extent contended for by the appellant, there could never be any recovery against it for any negligent act, because it is common knowledge that among the thousands of servants charged with the operation of the trains many are sometimes negligent, and that accidents resulting from the negligence of servants do and are liable to happen at any time.

The seventh and eighth assignments of error, complaining of the charge of the court and the refusal of a requested instruction, are but contentions for the same doctrine of assumption of risk, and are overruled.

There was no error in admitting the evidence of the witnesses as shown by the ninth and tenth assignments to have been received over the objection of the appellant. It was proper to show that the brakeman McMurray was in need of rest by the evidence of the witness that she saw him just before he started out on his trip, and that "he looked bad and worried, and seemed it was all he could do to walk." The testimony of the witness Malcolm Jones showed not only the physical condition of McMurray, but that the train dispatcher, Butler, must have

known of it. Butler, as train dispatcher, was charged with the duty of sending out the crews, and the evidence objected to showed that McMurray was present in the office when the witness requested Butler to allow him to lie off and rest. But, even if it were not true that the appellant was aware that McMurray was in need of rest and sleep, that fact did not relieve it of its duty to have the track in a safe condition. The doctrine of fellow servants has no application in this case, and the brakeman was the agent of the company to see that the switch was closed.

The judgment will be affirmed. Affirmed.

DRAKE v. DAVIDSON et al.¹

(Court of Civil Appeals of Texas. Feb. 8, 1902.)

HUSBAND AND WIFE — HOMESTEAD — WIFE'S RELINQUISHMENT — CONSIDERATION — SEPARATE ESTATE — CONVEYANCE — RECORD — APPEAL — FINDINGS — REVIEW.

1. Property deeded to a wife in consideration of her relinquishment of rights in a homestead became hers, and the lien of a judgment against the husband could not attach thereto.

2. Property was deeded to a wife in consideration of her relinquishment of rights in the homestead, but the deed to her failed to recite that it was her separate property, and she neglected to place it of record. Subsequently she, as principal vendor, together with her husband, conveyed the property to defendant; and it was levied on by prior judgment creditors of the husband, who had actual notice that the wife claimed the property as her separate estate. *Held*, that the property became that of the wife, notwithstanding the omission in the deed, and the lien of the judgment did not attach thereto.

On Rehearing.

Findings of fact covering every issue material to the judgment will not be inquired into for their correctness on appeal, unless assailed by proper exceptions.

Appeal from district court, Dewitt county; James O. Wilson, Judge.

Action by Sam J. Drake against Davidson & Bailey. From a judgment for defendants, plaintiff appeals. Reversed.

Lackey & Lewright, for appellant. Davidson & Bailey, for appellees.

GILL, J. This is an action of trespass to try title brought by the appellant, Sam J. Drake, against the appellees, Davidson & Bailey, to recover of them certain lots of land in the city of Cuero, Tex. A trial before the court without a jury resulted in a judgment for the appellees, from which this appeal is prosecuted.

The following facts appear practically without dispute: The A. B. Frank Company, of San Antonio, held a judgment against R. C. Patterson, of Cuero, Dewitt county, and had same abstracted and recorded in said county in 1896. At that time Patterson was an insolvent, having failed in business a short time prior thereto. He was a married man, and he and his wife owned a homestead in

or near Cuero, on which they resided. Thereafter he decided to sell his homestead to Sam C. Lackey for \$800 cash and the lots in controversy, valued at \$450. His wife, however, refused to join in this deed, unless the lots forming part of the consideration should be deeded to her in her separate right. To this the husband assented, and the homestead was deeded to Lackey on the terms above named; he executing a deed to Patterson's wife for the lots. Although Mrs. Patterson was named as grantee in this deed, Lackey, who drew it at the request of the parties, inadvertently failed to embody therein a clause indicating that the land was conveyed to Mrs. Patterson in her separate right. The Pattersons negligently failed to place this deed of record. They then moved to Sweet Water, Tex., and acquired another home. At the time of the sale of the homestead, Patterson owed many other debts in addition to that owed to A. B. Frank Company, which he was unable to pay. The \$800 cash received from Lackey was appropriated by him to the payment of his indebtedness. Thereafter, on April 1, 1899, Mrs. Patterson, joined by her husband, conveyed the lots in controversy to the appellant for a recited consideration of \$500 cash, and this deed was recorded in Dewitt county January 15, 1900. On December 18, 1899, an alias execution based on the A. B. Frank Company judgment was levied upon the lots as the property of R. C. Patterson, and on February 8th they were sold thereunder; one W. F. Harris, as agent for the judgment creditor, becoming the purchaser on a bid of \$25. Prior to this sale Lackey notified Harris that the property did not belong to R. C. Patterson, but had been deeded by him (Lackey) to Mrs. Patterson, as part of the consideration for the sale of her homestead, and that she claimed it as her separate property. Harris was at the same time apprised of the deed from Mrs. Patterson to appellant, which by that time had been placed of record. Thereafter the appellees, Davidson & Bailey, bought the lots and judgment from the A. B. Frank Company with full knowledge that Mrs. Patterson claimed them as her separate property. The deed from the Pattersons to Drake, the appellant, was given in satisfaction of a debt due him for money borrowed. This statement of the facts indicates the title as relied on by each party, respectively; Sam C. Lackey being the agreed common source.

The trial court found as a fact that Mrs. Patterson parted with her homestead rights under an agreement that she should have the lots in controversy in her separate right, and that the deed from Lackey to her was intended to have that effect, and was executed to induce her to sign the deed by which the homestead was conveyed. It was also held that such an arrangement would render the lots in controversy the separate property of the wife, if the deed executed in

¹ Writ of error denied by supreme court.

pursuance thereof contained the necessary recitals to convey notice to third parties of the nature of the title. Because of the absence of such stipulations, the trial court adjudged the land to appellees, and for this the appellant assigns error. The creditor has no interest in the homestead exemption. The owner may give it away, and the creditor will not be heard to complain. In dealing with the owner, the creditor is not presumed to take it into consideration as a possible asset, or to extend credit on account of it. *Cox v. Shropshire*, 25 Tex. 123; *Eaves v. Williams* (Tex. Civ. App.) 31 S. W. 86; *Conner v. Hawkins*, 66 Tex. 639, 2 S. W. 520; *Baines v. Baker*, 60 Tex. 139. It is true, when abandoned it becomes subject to execution for the satisfaction of the debts of the owner; and it is equally true that property taken in exchange therefor is alike subject, unless appropriated to homestead uses. The wife, however, has a distinct interest in the homestead, whether the title be separate or community,—an interest which she may assert independent of and contrary to the wishes of her husband. For this reason it has been held that property deeded to her in her separate right to induce her to part with her homestead interest becomes absolutely her own, and is exempt from forced sale for the satisfaction of community debts. *Blum v. Light*, 81 Tex. 415, 16 S. W. 1090, and authorities cited. The case of *Ogden v. Giddings*, 15 Tex. 485, relied on by appellees, seems to us to be inconsistent with the doctrine announced in *Blum v. Light*, supra, and illogical as well. For instance, it holds that property conveyed to the wife in her separate right in exchange for her homestead interest becomes her separate property, but further holds that the subsequent acquisition of another homestead by the head of the family divests this separate title and renders it subject to community debts. Now, in both the cases cited above the property claimed by the wife was personal property. If in *Ogden v. Giddings* the property had been realty, and the title thereto had been vested in the wife by the terms of the deed, the effect of the rule announced in that case would have been to divest one of title to real estate, not by a deed of writing, and with her consent freely and understandingly given, but by the mere force of the independent act of her husband, by which she is supposed to be benefited. In so far as the cases are at variance with each other, we incline to follow *Blum v. Light*, which is a well-considered case, and the latest utterance of our supreme court on the question. See, also, *Gatewood v. Scurlock* (Tex. Civ. App.) 21 S. W. 55. It follows, therefore, that had the deed, by its terms, declared this the separate estate of the wife, those dealing with it as the property of the husband could acquire no interest therein.

This brings us to a consideration of the question whether the failure to insert the

necessary clause in the deed to Mrs. Patterson was fatal to her separate right in the property. It is well settled that property bought with the separate funds of the wife becomes hers, independent of the recitals in the deed, and the fact may be shown by parol. *Parker v. Coop*, 60 Tex. 114; *Railway Co. v. Durrett*, 57 Tex. 48; *Blum v. Rogers*, 71 Tex. 668, 9 S. W. 595. The deed containing the necessary recitals is not the creator of the separate right, but the evidence of it. In this case the land in question became the property of the wife by force of the agreement of the parties, and the fact of her consent to the alienation of the homestead. As said in *Blum v. Light*, supra, she parted with a valuable right, which constituted a valuable consideration, supporting the deed to her. It is true, the mere fact that she joined her husband in the deed to the homestead, thus parting with her rights therein, would not, alone, change the character of the property acquired in consideration therefor, or give to her any separate interest therein. To that must be added the fact that the deed to her was the inducement for her to sign, and that element, as has been seen, is present in this case. We think it clear that her right could be established by parol, and that the mere inadvertence on the part of the draftsman of the deed would not debar her from asserting the rights which grew out of the transaction, considered in its entirety. Appellant bought the property, dealing with it as hers. She was the principal vendor in the deed to him. This deed indicated that she was asserting ownership in her own right, and was of record prior to the execution sale. In addition to this, actual notice of the facts was given to the agent of the A. B. Frank Company prior to the sale, and the appellees had like knowledge. The judgment lien could attach to no greater interest than the judgment debtor had. The facts disclose that he had none, and that the judgment creditor and the appellees had knowledge of this before the sale. We think the conclusion inevitable that the trial court erred in rendering judgment for appellees, and, the facts being undisputed, the judgment is reversed, and judgment here rendered for appellant.

Reversed and rendered.

On Motion for Rehearing.

(March 6, 1902.)

Appellees still maintain that the doctrine announced in *Ogden v. Giddings* (cited in the main opinion) 15 Tex. 485, should determine this appeal, and have presented their contention with much force both in the motion and in oral argument thereon. It is argued that by permitting the husband, in exchanging the community homestead for other property, to have the consideration deeded to the wife in her separate right, opens but

another inviting door to fraud, and would enable one so minded to thus transfer an indefinite amount of property beyond the reach of his creditors. The objection is not without force, but a similar objection to the homestead exemption itself might be urged with equal force. A fear of this consequence doubtless induced the court to hold in *Ogden v. Giddings*, supra, that the acquisition of another home annulled the separate character of the property previously deeded to the wife in consideration of her surrender of her interest in the former home. But it seems to us to be in unmistakable conflict with the later cases cited in the main opinion. That the wife's interest in a homestead is sufficient to constitute a valid consideration for a deed of property to her in her separate right is settled law in this state. This being conceded, and the title once vesting in her to her separate use, the statute itself prescribes that nothing short of her formal act can divest it. Rev. St. arts. 635, 4621. We do not desire to add anything further to what was said in the main opinion upon this point. We have found no reason to change our views.

The next complaint is that the facts do not show that Mrs. Patterson refused to sign the deed to her homestead until she was promised the lots in question in her separate right. A complete answer to this is that the trial court so found, and neither appellant nor appellees excepted to the findings of fact. Appellees contend that this court is not bound by the trial court's findings of fact, and may look to the record for reasons to affirm the judgment, if the findings of fact are insufficient or against the record. This is true where the findings of fact merely fail to embrace a finding upon every issue material to the support of the judgment. In such case, if the statement of facts contains evidence sufficient to supply the necessary finding, the trial court is presumed to have resolved the issue in favor of the judgment. The same rule is applied to the findings of a jury upon special issues, where the points are not properly preserved by appellant. But where either the special findings of a jury or the findings of fact prepared by the court cover all the issues of fact, their correctness will not be inquired into by this court in behalf of either party, unless properly assailed. The questions are purely law questions in such a case, and the inquiry is, what judgment must follow upon the facts found? Article 1333, Sayles' Rev. Civ. St. Such is the attitude of the present case. The court found distinctly and separately upon every controverted issue of fact. He found the facts to be as stated in the main opinion. We have, however, taken the trouble to carefully examine the statement of facts, and think the fact conclusions of the trial court find ample support therein. Patterson and his wife both testify that Mrs. Patterson made this deed to

her a condition to her signing the deed to Lackey by which the homestead was conveyed.

We do not doubt the correctness of our conclusion. The motion is therefore overruled. Overruled.

FOLEY v. HOLTkamp et ux.¹

(Court of Civil Appeals of Texas. Feb. 17, 1902.)

HOMESTEAD—INTENTION—OCCUPANCY—IMPROVEMENT—EVIDENCE—SPECIAL VERDICT—JUDGMENT.

1. In an action to recover realty which had been sold under execution, where plaintiff claimed that the sale was void because the land was his homestead, and the jury found, on special issues, that the plaintiff, before levy of the execution, intended in good faith to occupy the land as a home, and had taken actual possession as a home within a reasonable time after the intention so to do was formed, judgment for the plaintiff upon the special findings was proper.

2. Plaintiff, while unmarried, purchased an unimproved city lot, and for several years after his marriage lived in another county. About two years before the property was sold under execution, he returned to the locality where the lot was situated, with the intention of improving it. He contracted to have the property fenced, intended to sink a well, and discussed the construction of a suitable dwelling. Before these improvements were made, another party took possession of the property under claim of title, and pending litigation, in which the owner was finally successful, no improvements were made. Before the termination of the litigation the lot was sold under execution, and, by the advice of attorneys, plaintiff made no improvements thereon until, later, upon the advice of another attorney, he erected an inexpensive house, pending proceedings to recover the property from the purchaser at the execution sale. Held sufficient to justify a finding that plaintiff had formed an intention to occupy the land as a homestead prior to the levy of the execution, so that the sale thereunder was void.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by Otto Holtkamp and wife against John J. Foley. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

O. T. Holt and L. B. Moody, for appellant. McDaniel & West, for appellees.

GILL, J. This suit was brought by appellees, Holtkamp and wife, to recover the title and possession of a piece of real estate, and to cancel a sheriff's deed under which appellant, Foley, claimed to own it. Appellant answered by general denial and plea of not guilty, and asked, in reconvention, for title and possession. A jury trial resulted in a judgment for appellees, from which Foley prosecutes this appeal.

Appellant claims the property under sheriff's sale made by virtue of an order of sale issued on a judgment foreclosing an attachment lien in favor of appellant in a suit against Holtkamp for debt. The appellees

¹ Rehearing denied.

claim that the property was their homestead at the date of the levy and sale, and was therefore exempt. The question of homestead vel non is the controlling issue in the case. The jury, in response to special issues submitted, answered that appellee, on and prior to the date of the levy, intended in good faith to occupy the land as a home; that he had, prior to that date, done preparatory acts which indicated beyond doubt that he intended to improve the place and use it as a homestead; that these acts consisted of employing one Priest to fence the property; that he had taken actual possession of it as a home about May 15, 1901; and that, considering all the circumstances, this followed within a reasonable time after the intention so to do was formed. The testimony in behalf of appellee Otto Holtkamp showed: That he was a married man, and owned no other home than the property in controversy. That he had purchased the vacant lot in 1881, prior to his marriage. Subsequently he moved to Austin county, where he lived for 12 years. From Austin county he went with his family to Deming, N. M., where he lived a year and a half. While there he formed the intention to make the land in controversy his home, and moved back to Harris county, where the land was situated, and went into the grocery business, renting a dwelling in Houston. He then employed Priest to fence the property, and arranged for the purchase of the material. He also consulted a contractor as to the erection of a dwelling thereon and intended to put down a well; but, before the fence was begun, Kuhlman & Kolbow took possession of the property, claiming it as their own, and proceeded to place a fence around it. Thereupon Holtkamp instituted a suit against Kuhlman & Kolbow to recover the property. This was in 1895, and the suit was not tried until 1898. On March 23, 1898, after judgment was rendered in favor of Holtkamp, a motion for new trial was overruled. Notice of appeal was given, and statement of facts prepared. No appeal was perfected, but on February 25, 1899, writ of error bond was filed. In this suit a half interest in the property was conveyed by appellees to their attorney as a fee. Holtkamp finally recovered the property, but, before the litigation ended, Foley attached it (September, 1898) for debt, as above mentioned, and the proposed improvement of it for a home was further postponed on the advice of appellee's attorney. It was sold under the foreclosure July 4, 1899; Holtkamp giving public notice at the sale that he claimed it as a home. The debt to Foley was incurred in the conduct of the grocery business at Houston, and was not secured by a lien on the property. Ten days before the trial, Holtkamp constructed upon the land a small, cheap house, in which two of his boys were living at the date of the trial; but it was not large enough for his family, and he, with the rest of his fam-

ily, remained in the city, in rented premises. Prior to his suit against Kuhlman & Kolbow he had expressed to several persons his purpose to make it his home, and his purpose to do so was continuous thereafter, but active preparations were postponed on account of the litigation.

Appellant moved for a judgment upon the answers of the jury, but the motion was overruled. This is assigned as error. It is plain the court did not err in rendering judgment for appellant on the answers of the jury, for the jury found that appellees intended, in good faith, to occupy the premises as a home, made such preparations as clearly evinced such a purpose, and occupied it as such within a reasonable time thereafter; thus presenting every element which goes to make the homestead right. The judgment must conform to the verdict, and the trial court had no alternative. This disposes of the first two assignments, predicated upon the action of the court on the verdict.

By the third assignment of error the appellant complains because the court submitted to the jury the fourth, fifth, and sixth questions,—whether appellees ever took possession of the property within a reasonable time after conceiving the intention to dedicate the property to homestead uses, and doing preparatory acts looking to that end. It is contended the evidence was not legally sufficient to present such issues. This assignment is equivalent to a complaint that the court erred in failing to instruct a verdict for appellant. A homestead may be created by intention prior to actual occupancy, when it appears that the owner is entitled to the exemption as the head of a family, and that this intention has been manifested by such acts as amount to reasonably sufficient notice of that intention; the purpose of the law being to require such open evidence of this intention as will prevent the use of this right as a shield for fraud. *Wolf v. Butler* (Tex. Civ. App.) 28 S. W. 51. In *Cameron v. Gebhard*, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832, it is said: "The intention thus to appropriate the property shall not only be found in the mind of the party, but should be evidenced by some unmistakable acts showing an intention to carry out such design, or some sufficient reason should be given why this intention was not demonstrated by such acts." In the same case this general rule is announced: "From the decisions it is apparent that intention is almost the only thing that may not be dispensed with in some state of case, and it follows that this intention in good faith to occupy is the prime factor in securing the exemption. Preparation . . . is but the corroborating witness to the declaration of intention, the safeguard against fraud, and an assurance of the bona fides of the declared intention of the party." Justice Brown, in the same opinion, says further: "But the placing upon the premises

unhewn logs, for the purpose of erecting thereon the humblest cabin, with a bona fide intention to occupy as soon as the cabin can be built, secures the right." Questions of this sort most frequently arise where the claimant has bought unimproved property for the purposes of a home. In such case the declared purpose for which the property was bought is necessarily a potent factor in establishing the exemption. But we can perceive no difference in principle between such a case and this. Here, while it is true the vacant property was acquired years before this controversy arose, and at a time when appellee, being unmarried, was not entitled to the exemption, yet, after all, it is not the purchase for the purpose which secures the exemption, but the intention formed at a time when the party has a right to the exemption, and evidenced by the requisite acts. The absence of these acts of preparation, or a failure to promptly follow them by occupancy and use, may be accounted for; and, in measuring the reasonableness of the excuse, all the circumstances may be looked to by the jury. The presence of legal obstacles forbidding occupancy or further preparation has been held to excuse these otherwise requisite acts, and permits bona fide intention coupled with declarations to secure the right. *Gardner v. Douglass*, 64 Tex. 76. As applicable generally, see, also, *Gallagher v. Keller* (Tex. Sup.) 29 S. W. 647. In this case the claimant had no other home. He returned to Harris county for the purpose of using the property in controversy as such. This intention was not concealed, but openly expressed. He contracted to have the property fenced, intended to sink a well, and discussed with a contractor the construction of a suitable dwelling within his means. All this was done at a time when he was solvent, so far as the record shows; and, the title of the property being in him, he could doubtless have procured the construction of a dwelling by the creation of liens upon the property. All this was arrested by the action of Kuhlman & Kolbow, who asserted title to the property and took possession. This rendered it impossible to proceed with the actual construction of improvements until the claimants were dispossessed. A suit looking to that end was promptly filed, and ultimately resulted in his favor. Pending appeal appellant levied his writ, thus further putting the title in question. Under the advice of his attorney, he forebore to put valuable improvements upon property which might be adjudged to appellant. We do not think the law required him to commit such an imprudence in order to preserve his right. Prior to the trial of this case he placed some small improvements on the land, but this cannot be said to be inconsistent with his former refusal to proceed, for it was done on the advice of other attorneys. In view of the doctrine announced in the cases cited, it is plain the

facts required the submission of the issues of intention, good faith, preparation, and occupancy within a reasonable time. The debt of appellant was not incurred upon the faith of the property, was secured by no lien upon it, and appellee notified appellant prior to his purchase at execution sale that the property was homestead. While much time has elapsed since the intention was formed and the slight acts of preparation made, it appears that at no time during the intervening years has the property been free from litigation. Under the testimony, considered as a whole, we cannot say that the findings of the jury are so against the weight of the evidence as to require our interference. We do not mean to say the case is a strong one, or that, if primarily presented to us, we would have reached the same conclusion. But that alone would not justify us in disturbing the verdict on the facts.

The effect of what has been said disposes of all the assignments. Finding no reversible error, the judgment is affirmed. Affirmed.

BEATTY et al. v. BULGER.

(Court of Civil Appeals of Texas. Feb. 6, 1902.)

PARTNERSHIP—LIABILITY FOR INDIVIDUAL AGREEMENT—IRRESPONSIVE VERDICT—FRAUD—EVIDENCE—MISREPRESENTATION.

1. Where B. and D., partners, were plaintiff's agents in an exchange of land with M., and a provision in the agreement of exchange that a note of M., indorsed by B., and secured on M.'s land, should be paid by M., was modified so that plaintiff should assume the mortgage, and take other notes for such amount, indorsed by B.—B., only, agreeing to indorse, and D. not agreeing that B. should indorse,—B., only, and not the partnership, is liable on B.'s failure to indorse.

2. Where the petition alleges two grounds of liability, on one of which defendants are liable, if at all, for \$1,200, and on the other for \$375, it cannot be said whether the verdict for \$750 was, on one ground, for more than authorized, or, on the other, for less than authorized, so that it should be set aside as irresponsible.

3. Where plaintiff exchanged land with M., taking M.'s land, subject to a mortgage securing a note indorsed by B., and B. paid the note with funds in his hands belonging to plaintiff, it cannot be said that B.'s liability thereon was discharged with the property of plaintiff, so as to render B. liable to plaintiff; plaintiff having received the benefit by the discharge of the lien.

4. Failure of B., agent for plaintiff in an exchange of land with M., wherein plaintiff assumed a mortgage on M.'s land securing a note indorsed by B., to inform plaintiff that he was indorser on the note, while evidence of fraud, in connection with other matters, does not, as matter of law, establish it.

5. A misrepresentation may be actionable, though the person making it did not know it was false.

Appeal from district court, Galveston county; R. M. Franklin, Judge.

Action by Charles W. Bulger against D. R. Beatty and J. R. Davies. Judgment for plaintiff, and defendants appeal. Reversed.

Harris & Harris, for appellants. R. W. Houk, for appellee.

PLEASANTS, J. This suit was brought by appellee to recover of appellants damages in the sum of \$1,195.25 alleged to have been suffered by appellee by reason of false and fraudulent representations made to him by appellants. The cause of action is set out in the petition as follows: "On the 8th day of March, 1898, plaintiff was the owner of certain property in the city of Galveston, of the value of \$5,000, upon which there was an incumbrance of \$3,400. That D. C. McKinnon was the owner of a forty-acre tract of land near the town of Dickinson, in Galveston county, on which there was an incumbrance of \$950, evidenced by four promissory notes executed by McKinnon. That plaintiff had agreed to trade his Galveston property, subject to said incumbrance of \$3,400, for said forty-acre McKinnon tract, free from all incumbrance; it being understood and agreed that said notes for \$950 were to be taken up and canceled by said McKinnon. Plaintiff was then induced by the fraudulent misrepresentations of said Beatty & Davies to modify said agreement, and take said forty acres, or the McKinnon tract, and pay said incumbrance himself, in consideration of said Beatty & Davies and McKinnon agreeing to give said plaintiff, in lieu of the payment of the incumbrance, the equivalent in value in other notes and securities, which consisted of other notes aggregating \$950 and interest, as follows: Two notes for \$375 each, due three and eight months after date, respectively, and one for \$200, due twelve months after date. all executed by D. C. McKinnon, and dated February 25, 1898, and payable to the order of C. W. Bulger. That defendants conspired to defraud plaintiff and did defraud him out of \$950 and interest, in this: That said Beatty & Davies, who were copartners, were acting as plaintiff's agents in negotiating and advising and making said trades, and in all matters connected therewith, and were well paid for their services by plaintiff, and that it was their duty to use their judgments and discretion in plaintiff's interest and behalf. That the said notes aggregating \$950, which were the incumbrance on the forty-acre Dickinson tract, were at the time of the trade owned by said D. R. Beatty, or were indorsed and transferred by said Beatty, and he was liable for their payment to the holder thereof. That this fact was not disclosed by the said Beatty & Davies to said Bulger, and that the said Bulger did not know that his said agents were in any way personally interested until about February 1, 1900, long after this trade was made, and that said Beatty desiring them paid or satisfied, so that he would not be called upon to pay or satisfy them, and being well aware that McKinnon would never pay them, he, the said Beatty, paid his own notes or canceled his own in-

debtedness with his principal's money or property, and advised and persuaded and induced his said principal, Bulger, to accept the worthless new notes executed by McKinnon, and that this was fraud upon their principal, the plaintiff herein. Plaintiff further says: That defendants made fraudulent misrepresentations as to the value of the new notes, amounting to \$950, executed by said McKinnon to him (Bulger). That they told him that said new notes were perfectly good and could be collected, and that they knew said McKinnon was solvent and that his financial standing was excellent; that he owned property (a house and lot) in Galveston, and a section of land in Brazoria county, Texas. That said defendants well knew the contrary to be true, and that he was insolvent and had no property of any value subject to execution. That plaintiff believed that said Beatty & Davies were representing him and acting solely in his behalf and interest, and relied and acted on their judgment, advice, and good faith in making this trade, and not knowing or suspecting that said Beatty was handling his own property, or canceling his own indebtedness with the property of plaintiff. Plaintiff paid off the said notes owned or indorsed by said Beatty as aforesaid, and accepted the worthless notes of McKinnon for \$950, to wit, the new ones dated February 25, 1898, as aforesaid, which notes are, and always have been, absolutely worthless, owing to the insolvency of said McKinnon, all of which was well known to McKinnon and defendants Davies & Beatty, and that, had plaintiff known this, he would have investigated and used his own judgment as to the value of the McKinnon notes, dated February 25, 1898, accepted by plaintiff on Beatty's advice, and he would never have made the trade, or taken up and paid off the said notes owned by Beatty, which were the incumbrance on the Dickinson tract, and accepted the worthless notes in consideration of such payment. Plaintiff further says that, in order to induce plaintiff to accept the worthless notes of McKinnon, he (Beatty) agreed to indorse the first one due for \$375, dated February 25, 1898, and pay the amount of said note to plaintiff in case it could not be collected from McKinnon when due, which agreement was to be evidenced by Beatty's indorsement on the note; that said McKinnon is and has at all times been insolvent, and has failed and refused to pay any part of his said notes to this plaintiff, and the same cannot be collected from him, and are worthless, and have always been so; that although the said Beatty had the note he agreed to indorse in his possession, and led plaintiff to believe he had so indorsed it, said Beatty, with intent to defeat his agreement to guaranty the payment of said note to plaintiff, failed to so indorse it, and now fails and refuses to pay the same, although it cannot be collected from McKinnon.

Plaintiff further says that relying on all of the said misrepresentations of Davies & Beatty, and being thereby deceived, he accepted the worthless notes, and, in consideration for same, paid the said notes owned or indorsed by the said Beatty, amounting to \$950 and interest from date; that, by reason of said frauds practiced by defendants as aforesaid, plaintiff has sustained injuries to the extent of the face value of the worthless notes, to wit, \$950, and interest on same at the rate of 8% per annum from February 25, 1898, to date of judgment, and costs of suit, making the total amount of damages sustained by plaintiff \$1,195.25." The petition prays for judgment for said sum of \$1,195.25 and costs of suit, and for general relief. Defendants' answer contains general and special demurrers and general denial, and a special plea in which defendants aver that it was their honest opinion at the time said trade was made by them for plaintiff that said McKinnon was solvent, and that such is their opinion now, and that in making said alleged representation to plaintiff they did nothing more than express their honest opinion as to the solvency of said McKinnon. They further aver that plaintiff was a man of wide knowledge and large business experience, and did not rely upon defendants' expression of opinion as regards the solvency of said McKinnon, but, to secure himself against any loss by reason of the failure of McKinnon to pay said notes for \$950, retained a vendor's lien upon the Galveston property sold by him to McKinnon. The cause was tried by a jury in the court below, and verdict returned in favor of plaintiff for \$750, with interest thereon from March 10, 1898, in accordance with which judgment was rendered.

The evidence in the case is conflicting upon some of the material issues, and, in view of the conclusion reached by us as to the disposition of this appeal, it is not proper to discuss the conflicts in the evidence, or pass upon any of the assignments which raise the question of the sufficiency of the evidence to sustain the verdict. It was shown by uncontradicted evidence that the defendant Beatty was indorser upon the original McKinnon notes for \$950, which were paid by plaintiff; but there is no evidence that the defendant Davies was liable on any of said notes, or had any interest, direct or indirect, in procuring their payment; nor is there any evidence tending to show that he agreed or promised to indorse any of the new notes given plaintiff by McKinnon, or agreed or promised, in writing or otherwise, as an inducement for the acceptance of said new notes by plaintiff, that any of them would be indorsed by Beatty. Such being the state of the evidence upon this issue, it is manifest that no verdict can be sustained against the appellant Davies by reason of the failure of the appellant Beatty to indorse the first of said notes for \$375 as alleged in plaintiff's

petition. That a partnership is not liable upon an individual obligation of one of its members, not shown to be in furtherance of the purposes of the partnership, or undertaken for its benefit, is an elementary proposition, too plain to require the citation of authorities. Upon this issue the court below charged the jury as follows: "The measure of damages, if any, you find, will be the amount, if any, paid by plaintiff to discharge the incumbrance, if any, on the forty-acre tract, unless you shall have found that plaintiff is not entitled to recover by reason of any representations other than the promise, if any, to indorse the McKinnon note; and, in this event, the measure of damage, if any, will be the amount of McKinnon's first note." We think this charge clearly instructed the jury that they might return a verdict against the appellant Davies for \$375 if they believed that Beatty had promised to indorse one of McKinnon's notes for that amount, and had failed to do so. Appellants, by proper assignment, complain of this charge, and we think the assignment should be sustained. The same error occurs in other portions of the charge, as set out in appellants' twelfth and fourteenth assignments of error. Appellee contends that the appellants could not have been prejudiced by this instruction, because the jury, in finding for plaintiff in the sum of \$750, must necessarily have found against the defendants upon other grounds than the failure of Beatty to indorse the first of the new McKinnon notes. We do not think this contention is sound, because the verdict returned by the jury is irresponsible to the pleadings, the evidence in the case, and the charge of the court, and it is impossible to determine upon what ground said verdict was found. The petition alleges two grounds of liability. Upon one ground, the defendants, if liable at all, were liable in the sum of \$1,195.25, and upon the other ground in the sum of \$375. These two grounds of liability were both submitted to the jury by the charge of the court, and, under said charge, if they found for the plaintiff, they must find in one or the other of said sums. In disregard of these instructions, they have returned a verdict for a different sum, and it is impossible for us to say whether the \$750 is found entirely on the ground of fraudulent misrepresentation, or partly on said ground and partly on the failure of Beatty to indorse the note. If but one ground of liability had been alleged, and the verdict had been for a less amount than the pleadings and evidence showed plaintiff to have been entitled to recover, the defendants would not be heard to complain; but when, as in this case, two grounds are alleged, and the verdict shows that the jury have disregarded the charge of the court in fixing the amount of liability, it can only be a matter of conjecture as to whether they gave a larger amount on one ground, or a smaller amount on the other, than the evi-

dence and charge of the court authorized, and such verdict should be set aside for uncertainty. We think appellants' assignment challenging the verdict as being irresponsible to the pleadings, evidence, and charge of the court should also be sustained. *Simms v. Price*, Dallam, Dig. 554; *Ellman v. Brown*, 64 Tex. 184; *Moore v. Moore*, 67 Tex. 295, 3 S. W. 284.

We deem it unnecessary to notice appellants remaining assignments, further than to say that, barring the assignments which attack the verdict as being unsupported by the evidence, upon which we do not pass, none of them present any reversible error, or any error that is likely to occur upon another trial of this case.

Appellee, by cross assignments, complains of the action of the trial court in refusing to submit several special charges requested by him, and also in erroneously charging the jury as to what constitutes actionable false representation. The first of these assignments is as follows: "The court erred in refusing to give special charge No. 1 requested by appellee, to wit: 'Where an agent is employed to buy or sell for his principal, or negotiate a trade for him, it is the duty of the agent to act solely in the interest of the principal, and should the agent be or become an interested party, without disclosing the fact to his principal, and sell his own property to his principal, or buy his principal's property himself, or pay himself or cancel his own liability with the funds or property of the principal, the said agent would be guilty of constructive fraud; and, if it were shown that the principal was damaged thereby, the agent would be liable to the principal to the extent of same.'" We think this charge, as an abstract proposition of law, is perfectly sound, but we do not think it applicable to any issue raised by the evidence in this case. It is true, the undisputed evidence shows that Beatty was indorser upon the McKinnon notes paid by appellee; but it also shows that said notes were secured by a lien upon the land sold appellee by McKinnon, and that said land was of ample value to fully protect Beatty in his indorsement. This lien having been discharged by the payment of said notes, and appellee being the owner of said land, and having received the benefit of the value of same by reason of the discharge of Beatty's lien, it cannot be said that Beatty's liability was canceled or discharged with the funds or property of appellee. We think the court below did not err in refusing to give this instruction to the jury.

Appellee's second cross assignment complains of the refusal of the trial court to give special instruction No. 2 requested by appellee. This instruction, in substance, tells the jury that the failure of Beatty to inform the plaintiff that he was an indorser upon the notes which plaintiff agreed to pay and did pay was a fraud upon plaintiff, and

would entitle plaintiff to recover whatever amount he was shown to have been damaged by the assumption and payment of said notes. The fact that Beatty failed to make this disclosure to plaintiff was a circumstance which the jury might properly consider, in connection with all the evidence in the case, in determining the question of defendant's good faith in the transaction; but the jury should not have been told, as a matter of law, that such fact established fraud on the part of defendants.

Appellee's third cross assignment assails the charge of the court in instructing the jury that false representations, to be actionable, must be known to be false by the person making them. This assignment is well taken. A misrepresentation may be actionable, whether the party making it knows it to be false or not. In *Mitchell v. Zimmerman*, 4 Tex. 80, 51 Am. Dec. 717, our supreme court say: "But whether the party thus misrepresenting the fact knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial; for it has been justly said the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false."

Because of the errors before indicated, the judgment of the court below will be reversed, and the cause remanded, and it is so ordered. Reversed and remanded.

MILLIGAN v. TEXAS & N. O. R. CO.¹
(Court of Civil Appeals of Texas. Jan. 31, 1902.)

**RAILWAYS—PERSONAL INJURIES—PASSENGERS
—NEGLIGENCE—INSTRUCTIONS—EVIDENCE—PLEADING.**

1. A definition of negligence as "the failing to exercise that degree of care which persons of ordinary prudence would thus use under the same or similar circumstances" was correct.

2. In an action against a railway company for personal injuries, the court defined negligence with reference to plaintiff's acts, and also defined the duty which a railway owed its passengers as being "that high degree of care which very prudent persons would use under similar circumstances," but did not add that a violation of this duty would constitute "negligence" on defendant's part. Subsequently the court used the word "negligence" with reference to defendant, which plaintiff claimed was calculated to mislead the jury by causing them to measure defendant's liability by the definition of negligence given. *Held* that, as it was not affirmative error, and could have been obviated by an instruction had one been requested, the assignment of error would not be sustained.

3. In an action against a railway company for injuries sustained by alighting from a train, it was not error to reject evidence that there were no lights at the station, failure to provide lights not being pleaded.

Error from district court, Liberty county;
L. B. Hightower, Judge.

Action by Calvin Milligan against the

¹ Rehearing denied.

Texas & New Orleans Railroad Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Thompson & Willie, for plaintiff in error. Baker, Botts, Baker & Lovett and Watts, Chester & Ellison, for defendant in error.

GILL, J. This was an action by plaintiff in error, Calvin Milligan, against defendant in error, the Texas & New Orleans Railroad Company, for damages for personal injuries to himself and wife, alleged to have been caused by the negligence of defendant's agents and employes in charge of one of its passenger trains. The defendant pleaded general denial and contributory negligence. A trial before a jury resulted in a verdict and judgment for defendant.

On September 2, 1900, plaintiff and his wife took passage on one of defendant's passenger trains at the station called "Crosby" on defendant's line of road, his destination being the station of Sheldon, also on defendant's line. Sheldon was not a regular stopping point for defendant's passenger train, but was only a flag station. On the occasion in question the train on which plaintiff and his wife were passengers, arrived at Sheldon in the nighttime, and stopped both for the purpose of taking on other passengers and allowing plaintiff and his wife to alight. Plaintiff and his wife left the train before it stopped at the station, and while it was still moving. As a consequence, plaintiff received some injuries and his wife had both her legs cut off below the knees by the wheels of one of the coaches of the train. According to the testimony introduced by the defendant, the plaintiff and his wife had taken seats in the smoking car, and so remained until the train neared the station of Sheldon. The porter then announced the station of Sheldon as he passed through and went on his way. The train stopped at the station without unusual movement or incident. The conductor, knowing he had two passengers for that point, and not seeing them alight, inquired for them, and, hearing nothing of them, asked the station agent to look out for them, and the train proceeded on its way. A few minutes afterwards plaintiff and his wife were found on the ground, about 400 feet from the point at the station, where the train stopped to allow passengers to alight. This distance from the station is not disputed, and plaintiff admits that where he was found is where he left the train, or fell from it, as he did not move after he fell. The allegation of negligence against defendant was that when the train approached the station the porter announced the station, opened the door of the car in which plaintiffs were seated, and told plaintiff and his wife to get off the train; that plaintiffs, in obedience to this invitation or command, came out of the car onto the platform there-

of, for the purpose of getting off the train, but as they were on the steps of the train, and just before they attempted to alight, the train started up with a sudden jerk, and threw plaintiff and his wife off, whereby they were both injured. They testified in support of these allegations, stating that they had not yet attempted to alight, but were standing on the steps, and were thrown from the train by a sudden and violent jerk. As before stated, the defendant's witnesses testified that there was no sudden or violent jerk, and that nothing unusual occurred in connection with the stopping of the train. To this should be added the declaration of plaintiff's wife, when she was first found on the ground, to the effect that her husband told her to follow, left the train, and she followed him. Under this state of the evidence the trial court submitted to the jury the issues of negligence on the part of the defendant and of contributory negligence on the part of plaintiff and his wife.

Plaintiff, by the first assignment of error, assails the court's definition of negligence. It was defined by the court to be "the failure to exercise that degree of care which persons of ordinary prudence would thus use under the same or similar circumstances." This is an approved definition of the term, and citation of authority is unnecessary in support of its correctness. The definition is assailed mainly on the ground that a definition of ordinary negligence has no proper place in the charge of the court in a case of this sort, and that its presence misled and confused the jury. This contention is based upon the idea that the use of the word "negligence" in a subsequent portion of the charge, relating to the duty of the defendant to its passengers as applied to the facts of this case, led the jury to believe that no higher degree of care was required of the company than ordinary care. The facts presented the issue of contributory negligence, and required the submission of that issue to the jury. This could not well be done without correctly defining contributory negligence, and this involved a definition of negligence itself. The presence of the definition is thus justified, though not applicable to the duty imposed by law upon the defendant. With reference to this duty the court charged as follows: "You are charged that railroad companies engaged in the transportation of persons are held to that high degree of care which very prudent persons would use under the same or similar circumstances, but are not insurers of the absolute safety of their passengers." The jury was thus plainly instructed that a different degree of care devolved on defendant. In a subsequent portion of the charge, in submitting the issue of defendant's negligence, the court used this language: "And if you further believe that such acts on the part

of defendant's servants constituted negligence," etc. Plaintiff contends that the use of the word "negligence" in this connection necessarily referred the jury to the court's definition of negligence in the former part of the charge as the measure of the defendant's duty, and were thus induced to hold it to no more than the exercise of ordinary care. It is true the court, in prescribing the duty of the company, failed to add, "And a failure in this respect would be negligence on the part of the company," but, having plainly prescribed the duty of the defendant as distinct and different from that of plaintiff and his wife, we are not inclined to believe the jury were misled. It was not affirmative error, and the danger could have been obviated by a requested charge, and none was asked upon the point. The assignment cannot be sustained.

Plaintiff also complains of the language of the court in prescribing the duty owed by the company to passengers, but we think the complaint without merit.

Plaintiff further contends that the court assumed as an established fact that he and his wife were in the act of alighting from the moving train when they fell, and that the court erred in so doing. The part of the charge complained of is not susceptible of the construction sought to be placed upon it by plaintiff. It is clear to our minds that the question was left for the determination of the jury.

Plaintiff also complains of the refusal of the trial court to allow him to prove that the defendant had failed to provide lights outside of the depot at the station of Sheldon, and of a charge that the jury should not consider the absence of such lights in connection with the question of negligence. The failure to provide lights outside the depot was not pleaded as a ground of liability, and the court did not err in the respect complained of.

We do not deem it necessary to notice the other assignments. They are, in effect, disposed of in the discussion of those already noticed.

The evidence is ample to support the judgment for defendant, and, no reversible error being made to appear, it is affirmed. Affirmed.

HARRINGTON et ux. v. OLAFLIN et al.¹
(Court of Civil Appeals of Texas. Jan. 4, 1902.)

NOTES—MATURITY—LIMITATIONS—DEED AS MORTGAGE—FRAUD—IMPEACHMENT OF WITNESS—MARRIED WOMAN—EXECUTION OF DEED—NOTARY'S TESTIMONY—INSTRUCTIONS.

1. Five notes containing agreements that a failure to pay the note, or any installment of interest, should, at the election of the holder,

mature all the notes, were executed February 26, 1889, as consideration for a certain tract of land. The first note matured November 15, 1889, and one of the rest each year thereafter; and, the first note not being paid, suit was begun on November 5, 1890, in the federal court on all the notes, which suit was dismissed and another action brought April 24, 1894. Held, that the failure to pay the first note did not, ipso facto, mature the others, and the second action on such other notes was not barred by the four-year limitations, the same having been brought within four years of the election to mature all the notes, as evidenced by the suit thereon in 1890.

2. In an action on certain notes and to foreclose a lien on land for which the notes were given, answers to special issues were returned, stating that the defendant's wife was induced to sign the conveyance in question, which was absolute on its face, by the representation of defendant that he could thereby pay all debts and buy the property back at a profit of \$500; that, but for this representation, she would not have signed the same; and that defendant was requested by the grantees to secure his wife's signature to the deed. The jury were instructed to find that the deed was what it purported to be, unless they should believe, from a preponderance of the evidence, that it was intended to be a mortgage, and a mortgage was fully defined. Held, that the answer to the special issues did not show that the defendant and his wife were induced to execute the conveyance by fraud.

3. In an action by an indorsee on notes deposited as collateral for the debt of the indorser, the answer of the plaintiff to an interrogatory, that the reason the debt was not paid by the indorsers was because they fraudulently appropriated certain money, and not because they were insolvent, is inadmissible to impeach the indorser, who is a witness for the indorsee, the same being evidence of a single transaction, not material to the issue.

4. Where the wife of a grantor testified that she would not have executed the deed if she had known or believed that it was an absolute conveyance, the notary who took the wife's acknowledgment may testify, in rebuttal, that he explained the instrument to her, and informed her that it was an absolute deed, and that she seemed to understand.

5. In an action to foreclose a lien, it is not error for the court to refuse a special charge on fraud, requested by defendants, and to also refuse to submit a special issue thereon, where the evidence did not sustain the defendant's allegations thereof.

Appeal from district court, Hill county; Wm. Poindexter, Judge.

Action by H. B. Claffin & Co. against J. R. Harrington and wife. From a judgment in favor of the plaintiffs, the defendants appeal. Affirmed.

Jo. Abbott and A. P. McKinnon, for appellants. B. D. Tarlton and W. C. Morrow, for appellees.

BOOKHOUT, J. This suit was instituted in the district court of Hill county, Tex., on the 24th day of April, 1894, on five promissory notes executed by J. R. Harrington to A. J. Soloman and M. N. Rosenthal, or order, on the 26th day of February, 1889. The first note, for the sum of \$947.70, was due November 15, 1889; the other four notes, each for the sum of \$947.71, matured, respectively, November 15, 1890, 1891, 1892, and 1893, each drawing 10 per cent. interest from ma-

¹ Writ of error denied by supreme court.

turity, and 10 per cent. attorney's fees, etc. Said five notes purport on their face to have been given in consideration of 200 acres of land situated in Hill county, Tex.; the land being fully described in H. B. Claflin & Co.'s first amended petition. Defendants plead: First, that the notes sued on were barred by the four-years statute of limitation; second, that the 200 acres of land described in the plaintiff's amended petition was their homestead; third, that the deed of February 20, 1889, from Harrington and wife to Soloman and Rosenthal, was not intended as an absolute conveyance, but as a mortgage to secure an existing debt; fourth, that the execution of said deed by Mrs. Harrington was procured by fraud and deceit practiced upon her by her husband and Rosenthal; fifth, that J. R. Harrington was a very old man, and that he was misled, deceived, and overreached by false and fraudulent representations of Rosenthal. On the trial the jury returned answers to special issues, on which the court rendered a judgment for Claflin & Co. for \$7,515.87, and a decree foreclosing the lien on the 200 acres of land, from which judgment this appeal is prosecuted. The court submitted the case to the jury on special issues. The following are the questions submitted and the answers of the jury: "Question 1. Was the deed of date February 20, 1889, intended as an absolute deed, a conditional deed, or a mortgage? You will answer this question positively and plainly. Answer. The deed of February 20, 1889, was intended as an absolute deed. Q. No. 2. Did the defendant J. R. Harrington make any representations or statements to his wife, T. N. Harrington, in order to induce her to sign the instrument purporting to be a deed, of date February 20, 1889? You will answer this question yes or no. Ans. Yes. Q. No. 3. If you have answered 'yes' to the above question, then state what statement or representations he made to his wife? Ans. J. R. Harrington went to his wife and stated that, by making this trade, he could pay his debts, and could get the homestead back for \$500 less than they would give him for it, and that the deal would be all right. Q. No. 4. If you have answered question No. 2 'yes,' and in answer to question No. 3 have stated what representations J. R. Harrington made to his wife in order to induce her to sign said instrument, then you will answer this question: Did M. N. Rosenthal induce J. R. Harrington to make said representations to his wife for the purpose of obtaining her signature and acknowledgment to said instrument? Ans. M. N. Rosenthal asked J. R. Harrington to get his wife to sign the instrument. Q. No. 5. If you have answered that Rosenthal induced J. R. Harrington to make said representations to his wife, then you will answer this question: Would Mrs. Harrington have signed said instrument if said representa-

tions had not been made? Ans. No. Q. No. 6. Were the notes sued on placed in the American National Bank, at Waco, and the Waco State Bank, of Waco, and, if so, when were they placed in said bank, and by whom? Ans. Yes; the notes were placed in the American National Bank and the Waco State Bank, of Waco, Tex., on the 13th or 14th of October, 1889, by Soloman and Rosenthal. Q. No. 7. If you have found that said notes were placed in said banks, and have found when and by whom they were placed there, in answer to the sixth question, then you will answer this question: For what purpose were they placed in said banks? Was there any agreement made at said time? If so, state what such agreement was, and who made it, or who were the parties to such agreement? Ans. (a) The said notes were placed in the banks as collateral security. (b) Yes. (c) They were intended to secure the indebtedness of Lessing, Soloman & Rosenthal, and the agreement was that, after said banks had been paid, then H. Kempner was to hold said notes till he was paid by Lessing, Soloman & Rosenthal, and then to be held by H. B. Claflin & Co. till they were paid. Q. No. 8. Was there any agreement with Lessing, Soloman & Rosenthal that said banks were to hold said notes as security for any debts, and, if so, who made the agreement, and when was it made, and for what debt? Ans. Yes; there was an agreement between the Waco banks and Lessing, Soloman & Rosenthal, that, after said banks had been paid their claims, the notes should be turned over to H. Kempner. This agreement was made about October 13 or 14, 1889. Q. No. 9. Was there any agreement between H. Kempner and Lessing, Soloman & Rosenthal with reference to the Waco banks holding said notes as security for the debt of H. Kempner against Lessing, Soloman & Rosenthal, and, if so, state the date of such agreement, and what the agreement was? Ans. There was. Lessing, Soloman & Rosenthal agreed, about the 13th or 14th of October, 1889, that after the Waco banks had been paid they should turn over the said notes to H. Kempner, he to hold them till he was paid,—and then turn them over to H. B. Claflin & Co., of New York. Q. No. 10. If in answer to question No. 9 you have found that there was such an agreement, and have stated its date and terms, then you will answer this question: Was the firm of Lessing, Soloman & Rosenthal at said time indebted to H. Kempner? Ans. The evidence shows they were. Q. No. 11. If in answer to question No. 10 you have found and stated that the firm of Lessing, Soloman & Rosenthal were indebted to H. Kempner at said time mentioned in said question, then you will answer this question: Has the debt of H. Kempner been paid? If so, when and by whom? Ans. The debt of H. Kempner was paid by H. B.

Clafin & Co. in the spring of 1890. Q. No. 12. If you have found that the instrument of date February 20, 1889, purporting on its face to be a deed executed by J. R. Harrington and wife to Soloman and Rosenthal, was a mortgage, and not a deed, and if you have further found that said notes were placed with said banks at Waco to be held by the banks as security for the debt of H. Kempner against the firm of Lessing, Soloman & Rosenthal, then you will state whether or not, at the time said notes were placed with said banks as security for the debt of H. Kempner, the said Kempner knew, or had any knowledge, that said security, of date February 20, 1889, was a mortgage and not a deed? Ans. Nothing shows that H. Kempner knew or had any knowledge that the said security was a mortgage and not a deed. Q. No. 13. Was the firm of Lessing, Soloman & Rosenthal indebted to the plaintiff, H. B. Clafin & Co., during the years 1889 and 1890? Ans. The evidence shows that Lessing, Soloman & Rosenthal were indebted to H. B. Clafin & Co. in 1889 and 1890. Q. No. 14. When did the plaintiff, H. B. Clafin & Co., obtain possession of the notes sued upon, and from whom did they obtain such possession of such notes, and for what purpose did they come into possession of such notes? Ans. In the spring of 1890, from the banks of Waco, by an order from H. Kempner for the purpose of obtaining the control and getting the possession of all the collaterals that H. Kempner held against Lessing, Soloman & Rosenthal. Q. No. 15. Did said Waco banks hold the notes sued on as security for the debt of H. B. Clafin & Co. against Lessing, Soloman & Rosenthal; if so, state when and by whom the agreement by which the said banks were to hold such notes as security for the claims and debts of H. B. Clafin & Co. was made, and what such agreement was? Give its terms. If you can't state the exact date of such agreement, then state whether it was before or after November 19, 1889. Ans. The notes were held by the Waco bank aforesaid to secure the indebtedness of H. B. Clafin & Co. after said banks and H. Kempner were paid, on an agreement made before November 19, 1889. Q. No. 16. Did H. B. Clafin & Co. ever have in their hands sufficient property and collaterals of Lessing, Soloman & Rosenthal's to pay the indebtedness of said Lessing, Soloman & Rosenthal to the said H. B. Clafin & Co.? Ans. The evidence shows they did not. Q. No. 17. Has the debt of H. B. Clafin & Co. against Lessing, Soloman & Rosenthal ever been paid? Ans. The evidence shows that the debt of H. B. Clafin & Co. against Lessing, Soloman & Rosenthal has never been paid in full." There was evidence to sustain these findings. In deference to the verdict we adopt the above findings and such additional findings as are contained in the opinion.

Conclusions of Law.

1. It is contended that the court erred in refusing to reform the judgment and render judgment for the defendants, for the reason that the notes sued on were barred by the statute of limitations of four years. The notes were dated February 26, 1889, and the first matured November 15, 1889, and one each year thereafter. The notes contained the following election clause: "It is understood and agreed that failure to pay this note, or any installment of interest thereon when due, shall, at the election of the holder of them, or any of them, mature all notes this day given by me to A. J. Soloman and M. N. Rosenthal in payment of said property." The first note matured and was not paid. The holder of the notes, on November 5, 1890, instituted suit thereon in the United States circuit court at Waco. That suit was dismissed, and the present suit was filed April 24, 1894. The first note, which matured November 15, 1889, was admittedly barred, and no judgment was had thereon. The failure to pay the first note maturing did not, ipso facto, mature the remainder of the notes. Whether such failure should have the effect of maturing the remainder of the notes depended upon the exercise by the holder of his option or election to declare them due, by suit or otherwise. This election was not exercised until the suit was instituted in the United States court, which was November 5, 1890, and the statute was not put into operation as to the remainder of the notes until that date, which was less than four years prior to the institution of this suit. *Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. Ed. 879; *Association v. Stewart* (Tex. Sup.) 61 S. W. 387; *Wood, Lim. Act*, p. 296; *Harrold v. Warren* (Tex. Civ. App.) 46 S. W. 657.

2. It is insisted that the second, third, and fifth answers of the jury to the questions propounded by the court showed that the making of the deed of February 20, 1889, was not a voluntary act of Mrs. Harrington, but that she was induced to execute the same at the instance and upon the representation of her husband, and that her husband induced her to sign at the instigation of Rosenthal, who knew that Mrs. Harrington had refused to sign any more papers. In the second clause of the court's charge the jury were instructed that they should find said deed to be what it purported to be, that is, an absolute deed, unless they should believe from a preponderance of the evidence that it was, at the time of its execution, intended by all parties thereto to be a mortgage. The court, in the fifth clause of its charge, instructed the jury fully as to what would constitute a mortgage. The jury found, in answer to question No. 1, that the deed of February 20, 1889, was intended as an absolute deed. The answers of the jury to questions Nos. 2, 3, 4, and 5, when considered in the

light of the charge, show that the instrument of February 20, 1889, was not intended as a mortgage. It is contended that it is apparent from the evidence that Rosenthal perpetrated a fraud upon Harrington and wife in procuring the execution of the deed. The answer to question No. 4, that Rosenthal asked Harrington to get his wife to sign the instrument, is not a finding that Rosenthal fraudulently secured Mrs. Harrington's signature to the deed; nor does it show that he suggested any fraudulent means to Mr. Harrington by which he was to procure his wife's signature to the deed. The jury nowhere found that Rosenthal perpetrated a fraud upon either Harrington or his wife. The answer to question No. 3 negatives the suggestion that Rosenthal suggested any fraudulent means to secure Mrs. Harrington's signature to the deed. The evidence was sufficient to justify the jury in finding that neither Harrington nor his wife was induced to execute the instrument by reason of any fraud on the part of Rosenthal. The evidence further justified them in finding that the instrument was an absolute deed. The issue as made by the pleadings was whether the deed of February 20, 1889, was what it purported to be, an absolute deed, or whether it was a mortgage. The jury found it to be an absolute deed. If it could be said that by the answer to question No. 3 Harrington and wife contemplated they should have the right of repurchasing the property at \$500 less than they sold it for, this would not evidence a mortgage. The debt of Lessing, Soloman & Rosenthal was extinguished when the deed was made. Five days thereafter Harrington went to Waco and repurchased the property at \$500 less than he sold it for, the notes herein sued on being the consideration for said repurchase. Had the issue been raised that these transactions evidenced a conditional sale of the homestead, and the jury so found, it seems that this would not have defeated the conveyance. *Astugueville v. Loustaunau*, 61 Tex. 233; *Andrews v. Bonham* (Tex. Civ. App.) 46 S. W. 902.

3. It is insisted that the answers of the jury to questions Nos. 7, 9, and 15 are against the weight of the evidence in that the evidence shows that the notes were deposited in the banks as collateral security for the Lessing, Soloman & Rosenthal indebtedness to the banks, with the understanding that when the banks were paid they were to go to H. Kempner of Galveston, Tex., and the evidence does not show that they were to ultimately go to H. B. Claflin & Co. There was evidence both ways on this issue. The evidence was sufficient to justify the jury in finding as they did in answer to said questions Nos. 7, 9, and 15, in effect that the notes were deposited with the banks as collateral security for the indebtedness of Lessing, Soloman & Rosenthal to the banks, with the understanding that when the

debts of the banks were paid they were to go to H. Kempner of Galveston, and, when his debt was paid, to H. B. Claflin & Co., the appellee. *Claflin v. Harrington* (Tex. Civ. App.) 56 S. W. 370.

4. Appellants contend, in their third and fourth assignments of error, that the court erred in excluding the fourth cross interrogatory of the witness A. J. Soloman, and his refusal to answer said interrogatory, for the reason that the refusal of said witness to answer said interrogatory was a circumstance tending to impeach the character of said witness, and was material, in that it affected the weight to be given to the other evidence of said witness. The interrogatory referred to is as follows: "Were Lessing, Soloman & Rosenthal insolvent and in a failing condition on the date of your pretended purchase of said notes?" Neither Soloman nor Rosenthal was a party to this suit. The evidence shows that John Claflin and George Armstrong were permitted to testify, and did testify, that Lessing, Soloman & Rosenthal were not insolvent at the time plaintiff purchased the notes. The uncontroverted evidence is that Lessing, Soloman & Rosenthal did fail to pay appellees, and still owe them a large amount. The witnesses Claflin and Armstrong stated, in answer to cross interrogatory No. 4, in effect, that the reason that their debt was not paid was on account of Rosenthal and Soloman appropriating the proceeds of a large quantity of cotton to their own use. This was an attempt to impeach a witness by a single transaction tending to show a want of integrity on the part of the witness when the transaction itself was not material to any issue in the case. The evidence was not admissible for the purpose of impeaching the witness.

5. Appellants, in their fifth assignment of error, complain of the action of the court in permitting the witness G. D. Tarlton to testify as to what occurred between himself as notary and Mrs. Harrington at the time he took her acknowledgment. Mrs. Harrington had testified that she would not have executed said deed if she had known, or believed, that she was conveying her land absolutely to the said Soloman and Rosenthal. The witness Tarlton states that he explained to her the instrument, and told her that it was an absolute deed to the property; that she seemed to understand what was said to her; and he further testified that she acknowledged the deed. His testimony, we think, was in rebuttal of what Mrs. Harrington had testified to, and there was no error in admitting the same. It did not add to or strengthen the certificate of the notary; nor did it tend to impeach it.

6. Appellants' seventh assignment of error complains of the action of the court in refusing to submit their first special issue requested by defendant, reading as follows: "State whether or not Mrs. Harrington was induced to sign the deed from J. R. Harrington and

herself to Soloman and Rosenthal by reason of the fraudulent acts or conduct of her husband, J. R. Harrington." The special charge requested by appellants reads: "In connection with the submission of the foregoing special issue No. 1, the defendants ask the court to instruct the jury that fraud, like any other fact, may be proved by circumstantial evidence, and that it is not necessary that the party perpetrating the fraud intended, at the time, to perpetrate a fraud, but, if you find from the evidence that representations in this case, if any were made by J. R. Harrington to his wife, and that said representations had the effect to cause her to believe that the execution of the deed in question was for a purpose other than an absolute conveyance of the land in question, and she, in fact, believed from said representations that said conveyance was for a purpose other than an absolute conveyance, then, in law, his conduct to his wife would be fraudulent. The defendants pleaded, in substance, that Harrington told his wife they would have to give a mortgage on their land; that Rosenthal requested Mrs. Harrington's husband to explain the purpose of making the deed, and she signed the same believing that it was to secure her husband's debts. There is no evidence that Harrington told his wife they would have to give a mortgage on the land; there is no evidence that Rosenthal told Harrington to explain to his wife that the purpose of making the deed was to give a mortgage on their homestead, or to secure his indebtedness. The evidence did not sustain the issue of fraud upon Mrs. Harrington, as charged in defendants' pleading, and, for this reason, the court did not err in refusing to submit said special issue and special charge. The evidence does not show that Rosenthal induced Harrington to perpetrate a fraud upon Mrs. Harrington. Nor does it show that Rosenthal had any knowledge that Harrington had perpetrated a fraud upon his wife. The questions submitted by the court fairly covered all the issues raised by the pleadings and evidence.

We have carefully examined the several assignments of error not discussed, and now conclude that they present no reversible error.

Finding no error in the record the judgment is affirmed. Affirmed.

MATTHEWS v. MISSOURI, K. & T. RY. CO. OF TEXAS.¹

(Court of Civil Appeals of Texas. Dec. 21, 1901.)

SWITCHMAN—ACCIDENTAL DEATH—ACTION FOR DAMAGES—CONTRIBUTORY NEGLIGENCE—INSTRUCTED VERDICT.

The uncontradicted evidence in an action for the death of a switchman in charge of an engine showed that in moving the engine into a switch the engineer was governed by his sig-

nals; that he had signaled the engineer to back, and that it was his duty to inform him by signal or otherwise that he had gone too far or not far enough on the throw rail; that the switchman, being on the footboard of the tender, was in a better position to see and know the position of the engine, and must have known of the danger of attempting to throw the switch while the engine was on or moving over the feather rail. So far as the evidence showed, the engineer had a right to expect a signal for him to stop before reaching the feather rail, but without further signal decedent made the attempt to throw the switch, and was fatally injured by the lever, which struck him in the stomach. *Held*, that the court properly instructed a verdict for defendant, decedent being guilty of contributory negligence.

Appeal from district court, Hill county; Wm. Polindexter, Judge.

Action by L. D. Matthews against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for defendant, plaintiff appeals. Affirmed.

W. E. Dycus and W. S. Essex, for appellant. T. S. Miller and Ramsey & Odell, for appellee.

RAINEY, C. J. The appellant sued to recover for damages sustained by the death of his son, Henry A. Matthews, whose death was caused by the alleged negligence of appellee's employes. The defendant pleaded the general denial, and specially contributory negligence on the part of the said Henry A. Matthews. The court instructed a verdict in favor of defendant on the ground that deceased was guilty of contributory negligence, and therefore plaintiff was not entitled to recover. A verdict and judgment were rendered accordingly, and appellant assigns the action of the court as error.

No controversy arises on the facts as to plaintiff's cause of action had the right existed in the son had he survived the injury. The testimony concerning the injury consists of three witnesses, as follows:

E. O. Dearman testified: "I am in the employ of the M., K. & T. Ry. Co. at Hillsboro, and have been in their employment since December. I knew Henry A. Matthews for about thirty-six hours prior to his death. Worked in the same yard with him. I was foreman of the yard. I remember the morning he met his death. When the Dallas Flyer came in that morning from the north, I was standing on the east side of the passenger station at Hillsboro. The switch engine that Matthews worked with was standing on what we call 'Ft. Worth main track,' west, or just north, rather, of the crossing south of the passenger station. There was a switch just south of this crossing. The Dallas train pulls in from the south and stands there. It was at a point just north of the Dallas train just east of the depot. We generally make the cut of this train at this place. This train goes north to Dallas. (Witness identified sketch which showed where the switch engine stood, etc.) It is something inside of a hundred feet down to the switch

¹ Writ of error denied by supreme court.

from the crossing. The Dallas train came in that morning as usual. I was at the place where the accident occurred. After the Dallas train comes in, we generally back the switch engine up the main track and come in on the rear of his train. That comes in from the south. The engine is headed north, and customarily stands at the point indicated on the sketch, between the depot and the crossing. As soon as the train comes in, the engine moves down till it gets to a point south of the switch, and then runs in here on the Dallas track, and does the switching for the Dallas train. From the time this train arrived, and some minutes before, I did not see Matthews, and until thirty minutes probably after it arrived. When I saw him he was carried into the freight depot at Hillsboro. About thirty minutes after the accident I had a talk with Mr. Golding, the engineer. The switch engine did not come up with its usual promptness to do the switching for the Dallas train. It stopped south of the switch about twenty feet. It stayed there until I went after it. I did not see any one get out of the engine. I ran the engine up, and coupled it onto the rear of the train. There is an open view of this track. The switch in question is what we call a 'split switch.' It worked with a lever. In throwing it you throw one rail. The lever is raised out of one socket and lowered into another. It is usual, if a train had just run in on the Dallas track, in order to keep the main line open I would throw the rail back kept locked, I think. The switch is operated this way: If a train had just run in on the Dallas branch, in order to keep the main line open I would throw the rail back, and make the main line of the west track perfectly clear, and to do this would raise the lever and put it in the socket. It requires force to turn the lever and move the rail. The lever hangs down. You unlock the switch, raise the lever, and pull it around, and in doing so you pull the weight of the light rail. The rail does not move very easily. This switch worked rather hard. The target at the top of the switch is so constructed that for the Ft. Worth main line the target shows white. To throw it around for the Dallas side it shows red. After a train has passed in on the Dallas branch from the south, the red target will stand up in plain view. In daylight it can probably be seen for a quarter of a mile from each direction. If the main line is open, and the Dallas track closed, the switch target will show white. When the switch is open for the Dallas track, it will show red. And in this way the engineer may know whether it is Dallas or Ft. Worth track that is open. At that time I had been working as foreman of that crew for about four months. Matthews had only come in a day or two before to work with me on this particular switch. I don't know where he was working unless it was the Hillsboro south yards. When the Dallas switch is open, the

east rail of the switch would be away from the west rail of the main track. These split or feather rails are the switch rails. The west rail would be against the west rail of the main track. If the engine has run through without the switch being turned, it would generally break the switch, or bend some of its connections, or break the rail probably. If any one went to open the switch, and raised the lever, and just about the time the lever was raised the engine was run up the split rail and the party raising the lever had just completed the act of raising it, the effect would be quite a force on the switch lever. It would be violently thrown. At night a light is kept on these switch stands. I don't remember whether lights are so arranged that when the switch is turned for the Dallas branch it shows red, when for Ft. Worth line it shows green. The lights are generally turned out from 5:30 to 6 o'clock in the morning at that time of the year. When the lights are turned out it is usually light enough to see the targets on the switch stands. Don't remember whether this particular morning was cloudy or clear. The switch engine stood, I judge, about three hundred feet north of the switch, and about one hundred feet north of the crossing, before the switchman was hurt. Probably about one and a half minutes is usually occupied in running the engine from the place where it usually stands down to the stands and up the Dallas track, so as to make connection with the Dallas train. On this particular morning it took from five to seven minutes. It was the delay that caused me to go down to the switch. Matthews was considered a good workman, so far as I know. He only worked with me that one night. His salary as \$2.93 per day or night. He usually began work at 7 in the evening and laid off at 7 in the morning. When you take the lever out of the socket, and start to turn it around, the white or red target, as the case may be, keeps pace with the switch beam that you are working, so that if the white light is showing on the Ft. Worth switch, and you turn the lever, the red light will appear instead of the white. I do not usually ride on the switch engine, but I often walk by the switch. As I remember it, if the switch is thrown for the main track, the lever is on the east, and if it is thrown for the Dallas branch it is on the west; but I can't say; it may be the opposite. It has been some time since I worked with that switch. The lever, in throwing, faces east and west. If you wanted to approach a switch, you would approach it from the north, and in throwing a switch from the Dallas track to the Ft. Worth track your face would be to the south and your back toward the north, or toward the engine." Cross-examined: "The switching crew was composed of three men,—Mr. Matthews, Mr. Baty, and myself. The diagram or sketch represents the main line going to Dallas east of the depot; the

main line on the west side going to Ft. Worth. Just before the injury the Dallas train arrived from the south. This was the through train to Dallas called the 'Flyer.' There was another train made up here that went to Ft. Worth as a passenger train. Both left about the same time. The Ft. Worth was made partly from the train that came in from the south and partly coaches here in Hillsboro. When the Dallas train arrived, we had already made up as much of the Ft. Worth train as could be made of the cars here. The switch engine was south of that part of the Ft. Worth train that we had made up. And when the Dallas train came in the switch engine ran south, and went into the Dallas track, to take some coaches out, and put them on the Ft. Worth train. It was almost immediately east of the depot, near the Dallas track. Mr. Baty usually stayed with me on the opposite side of the Dallas track. I generally stayed on the platform, and Mr. Baty east of the Dallas main track, while the other man took the engine, and while we made the cut on the Dallas main line. The other man was Matthews. In the movement of the engine the engineer was guided by the signals from Mr. Matthews. He was the switchman in charge of the engine. When the Dallas train pulled in, he gave the engineer the signal, and the engineer ran his engine south, so he could come in on the Dallas track. The engineer was guided and governed entirely by Mr. Matthews in the movement of the engine, he being the switchman who was in charge of it for the purpose of signaling it to move about the yards. I judge that the switchman could see the lights on the targets as well as the engineer. I never noticed anything unusual about this particular switch so far as I could understand it. It was in good condition. It was in the right place, and conducted like other switches." Redirect examination: "From where the engineer was, he could plainly see, by looking out, whether a white or red target was in view. If the lamp was burning, he could see whether the red or green light was on, if either was. Mr. Golding had been at work here about five years. I did not notice the engine that morning until it stopped on the other side. The engineer is guided both by the signals of the switchman and by the target. I don't think he is supposed to run through a switch because somebody made him a signal. If he knew the switch was wrong, it is not his business to run through it because somebody tells him to."

F. W. Torrence testified: "I am engaged in firing. Work for the defendant company at Hillsboro and in the south yards. I have seen Henry A. Matthews, but was not acquainted with him. I had known him by sight for two or three days. I remember the morning he was killed. (Witness here examined the sketch marked 'Exhibit A,' and stated that it correctly represented the

depot, crossings, switch, and two tracks.) I remember when the Dallas train came in through the switch that morning. It was bright daylight. We could see plainly up and down the track when the train came in. I was on the west side of the switch engine, up in the cab. One of the windows of the cab is on the left and the other on the right. Our engine was somewhere between the depot and the street crossing. I judge it was about two hundred feet from the place where the engine stood to the crossing, and I think it is a little over one hundred feet to the crossing south of the switch. North of us the Ft. Worth train was being made up. The Dallas train had come in, and stopped just east of the depot. We then backed down to the switch, the front of the engine to the north, the tender to the south. I mean by 'back down' that we traveled south. Matthews was on the footboard of the engine, and I could not see him because he was on the engineer's side. I could not see him, but understood he was there. When we stopped, I judge the back of the tender was right even with the switch stand. That put the tender on the feather rail. The engine moved north a few feet,—about four feet. We then stopped perhaps a minute or thirty seconds. The engineer then backed south through the switch. S. E. Golding was the engineer in charge. After we got south of the switch, the engine stopped, and Mr. Golding got out, and walked towards the front end in the direction of the switch. He got back into the engine, and ran in back to the switch on the Dallas branch. He was out of the cab about a minute. He then said that the lever struck the switchman in the stomach. He said he threw the switch so the engine could run on the Dallas branch. After we moved ahead, I saw Matthews crossing the track. He was bent over, and had his hand on his stomach. From where the engine stood north of the crossing, we could see the switch target. Mr. Golding could see it from where he was, and all the way from there down to the switch itself. It was on his side. The engineer is governed by signals from the yard crew. He is supposed to look at the switch target. I did not see Matthews give him any signals." Cross-examination: "In moving a switch engine about the yards the engineer is governed entirely in his movements by the signals he gets from the yard crew. He looks at the switch target just as he looks down the track for a broken rail or any other obstruction on the track, but his signals to back up he gets from the yard crew. Mr. Matthews was in charge of the engine as a member of the yard crew, and the movement of the engine was guided and directed by him. This engine was a switch engine. It had different equipments from a road engine. A road engine has a cow catcher, and a switch engine has none, but it has instead

a footboard that usually reaches down nearly to the track, on both the front and rear of the engine. These boards are for the convenience of the yard crew in getting on and off the engine in its movements in the yard. The front was to the north, the tender to the south. Mr. Matthews was on the footboard on the engineer's side when the engine struck; he being on the east side and I on the west. The switch stand is on the east side of the track. If Mr. Matthews was on the footboard, there was no obstruction between him and the feather rail. There was nothing to obstruct his view of the feather rail, or the switch stand, or the engine itself. Supposing Mr. Matthews to be on the footboard on the side south of the engine, he was near the switch stand, and nearer the feather rail than Mr. Golding, and I suppose was in a better position to observe the condition of the light, the feather rail, the switch stand, than the engineer, or any one else. He was nearer the ground when he was on the footboard of the engine." Redirect examination: "It is a fact that the engineer is governed as well by the switch target as by the switching crew, and, if the white target is still showing, he knows that the Dallas switch is still open. It is also a fact that it was Matthews' place, as soon as he opened the switch and got it turned, to have given a signal to the engineer, and then the engine run through. That signal would be given by him after he got the switch open, if it was a 'back-up' signal. This is done by throwing the switch, and giving the engineer some motion to indicate that he can go through. In the daylight this [making movement of his hand] is a 'back-up' signal, if you are behind the engineer. The signal is given when the yard crew wants the engine moved." Being asked if the signal is given before the switch is thrown or afterwards, the witness answered: "I don't know. I don't understand. I could not say whether the switchman would give the signal before he threw the switch or not. The engine stopped on the feather rail. I could not say whether Matthews was on the footboard or on the ground at that time. I don't know whether he had made an attempt to operate the switch at that time, as the switch was on the opposite side from me, and I could not see it. The lights would indicate what the condition of the switch was at that time. We stopped about thirty seconds after we moved north. While the engine was on the feather rail, the switchman could not operate the switch. He could bring up the lever, but he could not throw it, except a certain distance. After the engine stopped, it moved north about four feet off the feather rail. It stayed there thirty seconds, I suppose. It generally takes only a second or two to operate the switch. The lever is on the north side of the switch. Mr. Matthews got off the footboard of the engine between

the crossing and the switch, about where two of the tracks come together, and went to the switch, and took hold of the lever. His back would be to the engine and his face to the south." Redirect examination: "The engine slowed up as it got to the switch. It slowed up some little bit before it got there." Recross: "I saw Matthews back by the side of the engine, after No. 6 pulled up on the Dallas 'cut off,' going to the rear end of the engine. This was before the engine started back to the switch. I never saw him again until after he was hurt. It came to a stop. I don't know how long it was in coming to a stop."

S. E. Golding testified: "That he moved from Alvarado to Hillsboro, Texas, in 1895, and had lived in Hillsboro ever since. I am in the employ of the railway company, and during the last five or six years I have been running a switch engine for the defendant. I knew Henry A. Matthews only one night. He worked as a member of the switch crew with the engine that night only, but I had seen him in the yards before. I remember the incident of his being injured. The switch engine was standing north of the Walnut street crossing before I started to the switch. This is two or three hundred feet north of the switch. The headlight was to the north and the tender to the south. Mr. Matthews gave me a signal to back it up. When we started he was on the footboard of the engine on the rear end, on my side. I never saw him get off the footboard when I made the stop for the switch. I saw I was going too close to the switch, so, in order to stop, I reversed my engine. When I did the engine stopped. I looked out to see where Matthews was. He was just raising the lever when I looked out. The lever struck him in the side. He was standing sidewise when he raised it. He went to close it. It struck him right there. I ran my engine off of the throw rail north. Mr. Matthews threw the switch round, and I backed off, then backed over the switch, and he could not by that time throw the switch back for me. In the meantime his breath had left him, and it threw him over like this [indicating a bending position]. I got down, went to him, and asked him if he was hurt too bad to go on with me. He said, 'Yes, I can't go any further,' so he sat down on the switch block. In the operation of my engine in the yard I get my signals from the switch crew." Cross-examined: "My engine was standing just clear of the crossing on the north side. Mr. Matthews was on the rear end of the engine, on the footboard. He then gave me the signal to back up. That was the first time I started. I don't know where between that point and the switch he got off. He gave me no signal between the crossing and the switch. I did not back far enough for the tender to be even with the switch target, but it was on the rail that was further up than I intended to run. I

had to reverse my engine to stop. When the engine stopped, I looked out to see if I was too close to the switch or not. Mr. Matthews was just raising the lever. I did not intend to be on the feather rail. I could see that I was too close to the switch. It was further up than I intended to go, and I looked, and saw Matthews, and the engine had already been reversed. If I had stopped five or six feet short of where I did I don't suppose the beam would have struck him in the stomach. It requires force to throw a throw rail around. If the engine is not standing on it, it requires force. All switches require a little force to move them. There is no danger of the switch flying around unless there is something on the rail. If I had stopped a little sooner, before I got there, the engine would not have thrown the beam around. As soon as we got through the switch I stopped, and went back. Matthews was unable to throw it. I saw the switch lever strike him in the stomach." Redirect examination: "The lever struck him before the engine moved north. I was just waiting for my brakes to release so I could move north. It was the duty of the man who follows the engine to signal the engineer whether he was gone too far or not far enough in coupling onto cars. I mean one of the switch crew. It was the duty of Mr. Matthews to inform me by signal or otherwise that I had gone too far on the throw rail or nor far enough. I generally look at the switch target to see what position it is in. I had a plain view of the target. I knew the switch. I could see it. It was daylight. I knew the switch was open. It was open for the Dallas branch. I could not stop quite soon enough. It was my intention to stop a little sooner, so as to have the switch thrown before I went into it."

The question for determination is, does the evidence show conclusively that deceased was guilty of contributory negligence? We have carefully considered the evidence, and we have been unable to discover any fact that would authorize the jury in finding that the deceased was not guilty of contributory negligence. The uncontradicted evidence shows that the deceased was the switchman at the time, and in charge of the engine; that is, in moving the engine the engineer was guided and governed by signals from him. He had signaled the engineer to back the engine, and the uncontradicted evidence of Golding, engineer, is that it was the duty of deceased to inform him, by signal or otherwise, that he had gone too far on the throw rail, or not far enough. Matthews, being on the footboard of the tender, was nearer the feather rail than the engineer, and was in a better position to see and know the position of the engine. He must have known the danger of attempting to throw the switch while the engine was on or moving over the feather rail. For his own protection it was incumbent upon him to ob-

serve the position of the engine before making the attempt. He, having control of its movements, and failing to do this, was guilty of negligence which contributed to his injury. While the engineer knew the effect of running the engine on the feather rail, there is nothing in the evidence to indicate that the deceased would endeavor to throw the switch while the engine was on the feather rail. As far as the evidence shows, the engineer had the right to expect a signal for him to stop, from the deceased, before reaching the feather rail. Under the evidence the plaintiff was not entitled to recover, and the court did not err in instructing a verdict for defendant.

The other assignments are not well taken, and the judgment is affirmed.

JOHNSON et al. v. GALVESTON, H. & N. RY. CO.¹

(Court of Civil Appeals of Texas. Jan. 31, 1902.)

CARRIERS — INJURY TO PASSENGER — DEFECTIVE TRACK — PLEADING — PROOF — INSTRUCTIONS.

1. Where, in an action against a railroad for death by reason of the derailment of a train, plaintiffs plead specially the causes of the derailment and the specific negligence on which they rely for recovery, they will be confined in their proof to such specific allegations, and can recover on no other grounds.

2. In an action against a railroad for death by reason of the derailment of a train it was alleged that such derailment was due to negligent lack of repairs in the track and roadbed and running at an excessive speed; and the court, after instructing that if the jury believed that the unrepaid track or excessive speed caused the accident they should find for plaintiffs, though it should also appear that a broken axle contributed to the accident, charged that, if they believed the broken axle was the sole cause of the accident, they should find for defendant. *Held*, that such charge was not erroneous as ignoring the derailment, or excusing defendant, notwithstanding the broken axle might have been due to defendant's negligence, since, read in connection with the part of the instruction preceding, a recovery was allowed if the broken axle, whether due to its own defects or the conditions alleged in the complaint, contributed to cause the derailment.

3. Plaintiffs' theory as to the cause of the accident having been overthrown on adequate evidence, such charge was not erroneous, as being on the weight of the evidence, in that it denied to plaintiffs the weight of the accident itself as an evidential fact tending to support the allegations of negligence, since, on such proof, the accident lost its evidential force.

4. It was undisputed that at and near the point where the axle broke, and up to where the last car stood after the accident (some 60 feet), the rails retained their alignment and position notwithstanding the tremendous strain resulting from the broken axle, and there was no evidence of loose spikes or that the rails spread at such point. *Held*, that a failure to mention spreading rails and loose spikes in a charge reciting the facts averred by plaintiffs as a basis for recovery was not error.

5. Plaintiffs' evidence, without conflict, having attributed the death to a gangrenous condition of the decedent's bowels, caused by the

¹ Rehearing denied, and writ of error denied by supreme court.

injury, the giving of a charge requested by defendant that, unless it was believed that the death was due to a gangrenous condition, and that such condition was due to the injury received in the derailment, the jury should find for defendant, was not erroneous, as excluding the hypothesis of death from shock, or that decedent's diseased condition was aggravated by the injuries.

G. An objection to a point in a charge which is fully covered in a special charge is without merit.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by Jennie L. Johnson and others against the Galveston, Houston & Northern Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Lovejoy, Sampson & Malevinsky and M. E. Kleberg, for appellants. Baker, Botts, Baker & Lovett and A. L. Jackson, for appellee.

GILL, J. This suit was brought against the appellee by Mrs. Jennie L. Johnson for herself and as next friend of the minors Vesta B., Octavia, and Virgil B. Johnson to recover damages for the death of Byron Johnson, the husband of plaintiff and the father of the minors. Herbert Austin, as next friend of Phyllis Johnson (a child of deceased by a former wife), joined in the suit. A trial by jury resulted in a verdict and judgment for defendant, from which plaintiffs have prosecuted this appeal.

The petition of plaintiffs, after the necessary formal allegations, contained the following: "That on or about the 24th day of February, the plaintiff Jennie L. Johnson, together with her husband, Byron Johnson, were passengers on one of the trains of the defendant company, traveling from Galveston to Houston, Texas. That at a point on defendant's line of railway known as 'Deep Water' the train was derailed. That in said derailment the said Byron Johnson received injuries which resulted in his death. That the derailment was due to the negligence of the defendant, and that the death of the said Byron Johnson was directly and proximately caused and occasioned by the negligence and carelessness of the defendant company, its servants, agents, and employes, in that: (a) Said company, its servants, agents, and employes, negligently and carelessly maintained its line of railroad at the point of said derailment in a defective and unsafe condition, in that the ties supporting said rails were rotten and worn out; that the spikes holding the rails to the ties were loose, and the roadbed unballasted and out of repair to such an extent that the rails spread,--all of which caused said derailment, as aforesaid. (b) That the defendant, its servants, agents, and employes, negligently and carelessly ran and operated said train at a dangerous and excessive rate of speed, considering the unsafe and defective condition of its track and roadbed, in that said train of

cars was running at the time at a rate of speed exceeding twenty-five miles per hour, and which, considering the defective and insufficient condition of the roadbed and track, was hazardous and dangerous." The defendant interposed a general demurrer, and answered that it was not guilty of the wrongs and negligence charged against it. The facts are as follows: On the day alleged in the petition, deceased, with his wife and family, took passage on one of defendant's passenger trains at Galveston, Tex., intending to go to Sour Lake. Near a point called "Deep Water" on defendant's line between Galveston and Houston, and while the train was traveling at a speed of between 30 and 40 miles an hour, a large portion of the train was derailed, and the entire train brought to a sudden and violent stop. As a result of the derailment, deceased was thrown against the corner of a seat, and injured. He died about 10 days afterwards. As to the extent of his injuries, and whether they caused his death, the evidence was conflicting. The evidence was also conflicting as to whether the derailment was due to any of the causes alleged in the petition, and as to whether it was due to defendant's negligence in any respect. From the evidence of those witnesses who testified with reference to the nature and causes of the accident we gather the following facts: The engine and tender did not leave the rails, and at the point where the engine and tender stopped the rails were in place and in proper alignment. The rear trucks of the tender were missing from their place, and the rear end of the tender was in contact with the track. The rear trucks of the rear sleeping car did not leave the rails, and the rails under them and from thence south toward Galveston were in place and alignment. From the rear trucks of the rear sleeper to the point where the engine and tender stopped, the track was badly torn up, the rails being spread and out of place, the ties torn up and broken, and all the intervening cars or coaches were off the track, the baggage car being entirely off the roadbed. At a point on the track about 60 feet south of the rear end of the last sleeper a hole was found between the rails, and the ties at that point were damaged and pushed together under the rails. Near this, and to one side of the roadbed, was found one of the wheels and a part of the axle of the rear truck of the tender. The axle of the rear truck of the tender had evidently broken at or near that point. One of the wheels and the fragment of the axle had been pressed between the ties by the passing train, thus making the hole and jamming the ties together, and had then in some way been thrown out to one side. No part of the train was derailed at this point, but, as above stated, the rails remained in place, and with sufficient strength to permit the passing of the entire train except the engine and tender, which had, of course, practically passed the point before the axle broke. The other ten-

der wheel, with its part of the broken axle, fell under the cars, and caused the derailment and destruction beyond that point. There was testimony to the effect that some of the ties were rotten, and that the road-bed was unballasted, and in a bad state of repair; but as to these conditions, and the extent to which the safety of the track was affected thereby, the evidence was conflicting. Dickson, an expert, testified as to the proper manner of testing the strength of axles, and further stated that the breaking of an axle was an exceedingly rare accident; that out of 5,000,000 in use in the United States not over 8 or 9 a week were broken. He further testified that such breaks were not always due to defects in the axle, and that an axle was much more liable to break on an uneven and poorly ballasted track than on a firm smooth track. The court submitted the issues to the jury, but refused to allow a recovery should the derailment be found to be due to any other cause than one of those named in the pleadings of plaintiffs.

By the first assignment of error appellants assail the following portion of the court's charge: "If you believe such broken axle was the sole cause of the accident, you will find for defendant." It is contended that this portion of the charge is error: First, because it ignores the derailment, which itself raised a presumption of negligence; second, the charge excused the defendant notwithstanding the broken axle might have been due to the negligence of defendant; and, third, because it was a charge on the weight of the evidence. The point thus presented was also raised by a requested charge to the effect that, if the jury believed the derailment was due to the negligence of the company, and proximately caused the death of deceased, they would find for plaintiff, which charge the court refused to give. Appellants contend that, notwithstanding they pleaded specially the causes of the derailment and the specific negligence on which they rely for recovery, they should not be confined to those allegations; that, having shown the derailment and the resulting injury, negligence would be presumed unless the appellee rebutted the presumption by proof that it was not at fault as to any efficient cause of the wreck. One phase of the assignment presents a question of pleading, and this we will determine first. It is a general and well-established rule that when one having a right to rely upon general allegations for the admission of his proof chooses to plead specially the facts upon which he relies for recovery, he must confine his proof to the facts alleged, and can recover upon no other ground. *Railway Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Railroad Co. v. Herring* (Tex. Civ. App.) 38 S. W. 129; *Railroad Co. v. Vance* (Tex. Civ. App.) 41 S. W. 167; *Railroad Co. v. Scott* (Tex. Civ. App.) 27 S. W. 827; *Railway Co. v. Younger*, 10 Tex. Civ. App. 145, 29 S. W. 948. This gen-

eral rule has been applied in this state almost without exception; notably in actions of trespass to try title, where, under a general allegation of ownership and ouster, the plaintiff may prove such title as he has; yet, if he pleads his title specially, he is confined in his proof to the title pleaded. That the rule is applicable to every character of action for damages save such as the one under consideration is not questioned by appellants. What, then, is the feature present in suits by passengers for damages resulting from derailment of passenger trains which renders inapplicable this wholesome and well-established rule? The purpose of pleading is to apprise opposing parties of the exact grounds of complaint against them, so that they may prepare to meet the issues thus made. The plaintiffs in this case had the right under the law to allege generally the fact of the derailment, and charge it in a general way to the negligence of the company, without specifying the respects in which the company had been negligent. Had this been the state of the pleading, the railway company, with knowledge that a more specific statement of the cause of action could not be required, must have come to the trial prepared to affirmatively acquit itself of any fault or blame to which the derailment might be attributable. Such a state of pleading would have been equivalent to notice that this would be required. The right to stand upon general allegations is accorded to plaintiffs in cases of this sort because the facts are usually within the knowledge of the defendant, and beyond the reach of plaintiffs. The fact of the derailment—a happening out of the usual course of things—raises the presumption of a fault somewhere. The road and its equipment are in the hands of the company, and suspicion points in that direction. But here the plaintiffs have swept aside the reasons upon which their right is based. They have assumed to be in possession of the facts. They have charged specifically and minutely the causes of the derailment, and the respects in which the railway company has been derelict in its duty. What was the natural and obvious effect of this specific pleading upon those having the company's affairs in charge? They would prepare to meet the specific charges made. They would prepare to contest the case upon the battle ground chosen by the plaintiffs themselves. If the plaintiffs were met and overthrown upon the issues thus made, should they be permitted to shift to some other issue developed upon the trial, and not earlier, and which the defendant was not called upon to prepare for? Suppose the plaintiffs, standing upon their rights, had pleaded generally, or had included a specific charge, that appellee had negligently used a defective axle, which alone or in connection with the other causes alleged was responsible for the derailment! The company might have called as witnesses

the manufacturers of the wheels and axle, and have shown that the axle was free from defects, and had withstood the most approved tests, or that, if defective, the defect was of such a nature as would not have been disclosed by the exercise of the utmost care. Appellee may have been able in many ways to acquit itself of the charge of negligence as to the axle. The right of appellee to make the effort to protect itself upon this point cannot be successfully questioned, and, since the issue was not tendered, but other issues distinctly relied on, it would be unfair to predicate liability thereon. But, even if we were inclined to hold otherwise, we regard the case of *Railroad Co. v. Summers* (Tex. Civ. App.) 49 S. W. 1107, as authority for the doctrine contended for by appellee and followed by the trial court. Appellants assail as pure dicta the expressions in the opinion in the case cited in so far as they bear upon the point at issue. If they have not the dignity of express authority, they approach it so nearly as to indicate clearly the views held by our supreme court upon the question. In the case cited the plaintiff, complaining of a passenger derailment, alleged that it was due to certain specific causes, among them the fact that the rails were of unequal height where they were joined together. This allegation was not sustained, but the proof showed instead that the rails were not in proper alignment, the edge of one of the rails extending to one side forming a lip or shoulder at the point of junction, and that this defect caused the wreck. The point was made that the proof was variant from the allegations, and the recovery on that ground ought not to be permitted to stand. The court of civil appeals recognized as applicable the general rule that the proof must conform to the pleadings, but held that the variance was not material. The supreme court granted a writ of error on the ground that the court of civil appeals had erred in holding that there was no material variance, but afterwards affirmed the judgment, having found, on a closer inspection of the pleadings, that they contained other specific allegations which covered the particular defect proved. *Railway Co. v. Summers*, 92 Tex. 621, 51 S. W. 324. Had the supreme court regarded the case as an exception to the general rule of pleading, it is not probable they would have made search for an appropriate allegation as a reason for upholding the judgment. In so far as the question of pleading is involved, the assignment is without merit.

The question of evidence involved in this assignment was presented with much force in oral argument, and, in view of the peculiar state of the facts, more seriously threatens the validity of the judgment than any other question made on this appeal. The point is this: If the axle was sound, and the appellee was without fault in using it as

a part of the equipment of the train, yet, if it was broken as a result of a yielding, uneven, and unballasted track and roadbed, or by reason of the high rate of speed, or if the breaking was due to both these causes, and if the company was negligent in so maintaining its track and roadbed, or in running the train at a high rate of speed, the company would be liable, even though the derailment would not have occurred but for the broken axle. In this view of the case the portion of the charge complained of, if considered alone, and without reference to the charge in its entirety, would be erroneous, or at least misleading. But the court, in the part of his charge preceding the part complained of, instructed the jury that if they believed from the evidence that the unballasted and unrepai red track or excessive speed caused the accident they should find for plaintiffs, though it should also appear that the broken axle contributed to cause the accident. Thus the court left it to the jury to say whether the matters complained of in the petition caused the accident, and this included the breaking of the axle as a result of an unrepai red track and excessive speed. A recovery was allowed if the broken axle, whether due to its own defects or the other conditions above named, contributed to cause the derailment. We are of opinion the charge, considered in its entirety, fully presented the issue of liability, and the assignment is without merit.

It is further contended that the part of the charge in question was upon the weight of the evidence in that it denied to plaintiffs the weight of the accident itself as an evidential fact tending to support the allegations of negligence. It certainly cannot be maintained that the charge by express terms excluded from the consideration of the jury the accident itself. They might consider the accident as tending to establish the existence of the negligent conditions complained of without running counter to any expression in the charge. While the fact of the accident might be considered as tending to establish negligence generally, the plaintiffs, by reason of the form of their pleadings, had abandoned the right to use it except in so far as it might aid in establishing the negligence alleged. The plaintiffs' theory of the accident was met and overthrown by proof adduced by the defendant. The jury have so found upon adequate evidence. When the true cause of the derailment was shown to be other than those alleged, the accident itself lost all its evidential force in so far as it might be relied on in support of plaintiffs' allegations. It was still evidence tending to show negligence on the part of the defendant, but of negligence as to matters which could not form the basis of a judgment in favor of plaintiffs.

In a special charge asked by the plaintiffs the court was requested to impose on them the burden of showing by a preponderance

of the evidence the facts entitling them to recovery. Another portion of the charge is complained of because the court, in reciting the facts averred by plaintiffs as a basis for recovery, failed to mention spreading rails and loose spikes. There is no evidence of loose spikes at the point where the axle broke, or that the rails spread at that point. It is undisputed that at and near that point, and up to where the last sleeper stood after the accident, the rails retained their position and alignment notwithstanding the tremendous strain resulting from the broken axle and its immediate consequences. This would seem to be a sufficient answer to this assignment. But this further reply naturally suggests itself: If it be conceded that there was evidence of spreading rails and loose spikes, these could be no more than the results of the decayed condition of the ties, and were included by inference in the expression, "If you believe from the evidence that defendant's roadbed had in it rotten ties, or that the roadbed was unballasted and out of repair," etc. The other objections to this portion of the charge have been disposed of in a former part of this opinion.

The action of the court in giving special charge No. 3 requested by defendant is assigned as error. In it the jury are charged that unless they believe the death of Byron Johnson was due to a gangrenous condition, and that such condition was due to the injury received in the derailment, they should find for defendant. The objection urged against this charge is that it eliminated from the consideration of the jury the question of shock as the concurrent cause of the death, and also debarred plaintiffs from recovery if he was diseased, and if his condition was aggravated by the injuries received in the wreck. The evidence for the plaintiff without conflict or difference of opinion attributed the death to a gangrenous condition of the bowels, caused by an injury. The language of one of the physicians who performed the autopsy was: "His death was due to sepsis, superinduced by profound shock, due to traumatism. Sepsis is acute blood poisoning." Another physician testified for plaintiffs: "His death was due to surgical shock and acute sepsis as a result of this injury or gangrenous bowel." It thus appears that there is scarcely a shade of difference in the opinion of the two physicians, and they both attribute his death to the gangrenous bowel, and attribute that to the injury. The physicians who testify for defendant say his death was due to causes independent of the accident. We do not think the jury could have possibly been misled. The second objection is without merit, because the court gave a special charge covering the point complained of.

We do not deem it necessary to notice the remaining assignments of error in detail. We regard them as untenable. The verdict

of the jury finds sufficient support in the evidence, and, no reversible error being disclosed by the record, the judgment is affirmed.

Affirmed.

TINSLEY v. CORBETT.¹

(Court of Civil Appeals of Texas. Jan. 24. 1902.)

TRESPASS TO TRY TITLE—FRAUDULENT CONVEYANCE—EXECUTION SALE—JUDGMENT—ADMISSIBILITY.

1. Where plaintiff in trespass to try title claims under an execution sale on an unsatisfied judgment on which previous executions had issued, and the indorsements on the last execution showed the result of the previous process, leaving a balance due, such judgment cannot be excluded as evidence on the ground that it was not shown that the land therein ordered sold was sold in accordance with the judgment, it not being necessary to render the judgment admissible to introduce the order of sale and each previous execution.

2. A judgment was entered for sale of certain land, with execution over in favor of R. against his codefendants in case he paid the judgment. R. purchased the land at the sale, and, the price bid being insufficient to satisfy the judgment, he afterwards purchased the judgment and sold the land and unsatisfied judgment to plaintiff, and paid the judgment creditor. Plaintiff had execution on the unsatisfied judgment against such codefendants, and after sale of certain land brought trespass to try title, claiming the land under such sale. *Held*, that the judgment was admissible in evidence over objection that the payment by R. to the judgment creditor discharged and satisfied it, since his right to pay the judgment and take a transfer from the judgment creditor was absolute, and, being the owner, he had the right to sell it to plaintiff without recourse.

3. In such case the judgment was admissible over objection that a stipulation in the transfer to plaintiff by which R. procured his release from further liability thereon released his codefendants, as such judgment was not a joint judgment, and R. was in no way obliged to his codefendants.

4. A judgment debtor, who was insolvent, subsequent to the judgment and before execution under which certain land was sold and purchased by plaintiff conveyed the land, which exceeded in value the recited consideration, to a near relative. The deed was not recorded for a year after its date. The debt in discharge of which the conveyance was alleged to have been made was placed by the grantee at an amount in excess of the stated consideration. *Held* sufficient to sustain a finding that such conveyance was fraudulent as against plaintiff.

5. Under Rev. St. art. 1375, providing that, where service of process has been made by publication, and defendant has not appeared, a new trial may be granted on defendant's application for good cause shown, the application must set forth facts, which, if true, would require the rendition of a different judgment; and such facts may be controverted, and evidence heard as to their truth.

Appeal from district court, San Jacinto county; L. B. Hightower, Judge.

Action by W. C. Corbett against G. W. Tinsley and another. From a judgment overruling a motion of defendant G. W. Tinsley for a new trial and reinstating a former judgment for plaintiff, he appeals. **Affirmed.**

¹ Writ of error denied by supreme court.

J. B. Scarborough, for appellant. D. F. Rowe, T. C. Rowe, and Robinson & Hansbro, for appellee.

GILL, J. This was a suit in trespass to try title, brought by W. C. Corbett, the appellee, against G. W. and Thomas Tinsley. Personal service was had upon the latter, and he answered, but did not appear either in person or by attorney at the trial. G. W. Tinsley was a nonresident of the state, and was served by publication. He did not appear either in person or by attorney of his own selection. The trial court appointed an attorney to represent him, and a trial was had, resulting in a judgment in favor of Corbett for the land sued for as against both defendants. After the expiration of the term at which the judgment was rendered, G. W. Tinsley filed a motion for new trial, under article 1375 of the Revised Statutes, allowing a nonresident defendant served by publication to file such a motion within two years from the date of the judgment. On a hearing of this motion the court reviewed the whole case, and thereupon overruled the motion, and reiterated the former judgment awarding the land to Corbett. From this judgment G. W. Tinsley has appealed.

Briefly stated, the facts are as follows: Corbett, claiming to be the owner of an unsatisfied judgment in favor of the Houston Land & Trust Company against Chas. S. Reichman, Chas. Tinsley, and Thomas Tinsley, had execution issued thereon and levied on the land in controversy as the property of Thomas Tinsley, one of the defendants in the judgment. The land, which was a tract of 1,476 acres, situated in San Jacinto county, was bought in by Corbett at sheriff's sale, and the sheriff duly executed to him a deed therefor, the bid being credited on the execution. This, with the deeds connecting it with the sovereignty of the soil, constituted Corbett's title to the land in suit. G. W. Tinsley relied on a deed from Thomas Tinsley to him, purporting to convey this and other land to him for a recited consideration of \$2,000. Corbett, on the trial of the motion, attacked the deed from Thomas to G. W. Tinsley on the ground that it was fraudulent, and without consideration, and that Thomas Tinsley was insolvent when it was executed. This deed was of date prior to the levy of the Corbett execution, but subsequent to the date of the judgment on which the execution issued. Corbett's title was assailed on the ground that the judgment upon which the execution issued was satisfied and discharged by sale of lands upon which liens were foreclosed therein, and that Corbett and Reichman, one of the defendants in the judgment, had conspired together to sacrifice said land and keep the judgment alive for the purpose of destroying Thomas Tinsley financially. The

sale under this judgment of the land, upon which the lien was foreclosed for its satisfaction, was not directly attacked on the ground either of irregularity in the process or for inadequacy of price. It was shown, however, that this land was in value about equal to the judgment. The following is a brief history of this judgment: C. S. Reichman sold to Chas. Tinsley an undivided half interest in certain lands situated in Harris county, Tex., taking vendor's lien notes in payment therefor. Chas. Tinsley sold this land to Thomas Tinsley, the latter assuming the payment of the outstanding vendor's lien notes held by C. S. Reichman. Reichman sold and transferred these notes to the Houston Land & Trust Company, and guaranteed their payment. A partition was made between Reichman and Thomas Tinsley, whereby a part of the land was set apart in severalty to him, the remainder to Reichman, and they agreed that the notes should bind only the part so set aside to Tinsley, but this agreement was not in such form as to bind the trust company holding the notes. Upon default as to these notes the trust company brought suit against Reichman and Chas. and Thomas Tinsley, and procured judgment against them and a foreclosure of the lien upon the land. By the terms of this judgment the land was ordered sold, the tracts set apart to Thomas Tinsley to be first offered for sale, and, if the bid therefor was not sufficient to satisfy the judgment, then to call off the sale, and sell the undivided interest unaffected by the partition. A personal judgment was rendered against each of the defendants, but Reichman was held secondarily liable as guarantor, with execution over against his codefendants in case he had to pay the judgment. Order of sale was issued as prescribed by the judgment, and levied on the lots set aside to Thomas Tinsley, but at the request of the trust company the sale was not made. The land was subsequently sold under order of sale, and appears to have been bought in by Reichman, the bid being credited on the judgment, and the credit thus made amounting to \$48. That Reichman purchased the land as just stated appears by inference only, as the facts upon this point are by no means clear. Reichman then went to the trust company, and arranged to buy the judgment, and have it transferred to him. He then arranged to sell to Corbett the land thus bought and the unsatisfied judgment for enough money to pay the trust company. This arrangement was consummated, the money paid by Corbett going directly to the trust company, the latter transferring the judgment to Reichman, and Reichman transferring it to Corbett. Reichman stipulated with Corbett that he should be released from further liability on the judgment. It was for the satisfaction of the balance due on this judg-

ment that Corbett had execution issued and levied on the land in controversy. Appellant objected to the introduction of this judgment in evidence: First, because it was not shown that the land therein ordered sold was ever sold in accordance with the terms of the judgment; second, because when Reichman paid its value to the trust company the judgment was thereby discharged and satisfied; third, because the stipulation in the transfer to Corbett, by which Reichman procured his release from further liability thereon, had the effect of releasing his codefendants.

The execution issued in behalf of Corbett purported to be the eighth execution issued on said judgment. By official indorsements thereon it appeared that an order of sale had issued, and the proceeds of the sale thereunder were duly credited. It showed other credits, aggregating \$570.16, leaving a balance due on the judgment of \$2,022.19. We do not think it was necessary, in order to render the judgment admissible, to also introduce the order of sale and each previous execution. The indorsements on the last execution disclosing the result of proceedings under former process were required by law, were official in character, and, if untrue, it devolved on the appellant to show their falsity. We are of opinion the objection, in so far as it was based upon this ground, was not well taken.

The second ground of objection is alike untenable. Reichman was adjudged liable as an indorser. By the terms of the judgment he was entitled to execution against his codefendants in case he paid the judgment. He had the right to purchase at foreclosure sale, and the law did not require that he assume any greater burden as a bidder thereat than a stranger to the judgment wishing to bid on the land. If, for want of higher bids, he bought at a bargain, he was entitled to such profit as he could make out of the transaction. The right on his part to pay to the trust company the balance due on the judgment and take a transfer thereof was absolute. In the absence of a transfer, such a payment would not have extinguished the judgment, for by its very terms its life was preserved for the benefit of Reichman. These propositions are too plain and well settled to require citation of authority in their support. That Reichman thereafter had the right to sell the land which he had purchased at foreclosure sale, and the judgment also, for enough to reimburse him for the purchase price and his outlay in settling with the trust company, is too plain for dispute; and, being the absolute owner of the judgment at that time, his right to sell the judgment to Corbett without recourse on himself was equally clear.

It is further contended by appellant that the land sold under the order of sale was a trust fund, sacred to the payment of the

judgment, and Reichman, having himself become the purchaser, was bound to use it for the satisfaction of the judgment, and, since it ultimately served this purpose, the judgment was discharged, it being shown that Corbett had knowledge of the facts. Appellant, in urging this proposition, loses sight of the fact that the trust company judgment against Thomas and Ohas. Tinsley and Reichman was not a joint judgment. Reichman owed nothing to his codefendants. By the very nature of the judgment he was their adversary. What right had Thomas Tinsley (who had acquired the land and assumed the payment of the notes, and who was primarily liable for their payment) to expect that Reichman would trouble himself, or jeopardize his own interest, to protect him, Thomas Tinsley? The latter had defaulted to Reichman as well as to the trust company, and by his failure to pay the notes had left Reichman to protect them. In doing so he had the right to protect himself. That Reichman, when he purchased at foreclosure sale, took the title to the land as against the Tinsleys, subject to be set aside only for irregularities or inadequacy of price, is clear, and the sale is not attacked upon those grounds. It may be contended by appellant that Reichman exercised these rights in a harsh and unconscionable manner, and that Corbett connived at it and profited by it, but such matters cannot be complained of in a proceeding of this sort. It follows from what has been said that the court correctly admitted in evidence the judgment and execution in support of Corbett's claim under execution sale. It follows also that judgment was properly rendered in his favor unless the sale of the San Jacinto county land by Thomas Tinsley to G. W. Tinsley was a valid and bona fide sale. Corbett contends that the sale was without consideration, and the deed made at a time when Thomas Tinsley was notoriously insolvent. This deed was made between the date of the trust company judgment and the issuance and levy of the Corbett execution, and purported to convey two other tracts of land besides the one in question. G. W. Tinsley claims that the land was conveyed to him in satisfaction of a debt due by Thomas Tinsley to him, amounting to \$3,000. The following facts either directly or remotely tend to establish the invalidity of the transaction: Thomas Tinsley testified the land conveyed by the deed was worth \$5,000. The deed recited a consideration of \$2,000. The debt in discharge of which it was conveyed was placed by appellant at \$3,000. The deed was not placed of record for a year after its date. G. W. Tinsley at once executed a power of attorney to Thomas Tinsley empowering him to handle and control the land, and the latter was thus empowered when he first answered in this suit, yet he set up no defense for G. W. Tinsley, and permitted judgment

to be rendered against him as a nonresident. Though Thomas Tinsley was his attorney in fact, and a codefendant in this suit, and invested with the broadest power over these lands, he does not appear to have notified his absent brother of its pendency. Prior to the date of this deed Thomas Tinsley had executed a "blanket" deed to G. W. Tinsley for all his lands in Texas, these lands being scattered over many counties in the state, and amounting to thousands of acres. G. W. Tinsley never rendered the land in question for taxes nor paid taxes thereon. Thomas Tinsley in this suit answered for himself by general denial and plea of not guilty, when at that time he was authorized to act as attorney in fact for his brother. Thomas Tinsley at the date of this deed was insolvent. It would serve no useful purpose to review the evidence upon this latter point. Suffice it to say we have made such investigation as was possible in the confused and unsatisfactory state of the record, and have found no reason to disturb the finding of the court on the question of insolvency. Thus we have an insolvent debtor conveying a large property to a near relative, the property in value grossly exceeding the recited consideration. When the issue of good faith is raised, the vendee of the insolvent fails to testify. With this added to the suspicious circumstances above recited, we cannot say that the trial court was not justified in refusing to credit the testimony of the insolvent as to the good faith of the transaction, especially when it is remembered that the opposing facts called for corroboration; and if it was in existence it could have been supplied by the testimony of G. W. Tinsley.

Appellant also complains because the court, in hearing his motion for new trial, reviewed the entire case, and placed the burden of proof on him, whereas the burden in the first instance would have been upon Corbett. In motions such as the one in question the "good cause shown," as required by the statute, necessitates the setting forth of facts, which, if true, would require the setting aside of the judgment assailed and the rendition of a different judgment. It would be idle to set aside a judgment and retry a cause when no other result than the one already reached could be attained. The allegations are not to be accepted as true, but may be controverted, and evidence heard as to their truth. This course the trial court pursued, and committed no error in so doing. *Keator v. Case* (Tex. Civ. App.) 31 S. W. 1099; *Browning v. Pumphrey*, 81 Tex. 166, 16 S. W. 870; *O'Neill v. Brown*, 61 Tex. 34. The trial court did not place the burden of proof upon appellant. The judgment distinctly states that appellee established his case by a preponderance of the evidence.

We do not deem it necessary to discuss the other assignments. They are without merit. Appellant's motion to correct the statement of facts which was submitted and taken with

the case is overruled. Having found no reversible error in the record, the judgment is affirmed.

Affirmed.

On Motion for Rehearing.

(Feb. 22, 1902.)

Appellant complains of our finding that the deed of Thomas Tinsley to G. W. Tinsley of date October 20, 1897, was not recorded until about a year after its date. The statement in the opinion is not accurate, as the deed was in fact recorded in San Jacinto county in February of the year following its date. It had been placed of record in another county shortly after its date. We were misled as to the state of the record on this point by a statement in the brief of appellee.

Appellant also complains of a statement in the opinion to the effect that appellee disclaimed his title from the sovereignty of the soil. If the statement is not technically correct, it is immaterial, as both parties claim under Thomas Tinsley, their immediate vendor. No point was made before this court involving an objection to the evidence either on the ground that Corbett failed to connect himself with the sovereignty of the soil or failed to show common source. Neither of these matters have any effect on the conclusion reached by us.

It is further urged that we erred in finding that Thomas Tinsley made a blanket deed to his brother, covering all his land in Texas. The deed spoken of was of date January, 1899, does not seem to have been adduced in evidence, and Thomas Tinsley in testifying about it says he cannot say that it was not a blanket deed including all his lands in Texas; thinks it specified the surveys, and the grantee was his brother. He does not say how much land it covered. On page 108 of the record he leaves a like impression, and in his affidavit on motion for new trial he admits that the Comanche county deed contained expressions which were susceptible of such construction, but swore that he had no intention to make it a blanket deed. The Comanche county deed was not of date prior to the deed assailed in this suit, but was subsequent thereto, and the expression in the opinion is erroneous to that extent. If such a deed in fact existed, it could not affect the inquiry here except in so far as it might throw light upon the financial condition of Thomas Tinsley at the prior date, viz., October 20, 1897. We were undertaking to state in a general and cursory way some of the prominent facts disclosed by the record indicating insolvency. To indicate in this opinion the exact state of the record on the question would be next to impossible. We have seldom found a record so involved and confused. But the record itself is not more confusing than the testimony of Thomas Tinsley. He testifies to a vast number of

tracts of land scattered over many counties in the state. Nearly all of them have either been hypothecated or are affected by judgment liens. Many of them the witness knows little of either as to the title or status as to liens. There are foreclosures through the courts, with interest, costs, and attorney's fees; trustee's sales out of court, with attendant costs; and through and over it all wanders the Beck judgment, the Houston Land & Trust Company judgment, and the Corbett judgment, seeking something belonging to defendant and subject to execution. This search, according to Corbett, extended over five years. According to Thomas Tinsley it resulted in the sacrifice of thousands of dollars' worth of his lands. If this deed to G. W. Tinsley is not set aside, the judgment must go forth again seeking what of Thomas Tinsley's property it may devour. The record reeks with indications of the hopeless confusion and insolvency into which Thomas Tinsley's affairs had fallen. Yet counsel for appellant gravely insists not only that this court erred in refusing to disturb the judgment of the trial court, but that there is no evidence upon which to base such a finding. Counsel is surprised that the trial court did not credit the statement of appellant that he was worth thousands of dollars over his liabilities, when one of his chief complaints was that a judgment which he had failed to pay was destroying him.

Had counsel for each side been more careful to be accurate in their statements, this court would have been spared much tedious labor, and the errors pointed out in the motion would have been avoided. We have carefully considered the motion for rehearing, but have found no reason to change our conclusion as expressed in the original opinion.

The motion is overruled. Overruled.

BENNETT v. STATE.

(Supreme Court of Arkansas. Feb. 8, 1902.)

Dissenting opinion. For majority opinion, see 66 S. W. 198.

RIDDICK, J. I regret that I am unable to agree to the judgment announced by the court, but a consideration of the case has convinced me that the learned circuit judge committed an error in instructing the jury, and that a new trial should be granted. There was, as is stated in the opinion of the court, evidence tending to show that the defendant was seen leading the horse alleged to have been stolen away from its usual range, where it was accustomed to stay, and to show that the defendant had taken actual possession of the horse. But, on the other hand, there was evidence contradicting this evidence, and tending to show that the horse was an estray running at large near a farm owned by a brother

of defendant; that the horse jumped into the field which Hall, a tenant of defendant's brother, was cultivating; and that Hall put him up and worked him, but that defendant never had possession of the horse or exercised any act of ownership to him. Defendant testified further in his own behalf that he had never at any time either had possession of the horse or claimed to be the owner of him. Under this evidence the jury could have found that defendant had claimed to be the owner of this stray horse, and had offered to sell or trade him, but had never taken possession of him, or had actual control of him in any way. It was possible that the jury might come to this conclusion on the facts. The law as to their duty, in that event, should have been made plain to them. But this is where I think the charge to the jury was defective and misleading. After giving correct definitions of the crime of larceny, and correctly instructing the jury on the law of larceny in a general way, the court comes in the sixth instruction to deal with the law as applied to the peculiar facts of this case, and says: "If the jury believe that the horse in question was running at large and regarded as an estray in the neighborhood, and they further find from the evidence beyond a reasonable doubt that defendant took possession of said horse, or exercised such ownership over him as owners of live stock usually exercise over the same, with intent to steal, they will find defendant guilty." In other words, the judge, as I understand this instruction, told the jury that if the defendant took possession of the horse with intent to steal him, or exercised such ownership over him as owners of live stock usually exercise over the same, with intent to steal, they should find him guilty. There is nothing to show what was meant by the words "exercised such ownership over him as owners of live stock exercise over the same." The jury were left open to put such interpretation on the words as they chose to do, and to convict the defendant if in their opinion he had exercised such ownership over the horse as owners of live stock usually exercise over them.

Now, it is well known that there are considerable sections of this state in which the lands are wild and uninclosed, and where owners of live stock frequently allow them to run at large on the range, with little control over them. They are sometimes bought and sold on the range without any actual possession or delivery of the animals; and, so far as we know, this jury may have concluded that the mere claim of ownership or an offer to sell the horse on the part of the defendant, without any taking of possession, was sufficient to bring him within the scope of this instruction, and to justify a conviction. For this reason, it seems to me this instruction was not only wrong, but that, under the facts of this case, it was likely to be prejudicial to the defendant.

After this instruction was given, counsel for defendant, in order to prevent the jury from being misled by it, asked the court to tell the jury explicitly that a claim of ownership without a taking of the horse by the defendant was not sufficient to convict. These instructions asked by the defendant are set out in the statement of facts made by the court, and it is unnecessary to repeat them here. It seems to me very plain that, having given the instruction above referred to, one or more of those asked by the defendant should have been given to make plain to the jury that a mere claim of ownership or an offer to sell the horse by him was not sufficient to convict when no caption or asportation was proved. But the court refused all of these instructions and no one can say from the evidence and instructions whether the jury found a taking of the horse as alleged in the indictment or not. In referring to this point, the court in its opinion says that no one can infer an intent to steal from a mere claim of ownership, and that a man who would find another guilty of larceny on such evidence would be unworthy to sit on the jury. That may be true, but men ignorant of the law often sit on the jury. It is for that reason that judges are required to instruct the jury as to the law applicable to the facts of the case. That the law is plain is no excuse for refusing to give it when asked. The instruction asked in this case, in my opinion, clearly stated the law, and should have been given, and the refusal to do so I think was prejudicial error, for which the judgment should be reversed.

WOOD, J., concurs in the dissenting opinion.

KANSAS & T. COAL CO. v. GABSKY et al.
(Supreme Court of Arkansas. Feb. 15, 1902.)

DEATH—ACTIONS—PARTIES—NEXT OF KIN.

Under Sand. & H. Dig. § 5051, declaring that no person under the age of 14 years shall be permitted to enter any mine to work therein, and section 5058, providing that for any injury to persons occasioned by willful violation of the act a right of action shall accrue to the party injured for any direct damages sustained thereby, no right of action exists in the next of kin of such an employé for damages resulting from his being killed while so employed; the object of the act being to prohibit the working of children under 14 years of age in coal mines at all.

Hughes, J., dissenting.

Appeal from circuit court, Sebastian county, Greenwood district; Styles T. Rowe, Judge.

Action by Mary Gabsky and others against the Kansas & Texas Coal Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Hill & Brizolari, for appellant. Mechem & Bryant, for appellees.

BUNN, C. J. This is a suit for damages occasioned by the death of the minor son of the plaintiff Mary Gabsky while working in a coal mine of the appellant in Sebastian county, Ark., on the 28th day of January, 1890. The complaint is as follows: "Now come the plaintiff Mary Gabsky, for herself, and Sophia Gabsky and Stephen Gabsky, minors, by Mary Gabsky, their next friend, and say: (1) That they are residents of Sebastian county, Ark., and the defendant is a corporation organized under the laws of Missouri, and engaged in the business of mining coal in Arkansas, at all the dates hereinafter mentioned. (2) That on or about the 1st day of January, 1890, the defendant willfully permitted one John Gabsky, a minor aged 11 years, to enter its coal mine No. 51, near Huntington, Ark., to work therein, and the said John Gabsky continued in said mine until the 28th day of January, 1890, when he was instantly killed in said mine by a large rock falling upon him from the roof thereof. The said John Gabsky left surviving him, as his sole heirs and next of kin, the plaintiff herein Mary Gabsky, who was his mother, and Sophia Gabsky, a sister aged 8 years, and Stephen Gabsky, a brother aged 3 years. None of the plaintiffs have any property or means of support, other than the personal exertions of the plaintiff Mary Gabsky. (3) In consequence of the willful violation of law by the defendant, in permitting the said John Gabsky to enter its mine to work as aforesaid, and his resulting death, the plaintiffs have sustained direct damages in the sum of \$2,000. Wherefore they pray judgment against the defendant for \$2,000 and costs."

This complaint was filed August 24, 1890, and summons served the next day. The defendant answered on the 12th of September, 1890; the first paragraph of its answer being a general demurrer to the complaint as not stating facts sufficient to constitute a cause of action. The second paragraph denies that any cause of action exists in the plaintiff against the defendant, if the death of John Gabsky occurred as alleged. The third paragraph avers a want of information as to certain averments in the complaint as to matters pertaining personally to the plaintiffs and deceased, averring the materiality of the same, and demanding strict proof of the same. The defendant in this paragraph denies that it willfully permitted John Gabsky, a minor of the age of 11 years, to enter its coal mine No. 51, near Huntington, Ark., to work therein, and states the facts to be "that one Thomas Reskoski, a miner then in the employ of the defendant, and who lived or boarded with the plaintiff Mary Gabsky, brought the said John Gabsky with him to the said mine No. 51, and asked permission of the pit boss thereof to allow him to take the said John Gabsky into the mine to work for him and the said Reskoski, and the pit boss was assured by the said Reskoski

ki and other friends of said John Gabsky that he was of the age of 15 years and could read and write, and the physical appearance of the said John Gabsky would lead an ordinarily prudent and reasonable man to believe that he was over the age of 14 years, and, so believing and being so assured, the said pit boss permitted the said Gabsky in the mine for the said Reskoski; and the defendant is informed and believes, and so asserts and avers, that the death of said Gabsky was caused by the neglect and recklessness of the said Reskoski and said John Gabsky, and other miners while said Gabsky was working, and not through any negligence or dereliction of duty upon the part of this defendant. The defendant states, further, that it was with the consent and approval of Mary Gabsky that said John Gabsky was permitted to work in said mine, and, if said John Gabsky was under the age of 14 years, said fact was known to his mother, the said Mary Gabsky, and said fact was unknown to this defendant; and, the physical appearance of said John Gabsky indicating that he was of the age where he could lawfully enter said mine to work, the defendant did not willfully permit a minor under the prohibited age from working therein, and the said mother by so permitting the defendant to be imposed upon, and wrongfully permitting her said son to work in the mine [while] under the age prohibited by law, if such be a fact (and plaintiff has so alleged), it was the negligent act of said plaintiff, and not of this defendant, which caused the death of said John. That it was the duty of the parent of said John to refrain from allowing him to work in the mines under the age permitted by the statute; and the wrongful and knowing act of the parent of said John, and not the willful act of defendant, together with the negligence of said John and his fellow workers, were the causes of his death."

The evidence in the case substantially sustains the averments of the answer. The demurrer of the defendant, contained in the first and second paragraphs of its answer, raises a question of law,—whether or not Mary Gabsky, for herself or as next friend of her two surviving children, has a right of action against the defendant. The complaint is manifestly founded upon the statute known as the "Minor's Act,"—nothing more, nothing less. The two sections which are material in this controversy are digested in Sandel's & Hill's Digest as follows:

"5051. No person under the age of 14 years shall be permitted to enter any mine to work therein."

"5058. For any injury to persons or property occasioned by willful violation of this act, a right of action shall accrue to the party injured for any direct damages sustained thereby."

The direct damages here referred to means damages for injury occasioned by the fact of being permitted to work in the mines;

and, the working in the mines under the prohibited age being shown, and to be willful in the legal sense, it is ordinarily conclusive upon the defendant, for the object of the act was to prohibit the working of children under 14 years of age in coal mines at all. If it is thought that an action for damages for the death of a person, as in this case, survives in the next of kin, it should be asserted by a complaint based upon our statute of survivorship, commonly known as "Lord Campbell's Act." What should be shown in a case under that act we leave to the plaintiffs to determine. But, as the case was tried solely under the minor's act, and a complaint made in strict conformity thereto, and no provision is made in that act for a survivorship of the action, the demurrer set forth in the first and second paragraphs of the answer should have been sustained; and the judgment of the court is reversed, and the cause is remanded for a new trial, with privilege to the plaintiff to amend her complaint, if she so desires to do.

HUGHES, J., dissents.

POPE et al. v. CAMPBELL et al.

(Supreme Court of Arkansas. Feb. 15, 1902.)

TAXATION—TAX SALE—VALIDITY—JURISDICTION—WARNING ORDER—ENTRY ON COURT RECORD.

Acts 1881, p. 63, § 1, provides that any citizen who shall give security for costs may file a complaint for the enforcement of overdue taxes in equity, in the name of the state, in the court having equity jurisdiction. Section 2 declares that on the filing of such complaint the clerk of the court shall enter on the record a warning order, which may be in a certain form. Sand. & H. Dig. § 1115 reads that the circuit courts shall have exclusive jurisdiction as courts of equity; and section 1223 recites that the records of proceedings at law shall be in books separate and distinct from the records and proceedings in equity. A warning order in a proceeding to enforce overdue taxes was entered on the records of the circuit court kept for law proceedings, and not on the chancery record. *Held*, that the court had no jurisdiction to make a decree for the sale of lands for such overdue taxes, so that a sale thereof was void.

Bunn, C. J., dissenting.

Appeal from Woodruff chancery court; Edward D. Robertson, Chancellor.

Action by Sallie A. Pope and others against Alvin Campbell and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Appellants brought an action in equity praying for the cancellation of deeds founded upon a purchase of lands at "overdue tax" sale; contending that the tax sale was void, and that the court that made the decree for the sale of the lands for overdue taxes had no jurisdiction, because the warning order required by the statute to be entered upon the record of the chancery court was not entered upon the record of that court, but,

Instead, was entered on the record of the circuit court. At the time of the rendition of the decree in the overdue tax suit the circuit court had both law and chancery jurisdiction (in 1883). It kept separate records as required by law (Sand. & H. Dig. § 1293), for chancery and law proceedings. The order was made by the clerk and entered on the record for proceedings at law. This evidence appears in the record: A written and signed statement of O. B. Mills, deputy clerk of Woodruff county (which statement was admitted in evidence by consent of parties), to the effect that from the year 1865 to the present time there has been kept by the clerks of the circuit court in Woodruff county separate records, in which the proceedings at law and the proceedings in equity have been kept; that chancery record A, introduced in this cause, is the only record of equity proceedings kept in Woodruff county from 1865 to August 25, 1883, and that chancery record B, introduced in evidence, is the only record of equity proceedings kept by the clerk of Woodruff county from August 25, 1883, to the present time; that the order warning landowners to appear, as provided by section 2 of the Acts of 1881, in the cause of "State, on Relation of V. H. Henderson, v. Certain Lands," which proceeding was known as the "Overdue Tax Proceeding of Woodruff County," was never entered in either of these records of proceedings in equity. All the records of the proceedings in such overdue tax suit are entered upon these two chancery records, except the warning order mentioned above, and the pro confesso decree entered by the clerk in vacation. The record marked, "Minutes B, Circuit Court," introduced by defendant, is the separate record of proceedings at law kept by the clerk of the circuit court exclusively for the record of such proceedings. The warning order and pro confesso decree in the overdue tax case of 1883, above mentioned, is entered in this record, "Minutes B, Circuit Court." The warning order on pages 166 to 176, December 22, 1882, in so far as it relates to the lands in this suit, is as follows: "The plaintiff introduced the two chancery records referred to by Mr. Mills in his statement, chancery records A and B. The defendant introduced the law record referred to by Mr. Mills in his statement, called, 'Minutes B, Circuit Court.'" The court dismissed the bill for want of equity.

H. F. Roleson, for appellants. J. T. Paterson, for appellees.

HUGHES, J. (after stating the facts). The only question for the consideration of the court is whether the warning order in the overdue tax proceeding was entered of record as required by the act of 1881, p. 63. The act provides:

"Section 1. That hereafter any citizen of this state who shall give security for costs,

may file a complaint in equity in the name of the state, in the court having equity jurisdiction," etc.

"Sec. 2. On the filing of such complaint the clerk of the court shall enter on the record an order, which may be in the following form," etc.

"The circuit court shall have exclusive jurisdiction * * * as courts of equity. * * *" Sand. & H. Dig. § 1115. "The records of proceedings at law shall be in books separate and distinct from the records and proceedings in equity." Id. § 1293.

That the act contemplated that the warning order should be placed on the chancery record is too plain for contention. The suit shall be in equity. The records of its progress must be kept on the equity record, in books separate and distinct from the records of cases at law. If this requirement of the statute is designed to serve any purpose, then it is mandatory. In Gregory v. Bartlett, 55 Ark. 34, 17 S. W. 344, this court said in speaking of the notice required by this act: "When this requirement of the statute is complied with, it furnishes to the owner of delinquent lands a means of information which the statute designed he should receive. Searching the records, and finding no order for proceeding against his land, he had a right to presume none existed. There is nothing in the statute to indicate that the legislature considered the entry of the order upon the record as of any less significance than the publication of it. * * * The statute does not authorize the clerk to make the order in any manner other than by entry on the record, and authorizes publication of nothing except a copy of the record. To say that the clerk can dispense with the record, and make his entry in the first instance in a newspaper, would be to disregard a plain provision of the statute, and dispense with one of the means the law affords for imparting information to the landowner. But when a statutory provision is plain, and is made to aid in the accomplishment of a useful end, it cannot be treated as merely directory, and so be disregarded." It is true that in this case of Gregory v. Bartlett there was no order made, as far as the record showed. Nevertheless it bears on this case.

The judgment is reversed, and the cause is remanded, with directions to enter a decree for appellants.

BUNN, O. J. (dissenting). The point in this case is materially different from that decided in Gregory v. Bartlett, 55 Ark. 30, 17 S. W. 344; for there there was a total failure to enter upon the record of the chancery court, or any record of any court, the preliminary or foundation order upon which the constructive summons or notice should be based, and therefore the proceedings afterwards were held to be void. In the case at bar the order was made by the clerk, but inadvertently it was entered in the book contain

ing the law proceedings of the circuit court; the same judge having jurisdiction of both law and chancery, and the same clerk acting in both in keeping the minutes and record. In other words, it was a mere misprision of the clerk, by which the order was entered in the wrong record book; both being under his control. The object of the order is not to give notice to parties litigant of the pendency of the suit against them and their lands, for that notice is a publication, according to the statute, of a copy of the order made by the clerk; and it follows, therefore, that the entering of the order on the record is for a justification of the clerk in publishing a copy of the same. No litigant could possibly suffer injury by such a misprision. If the publication of a copy of the order called his attention to the suit, and he wished to inquire into its regularity, he almost necessarily would call upon the clerk for the record information. This transaction was many years ago, and as the same defect, if jurisdictional defect it is, as held by the decision of the court, it doubtless extended to all the lands in the county involved in the overdue tax proceeding. The injury would therefore be far-reaching and greatly extended in its scope. I do not think a mere misprision of the clerk as to a matter not prejudicial to litigants should be allowed to work such a widespread calamity.

ROTH v. MERCHANTS' & PLANTERS' BANK.

(Supreme Court of Arkansas. Feb. 15, 1902.)

JUDGMENTS—RES JUDICATA.

A judgment in an action on a note given for a patent, but not showing such fact on its face, which adjudges the note invalid under Sand. & H. Dig. § 493, providing that notes given for patents, unless executed on printed forms, showing such fact, shall be absolutely void, is not a bar to a subsequent suit against the maker for a balance due, and evidenced by the note, on the agreed price of the patent.

Appeal from circuit court, Jefferson county; Jno. W. Crawford, Special Judge.

Action by the Merchants' & Planters' Bank against Louis Roth. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

Austin & Taylor, for appellant. White & Althelmer, for appellee.

BATTLE, J. "Louis Roth, the appellant, purchased an undivided one-fourth interest in a patent known as the 'Eclipse Folding Wagon Step,' and agreed to pay \$1,500 therefor. He paid \$1,000 in cash, and executed his note to C. P. Thornton, his vendor, for \$500, in payment of the balance. In due course of trade, for a valuable consideration, without notice, and before maturity, the Merchants' & Planters' Bank, of Pine Bluff, became the owner of this note. At maturity the maker, Louis Roth, refused to pay the

note, and in a suit brought in the Columbia circuit court against him and C. P. Thornton as indorser, he filed an answer, and, after admitting the execution of the note to C. P. Thornton, and transfer of same to plaintiff Merchants' & Planters' Bank, pleaded 'for a complete defense against the note, * * * that it was given by him to his co-defendant for an interest in a patent right, and was not on a printed form, and did not show on its face that it was executed in payment of such patent right, as required by sections 493, 494, Sand. & H. Dig., and the said note is therefore void'; and the court, sitting as a jury, found that issue in favor of the defendant, and rendered judgment accordingly. Suit was then brought in the Jefferson circuit court on account for the balance of the purchase money by the bank, and, as the account was not assignable by statute, C. P. Thornton, the assignor, was joined as plaintiff. To this suit the appellant, Louis Roth, pleaded the judgment of the Columbia circuit court declaring the note void as a bar to the right of appellees to recover upon the original consideration." The circuit court held that the plaintiffs in the latter suit were entitled to recover, and rendered judgment in their favor for the amount sued for, and the defendant appealed.

Section 493, Sand. & H. Dig., upon which the appellant's defense to the action against him in the Columbia circuit court was based, is as follows: "Any vendor of any patented machine, implement, substance, or instrument of any kind, or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this state on a credit, in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void."

The object of this statute was to save to a vendee of "any patent machine, implement, substance, or instrument of any kind, or character whatsoever" all the defenses he may have to an action on his note for the purchase money, and to prevent the loss thereof by a transfer of the note to an innocent holder before maturity. The failure to comply with the statute does not affect the validity of the sale, but renders only the note absolutely void. The penalty does not reach beyond the object to be accomplished. Though the note may be void, the vendor can recover whatever may be due him on the contract of sale from the vendee. *Tillman v. Thatcher*, 56 Ark. 334, 19 S. W. 968;

Marks v. McGehee, 35 Ark. 217; Tucker v. West, 29 Ark. 401; Stratton v. McMakin, 84 Ky. 641, 4 Am. St. Rep. 215; Railroad Co. v. Stansell, 43 Ark. 275.

The defense of appellant to the action instituted in the Columbia circuit court was in the nature of a plea of abatement. It did not reach the merits of the case, but the validity of the note only. The only thing adjudicated by the judgment of that court was the validity of the note sued on. This judgment was no bar to an action upon the contract of sale.

The effect of a judgment upon causes of action is unlike that it has upon defenses. The defendant in an action is required to set up all his defenses to the same. "A valid judgment for the plaintiff sweeps away every defense that should have been raised against the action; and this, too, for the purpose of every subsequent suit, whether founded on the same or a different cause." Ellis v. Clarke, 19 Ark. 421, 70 Am. Dec. 603; Bell v. Fergus, 55 Ark. 588, 18 S. W. 931; Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204.

As to causes of actions the rule is stated by the supreme court of the United States in Russell v. Place, 94 U. S. 608, 24 L. Ed. 214, as follows: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to give this operation to the judgment it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the records,—as, for example, if it appear that several distinct matters may have been litigated upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." It further said in the same case: "To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be canceled was necessarily tried or determined,—that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

In Shaver v. Sharp Co., 62 Ark. 78, 34 S. W. 262, it is said: "That which has not been tried cannot have been adjudicated. * * * That which is not within the scope

of the issues presented cannot be concluded by the judgment." See, also, Dawson v. Parham, 55 Ark. 286, 18 S. W. 48; McCombs v. Wall, 66 Ark. 336, 50 S. W. 876; Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195; Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204.

The same rule obtains as to cross claims, set-offs, and recoupments. The defendant in an action against him is not bound to set up such claims, if he has them, but it is generally optional with him to do so or not. McWhorter v. Andrews, 53 Ark. 307, 13 S. W. 1099; 21 Am. & Eng. Enc. Law (1st Ed.) 224, and cases cited.

The judgment of the Jefferson circuit court is affirmed.

MALONEY et al. v. TERRY.

(Supreme Court of Arkansas. Feb. 8, 1902.)

FRAUD—ATTORNEY AND CLIENT—EQUITY—JURISDICTION—TRUSTS.

Equity has jurisdiction of a bill by a client against his attorney, charging that the latter, in settling a claim against the client, fraudulently procured and retained a greater sum from the client than was paid to settle the claim, and asking that the attorney be decreed to be a trustee as to the sum fraudulently obtained, and to be compelled to account therefor.

Bunn, C. J., dissenting.

Appeal from chancery court, Pulaski county; Thomas B. Martin, Chancellor.

Action by W. J. Terry, as administrator of the estate of Joseph Townsend, deceased, against E. S. and L. O. Maloney, to declare a trust and for an accounting. From a decree in favor of the plaintiff, the defendants appeal. Affirmed.

Appellee, W. J. Terry, as administrator of the estate of Jos. Townsend, deceased, brought suit in the Pulaski chancery court by bill in equity as follows: "The plaintiff, for his cause of action, alleges: That his intestate, Jos. Townsend, employed E. S. Maloney as an attorney and agent to negotiate a loan of \$3,000, and to settle a claim with Sarah Townsend. That he was to settle said claim with the approval of said Jos. Townsend, upon terms most advantageous to him, the said Townsend. That he took a retainer from Sarah Townsend in the same transactions. That the said E. S. Maloney reported to said Jos. Townsend that he could not procure a settlement of the claim of Sarah Townsend for less than \$1,850. That he reported to Sarah Townsend that plaintiff would only pay her \$1,500. That upon his false and fraudulent representations the said Jos. Townsend agreed to pay him \$1,954.50,—\$100 for his fee, and the \$1,850 for settlement with Sarah Townsend, and \$4.50 for revenue stamps, etc. The said Jos. Townsend did pay him said sum of \$1,954.50 for said terms, and the said Maloney only paid to the said Sarah Townsend \$1,425, claiming that he had only received from said Jos. Townsend \$1,500, out of which

he reserved the sum of \$75 for fees from her, the said Sarah Townsend. That the said E. S. and L. C. Maloney are partners in the practice of law, and were at the date of the transaction herein set forth. That the said E. S. Maloney violated his trust, and speculated upon the rights of plaintiff. That since the date of said transaction Jos. Townsend has departed this life, intestate, and W. J. Terry has been appointed the administrator of said Townsend's estate. Wherefore plaintiff prays that process issue against said defendants, and that this court decree that the said E. S. and L. C. Maloney are trustees, and hold said sum of \$450 as trustees for plaintiff, and that they be required to account for and pay the same to the plaintiff; and for all other, proper, and general relief in the premises." The defendants moved to transfer the cause to the Pulaski circuit court because the bill did not state facts within the jurisdiction of a court of equity. The motion was overruled, an answer filed, and the case afterwards heard upon depositions and other written evidence, and decree was entered for the appellee.

Rose & Coleman, for appellants. Blackwood & Williams, for appellee.

WOOD, J. (after stating the facts). We are asked to reverse only upon the ground that the court had no jurisdiction. The appellants contend that there was a complete and adequate remedy at law, and for that reason the court of chancery should have transferred the cause to the law court. For the purpose of this motion we must look only to the complaint, and treat its allegations as true. It sets up the trust relation, and shows that the money sued for was obtained through fraudulent representations, and was received and is held in a fiduciary capacity. That was sufficient to give the chancery court jurisdiction. Having jurisdiction of the subject-matter, it does not have to give it up because a court of law could also give complete and adequate redress. This court, as early as *Bently v. Dillard*, 6 Ark. 79, and *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696, held that: "If a court of law and a court of equity have concurrent jurisdiction over the subject-matter, the party may make his election as to the tribunal which shall determine the controversy, and cannot be compelled to submit to an adjudication at law when he prefers going into chancery." This doctrine is as sound now as it was then. There has been nothing in the constitution, statutes, or decisions to change it. Originally all matters growing out of trust relations were exclusively of equitable cognizance. But, as Judge Story remarked: "In modern times courts of law frequently interfere, and grant a remedy under circumstances in which it would certainly have been denied in earlier periods; and sometimes the legislature by

express enactments has conferred on courts of law the same remedial faculty which belongs to courts of equity. Now, as we have seen, in neither case, if the courts of equity originally obtained and exercised jurisdiction, is that jurisdiction overturned or impaired by this change of authority at law in regard to legislative enactments; for, unless there are prohibitory or restrictive words used, the uniform interpretation is that they confer concurrent, and not exclusive, authority, and it would be still more difficult to maintain that a court of law, by its own act, could oust or repeal a jurisdiction already rightfully attached in equity." 1 Story, Eq. Jur. § 80, and authorities cited in note. In *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103, a bill was filed to recover of the defendant certain moneys which he had received as trustee of the complainant. Mr. Justice Cowan, for the court, said: "It is objected that the complainant had an adequate remedy at law. I need hardly say that the argument in that form is far from precluding relief by bill in equity. If the complainant had a remedy at law by action for money had and received,—which I think he had,—yet equity has a clear concurrent jurisdiction. That is founded on the fact that *McCrea* took the money as a trustee. The action for money had and received is in the nature of a bill in equity." In *Varet v. Insurance Co.*, 7 Paige, 560, a cargo upon which the defendant had written a policy was seized under the Berlin and Milan decrees and condemned. The plaintiff and defendant having adjusted the loss at \$5,000, compensation to that amount was made by the French government, and paid over to the defendant. On bill filed to recover the money from the defendant, it was objected that the complainant's remedy was at law. Chancellor Walworth said: "The equitable action of assumpsit is now allowed in many cases of this kind where the remedy originally was in equity only. But the fact that a remedy now exists at law in such cases does not deprive this court of its ancient jurisdiction to grant relief here, or, in the language of an English chancellor (Lord Eldon): 'This court is not at liberty to give up its jurisdiction because courts of law have fallen in love with it.'" *Hubbard v. Mortgage Co.*, 14 Ill. App. 40. See, also, *Insurance Co. v. Roulet*, 24 Wend. 505. More might be said; but see 2 *Beach, Trusts*; *First Congregational Soc. v. Trustees of Fund*, etc., 23 Pick. 143; *Harrison v. Rowan*, 4 Wash. C. C. 202, Fed. Cas. No. 6,143; *Kemp v. Pryor*, 7 Ves. 237; *Irick v. Black*, 17 N. J. Eq. 189; 1 *Pom. Eq. Jur.* §§ 277, and cases cited in note; *Bisp. Eq.* 56; *Sweeny v. Williams*, 36 N. J. Eq. 627, and numerous authorities cited; *Myrick v. Jacks*, 33 Ark. 429.

Affirmed.

BUNN, C. J., *dissent*. 

HADLEY v. BRYAN et al.

(Supreme Court of Arkansas. Feb. 15, 1902.)

APPEAL—PARTIES—QUESTION NOT RAISED BELOW—JUDGMENT—RELEASE OF SINGLE DEFENDANT—EFFECT AS TO OTHERS.

1. It is too late to contend on appeal that plaintiff, sued as trustee, was not a proper party to the suit because he had no real interest therein.

2. The owner of a judgment against three defendants jointly, in consideration of a certain sum less than was due thereon, paid by a third person in behalf of one of them, satisfied the judgment so far as he was concerned, expressly stating in the satisfaction that he intended thereby only to release him, and not the others, from further liability on the same. *Held*, that it did not constitute a release of all, as it expressed on its face an intention of only releasing one defendant, and operated only as a covenant not to sue him, and worked no injury to the others, since it reduced the total amount, and did not prevent contribution as to the remainder from the party released.

Appeal from circuit court, Lawrence county, in chancery; Frederick D. Fulkerson, Judge.

Suit by J. J. Bryan against H. H. Hadley and others. From a decree in favor of defendant J. M. Stout, and against plaintiff Bryan and defendant Hadley, the latter appeals. Affirmed.

Geo. G. Dent, for appellant. J. N. Beakley, Jos. W. Phillips, H. L. Ponder and Jos. M. Stayton, for appellees.

BUNN, C. J. On the 14th February, 1899, J. J. Bryan, as trustee for the use and benefit of the Bank of Black Rock, filed his complaint in equity to foreclose a deed of trust executed by H. H. Hadley and wife, to secure a note executed by H. H. Hadley and John K. Gibson to said bank for the sum of \$250, dated February 10, 1898, due and payable on the 10th May, 1898, with interest from date until paid at the rate of 10 per centum per annum. Among other things, it was alleged in the complaint: That on August 30, 1888, James M. Stout and George M. Caldwell, partners, recovered judgment against H. H. Hadley, E. C. Olney, and M. G. Wilson, for \$369.50, and \$11.50 costs, aggregating \$381, upon which was paid subsequently and duly credited: December 18th, \$5; on May 9, 1891, \$102.75; and on March 6, 1895, \$50; leaving a balance on the 6th March, 1895, the sum of \$—, being 10 per centum per annum interest. That on January 13, 1898, execution issued on said judgment, which was levied on the land of Hadley embraced in the deed of trust to the bank, and ran against the estate of Hadley. The last payment, to wit, on the 6th March, 1895, made on said judgment, was made by Olney individually, and the following instrument of writing was given him by J. M. Stout, who, it appears, was the sole owner of the judgment, viz.: "For and in consideration of the sum of \$50.00 to me paid by Jno. K. Gibson, for E. C. Olney, I have this

day satisfied a judgment as far as the said E. C. Olney's obligation thereby is concerned, which was obtained by Caldwell and Stout against H. H. Hadley, E. C. Olney and M. G. Wilson, in the Lawrence circuit court for its Western district, about the month of August, 1888, and which is the only judgment I own or control against said parties, intending hereby only to release the said Olney, and not the said Hadley and Wilson, from further obligation on said judgment, and accept the said fifty dollars in full for his liability on the same. [Signed] J. M. Stout." That the release of one of the defendants in judgment was a release to all, and that the said judgment was thereby satisfied in full, and as to all the parties defendant therein; and that the execution sale made thereunder of the 248 acres of land of Hadley (which was the same land as is embraced in the deed of trust) was and is null and void. On motion the said J. M. Stout was made a party defendant in the cause. H. H. Hadley filed his answer and cross bill, and also subsequently his amended answer and cross bill, and alleged the same as to the release as did the plaintiff in his complaint. To this answer and cross bill Stout interposed his demurrer, as to the release of the judgment, and then answered the complaint, to the same effect. The demurrer of Stout to the amended answer and cross bill of Hadley was heard by the court on the 14th March, 1900, and upon consideration was sustained, the court holding that the release only went to the release of Olney, and not to the release of Hadley and Wilson, and, consequently, that the judgment was not satisfied by the making of said payment of \$50 by said Olney, and decreed that Stout might proceed to collect the two-thirds share of Hadley and Wilson, but that the release was tantamount to a covenant not to sue as to the one-third share of Olney. To this ruling the defendant Hadley (refusing to plead over) excepted, his exceptions were noted of record, and he prayed and was granted an appeal to this court. On the same day the court proceeded to make its findings on the facts of the case and render its decree condemning said land embraced in both the deed of trust and execution, to be sold, and the proceeds, after payment of costs, to be divided between the plaintiff and defendant Stout, to be applied towards the satisfaction of the deed of trust note of the bank, and the execution of Hadley, adjudged as aforesaid. The transcript in this cause was filed in the office of the clerk of this court on April 28, 1900, and the briefs of appellant Hadley were filed March 12, 1901, and of the appellees April 10, 1901. The transcript was lodged in this court April 28, 1900, and on September 2, 1901, defendant Hadley filed his petition in the court below for an order nunc pro tunc, so as to make the record show that he had been granted an appeal therein from the final decree. This petition appears to have been granted by the

court, over the objection of the plaintiff. The showing made in the petition does not appear to be sufficient for such an order, but the appeal has been considered nevertheless.

In his brief defendant Hadley contends that the trustee, Bryan, suing for the use and benefit of the bank, was not a proper party to the suit, as he had no real interest in it. This contention, however, appears to have been made for the first time in this court, and we need not consider it now.

The principal matter of controversy is the release of Olney by J. M. Stout, the sole owner and assignee of the judgment of Stout & Caldwell, and which we have copied in the statement of facts. We think the demurrer of Stout to the allegation of defendant Hadley and plaintiff bank, that this release of Olney was a release of all the defendants in judgment, was properly sustained, as it expressed on its face the intention of only releasing Olney, and operated only as a covenant not to sue him, and worked no injury to his codefendants in judgment, since it had the effect of reducing the total amount thereof, and did not prevent contribution by Olney as to the remainder. The case of *Machine Co. v. Harmon*, 45 Ark. 291, is in point, and controls this question in the case.

Decree is affirmed.

MEMPHIS & L. R. R. CO. v. ORGAN et al.
(Supreme Court of Arkansas. Feb. 15, 1902.)
APPEAL—REVERSING AND REMANDING ORDER—SCOPE OF ORDER.

Where the supreme court held that an action was barred by limitations as to some of the appellees, and reversed and remanded the case without any reservations as to the appellees whose claims did not appear to be barred, the reversal and remand applied to the whole case, placing it in the same position as if no decree had ever been rendered in the court below.

Appeal from circuit court, Crittenden county, in chancery; Felix G. Taylor, Judge.

Ancillary suit by Charles H. Organ and others against Memphis & Little Rock Railroad Company. From a decree in favor of plaintiffs, defendant appeals. Suit dismissed.

Rose, Hemingway & Rose, for appellant. Randolph & Randolph and T. B. Finley, for appellees.

BUNN, C. J. This suit is ancillary to the suit of *Theresa L. Organ et al.*, which had but recently been determined in the Crittenden circuit court when this cause was instituted therein, and an appeal had been taken to this court, and styled here the *Memphis & Little Rock Railroad Company* as reorganized; that is to say, it is confessedly based upon the decree of the court below in the former suit. That suit was determined in this court on the 14th October, 1899, and

on that day was reversed and remanded. The only question involved in the opinion rendered was the application of the statute of limitations, and it was proved as a fact in the case that the action was barred as to all the claimants in the case, except seven or eight of the more remote heirs, under disabilities of one kind or another at the time the original suit was instituted on August 3, 1880. The decree of the court below in the cause was remanded, with directions to proceed according to the opinion then rendered.

The contention of appellant in its motion to dismiss the case is that when a decree is reversed on appeal in this court the case stands as if no decree or judgment had ever been rendered in the court below, and this reversal affects all the appellees in the suit to that extent. We are of opinion that that is the correct rule, as applied to this case; for, while it was said by this court that some of the claimants were not barred, this of course meant that they were not barred as appeared from the record in the case. The reversal, and remanding of the case for further proceedings, meant necessarily a remanding of the whole case, for that order would be superfluous as to the heirs shown to be barred by the statute of limitations, and could only apply to those who did not appear in the record to be barred. It was, manifestly, a reversal of the entire case, for there were no reservations in the decree of reversal in favor of those said to be not barred. The ancillary case, having had its foundation swept from under it, must necessarily fall. We think the principle of *West v. Cedar Co. (C. C.) 110 Fed. 725*, applies to the issue made in the motion to dismiss and response thereto in this case.

Action dismissed.

WILLS v. CITY OF FT. SMITH.

(Supreme Court of Arkansas. Feb. 15, 1902.)
MUNICIPAL ORDINANCE—WEIGHING COAL ON CITY SCALES—CONSTRUCTION—VALIDITY—UNREASONABLE AND OPPRESSIVE CHARACTER.

1. A city ordinance making it unlawful to sell coal without weighing it on the city scales, and paying the weighman 10 cents for the weighing of any load or part of a load, applies only to wagon loads, and not to sales of very small quantities, such as a bucket or wheelbarrow of coal.

2. Since under *Sand. & H. Dig. § 5132*, providing that a city may require parties selling coal in the city to weigh the same on city scales, and pay a reasonable fee for the weighing, the city may impose a fee sufficient to cover expenses incident to enforcing the requirement, including extra police superintendence necessary for that purpose, which, if not plainly unreasonable and excessive, will not be interfered with, an ordinance imposing a fee for such service, the revenue from which is only a trifle more than the expense of furnishing and keeping the scales in repair, hiring an assistant weighmaster, and furnishing necessary police superintendence, cannot be held to

have been passed for the purpose of raising revenue, so as to be outside the scope of the statute and invalid.

3. Where a city from November 1st to April 1st of each year, which was the season when coal was most in demand, maintained public scales near a coal yard, while the city scales in continuous operation were about 10 blocks therefrom, an ordinance requiring all coal to be weighed on the city scales, and the payment of 10 cents for the weighing of each load or part of a load, is not so unreasonable and oppressive as to be invalid, though it is an inconvenience and annoyance to the owner of the coal yard during the part of the year when not much coal is sold.

Hughes and Battle, JJ., dissenting.

Appeal from circuit court, Sebastian county; Styles T. Rowe, Judge.

Action by E. C. Wills against the city of Ft. Smith to enjoin the enforcement of a city ordinance. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

The city council of Ft. Smith on 5th of February, 1900, passed an ordinance, the first section of which provides as follows: "It shall be unlawful for any person hereafter to sell, barter or exchange coal in any quantity in the corporate limits of this city until they have first weighed the same upon the city scales of the city of Ft. Smith and paying the weighman the sum of ten cents for the weighing of any load or part of a load of coal." The second section of the act provides that any person violating the ordinance shall be fined not less than \$5 nor more than \$25. E. C. Wills, a coal dealer in Ft. Smith, brought this action to enjoin the city from enforcing, or attempting to enforce, said ordinance on the ground that the ordinance was void. The city appeared by counsel, and filed an answer denying the material allegations in the complaint. The evidence showed that the total revenue to the city from the sales was over \$1,400, while the expenses in operating the scales was above \$1,300. On the hearing the circuit court found in favor of the defendant that the ordinance was valid, and dismissed the complaint. Plaintiff appealed.

Read & McDonough, for appellant. F. M. Jamison, for appellee.

RIDDICK, J. (after stating the facts). The questions presented by this appeal relate to the validity of an ordinance of the city of Ft. Smith in reference to the weighing of coal sold in that city. Plaintiff, a coal dealer in that city, contends that the ordinance is void on the ground that it was unreasonable and oppressive, and operated to deprive plaintiff of his property without due process of law, and for the further reason that it was passed for the purpose of raising a revenue for the city. The ordinance in question, after providing that all coal sold in the city shall be weighed upon the city scales, directs that the sum of 10 cents shall be paid to the weighmaster for the weighing "of any load or part of a load of coal."

The word "load" used in the ordinance is rather indefinite, and might be said to include a car load or wheelbarrow load of coal as well as a wagon load. But as the evident intention of this ordinance was to protect the residents of the city who were purchasers and consumers of coal against fraud, imposition, or mistake in the weighing of the same, and as coal is usually delivered to consumers by wagons either in full loads or in parts of a load, we think it is evident that the word "load" in the ordinance refers to wagon loads, and that it has no application to sales of very small quantities, such as a bucket or wheelbarrow load of coal. In fact, the mayor of the city testified that the ordinance was construed by the city authorities to apply only to cases when the delivery was by wagon in loads or parts of loads, and we are willing to adopt that construction of it.

Now, our statute expressly grants to cities the right "to provide for the measuring or weighing of hay, wood or any other article for sale." Sand. & H. Dig. § 5132. Under this statute the city had the power to require parties selling coal in the city to weigh the same on scales provided by the city, and to pay a reasonable fee for the weighing. Taylor v. City of Pine Bluff, 34 Ark. 603. While under our statute an ordinance of this kind cannot be passed for the purpose of taxation and raising a revenue, yet fees can be imposed sufficient to cover the necessary expenses incident to the enforcement of the ordinance. The city council is required to determine what fees will be necessary for that purpose. And in arriving at their conclusion on that question they may take into consideration all legitimate expenses required for the enforcement of the ordinance, including, as we think, any extra police superintendence necessary for that purpose. City of Fayetteville v. Carter, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509. As the exact size of the fee required cannot always be ascertained in advance, the courts will not interfere with the action of the council when the fees imposed are not plainly unreasonable and excessive. Taylor v. City of Pine Bluff, 34 Ark. 603; City of Fayetteville v. Carter, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509; City of Hot Springs v. Curry, 64 Ark. 152, 41 S. W. 55.

After considering the facts proved in this case, we think the evidence does not show that this ordinance was passed for the purpose of raising revenue. On the contrary, there is evidence to justify a finding that the annual expenses of the city in furnishing and keeping in repair scales, in hiring assistant weighmaster required, and in furnishing necessary police superintendence, very nearly equal the revenue arising from the fees imposed for weighing.

As to the contention that the ordinance is unreasonable and oppressive, the evidence shows that the coal yards and place of business of plaintiff are situated about 10 blocks distant from the public scales, which

operated by the city continuously during the year. On this account the ordinance does impose some hardship on plaintiff, especially in cases where the coal is sold in small quantities to persons who wish the same delivered at or near the coal yard of plaintiff. In such a case it is no doubt very inconvenient to be compelled to carry the coal over half a mile to the scales for weighing, and then return with it to the yards or near them for delivery. But it was shown that from 1st of November to 1st of April, during the season when coal was most in demand, the city maintained and operated two public scales, one of which was near plaintiff's yards. From the 1st of April to 1st of November the scales located near the coal yards were not operated, for the reason that during that time of the year the demand for coal was small, and the expense of operating the scales was greater than the income from the fees charged. While, as before stated, the requirement that even small quantities of coal must be, when sold, weighed on the city scales, imposes during the summer, when only one pair of scales is operated by the city, some unnecessary inconvenience and expense on plaintiff, still, taking into consideration that this is during a season when not much coal is sold, a majority of us are of the opinion that the ordinance is not so clearly unreasonable and oppressive as to justify a court in holding it invalid. It is often that city ordinances occasion individual inconvenience and even hardship. The powers which are vested by law in municipal legislatures are at times exercised unwisely; for these, like other human tribunals, are not infallible. But it does not follow because an ordinance operates to the annoyance and inconvenience of a citizen, instead of to his benefit, that it is invalid, or that the courts can for that reason interfere with the local concerns of the city, and declare the ordinance invalid. On the whole case, a majority of the judges are of the opinion that the judgment of the circuit court is right, and it is therefore affirmed.

HUGHES and BATTLE, JJ., dissent, on the ground that the ordinance in question is unreasonable and oppressive, and therefore void.

MARTIN-ALEXANDER LUMBER CO. v. JOHNSON.

(Supreme Court of Arkansas. Feb. 15, 1902.)

BILLS AND NOTES—CURRENCY—CHECKS—WAGES—PAYMENT IN GOODS—ASSIGNMENT.

1. Sand. & H. Dig. c. 18, forbidding the creation or circulation of any note, bill, bond, check, or ticket purporting that any money or bank notes will be paid to the holder, or that it will be received in payment of debts, or to be used as a medium of currency in lieu of money, was intended to prevent creation of private circulating medium; and checks issued by a company to its employes, redeemable in

merchandise at the company's store, were not within the statute.

2. Where a company issued checks to its employes, payable in goods at its store, if the wages of the employes were due when the checks were received by them, it is a case of accord without satisfaction, and the acceptance of the checks is not a bar to an action by them or their assignee for the money due them as wages.

3. Where there was evidence to show that wages of employes, though so much per day, were not due until the 15th of the succeeding month, and the employes accepted checks for merchandise prior to such time, then the contract would be binding on the parties, and the company would not be liable in money for the amount of such checks.

4. The question whether the wages were so due or not was properly submitted to the jury.

5. The checks were assignable under Sand. & H. Dig. § 480, declaring all agreements or contracts in writing for the payment of money or property, or both, assignable.

Appeal from circuit court, Pike county; Will P. Feazel, Judge.

Action by J. R. Johnson against the Martin-Alexander Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

Appellee obtained judgment against appellant for \$475, the sum of numerous checks in denominations of 5 cents, 10 cents, 25 cents, 50 cents, and \$1, given by appellant to its employes in payment of their wages. The form of the checks is as follows: "Martin-Alexander Lumber Company: Deliver to bearer at our store five cents worth of merchandise. [Signed] E. D. Martin, President." The checks were made of pasteboard, were round, and about the size of a silver dollar. They had stamped across their face in red ink the words, "Not redeemable in cash." The appellee says that before bringing suit he demanded of appellant the payment of the checks sued on, and that appellant refused to cash them. There was no demand of appellant to pay the checks in merchandise. He got the checks in payment for goods sold to appellant's employes. The evidence was substantially as follows: George Sewer testified for plaintiff: "I was bookkeeper for the defendant three years. The company hired its hands by the day; and at night, if they wanted anything, checks were issued to them in any amount, not to exceed what was due them on the books. When these checks were taken up at the store in exchange for goods, they were returned to me and reissued. We kept no register of when checks were handed out. We simply charged the amount on the account of the man to whom they were delivered. The checks were issued in order to save bookkeeping. The company had a regular pay day on the 15th of each month, and they paid in money only on that day. The company never redeemed these checks in cash. When a party took them he had to trade them out at the store. If an employe would wait until the 15th, he would get cash for all that was due him. The company did not make

an enormous profit on the goods it sold to its employes. Its average profit was about seventeen and a half per cent." D. L. Bowen: "I worked for the company, and had to take checks for what they owed me. I was forced to take the checks because they would not pay the money, and I had to have something to live on. We had to pay from 20 to 30 per cent. more at the company's store than we could buy the same things for from other merchants in the same town. I remember I had to pay 75 cents for a sack of flour, when the same flour was selling at other stores for 55 cents. I worked for the company year before last. I could have gotten the money on the 15th of the month. We knew that when we took the checks that we would have to pay at least 20 per cent. more for the goods than we would have to pay at other stores for cash, but we had to take the checks or wait until the 15th for our money." R. G. Atkins testified: "I worked for the company. By waiting until the 15th, I could have gotten cash, but my circumstances were such that I was forced to take checks. We were forced to pay at the company's store 20 per cent. more than the goods were selling for at other stores." W. C. Clayton testified: "I am depot agent at Pike City. These checks were taken by other merchants for goods at a discount. People in the country also took them for produce. They were at a discount of from 15 to 20 per cent." John Read testified: "I worked for the company. By waiting until the 15th, I could get the money; but I had to live on my daily wages, and so had to take checks. I soon found that I was paying more at this store than at others. I understood when I took the checks that they would not be redeemable in cash." A. V. Alexander testified as follows for defendant: "The checks sued upon were orders upon the store of the Martin-Alexander Lumber Company for goods, and were stamped across their face in red ink, 'Not redeemable in cash,' and when they were issued notices were posted in the store of the company and at the company's mills, setting forth that these checks were given to each employe if he wished his pay before pay day; but that on the 15th of the month they would be paid in cash. This plan of doing business was known to all the company's employes, and was satisfactory to them, so far as I know. The plaintiff is a competitive merchant in the town, who took the checks in payment for goods. The company has offered, and is now willing, to redeem these checks in goods according to their terms. The company made no exorbitant profit on the sale of its goods upon these checks. Its net profits from the store were less than 20 per cent. The competitive merchants would necessarily have to offer less than the company's prices in order to get the business of the company's employes, and so might not be able to make a reasonable profit; but that was no fault of the compa-

ny. No employe has ever had checks forced on him, or lost his position with the company because he preferred to wait until the pay day, and get the cash. No employe was ever forced to take checks or offered checks unless he asked for them. The checks are not redeemable in money. We take them up in merchandise, according to their tenor." Capt. Hughes testified: "I have worked for the defendant company for three years. It always paid promptly. I took checks, and bought with them anything I wanted."

Rose, Hemingway & Rose, for appellant.
O. C. Hamby, for appellee.

WOOD, J. (after stating the facts). 1. The checks sued on do not come within any of the provisions of chapter 18, Sand. & H. Dig. The design of that chapter was to prevent the creation or circulation by private individuals of "any note, bill, bond, check or ticket, purporting that any money or bank notes will be paid to the receiver, holder or bearer, or that it will be received in payment of debts, or to be used as a currency or medium of trade in lieu of money." Also to prevent the issuance by "any city, town, or corporation whatever of any small bills or notes, commonly denominated change tickets or shinplasters." "Bills and notes" are payable in money, not merchandise. They are not "bills" and "notes" if redeemable in commodities instead of money; and "bills and notes" as here used are commonly denominated "change tickets" or "shinplasters" because they are for a small sum of money. Webst. Dict. verbo "Shinplaster." The statutes are leveled against any attempt to create a private circulating medium or currency; i. e., notes, bills, bonds, checks, or tickets redeemable only in the current money of the realm. *Van Horne v. State*, 5 Ark. 350; *Ex parte Anthony*, Id. 359. In *Yeates v. Williams*, 5 Ark. 684, Judge Lacy said, "The legislature intended to cut up by the root all individual paper emissions of money." The statutes are in pari materia. *Van Horne v. State*, supra. See, also, *Smith v. State*, 21 Ark. 294; *Jones v. Mayor*, etc., 25 Ark. 301; *Lindsey v. Rottaken*, 32 Ark. 619; *U. S. v. Van Auken*, 96 U. S. 366, 24 L. Ed. 852; *Hollister v. Institution*, 111 U. S. 62, 4 Sup. Ct. 263, 28 L. Ed. 352; *In re Aldrich* (D. C.) 16 Fed. 370; *U. S. v. White* (C. C.) 19 Fed. 723. The form of the check or order in suit refutes the idea that it was intended to circulate as money. It was an order or check for merchandise. The bearer was specifically notified that it was "not redeemable in cash." Moreover, the proof aliter showed that the purpose was not to have the checks circulate as money. The checks were issued, says the bookkeeper, "to save trouble in bookkeeping." It is true they passed by delivery into other hands than those of employes. But this was always at a discount, and the appellee himself only took them for merchandise. It is doubtful whether they

were ever designed to pass beyond the hands of the employer and the employé. Their circulation was necessarily localized to a very restricted territory. The case of Iron Mountain and Helena Railroad against Stansell differs materially from this. In that case the suit was not upon the certificates or paper, but was for money due on the original contract. Before the suit was instituted, there was a demand made upon the railroad for the payment of the certificates in freight and passage, as the certificates called for. The plaintiff tendered them in payment of freight and passage, and they were refused. The maker of the certificate was setting up their illegality. But that was not the issue. Judge Smith said: "The result of the present controversy does not depend on the validity or invalidity of these transportation certificates; nor upon the question whether, if they were issued in contravention of a statute, a private corporation is obliged by law to redeem them. * * * The main question," he continues, "is therefore whether the corporation defendant owes the plaintiff money on a contract which it refuses to pay." In that case there was strict privity of contract between the plaintiff and the defendant. A portion of the contract of the railroad with the construction company was assigned to the plaintiff with the knowledge and consent of the railroad company, and the plaintiff sued the railroad company for material furnished under that contract. It is manifest, therefore, that the court did not have before it for decision the question as to whether the certificates were in a form prohibited by law, and what the learned judge said in that respect was dictum. Here the suit—the right to recover—was based on the orders or checks. The holder was a party to the agreement. No demand was ever made on the lumber company for the redemption of the orders or checks in merchandise. On the contrary, the proof was that the lumber company was ready to redeem the checks in merchandise, as specified therein, at any time when called for.

2. If the wages of the employés were due when the checks were issued and received by them, then the case is one of accord, but without satisfaction, and the acceptance of the check or order would be no bar to an action by them, or one standing in their right, for the money due them as wages; for it is a "general principle that accord without satisfaction is no bar to an action of debt,—that is, that accord, being a promise to confer satisfaction, must be fully and actually executed and accepted in order to be a satisfaction." "Consent of a party to accept in satisfaction without actually receiving does not form a valid bar to the action." Pope v. Tunstall, 2 Ark. 209; Ballard v. Noaks, Id. 45. The illustration of learned counsel is apt: "If A. owes B. a debt which is due, and B. says that he will take A.'s horse in payment, B.'s promise is without considera-

tion, and he may refuse to accept the horse when tendered. But if A.'s debt to B. is not yet due, and A. waives his right to delay payment, and promises to pay in something else of value, or at another time and place, which is accepted by B., in such case there is a new contract upon sufficient consideration, which is binding." Cavaness v. Ross, 83 Ark. 572; 1 Cycl. Law & Proc. pp. 323, 324, tit. "Accord and Satisfaction." There was evidence tending to show that the wages of the employés, although so much per day, were not due until the 15th of each succeeding month. If that were true, the agreement to pay and to accept merchandise for the wages not yet due would be binding upon the parties to the contract. In this view of the evidence appellant doubtless presented its request for instruction numbered 4, which is as follows: "(4) If the jury find from the evidence that the company (Martin-Alexander Lumber Company) had established a pay day on which their employés would be paid in full in currency any amount due them for labor, and said employés elected to accept in lieu of said money at pay day these commissary checks, then said company would not be liable in money for the amount of such commissary checks so taken up before pay day." The request, although not as clear as it should have been, embodied the correct idea, and, taken in connection with the evidence, we think, could not have misled the jury, and should have been given. It was certainly a question for the jury as to whether the wages were due or not when the checks were issued and accepted. We do not find that other instructions cover the question involved in the fourth request, supra.

3. The checks under consideration are contracts or agreements in writing for the payment of merchandise, and under section 489, Sand. & H. Dig., are assignable by delivery.

For the error indicated, the judgment is reversed, and the cause is remanded for new trial.

HUGHES and RIDDICK, JJ., did not participate.

WARD v. STATE.

(Supreme Court of Arkansas. Feb. 15, 1902.)
CRIMINAL LAW—LARCENY—INSTRUCTIONS—EVIDENCE—PRIVILEGED COMMUNICATIONS.

1. Under Sand. & H. Dig. § 2916, subd. 4, providing that a husband and wife shall be incompetent to testify for or against each other, or concerning a communication made by one to the other during the marriage, a note handed by a husband confined in a jail to his wife while visiting him is inadmissible.

2. Where a prisoner confined in jail handed to his wife, while visiting him, a communication to a third person, such communication was admissible in evidence to show the purpose for which it was written, though taken from the wife against her will.

3. On trial for larceny of an animal which defendant claimed that he had purchased from

another person, an instruction that if the jury found that such other person stole the animal, and defendant was present and put the rope on it, or assisted in so doing, or in driving it away, he would be guilty, was erroneous, since, if defendant bought the animal from the third person, he could not be convicted unless it appeared that he knew at the time that that person did not own the animal.

Bunn, C. J., dissenting.

Appeal from circuit court, Phillips county; Hance N. Hutton, Judge.

Berry Ward was convicted of larceny, and appeals. Reversed.

McCulloch & McCulloch and H. F. Roleson, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

HUGHES, J. The appellant was indicted for and convicted of the larceny of a yearling, and appealed to this court. There was some testimony tending to show that the appellant bought the yearling from Charlie Lawrence, who was a witness in the case. On the trial the state offered to introduce a letter written by defendant; it being agreed by counsel for defendant that W. R. Hampton, if present, would testify that he was jailer at Marianna; that in September, 1900, while defendant was in jail, witness allowed defendant's wife to visit him in the jail, and while she was in there witness saw defendant slip something to her; that, when she came out, witness took the article away from her, and it was the note offered in testimony, wrapped in a leaf of a Bible. The defendant objected to the introduction of the testimony of Hampton and of the letter because the same was irrelevant. The court overruled the objection, to which the defendant excepted. The letter was as follows: "To Iles Nesba: Mr. Iles Nesba I want you and Johnson to get together and Charlie Lawrence and get him to say that he sold me that yearling if you will do that for me I have got them. You see Charlie and have a talk with him you and Johnson. I will have you and Johnson sumens at once. Don't get afraid now help me if it was you I would dou that for you. I want you and Johnson to get redy. I want a new tryel as soon as you get this note I want you all to swere that Charlie Lawrence told you that he sold me that yelen since I have been in jail he told you that. As soon as you read this note you burn it up. I am going to have you sumens be redy. Your friend B. W. Ward in jail Marianna, Ark. Wife send for Iles nesba to come at once you give him this note and tell him to get redy at once i want to have a new trial tuesday and as soon as you give this note to Iles then you go and tell my lawyer that I want to call a new tryel and i will come home. B. Ward." That part of the letter to the wife was con-

fidential communication from husband to wife, and privileged, and not admissible in evidence, but there is nothing material in this part of it. Sand. & H. Dig. § 2916, subd. 4. But a majority of the judges are of the opinion that that part of the letter not addressed to the wife, but to "Iles Nesba," is not privileged, though taken from the wife against her will, and was admissible in evidence to show the purpose for which it was written. The jury might think it was an attempt to manufacture testimony, or that it was an attempt to get Charlie Lawrence to tell the truth, and say he had sold the steer to the defendant, which he had sworn he did not do, on the trial. The defendant was contemplating a motion for a new trial when the letter was written. The defendant had testified that Charlie Lawrence sold him the yearling, claiming that he owned it.

The jury retired, and afterwards returned into court for further instructions, and the court orally gave the following: "If the jury find that Charlie Lawrence stole the yearling, and the defendant was present and put the rope on the yearling, or assisted in so doing, or in driving it away, then he would be guilty as charged in the indictment," to which the defendant excepted. This was error. It ignores the idea that if defendant bought the steer from Lawrence, who claimed to own it, they could not convict the defendant, unless they believed from the evidence, beyond a reasonable doubt, that the defendant knew at the time that Lawrence did not own the steer.

For the error in this instruction, the judgment is reversed, and the cause is remanded for a new trial.

BUNN, O. J. (dissenting). A fair construction of the letter does not authorize the conclusion that the defendant intended to suborn witnesses. From its language, he being evidently an ignorant person, it may have meant to have Lawrence merely speak the truth. This note or letter raised no question for the jury. Like any other instrument of writing, its linguistic meaning is for the court to determine. Furthermore, I think the undelivered letter may be regarded as a privileged communication between husband and wife. The exceptions to the rule of non-admissibility are based upon the act of the party to be affected voluntarily giving the substance of the communication to a third person. An exception to the general rule is not made where the writing, as in this case, was extorted by force or intimidation from the wife or husband, nor where the one or the other is made to divulge a verbal privileged communication. See *State v. Mathers* (Vt.) 15 L. R. A. 283, note (s. c. 23 Atl. 590, 33 Am. St. Rep. 921). I think the judgment should be reversed.

ROWE et al. v. CURRENT RIVER LAND & CATTLE CO.(Supreme Court of Missouri, Division No. 2.
Feb. 25, 1902.)**APPEAL—COURTS—TITLE TO LAND—TRANSFER OF CAUSE.**

Where, in a suit to quiet title to land, the court finds the title to be in plaintiffs, but decrees a lien on the land for an aggregate sum of \$86, expended in payment of taxes by defendant, and the question on appeal is not the title, but whether such sum ought to constitute a lien, the case will be transferred from the supreme to the appellate court.

Appeal from circuit court, Shannon county.

Bill by Thomas J. Rowe and others against the Current River Land & Cattle Company to quiet title to land. From a decree adjudging a lien on the land for certain taxes paid by defendant, plaintiffs appeal to the supreme court. Cause transferred to the appellate court.

Warren D. Isenberg, Jno. O. Brown, and Thos. M. & Cyrus H. Jones, for appellants. Jas. Orchard and L. B. Shuck, for respondent.

SHERWOOD, J. Suit to quiet title to land. On hearing had, the trial court found and adjudged the title to be in plaintiffs; but inasmuch as defendant had paid out the sum of \$36.49 when purchasing the land for taxes at an invalid sale, and had since that time paid out also the further sum of \$50.42 in taxes on said land, the court required plaintiffs to pay the sums thus expended, amounting in the aggregate to \$86.90, to defendant, and made said sum a lien on the land; so that the question now at issue between the parties litigant is the sum last aforesaid, and whether it ought to constitute a lien on the land. It is clear from this statement that as title to land is not involved in this litigation, and as the sum in controversy is not sufficient to confer jurisdiction on this court, we have no jurisdiction of the cause, and it is accordingly transferred to the St. Louis court of appeals. All concur.

WILSON v. ST. LOUIS & S. F. R. CO.(Supreme Court of Missouri, Division No. 2.
Feb. 25, 1902.)**APPEAL—BILL OF EXCEPTIONS—AUTHENTICATION—FILING.**

A bill of exceptions which has not been authenticated by being filed cannot be considered.

Appeal from St. Louis circuit court; Selden P. Spencer, Judge.

Action by Mary M. Wilson against the St. Louis & San Francisco Railroad Company. Verdict for defendant, and plaintiff appeals. Affirmed.

Jas. P. Kerr, for appellant. L. F. Parker and Jno. T. Woodruff, for respondent.

SHERWOOD, J. This cause has been fully briefed, but counsel for defendant, in addition to briefing the cause on the merits, call attention to the fact that what is termed the bill of exceptions has never been authenticated by being filed. An examination of the transcript shows this objection to be well taken. The bill is signed by the judge at chambers during the June term, and contains an order to the clerk to file it, but no filing of the bill, as shown by the record, has occurred. In *Lafollette v. Thompson*, 83 Mo. 199, this court said: "The record discloses an order and consent of parties that a bill of exceptions may be filed after adjournment of the term. There is nothing of record, or on what purports to be a bill of exceptions, to indicate it was ever filed at all. There must be an entry of record to make a bill of exceptions a part of the record. This is indispensable in term time. When leave is granted, with consent of parties, to file a bill in vacation, there must be some certificate on the bill itself, signed by the clerk, indicating the fact and date of filing, or some entry made by the clerk in the records of the court to that effect." This rule has been followed many times. *State v. Rolley*, 135 Mo. 677, 37 S. W. 827; *Williams v. Williams*, 26 Mo. App. 408; and other cases. To like effect are *Fulkerson v. Houts*, 55 Mo. 301; *Pope v. Thomson*, 66 Mo. 661; *Johnson v. Hodges*, 65 Mo. 589; *Carter v. Prior*, 78 Mo. 222; *Dinwiddle v. Jacobs*, 82 Mo. 195; *Ricketts v. Hart*, 150 Mo. 64, 51 S. W. 825; *Roush v. Cunningham*, 163 Mo. 173, 63 S. W. 377. Finding no error in the record proper, judgment affirmed. All concur.

BECK v. FERD HEIM BREWING CO.(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)**NEGLIGENCE—PLEADING—DEFECTIVE SIDEWALKS—PERSONAL INJURIES—ABUTTING OWNER—LEGAL DUTY.**

A petition alleging that defendant was the owner of property on which was an embankment about 20 feet high, adjacent to a public street; that for some distance along the frontage of the street no retaining wall had been erected by defendant, and, as a consequence, earth had fallen on the sidewalk, causing injury to plaintiff, a traveler,—does not state a cause of action, for an abutting owner owes no duty to maintain the sidewalk in good order, and is not responsible for any defects which are not caused by his own wrongful act.

Appeal from circuit court, Jackson county; E. P. Gates, Judge.

Action by Lewis C. Beck against the Ferd Heim Brewing Company. From an order refusing to set aside a nonsuit, plaintiff appeals. Affirmed.

L. A. Laughlin, for appellant. Ben. T. Hardin, for respondent.

BRACE, P. J. On the trial of this cause the defendant objected to the introduction

of any evidence under the petition on the ground that it did not state facts sufficient to constitute a cause of action. The objection was sustained. The plaintiff took a nonsuit with leave, and, his motion to set the same aside having been overruled, he appeals.

So much of the petition as is relied upon for a statement of his cause of action is as follows: "Plaintiff states that the defendant is a corporation organized and existing under and by virtue of the laws of the state of Missouri, and is the owner of the following described real estate, situated in Jackson county, Missouri, to wit: The east eighty-five (85) feet of lot four hundred and one (401) in block thirty-six (36) of Old Town, an addition to the city of Kansas (now Kansas City); that said real estate is situated at the northwest corner of Fifth and Locust streets, in said city, and has a frontage of eighty-five feet on Fifth street; that a plank sidewalk extends along Fifth street in front of said real estate of defendant and adjacent to said sidewalk on the side of the property line, and upon said real estate is an embankment of earth about twenty feet high. Plaintiff states that for a portion of the way along the frontage of said real estate on Fifth street a retaining wall has been built for the purpose of keeping the earth from said embankment from sliding down on said sidewalk, but for a distance of about thirty feet back from said corner no such wall exists. Plaintiff states that, in consequence of the failure and neglect of defendant to erect a barrier to keep the earth from sliding down from said embankment onto said sidewalk, earth had run down from said embankment, and was deposited on said sidewalk, at the time hereinafter mentioned, at a point about thirty feet west from said corner, and where said retaining wall stops. * * * Plaintiff further states that on the 30th day of April, 1898, and for a long time prior thereto, there was a deposit of clay earth on said sidewalk at said point, which came from said embankment, and that the same was known to defendant, or might, by the exercise of ordinary care and prudence, have been known to defendant in time to have averted the injury to plaintiff hereinafter complained of. For his cause of action plaintiff states that on the evening of said day he was walking in an easterly direction along the sidewalk on the north side of Fifth street, between Oak and Locust streets, in said city; that it was raining, and the deposit of clay earth on said sidewalk at the point hereinbefore mentioned was very slippery. Plaintiff further states that on arriving at said point his feet slipped on the sidewalk, owing to the deposit of clay earth thereon, and plaintiff fell violently to the sidewalk. Plaintiff further states that as a result of said fall his left leg was broken just above the ankle; that he has been confined to his home ever since,

unable to follow his usual vocation of cook; that he has suffered, and will continue to suffer in the future, great bodily pain and mental anguish; that said injury is of a permanent nature,—all to plaintiff's damage in the sum of five thousand dollars, for which sum he asks judgment with costs."

The rule invoked in support of the petition, well established by the authorities cited in the brief of counsel for the plaintiff, is "that any act of an individual, although performed upon his own soil, that detracts from the safety of travelers upon a public street or highway, is a nuisance, and actionable or indictable as such" (1 Wood, Nuls. [3d Ed.] § 120); or, as otherwise stated: "No person, not even the adjoining owner, whether the fee of the street be in himself or in the public, has the right to do any act which renders the street hazardous or less secure than it was left by the municipal authorities" (2 Dill. Mun. Corp. [4th Ed.] § 1032). There is no uncertainty about the law. The defect in the petition is that it does not state a case within the rule. It does not charge the defendant with the performance of any act upon his own soil detracting from the safety of the traveler on the street, or any act which renders the street hazardous or less secure than it was left by the municipal authorities. If the petition had charged the defendant with erecting or maintaining a nuisance on his premises abutting on the street,—i. e., an embankment which rendered the street hazardous or less secure than it was left by the municipal authorities,—the argument of counsel in support of it would be sound, and the authorities cited in point. But such is not the case. For aught that appears in the petition, this street, sidewalk, and the embankment on the defendant's premises are in the same condition in which they were left by the municipal authorities, and thereupon is postulated a duty upon the part of the defendant to erect a barrier to keep the earth from sliding from the embankment down on the sidewalk, and plaintiff's right of action is predicated on the failure of the defendant to discharge that duty. But no such duty arose from the facts stated. By the operation of natural causes, earth will slide down the side of an embankment, accumulate at its base, and become wet; and it was not the duty of the defendant, upon the facts charged, to protect the sidewalk at the base of this embankment from the effects of such natural operations. The liability of an abutting property owner for a dangerous sidewalk does not arise from such causes, but from the fact that by his own act he caused such condition. As such owner he owes no duty to maintain the sidewalk in front of his premises in a safe condition, and is not responsible for any defects therein which are not caused by his own wrongful act. *Reedy v. Association* (Mo.) 61 S. W. 859, 53 L. R. A. 805; *Baustian v. Young*

152 Mo. 317, 58 S. W. 921, 75 Am. St. Rep. 462; City of Independence v. Black, 134 Mo. 68, 84 S. W. 1094; City of St. Louis v. Connecticut Mut. Life Ins. Co., 107 Mo. 92, 17 S. W. 637, 28 Am. St. Rep. 402; Norton v. City of St. Louis, 97 Mo. 587, 11 S. W. 242. The petition failed to state a cause of action against the defendant.

The circuit court committed no error in sustaining the objection thereto raised in the manner aforesaid, and its judgment is affirmed. All concur.

BOARD OF RELIEF OF C. P. CHURCH et al. v. DRUMMOND et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

JUDGMENTS—ENTRY—CLERICAL ERROR—ORAL EVIDENCE.

1. A clerical mistake, made in the entry of a decree, cannot be established by oral evidence.

2. It was immaterial, as affecting the rule that a clerical mistake in the entry of a decree cannot be established by parol evidence, that the relief was sought by a bill in equity, instead of by application by motion.

Appeal from circuit court, Scotland county; Nat M. Shelton, Special Judge.

Bill by the Board of Relief of the C. P. Church and others against Mary B. Drummond and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Ben Eli Guthrie and J. M. Jayne, for appellants. Smoot, Mudd & Wagner, for respondents.

BRACE, P. J. At the February term, 1898, of the Scotland county circuit court, the following decree was duly entered of record in said court: "In the Circuit Court of Scotland County, February Term, 1898. James C. Drake, Executor of the Estate of Francis Drake, Deceased, Plaintiff, vs. Mary R. Drake, Mary B. Woods, Redman H. Woods, Francis I. Woods, Millie J. Woods, the Trustees of the Bethel Congregation, the Trustees of the Memphis Congregation of the C. P. Church, the Board of Ministerial Relief of the C. P. Church of Evansville, and the Board of Education of the C. P. Church of Nashville, Defendants. Now, at this day, this cause coming on to be heard, and the parties all appearing by their respective attorneys, and all and singular the matters and facts involved in this litigation are submitted to the court for consideration and judgment, and the court, after having heard the evidence and the argument, finds that said Francis Drake in his lifetime made his will, and that afterwards, in 1893, departed this life, and that said will was duly probated in the probate court of Scotland county, Missouri, and the plaintiff is the executor of said will. The court further finds that Francis Drake intended by his said last will, a copy of which is filed with the petition in this cause, to give to his wife, defendant

Mary R. Drake, the net income of all the property of which he was possessed for and during her natural life, and the court so construes said will, and finds and directs said executor to pay to her, according to the terms of said will, the net income of all said property during her lifetime. The court further finds that said Francis Drake intended after the death of his wife, Mary R. Drake, to have paid from his *personal property* to Mary B. Woods, Redman H. Woods, Francis I. Woods, and Millie J. Woods each the sum of \$200 according to the terms of said will, and the court construes said will to mean that after the death of his wife, Mary R. Drake, this legacy to the Woods heirs should first be paid before any other legacies, and out of his *personal estate*. The court further finds that said Francis Drake intended after the death of his wife, Mary R. Drake, that the Trustees of the Memphis Congregation of the Cumberland Presbyterian Church should have and enjoy lots eight (8) and nine (9), in block one (1), Mety's addition to the town, now city, of Memphis, Scotland county, Missouri, to be held and used for a parsonage, and if they become disorganized then the presbytery should have said property and control the same; and, further, after the death of his said wife he willed and bequeathed to the trustees of the Memphis Congregation of the C. P. Church the sum of \$500, to be paid out of his *personal property* according to the terms of said will, and the court construes and finds that it was the intention of said Drake that said sum should be paid out of his *personal property*, and after the payment of the legacies to the Woods heirs before mentioned, and the court so construes and finds and directs said executor to so pay the same, said bequest to be subject to the conditions contained in said will. The court further finds that the deceased gave to the trustees of the Bethel Congregation of the Cumberland Presbyterian Church of the Kirksville Presbytery the sum of \$400, with certain restrictions in said will mentioned; and the court further finds that it was the intention of said deceased that said bequest should be paid after the death of his wife, Mary R. Drake, and out of any *personal property* that he might then own or possess, and that same should be paid after the bequest to the Woods heirs, and after the bequest to the Memphis congregation, and the court so construes said will, and so finds and so directs said executor to pay the same in the distribution of said estate. The court further finds that by the terms of said will said Drake gave and bequeathed to the defendant the Board of Education of the C. P. Church of Nashville, Tenn., \$500, subject to certain restrictions in said will; and the court finds that it was the intention of said Drake that same should be paid out of his *personal estate* after the payment of the legacies hereinbefore described, and after the death of his wife,

Mary B. Drake, and the court so finds and so construes said will, and so directs the said executor to pay the same in the final distribution of said estate. And the court doth further find that the said deceased, Drake, bequeathed all the remainder of his *personal* estate to the Board of Ministerial Relief of the C. P. Church, subject to certain restrictions in said will; and the court finds that said residuary clause was only intended to convey the remainder, if any, of his *personal* estate that he might own at the time of his death after the payment of all the legacies before mentioned, and the court so finds and so construes said will, and so directs said executor to distribute said estate. The court further finds that it became necessary to construe said will for the protection of said executor and said estate, and orders and directs that the costs and expenses for construing said will be paid out of the estate of the said Francis Drake, deceased." The words in the decree over which this controversy arises are italicized, for the purposes of this opinion.

Afterwards, to the February term, 1890, of said court, this suit was brought by the said Board of Ministerial Relief, Board of Education, the said Trustees of the Bethel Congregation, the Trustees of the Memphis Congregation, and the said James C. Drake, executor, as plaintiffs, against the said Mary B. Drummond, née Woods, Redman H. Woods, Francis I. Woods, and Millie J. Woods, the petition in which charges, in substance, that said cause in which said decree was entered came on for trial before one Elias Scofield, special judge, who, after hearing the pleadings and evidence, made a decree set out in the petition, different from the one entered, in that the former omits the word "*personal*" before the words "*property*" and "*estate*" in the second, third, fourth, fifth, and sixth clauses of the decree, so that in the decree set out in the petition those legacies are to be paid out of the "*estate*," and not out of the "*personal* estate," as in the decree entered. The petition then charges that said special judge announced his decision, and requested that the attorneys for the plaintiffs in said cause draft the decree as set out in the petition, but said attorneys by mistake drafted and had spread upon the records of the court, without the knowledge of said special judge, the decree as entered, and prays said decree as entered be corrected, and made to conform to the decree set out in the petition. The answer of the defendants was a general denial.

On the trial, over the objections of the defendants, the plaintiffs were permitted to introduce oral evidence tending to prove that the decree set out in the petition was in conformity with the judgment orally announced by the special judge, and in rebuttal thereof the defendants introduced oral evidence tending to prove that the decree

entered was in conformity with the judgment orally announced by the special judge; that the attorney who was authorized to draw the decree went immediately to his office, dictated it to a stenographer, who made a copy thereof from her notes, which was submitted to the judge and attorney on the other side, and thereafter the decree was duly recorded. After hearing all the evidence, the court found "that the judgment heretofore rendered and now sought to be set aside was the judgment and decree of the court rendered in said cause," dismissed the plaintiffs' bill, and rendered judgment against them for costs, and plaintiffs appeal.

The only error assigned for reversal is that upon the evidence the finding should have been for the plaintiffs instead of for the defendants. The evidence was oral and conflicting. The judge who tried the case below was doubtless personally acquainted with the witnesses, knew their standing in the community, and their interest in the controversy; had the benefit of their exact language, and its connection in the deliverance of their testimony; the opportunity of observing their manner and bearing, and of noting any indicia of favor or prejudice, or of a loose or retentive memory on the part of the witnesses; and was altogether in a much better position to judge the credibility of the witnesses, weigh their testimony, and determine the preponderance of the evidence, than we are. The evidence before us in the record affords no reason for believing that he determined that question unwisely, and deferring to his judgment thereon, as in such cases we are in the habit of doing, the judgment of the circuit court might well be sustained.

But the judgment must be sustained on another ground. This proceeding in the Scotland county circuit court is to have a decree entered on its records, which it is alleged was rendered by said court, but which by mistake was not entered as rendered. No fraud is charged. The mistake charged is necessarily the mistake of the clerk, who is alone authorized to enter the decrees of the court upon its record. The proceeding, by whatever name called, is simply for the purpose of amending a decree of that court duly entered of record, by correcting an alleged clerical mistake therein. That the court had the power to thus correct the alleged mistake is well-settled law. *Hanly v. Dewes*, 1 Mo. 16; *Gibson v. Chouteau's Heirs*, 45 Mo. 171, 100 Am. Dec. 366; *Turner v. Christy*, 50 Mo. 145; *Priest v. McMaster*, 52 Mo. 60; *Jillett v. Bank*, 56 Mo. 304; *Fletcher v. Coombs*, 58 Mo. 430. But it is also just as well settled by a long and uniform course of decision in this state that such a mistake cannot be established by oral evidence; that the decree of a court of general jurisdiction, duly entered of record, imports

and cannot be changed or altered on the ground of clerical mistake, except by evidence contained in some written record, minute entry, memorandum, or paper in the case. *Young v. Young* (Mo.) 65 S. W. 1016; *Railway Co. v. Holschlag*, 144 Mo. 253, 45 S. W. 1101; *Atkinson v. Railroad Co.*, 81 Mo. 50; *Belkin v. Rhodes*, 76 Mo. 643; *Bank v. Allen*, 68 Mo. 474; *State v. Primm*, 61 Mo. 166; *Robertson v. Neal*, 60 Mo. 579; *Fletcher v. Coombs*, 58 Mo. 430. The facts alleged in the petition are only those upon which might have been predicated an application by motion and notice for the same relief, by an order for an entry nunc pro tunc, and the rules of evidence in such case cannot be changed by filing a petition, and calling it a bill in equity.

In any view of the case, the judgment of the circuit court ought to be affirmed; and it is so ordered. All concur.

STATE BANK OF EAGLE GROVE v. DOUGHERTY et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

HOMESTEAD—EXEMPTIONS—PURCHASE WITH PROCEEDS OF HOMESTEAD IN ANOTHER STATE.

Rev. St. 1899, § 3623, providing that where another homestead is acquired, as provided in section 3622, with the proceeds of the sale of the prior homestead, it shall be exempt, does not apply to a homestead purchased with proceeds of a homestead in another state, exempt under its laws, and does not exempt the homestead so acquired from judgment on cause of action accrued before its acquisition.

Appeal from circuit court, Barton county; W. L. Jarrott, Judge.

Suit by the State Bank of Eagle Grove against A. H. Dougherty and others. Judgment for defendants. Plaintiff appeals. Reversed.

Thurman & Wray, for appellant. H. W. Timmonds, for respondents.

BRACE, P. J. On the 6th of November, 1895, the defendant A. H. Dougherty became indebted to the plaintiff bank on a promissory note on which the bank obtained judgment against him in the Barton county circuit court for the sum of \$273.30 at the January term of said court, 1898. At the time this indebtedness was incurred the said defendant owned 320 acres of land in Iowa, on which he resided with his family, and which he afterwards sold, and invested \$2,000 of the proceeds thereof in the 80-acre tract in Barton county, described in the petition, his deed for which was filed for record on the 7th of March, 1896, about which time he moved with his family on said 80-acre tract, and has ever since occupied the same as a homestead. Afterwards, on the 25th day of August, 1897, he conveyed the same by deed to his codefendant Napper, who on

the same day by deed conveyed the same to the defendant Mary N. Dougherty, wife of the said A. H. Dougherty. These deeds were duly executed, acknowledged, and recorded, but were without consideration, and this suit is brought to set them aside, and subject the land to the payment of plaintiff's judgment. On the facts the judgment was for the defendants, and the plaintiff appeals.

The only question in the case is, is the Barton county homestead exempt from execution on plaintiff's judgment by reason of the fact that it was bought with the proceeds of land in Iowa, in which the defendant Dougherty, under the laws of that state, had a homestead? The plaintiff's cause of action having accrued before the said defendant acquired the Barton county homestead, and before his deed therefor was filed for record, it was subject to execution upon the judgment (Rev. St. 1899, § 3622), unless exempted therefrom by the provisions of the following section, by which it is provided that "whenever such housekeeper or head of a family shall acquire another homestead in the manner provided in section 3622 the prior homestead shall thereupon be liable for his debts, but such other homestead shall not be liable for causes of action against him to which such prior homestead would not have been liable: provided, that such other homestead shall have been acquired with the consideration derived from the sale or other disposition of such prior homestead. * * * Rev. St. 1899, § 3623.

The right of homestead is purely a creature of statute, and, while such a right has been created by statute in all or most of the states, such statutes can have no extraterritorial force, and must be construed to apply to homesteads within the state of the enactment. The section quoted is a part of the chapter entitled "Homesteads," by which such right is created in this state. The legislature, in section 3623, is dealing with homesteads in Missouri, two of them, a prior and a subsequent one, acquired in accordance with the provision of that act. The prior homestead, which is to become subject to the housekeeper's debts, is a homestead in Missouri, and the subsequent one, acquired with the consideration derived from the sale of the prior one, is a homestead in Missouri, which is not to be liable for debts to which the prior homestead in Missouri would not have been liable. With a prior homestead in Iowa or any other state this statute has nothing to do. Of course, the legislature never attempted to subject a prior homestead in Iowa or any other state to a housekeeper's debts, or intended to make the liability of a subsequent homestead in Missouri depend upon the liability of a prior homestead in another state. Upon no principle of statutory construction or interstate comity so eloquently invoked by counsel for respondent could the homestead laws of Iowa have

that effect, as is well illustrated by the decisions of the supreme court of that state. In *Rogers v. Ralsor*, 60 Iowa, 358, 14 N. W. 317, the opinion is as follows (Day, J.): "Our statute provides that the owner of a homestead may change it entirely, and that the new homestead, to the extent in value of the old, shall be exempt from execution in all cases where the old or former homestead would have been exempt. Code, §§ 2000, 2001. Under these sections it has been held that a new homestead, acquired with the proceeds from the sale of the old one, is exempt from judicial sale in all cases in which the former homestead would have been exempt. *Sargent v. Chubbuck*, 19 Iowa, 37; *Thompson v. Rogers, Richardson & Co.*, 51 Iowa, 333, 1 N. W. 681; *Pearson v. Min-turn*, 18 Iowa, 36. The laws of Missouri are not pleaded, and will, for the purpose of this case, be presumed to be the same as our own. The laws of each state, however, apply only to homesteads acquired and held under its own laws, and within its territorial jurisdiction. The laws of neither state can have any extraterritorial force or application. What, then, was the character impressed upon the proceeds of the Iowa homestead when taken to Missouri for reinvestment? The laws of Iowa ceased to operate upon it, and to affect its character, as soon as it was invested in real estate in the state of Missouri. It was not the proceeds of the sale of a homestead held under the laws of Missouri, for these laws can apply only to a homestead held under the law of that state. It follows that the fund arising from the sale of the Iowa homestead upon being carried into Missouri lost the distinctive character of being the proceeds of the sale of a homestead. When these proceeds were invested in a homestead in Missouri, that homestead was not exempt from execution for the debt in question, which existed before the homestead was acquired. Code, § 1992. For like reason the new homestead acquired in Linville, in 1873, was liable for debts contracted before it was purchased. The court did not err in sustaining the demurrer. Affirmed."

In the subsequent case of *Dalton v. Webb*, 83 Iowa, 478, 50 N. W. 58, 32 Am. St. Rep. 314, the ruling in *Rogers v. Ralsor* was reiterated and affirmed, so that the shadow of an argument on the score of comity in support of respondent's contention disappears under the rulings of the state in whose behalf it is invoked. Nor do we find any support for that contention in either of the two cases relied upon. *Stinde v. Behrens*, 81 Mo. 254; *Keyes v. Rhines*, 37 Vt. 260, 86 Am. Dec. 707. In the former case, it was, in effect, held that the conveyance by the wife of her interest in a homestead in Kansas was a good consideration for the conveyance to her in her own right of real estate in Missouri, and that the latter conveyance was not in fraud of a creditor from

whose debt the homestead was exempt. In that case, as is said in the opinion: "The exchange of deeds was made at the homestead of the defendants, and while it was being occupied by them as such, and was consented to by Mrs. Behrens upon the express condition that the property to be received in consideration for the conveyance of her homestead should be conveyed to her;" "and that it has been held by the supreme court of Kansas that the conveyance by the wife of her interest in the homestead is a sufficient consideration for the transfer to her, in her own right, of the proceeds of such conveyance;" and this court sustained Mrs. Behrens' title, not because of any protection extended to it by the homestead laws of Kansas, but because it was her property acquired by a valid contract under the laws of that state where the contract was made. The Vermont case is of like character. There "the defendant's wife signed a deed of their homestead sold under process of law in New Hampshire, upon condition of the payment of the proceeds to her, to be kept by her as a separate fund for a future investment in a homestead, free from all interference of her husband, and the court held that she thereby acquired title to the money, and held it free from attachment on her husband's debts."

The judgment for the defendants on the facts is manifestly erroneous, and is reversed, and the cause remanded, with directions to the circuit court to enter a decree in favor of the plaintiff in accordance with the prayer of the petition. All concur.

JOHNSON v. STEBBINS-THOMPSON REALTY CO. et al.

(Supreme Court of Missouri, Division No. 2
Feb. 25, 1902.)

FRAUDULENT CONVEYANCE—EVIDENCE—BURDEN OF PROOF—SUFFICIENCY—JUDGMENT —FRAUD—COLLATERAL ATTACK.

1. In an action to set aside an alleged fraudulent conveyance made by a corporation to its president, evidence considered, and held insufficient to show that any consideration therefor was paid by him, and that it was void as to creditors.

2. In an action by a judgment creditor to set aside an alleged fraudulent conveyance, the burden is on defendants to maintain an allegation that fraud was practiced by plaintiff in obtaining his judgment.

3. A corporation executed a note payable to its treasurer, and while it remained in his possession he without authority signed the name of the defendant company, in which he was also an officer, on its back, and sold it to plaintiff, who knew that he had no authority to sell it. The corporation never received any consideration for the sale. Plaintiff afterwards sued on the note. The suit was dismissed as to the defendant corporation, and judgment rendered in favor of the other defendants for want of authority. Afterwards plaintiff sued the defendant corporation on the note. Defendants' attorney testified that he was informed plaintiff's counsel that the suit would be prosecuted to judgment, and therefore

general denial. Plaintiff's counsel denied this statement. After two continuances the case was called for trial during the absence of defendants' attorney from the city, the matter taken up by plaintiff himself in the absence of his counsel, and judgment rendered against defendants. *Held* insufficient to show that the judgment was obtained by fraud.

4. In a suit by a judgment creditor to set aside an alleged fraudulent conveyance, neither the debtor nor his vendee can attack the judgment on the ground that the note on which it was founded was obtained by fraud.

Appeal from circuit court, St. Louis county; R. Hirtzel, Judge.

Action by James B. Johnson against the Stebbins-Thompson Realty Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

This is a suit in equity by plaintiff, a judgment creditor of the defendant Stebbins-Thompson Realty Company, a corporation, to set aside a deed to a tract of land, therein described, from said corporation to the defendant Judson Thompson, upon the grounds that it was a voluntary conveyance, and a fraud upon the creditors of the realty company, and especially the plaintiff. The petition alleges that the plaintiff, on November 25, 1896, obtained a judgment in the circuit court of the city of St. Louis against the Stebbins-Thompson Realty Company for the sum of \$1,936.20, on which judgment an execution was issued, and returned nulla bona February 1, 1897; that at the time said execution was issued and returned the realty company was the owner of certain parcels and lots of land in said St. Louis county, in the petition described; that on February 20, 1897, the realty company, with the intent to hinder, delay, and defraud its creditors, and especially the plaintiff, conveyed said lands to defendant Judson M. Thompson for the pretended consideration of \$1,000, and that the said J. M. Thompson thereupon took possession of said property; that in fact no consideration was paid, and the deed was purely voluntary; that at the time the said J. M. Thompson was president of the realty company, and as such conveyed the land to himself, without authority from the board of directors; that in March, 1897, an alias execution was issued on said judgment of the plaintiff to the sheriff of this county, and the lands aforesaid were sold at public sale under said execution and purchased by plaintiff on June 25, 1897, and on September 23, 1897, the said J. M. Thompson filed his affidavit, stating that the realty company by a majority vote of its stockholders has been dissolved as a corporation. The bill asks that the conveyance aforesaid to J. M. Thompson may be adjudged fraudulent and void, and that the same be set aside, and that defendant may be enjoined and restrained from selling and disposing of the property. The answer of Judson M. Thompson and Frank C. Thompson, two of the trustees of the former realty company, sets forth that said realty company was dissolved in September,

1897. It then admits the judgment obtained by plaintiff, and the conveyance to J. M. Thompson, and states that the latter was made for a full and valid consideration; that defendant J. M. Thompson had advanced to the realty company the purchase price for the land, and that at the time the plaintiff obtained his judgment the realty company was indebted to J. M. Thompson for the purchase price of the land, and said realty company was at that time not indebted to any other person, except J. M. Thompson, and he and his codefendant Frank C. Thompson were then and there the owners of all the stock in said realty company; and that the plaintiff's judgment against said realty company was obtained by fraud and surprise, and there was no obligation or honest indebtedness to pay the same. Further answering, and by way of cross bill, defendants allege in detail and quite elaborately that the note upon which the aforesaid judgment was obtained was a fraud on the realty company and other indorsers, as well as the original maker of the note; that the note was in fact stolen by defendant Stebbins, and wrongfully and without authority indorsed by him for and in behalf of the Stebbins-Thompson Realty Company, and without their knowledge or consent; that when plaintiff bought this note he knew all these facts, and did not pay full consideration for it; that suit was brought on this very note by the plaintiff against the Suburban Realty Company, the original maker, and Parker and Thompson, as indorsers, and also against the Stebbins-Thompson Realty Company as indorser, but dismissed as to the latter before trial; and that in said suit judgment was rendered for the defendants in said cause, upon showing these facts upon the trial in court, and the same was afterwards affirmed in the St. Louis court of appeals on the 4th day of May, 1895, and by reason of said trial and judgment the Stebbins-Thompson Realty Company was completely discharged and released, and the same became adjudicated as to said realty company. For a further defense these defendants allege that the plaintiff obtained the aforesaid judgment against the Stebbins-Thompson Realty Company by deceit, and false and fraudulent contrivances; that plaintiff's attorney, by cunning and false representations, deceived the attorney for the defendants, he also being then and there the attorney for the realty company in said suit, and obtained a judgment upon said note during his absence from the city of St. Louis. The allegations of new matter are generally denied by the plaintiff in his replication herein filed. Although the defendant Stebbins entered his voluntary appearance, he did not answer. Judson M. and Frank C. Thompson answered jointly, and Judson M. Thompson also filed a separate answer. Judson M. Thompson and Frank C. Thompson, his son, and Stebbins, composed the board of directors. The trial re-

sulted in judgment for defendants, from which plaintiff appeals.

W. B. Homer, for appellant. Given Campbell, for respondents.

BURGESS, J. (after stating the facts). The salient facts are about as follows:

On the 25th of November, 1893, in the circuit court of the city of St. Louis, judgment was rendered in favor of plaintiff, and against defendant Stebbins-Thompson Realty Company, for the sum of \$1,936.20, and execution was issued out of the circuit court of the city of St. Louis, and directed to the sheriff of the city of St. Louis, which was returned, "No property found." At the date of said judgment the Stebbins-Thompson Realty Company was the owner of certain property situated in the county of St. Louis, and on the 29th of February, 1897, this company caused a deed to be recorded purporting to convey said real estate from said corporation to Judson M. Thompson, president of the corporation; the deed being executed by Thompson as president. On the 20th of February a record of a meeting was entered in the minute book of the corporation, which is spoken of as a special meeting of the directors, at which were present Judson M. Thompson and F. C. Thompson, and the deed was authorized by Judson M. and F. C. Thompson. The third member of the board of directors was not present, nor was he notified. On the 18th of March, 1897, execution was issued out of the circuit court of the city of St. Louis upon said judgment, directed to the sheriff of the county of St. Louis, under which execution the property was sold and purchased by the plaintiff. On the 23d of September, 1897, Judson M. Thompson, defendant, made an affidavit that said corporation was dissolved by a majority vote of its stockholders, which was filed with the secretary of state. At the time of signing the note upon which the judgment was rendered under which the land in question was sold, there was another company, called the Suburban Realty Company, of which the defendant F. C. Thompson was secretary, Lovell W. Stebbins treasurer, and George T. Parker president. This company, on the 17th day of April, 1893, made its note for \$1,525, payable 90 days after its date, to the order of Stebbins as treasurer, which was indorsed by Parker and F. C. Thompson conditionally, and by Stebbins individually. The note was never delivered by the Suburban Realty Company to any other person, and while it remained in the possession of Stebbins as the treasurer of the company he wrote the name of the Stebbins-Thompson Realty Company on the back of the note, and sold it to the plaintiff, James B. Johnson, who had full knowledge of the fact that it was the property of defendant company and that Stebbins had no authority to sell the same. The company never realized anything from the purchase of this note. Johnson gave to Steb-

bins \$250, and paid him the residue, less \$112, on the 29th of April, 1893. The \$112 deducted consisted of the amount of a judgment against Stebbins which Johnson held, and it was settled by this transaction. The note not being paid at maturity, plaintiff brought suit in the circuit court of the city of St. Louis against the Suburban Realty Company, George T. Parker, Frank C. Thompson, Lovell W. Stebbins, and the Stebbins-Thompson Realty Company. A defense was made to this suit to the effect that the note was never delivered, and that, while in the custody of the company and being held in escrow, it was stolen by Lovell W. Stebbins, and without the knowledge of defendants, or any authority, sold to the plaintiff, who had notice of the circumstances. Before the trial of the case it was dismissed as to the Stebbins-Thompson Realty Company. The case went to trial, and a judgment was rendered in favor of the defendants the Suburban Realty Company, the maker of the note, George T. Parker, and Frank C. Thompson. Subsequently a suit was instituted by said James B. Johnson on the same note in the circuit court of the city of St. Louis against the Stebbins-Thompson Realty Company. As to what passed during the pendency of this suit there is an absolute conflict between the testimony of Mr. W. B. Homer and Mr. John M. Glover; Mr. Glover insisting that he was informed by Mr. Homer that the suit would not be prosecuted to a judgment, and that, therefore, he filed a general denial. After two continuances it seems that the case was called for trial during Mr. Glover's absence from the city, and the matter was taken up by Mr. Johnson himself, in the absence of Mr. Homer, and the court rendered a judgment without the presence of counsel for the defendant.

With respect to the consideration for the conveyance of the lot in question by the Stebbins-Thompson Realty Company to Judson M. Thompson, it appears that Thompson claimed that long before the date of plaintiff's judgment he advanced to that corporation the money with which the property was purchased, and thereafter F. C. Thompson presented the following resolution: "Whereas, this corporation is indebted to J. M. Thompson for the value of the purchase price for so much of the property known as the 'Candler Tract' at Glendale as belongs to this company: Resolved, that the president be directed to convey the same to him in extinguishment of this company's obligation." In pursuance of this resolution J. M. Thompson, as president of said company, executed to himself a deed to the property, in which the consideration is recited to be \$1,000, while the evidence showed that the company was not indebted in any amount for said tract. Stebbins testified that at the time of his resignation as treasurer of the Stebbins-Thompson Realty Company it owed nothing to J. M. Thompson, but that Thomp-

son was indebted to the company in the sum of \$500 on a note given for shares of capital stock in the company. F. C. Thompson, son of J. M. Thompson, who was the secretary of the company, testified, in answer to a question whether the corporation owed his father any money at the time of the conveyance, that it owed his father at that time about \$1,130. On cross-examination he testified that the company never owned any property except this Telsa Place property. He in no way contradicts the statement of Stebbins regarding the acquisition or disposal of the property. He was able to produce the cash book of the company, but could not find the ledger or any other book of the company, and said they were lost. On redirect examination he testified: "The total credits of the cash book footed \$353.34. The interest I figured up, which run for a period of over three years, amounting to \$28.91. Then in addition to that we credited him with \$616.20, paid by him for the account of Stebbins-Thompson Realty Company." He further testified on cross-examination: "Q. (by Court). Your father paid \$616 for what? A. For the release of his Telsa property. Q. Why haven't you it entered on that book? A. The company didn't have the money, and father— Q. At that time you had his note. Why didn't you put it on the note? A. I don't know. Q. Do you know why the \$616 didn't go into the book? A. He paid it at that time in settlement of this property. Q. Why didn't it go on the book? A. I don't know, I told you. Q. And you don't know why it didn't go on the note? A. We more than paid the note. Q. Does your father pay interest on the demand note? A. Not unless it was accrued. Q. He charges the company interest? A. Yes, sir. Q. But they don't get any interest from him? A. No, sir. Q. When did you discover that the \$616 had been left off the book? A. It was about the time the deed was made to my father. Q. It was after that, wasn't it? A. No, sir; about that time. Q. How did you discover it? A. Probably before that time. Q. Well don't change. That is the time you discovered it. How did you happen to discover it then? A. Looked up to see. Q. Where did you find it? A. I didn't find it. Father knew of it. Q. You didn't know it before? A. Yes, sir; I did. I told you it was intended to settle the company up afterwards. There was money due us for other purposes, and he advanced us money to help to close up the deal. Q. Yes; and others gave you money? A. Yes, sir. Q. There was a syndicate, and your father was one? A. Yes, sir. Q. And they all put up some money in reference to this deal, and formed another corporation, called the Telsa Realty Company? A. Yes, sir. Q. And out of that deal they expected to get their money back? A. Yes, sir. Q. And your father was just the same as the rest of them? A. Yes, sir. Q. The company owed the whole

lot the money? A. I don't know what you mean now by the Telsa Realty Company. They owed a whole lot of money to the Stebbins. Q. This syndicate, called the Telsa Realty Company, owed the Stebbins-Thompson Realty Company money? A. Yes, sir. Q. And your father was a member of that company, also? A. Yes, sir." J. M. Thompson, defendant, testified: "Q. Now, please explain to us this payment of \$616, when it was made. A. It was made on April 3, 1893. It was made to the order of John Candler, the original owner of the property. They wanted to remove all incumbrances on the property,—to take up the notes that were given for the purchase of the property. The purpose was to make the consideration in the deed the amount of my debt, which was, as near as I recollect, at the time, without counting interest, \$1,000. I asked my son and he gave me these figures." On cross-examination he testified: "The Stebbins-Thompson Realty Company gave me no memorandum showing that they owed me this \$616. Q. Did you have an entry on the books to that effect? A. I never had anything to do with the books. They didn't know that the note was sold until three months afterwards. Then how could they make an entry." Being further asked as to the entries on the books, he testified: "I did not expect it to be entered. I paid lots of money I had not entered. Q. Now the Stebbins-Thompson Realty Company never in any book or paper, or in any way, made any acknowledgment, so far as you know of, of your paying this \$616? A. No, sir. Q. And you never asked them for it? A. No, sir. Q. And you had a note in which you owed them considerable amount, and you never paid it or credited that note? A. I paid that note. Q. Long afterwards you paid it? A. No, sir; not long afterwards. It could have been paid any moment. Q. But did you pay it after you had paid this \$616? A. I did not keep any account of that. Q. Answer my question. A. No, sir. Q. Can you give any reason why you did not have your note canceled after you had paid that \$616 out? A. It had no connection with the note. I never thought of it at the time. I can give no other reason. Q. You never thought of claiming this \$616 at the time, did you? A. I have stated all I care to state about that, sir."

The first point presented for our consideration upon this appeal is with respect to the deed from the Stebbins-Thompson Realty Company to J. M. Thompson, which plaintiff claims was fraudulent and void because made for the purpose of defrauding the creditors of said corporation, and especially plaintiff. The evidence as to the payment by defendant Thompson of the \$616 for the release of the property in question is far from being satisfactory. Defendant's son, F. C. Thompson, who was secretary of the defendant company, did not know how it originated, except what he learned from his father, and

he made no entry of it on the books of the company, and why he did not do so he did not know. When asked why he did not put it upon the company's note which it held against his father for \$500, he made the same reply; that is, he did not know. J. M. Thompson's explanation of the transaction was equally as indefinite and unsatisfactory. Upon the whole the evidence failed to show that J. M. Thompson paid any value for the property, and its attempted conveyance to him by the company was voluntary, without any consideration, and void as to his creditors.

But defendants contend that the judgment under which plaintiff claims title was obtained by him through fraud and deceit. The respective counsel testified upon the trial upon this branch of the case, and their evidence was contradictory and irreconcilable as to the circumstances connected with the procurement of the judgment. The burden was upon defendants to show that fraud was practiced by plaintiff in the very act of obtaining the judgment (*Murphy v. De France*, 101 Mo. 151, 13 S. W. 756; *Moody v. Peyton*, 135 Mo. 482, 46 S. W. 621, 58 Am. St. Rep. 604; *Bates v. Hamilton*, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407) by a preponderance of the evidence; and, as every presumption is to be indulged in favor of its integrity, we are of the opinion that they failed to do so, and the trial court so found.

But it may be said that, notwithstanding the evidence adduced by defendants in support of their cross bill may have been insufficient to justify vacating and setting aside the judgment rendered in favor of plaintiff against the Stebbins-Thompson Realty Company, yet it is sufficient to show that the judgment itself is fraudulent; that the suit against the realty company was fraudulently and without legal right instituted, and that the plaintiff, as a matter of law, was not entitled to said judgment against the realty company; and that he acted in bad faith and without warrant of law when he obtained the same, even though it was due to defendants' neglect, and no fraud was shown in the procurement of said judgment. All of the authorities hold that a judgment of a court having jurisdiction of the subject-matter of controversy and of the parties cannot be impeached collaterally in an action between the same parties or their privies in law upon a point put in issue and decided, but that the party desiring to avoid the judgment must apply to the court which pronounced it to have it vacated. *Callahan v. Griswold*, 9 Mo. 784; *Field v. Sanderson*, 34 Mo. 542, 86 Am. Dec. 124. In *Freem. Judgm.* (2d Ed.) § 334, it is said: "The parties to an action cannot impeach or set at naught the judgment in any collateral proceeding on the ground that it was obtained by fraud or collusion. It is their business to see that it is not so obtained. If, without any fault or neglect of one party, his adversary suc-

ceeds by fraud in obtaining an inequitable and unauthorized judgment, he must take some proceeding prescribed by law to annul the judgment, and cannot, in the absence of such annulment, treat it as invalid. It is only third persons who have the right to collaterally impeach judgments. They are accorded the right because, not being parties to the action, nothing determined by it is as to them *res judicata*."

It has been held that a purchaser of real property who holds under a judgment debtor cannot impeach the judgment upon other grounds than those which would entitle the judgment debtor to impeach it, that he occupies the same position of the judgment debtor, and that his rights are not enlarged by reason of his purchase; and, even though fraud was practiced upon the judgment debtor in the procurement of the judgment, this will not entitle a party claiming under the judgment debtor to impeach it, unless the judgment debtor could do so. 2 *Freem. Judgm.* (2d Ed.) § 335; *Johns v. Pattee*, 55 Iowa, 665, 8 N. W. 663; *Gallaugh v. Hebrew Congregation*, 35 La. Ann. 829; *Stoutimore v. Clark*, 70 Mo. 471. Now, defendant Thompson was not only a member of the defendant corporation, but was its president, and claims whatever title to the land he has by deed from it; and it was by reason of the corporation's own negligence that the judgment was rendered against it under which plaintiff claims, and the law will not, under the circumstances, afford Thompson any redress, unless it be that he be permitted to go behind the judgment and show that the note which was its foundation was never delivered, and surreptitiously obtained by Stebbins, and that plaintiff received it from him with notice of these facts. It is indisputable that the corporation could not do this in this case, because it, through its officers, knew these facts before the judgment was rendered, and set them up as a defense to plaintiff's cause of action, and by its own negligence permitted judgment to go against it; and defendant, being privy to the corporation, occupies no better position than it does. Whatever may be the rule elsewhere, it seems to us the better rule is that "the parties to an action, and the persons in privity with them, cannot attack or impeach a judgment for fraud; and any attack must be regarded as collateral which is made in any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying a judgment or decree." 2 *Freem. Judgm.* (2d Ed.) § 336; *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95.

Defendants, however, rely upon the case of *Conover v. Jeffrey*, 28 N. J. Eq. 39, in which the case of *Rich v. Sydenham*, 1 Oh. Cas. 202, seems to be approved, wherein it was held that in a proper case the court may look behind a judgment at law, in order to do justice to the parties to it, as in a

where the plaintiff, when the defendant was drunk, got a bond from him for \$1,000 for a loan of \$90, and had received judgment at law for the bond. His bill, filed to subject certain property held in trust for defendant's wife to the payment of the judgment, was dismissed on the ground of the iniquity of his conduct in obtaining the bond. But the case of *Rich v. Sydenham* was not well considered, nor is it supported by either reason or authority, and the doctrine therein announced is clearly erroneous. And even in the *New Jersey* case it was ruled that as the case was simply that of a judgment creditor, who had established his claim at law, seeking in equity to reach his debtor's property which had been fraudulently conveyed away, the debtor was in no position to contest the creditor's right to his judgment; that to such a suit it was no defense that the conduct of the creditor in obtaining his judgment was inequitable. A judgment obtained in a court having jurisdiction of the parties and the subject-matter in controversy is conclusive between the parties thereto and their privies, and cannot be gone behind of for the purpose of showing a state of facts which might have been a defense to the action in which the judgment was rendered.

For the reasons indicated the judgment is reversed and the cause remanded. All concur.

STATE v. JACKSON.

(Supreme Court of Missouri, Division No. 2.
Feb. 4, 1902.)

CRIMINAL LAW—MURDER—JURIES—INSUFFICIENT PANEL—POWER OF THE COURT—STATUTORY METHOD OF IMPANELING—TRIAL—INSTRUCTIONS—DEFINITION OF DELIBERATION—HARMLESS INSTRUCTIONS.

1. Rev. St. 1890, art. 2, § 3795, provided for the manner of drawing juries in felony cases in the courts having jurisdiction thereof in counties containing cities of 50,000 and less than 300,000 inhabitants; and section 3801 of the same chapter expressly conferred upon such courts power to direct the number of jurors to be summoned, and to make such rules and orders as they might deem proper touching the jury service. *Held*, that where it appeared that a regular panel, made up according to section 3795, was incomplete, the court had authority to complete it by a proper order placing thereon the names of a requisite number of citizens not regularly summoned, but otherwise qualified.

2. The method of summoning and impaneling juries provided for by statute is merely directory, and hence it is no objection to a panel that the court completes it by making an order placing thereon the names of citizens who were not summoned according to the statutory method.

3. Where the trial court passes upon the question as to whether jurors were disqualified under Rev. St. 1890, § 3799, prescribing what persons shall not serve on juries, its finding will not be disturbed unless manifestly erroneous.

4. On a prosecution for murder, wherein it appeared that the killing was unprovoked, the court instructed that the word "deliberation" meant "in a cool state of blood, not in the heat of passion caused by some just or lawful prov-

ocation." *Held* that, though the definition of "deliberation" was inaccurate, in that it omitted the essential element of time necessary to show that the homicide was committed with design to accomplish some unlawful purpose, yet, inasmuch as there was no lawful provocation which could reduce the offense from murder in the first degree to some other grade of homicide, the instruction was not prejudicial to defendant.

5. An instruction for the state on a prosecution for murder, which conflicted with another instruction given for the state with respect to murder in the second degree, was not prejudicial to defendant where he was not convicted of murder in the second degree.

6. Defendant and deceased were playing cards in a saloon, and had some dispute, whereupon deceased said, "I don't want to fuss with you," and went across the room. Defendant soon thereafter stepped up to deceased, and said, "I will have something to do with you," and deceased left the room, and went to another saloon near by. Defendant borrowed a pistol, saying he needed it, and followed deceased to the other saloon, stepped up behind him, and, after standing thus for a few minutes, without any warning to deceased, shot him in the back of the head. *Held*, that the homicide was without any justification or mitigating circumstances which could reduce it from murder in the first degree to any lesser offense.

Appeal from criminal court, Jackson county; Jno. W. Wofford, Judge.

James Jackson was convicted of murder, and he appeals. Affirmed.

English & English, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

BURGESS, J. The defendant was indicted for the murder of one Prophet Everett. He was convicted in the criminal court of Jackson county at its April term, 1901, of murder in the first degree, and sentenced to be hanged. From the sentence and judgment he appeals.

Both the defendant and deceased were negroes. They were but slightly acquainted. On Saturday night, December 22, 1900, they met in a saloon in Kansas City, and engaged in a game of cards. They had some disagreement over the game, whereupon deceased arose from the table at which they were playing, and remarked to defendant, "I don't want to bother and fuss with you," and walked to another part of the room. Shortly thereafter defendant stepped up to deceased, and said to him, "I will have something to do with you." Deceased then left that saloon, and went to another, which was about two blocks away. Shortly after deceased left the saloon where he and the defendant had been engaged at cards, defendant took from George Washington, another negro, a pistol which Washington had in his pocket, at the same time remarking to him, "I am going to keep it; I need it," and put it in his pocket. He then went to the saloon to which deceased had gone, and found him watching a game of cards. Defendant, after entering the saloon, stepped up behind deceased, and, after standing there a few minutes, and without any warning to him, held the pistol

which he had taken from Washington within about three feet of the back of the head of deceased, and fired, when deceased at once fell forward upon the floor dead, the ball having entered his head at the back part, passing through the brain, and producing instant death. Deceased was unarmed. Just at the time of the shooting two Kansas City police officers entered the front door of the saloon. They were just in time to witness the killing. Immediately after firing the shot, and seeing his victim fall to the floor, the defendant rushed out of the back door of the saloon. One of the officers followed. The other officer, leaving the building by the front door, rushed to the rear of the building, where the defendant, seeing himself cornered and covered with the officers' revolvers, threw up his hands, and allowed himself to be placed under arrest.

The first error assigned by defendant complains of the action of the trial court in causing to be placed upon the panel of jurors certain persons whom he claims were not selected in accordance with the statute. It appears from the record that on the first day of the April term, 1901, of the criminal court of Jackson county, the following order was made, to wit: "Now, at this day, it appearing to the court that the regular panel of jurors is incomplete, the court orders that the following named citizens, who are present in open court, be placed on the regular panel for the April term, 1901, to wit: M. M. Brennan, Miles McNally, Frank Sarver, William Kelly, and W. P. Mulvihill." Thereafter, at the beginning of the trial of said cause, the defendant objected to the panel of jurors upon the ground that it contained the names of jurors not drawn or selected in accordance with the provisions of article 2, c. 42, Rev. St. 1899, namely, M. M. Brennan, Miles McNally, Frank Sarver, William Kelly, and William P. Mulvihill, in that they were not drawn as provided by said section, and that a jury could be made from the regular panel, and that said jurors were not selected by the court. The objection was overruled, and defendant duly excepted. Section 3795, art. 2, Rev. St. 1899, with respect to "juries in counties containing cities of 50,000 and less than 300,000 inhabitants," provides for the manner of drawing juries in any circuit court or court having jurisdiction of felony cases in such counties; while section 3801 of the same chapter expressly confers upon such courts the power to direct from time to time the number of jurors to be summoned for said court, and to make such rules and orders as it may deem proper touching the jury service of the court. It thus clearly appears that the action of the court in ordering the persons named to be placed upon the regular panel for the April term was in accordance with the statute. But, even if it was not, it has always been held by this court that the statutory method of drawing, summoning, and

impaneling juries is merely directory. *State v. Matthews*, 88 Mo. 121; *State v. Gleason*, Id. 582; *State v. Albright*, 144 Mo. 688, 46 S. W. 620.

The defendant also objected to the panel upon the ground that it contained the names of jurors who were not qualified under the provisions of section 3799 of said statute, namely, M. M. Brennan, Miles McNally, Frank Sarver, William Kelly, and W. P. Mulvihill, in that they have no visible means of support, and upon other grounds unnecessary to mention. These questions were all passed upon by the court, whose province it was to do so; and, as it does not appear that its finding was clearly against the evidence, it should not be disturbed. Thus, in *State v. Williamson*, 106 Mo. 162, 17 S. W. 172, it is held that the finding of the trial court as to the qualifications of jurors will not be disturbed unless it appears that manifest error had been committed; and such was not this case.

The point is made that the court erred in giving the first instruction on the part of the state, in that it defines the word "deliberation" as meaning "in a cool state of the blood, not in a heat of passion caused by some just or lawful cause of provocation to passion; and the court instructs you that under the evidence in this case there is no evidence tending to show the existence of any such passion or provocation." The argument is that the instruction omits the essential element of deliberation; that is, that the homicide must have been committed in the furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other unlawful purpose. While the definition of the term "deliberation" is inaccurate, and not in accord with the uniform rulings of this court, in that it omits an essential element of the crime,—that is, that the homicide must have been committed in furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other unlawful purpose (*State v. Wiehners*, 66 Mo. 13; *State v. Avery*, 113 Mo. 473, 21 S. W. 198; *State v. Andrew*, 76 Mo. 104; *State v. Ward*, 74 Mo. 253; *State v. Kotovsky*, Id. 249; *State v. Ellis*, Id. 219; *State v. Stephens*, 96 Mo. 638, 10 S. W. 172; *State v. Fairlamb*, 121 Mo. 187, 25 S. W. 895; *State v. Tettaton*, 159 Mo. 354, 60 S. W. 743; *State v. Furgerson*, 162 Mo. 668, 63 S. W. 101),—the instruction could not have been prejudicial, since there was no lawful provocation which could reduce the offense from murder of the first degree to some other grade of homicide. Nor does it make any difference that the instruction may have been in conflict with the third instruction given on behalf of the state with respect to murder in the second degree, even if such be the case, for, as defendant was not convicted of murder in that degree, we are unable to see how he could possibly have been prejudiced by the instruction.

We are also of the opinion that no such

error was committed in the admission of evidence on the part of the state as would justify a reversal. The homicide was without justification or excuse, or even a mitigating circumstance. Defendant had a fair trial, and, finding no error in the record that would justify us in reversing the judgment, it must stand affirmed, and the sentence ordered to be executed. All concur.

HANLON v. PULITZER PUB. CO.

(Supreme Court of Missouri, Division No. 1
Feb. 19, 1902.)

SUPREME COURT—JURISDICTION—LIBEL—CONSTITUTIONAL QUESTION—INSTRUCTION.

The question whether defendant is entitled to an instruction on the burden of proof in a libel suit does not involve a construction of Const. art. 2, § 14, providing that, in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the facts, so as to give the supreme court jurisdiction of an appeal in a case involving such question.

Appeal from St. Louis circuit court; Jas. E. Withrow, Judge.

Action by Thomas P. Hanlon against the Pulitzer Publishing Company. From a judgment for plaintiff, defendant appeals. Case transferred, for want of jurisdiction, to the St. Louis court of appeals.

Judson & Green, for appellant. Morris & Fitzgerald and Jas. P. Maginn, for respondent.

VALLIANT, J. This is an action for libel. The defendant corporation is the publisher of the St. Louis Post-Dispatch. The petition sets out in full the article complained of; states that it was published by the defendant and concerning the plaintiff; that it is false and malicious, and to the plaintiff's damage. The answer admits the publication, denies malice, avers that the statements in the publication were true, and pleads certain facts in mitigation. The trial resulted in a verdict for the plaintiff for \$1,200 compensatory and \$500 punitive damages, and judgment accordingly, from which the defendant appeals.

The appeal comes to this court on the theory that a constitutional question is involved. The clause of the constitution referred to is, "and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact." Article 2, § 14. Before a party can be in a position to invoke the jurisdiction of this court to decide a constitutional question, he must be able to show that he claimed in the trial court some right under the constitution which was denied him, or that a constitutional question, to his own disadvantage, was ruled in his adversary's favor. Appellant insists that its right under the above-quoted

clause of the constitution was denied or infringed by the refusal of the court to give the following instruction asked by it: "The court instructs the jury that, under the constitution of the state, the jury in every action for libel are the judges of the law as well as of the facts. You are therefore to determine from all the facts in evidence whether the publication complained of was a libel upon the plaintiff, and, unless you so find that it was a libel upon the plaintiff, your verdict must be for the defendant." The court, of its own motion, gave the following: "The jury are instructed that, under the law of this state, the jury, under the direction of the court, are to determine the law and the facts in all suits and prosecutions for libel, which means that in this case you are to determine whether the publication complained of is or is not a libel upon the plaintiff." The particular rights guaranteed to the defendant under the clause of the constitution above quoted were to plead the truth of the publication in defense, and to have the jury, under the direction of the court, determine the law as well as the facts. Those rights the appellant claimed in the trial court, and they were given. But appellant contends that the omission of the last clause of the refused instruction, "and, unless you so find that it was a libel upon plaintiff, your verdict must be for defendant," impaired its constitutional right, in that that clause was, in effect, an instruction on the burden of proof, and that, to give full effect to the clause of the constitution quoted, the jury should be instructed on the law of burden of proof. We will not decide whether, under the pleadings in this case, the defendant was entitled to an instruction that the burden of proof was on the plaintiff on that issue, nor whether this refused instruction was really an instruction on that point, because those questions, discussed in the briefs, will be for the appellate court, to which the case will be transferred. We will go no farther than to say that the question of whether the defendant is entitled to an instruction on the burden of proof in a libel suit does not involve a construction of the constitution.

We are of the opinion that there is no constitutional question in this case, and it is therefore transferred to the St. Louis court of appeals. All concur.

ROSE v. SMITH et al.

(Supreme Court of Missouri, Division No. 1
Feb. 19, 1902.)

HOMESTEAD—SALE—MORTGAGE—REINVESTMENT OF PROCEEDS IN NEW HOMESTEAD—EFFECT.

1. A husband and wife owned a homestead in farm lands valued at \$1,500, which they mortgaged to plaintiff for that amount. Thereupon the husband purchased a livery stable for \$1,375, and a town home for \$1,100. Out of the \$1,500 realized from the mortgage he paid \$1,370 on the livery stable. Later he added to

the balance, of \$130, money received from the sale of farm implements, and paid for the house. He thereupon abandoned his farm homestead and moved into the town house, and established his homestead there. *Held*, that though the new homestead was not paid for out of the identical \$1,500, except as to the \$130 balance, it must nevertheless be treated, in equity, as acquired with the proceeds of the old one, and therefore exempt from execution as fully as the old, under Rev. St. 1899, § 3623, providing that in such case the new homestead shall be exempt as fully as the old.

2. Though the mortgage of the old homestead merely created a lien, and the mortgagors might have had a homestead in the equity of redemption, their ceasing to occupy it and their acquirement of a new homestead in another place amounted, in law, to an abandonment of the old homestead.

3. Where the owner of a homestead mortgages it and invests the proceeds in a new homestead, the latter is as much exempt from execution, under Rev. St. 1899, § 3623, as though the proceeds of a direct sale had been so reinvested.

Appeal from circuit court, Ralls county; D. H. Eby, Judge.

Action by D. D. Rose against E. C. Smith and others to set aside an alleged fraudulent conveyance. Judgment for plaintiff, and defendants appeal. Reversed.

In 1892 E. C. Smith and wife owned four-sevenths interest in 205 acres of land in Pike county. The wife owned one-seventh by inheritance, and the husband three-sevenths by purchase. The value of their interest was \$1,500. It was the homestead of the family. Smith and wife mortgaged the homestead to the plaintiff for \$1,500. Then Smith purchased a livery stable and a house in the town of Center, Ralls county. The house was worth \$600 to \$1,000, and stood upon a lot 252 feet by 90 feet. The contract for the livery stable and the house was an entirety, and \$5 earnest money was paid to bind it. The livery stable was priced at \$1,375, and the house at \$1,100. Smith stated to Rose that he was borrowing the \$1,500 to buy the livery stable. The loan was made on the 2d of April, 1892. On the 5th of April, Smith paid \$1,370 for the livery stable, and received a deed for it. The \$5 earnest money was applied to make up the difference between the \$1,370 paid and the \$1,375, the agreed price. This \$1,370 was paid out of the \$1,500 borrowed. This left \$130 of the \$1,500 so borrowed. To this \$130 Smith added the money he received from the sale of some stock and farm implements, and on May 9, 1892, he paid for, and received a deed to, the house. Smith thereupon abandoned his homestead on the farm and moved into the town house, and established his homestead thereon, and has continued to use and occupy it ever since. In 1894 Smith conveyed the new homestead to his wife. In 1896, the \$1,500 loan on the farm having matured, and Smith being unable to pay it, the plaintiff foreclosed the deed of trust, and became the purchaser for \$1,250. After crediting that sum on the debt of \$1,500 and the interest due, he brought suit for the deficit,

and obtained a judgment for \$700. Under this judgment he levied upon the new homestead, had it sold under execution, and became the purchaser for \$5. The day before the judgment for the deficit was rendered, Smith and wife sold the new property to Mrs. Smith's brother, the defendant Ogle. The consideration was \$200 that Ogle had loaned his sister, Mrs. Smith, and \$450 in cash. The plaintiff then brought this proceeding in equity, and asked that the deeds from Smith to his wife and from Mrs. Smith to Ogle be declared fraudulent and be set aside, and for possession of the property, etc. The circuit court rendered judgment as prayed, and the defendants appealed.

J. D. Hostetter, for appellants. Roy & Hays and Ed. L. Alford, for respondent.

MARSHALL, J. (after stating the facts).

1. The head of a family may sell or mortgage his homestead, whether he be solvent or insolvent, and his creditors cannot impeach the sale; for, having no claim upon the homestead, their rights are not impaired. *Bank v. Guthrey*, 127 Mo., loc. cit. 198, 29 S. W. 1004, 48 Am. St. Rep. 621; *Creech v. Childers*, 156 Mo. 338, 56 S. W. 1106; *Association v. Howard*, 150 Mo., loc. cit. 450, 51 S. W. 1046. So a homesteader can dispose of one homestead, and with the proceeds acquire another, and the new homestead will be exempt from execution as fully as the old one was. Section 3623, Rev. St. 1899; *Smith v. Enos*, 91 Mo. 579, 4 S. W. 269; *Goode v. Lewis*, 118 Mo. 357, 24 S. W. 61; *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649; *Banking Co. v. Brown* (not yet officially reported) 65 S. W. 297. But while the plaintiff admits that such is the law, he denies that it covers this case, for two reasons: (1) Because the identical proceeds of the sale of the old homestead were not used to buy the new homestead, but \$1,370 of such \$1,500 was invested in the livery stable; and (2) because Smith never sold the old homestead,—he only mortgaged it,—and a mortgage is only a lien, and not a sale, and therefore Smith had a homestead in the equity of redemption. It is true that the evidence shows that \$1,370 of the \$1,500 was invested in the livery stable. But the evidence shows that the \$130 balance of the \$1,500 was invested in the new homestead. Therefore, pro tanto, Smith had that much of a homestead in the town house; and this action must fail because it seeks to set aside the whole conveyances, and to put the plaintiff into possession of the whole premises. So that the judgment of the circuit court cannot stand. But complete justice would not be done by stopping here. The evidence shows that the contract for the purchase of the livery stable and the town residence was an entirety. This being true, if Smith had added to the \$1,500 borrowed on the old homestead the amount he realized from the sale of the stock and farm implements, and had deposited both amounts in

the bank together, and if the livery stable and town house had been conveyed to him by the same deed, and he had given one check for \$2,475, the agreed price for the two, there would be no doubt that any court would have treated the new homestead as purchased with the proceeds of the sale of the old. The only difference between this and the case at bar is that the proceeds of the sale of the old homestead and of the farm implements were only mixed pro tanto, and not entirely, and that the payments for the stable and the house were not made at the same time, by the same check. The contract for the purchase of the two was, however, an entirety. No just or logical distinction between the case assumed and the case at bar can be drawn, so far as the rights of the plaintiff are concerned. He cannot be heard, in equity, to say, "If the one course of procedure had been adopted, I would have had no right to subject the new homestead to the payment of my debt, but, because of the difference in the form of procedure in the other case, a right has accrued to me to so subject the new homestead." It is a rule of equity as old as its establishment that courts of equity look to the substance, and not to the shadow,—look to the right, and not to the form any transaction may have taken. So regarded, there is no equity in the plaintiff's contention, and the new homestead must be treated as acquired with the proceeds of the sale of the old. The fact that, even under the plaintiff's contention, at least a part of the stock and farm implements were exempt from execution, and hence, likewise, were the proceeds of their sale, and that such proceeds, added to the balance of \$130 remaining of the \$1,500, were used to buy the town house, and hence that house was for this reason exempt, has not been overlooked. The second contention of the plaintiff is true, in the abstract, but has no application to this case. A mortgage creates a lien, and the mortgagor may have a homestead in the equity of redemption. But in this case the mortgagor abandoned his occupancy of the land mortgaged, and therefore lost his right to claim a homestead in the equity of redemption. Not only this, but he actually established a new homestead in the town house; and, as he could not have two homesteads at the same time, this was an abandonment, in law, of the prior homestead. Again, while primarily a mortgage, or, rather, a deed of trust, creates only a lien, it may effectually transfer the title, also, if the lien is not discharged by the payment of the debt. At common law a mortgage was a pledge, to be defeated upon the happening of a subsequent condition, and if the condition was not fulfilled the pledge became absolute,—the pledgee was entitled to possession, as he already had title by the terms of the mortgage. A deed of trust places the title in the trustee, instead of in the beneficiary, as a mortgage does. But the title in the trustee may be divested out of

him by a sale under the deed of trust, and the title in this way be transferred from the original debtor or grantor in the deed of trust to the creditor, as was done in this case, or some third person. So that a homestead may be sold as effectually by means of a mortgage or deed of trust as by a direct conveyance. And the proceeds of a sale of a homestead by mortgage or deed of trust, that are invested in a new homestead, are just as much within the spirit and reason of the statute, and just as fully protected by the statute, as if the old homestead had been sold outright, and the proceeds reinvested in the new homestead. There is therefore no merit or equity in the plaintiff's second contention.

2. The town house being a homestead, the conveyance by Smith to his wife in 1894, and by Mrs. Smith to Ogle in 1898, carried a good title, no matter what motive actuated the transfer. *Bank v. Guthrey*, 127 Mo. 189, 29 S. W. 1004, 48 Am. St. Rep. 621.

The judgment of the circuit court is reversed, and, as the plaintiff can never recover in this action, the cause is not remanded. All concur.

MORLEY v. HARRAH et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

ACTION TO SET ASIDE DEED—FRAUDULENT REPRESENTATIONS—EVIDENCE.

Deed from plaintiff in consideration of \$800 in notes, part of \$2,000 in notes secured by mortgage, should be set aside for fraudulent representations; plaintiff testifying that defendant told him that the \$2,000 notes represented a loan on the mortgaged land, and that it was under cultivation and rented for \$250 per year; it appearing that the land was worthless and unoccupied; that the person giving the mortgage did not own the land, and was not known by any witness; that defendant told plaintiff he must trade at once, if at all; and that two days later defendant conveyed the land to another, without consideration and without his knowledge; defendant testifying that he took the notes in exchange for a stock of goods; that when he traded with plaintiff he knew nothing about the land; that he told plaintiff so, and made no representations, but that he gave plaintiff a written description of the land, containing the representations plaintiff charged him with making; a witness testifying that, shortly before such trade, defendant tried to sell the notes to him, and made such representations as to the land; and an attorney testifying that defendant, in talking with him about his indebtedness, had stated that the notes were worthless.

Appeal from circuit court, Clinton county; A. D. Burnes, Judge.

Suit by George W. Morley against J. C. Harrah and others. Judgment for defendants. Plaintiff appeals. Reversed.

Thos. E. Turney and Jas. E. Goodrich, for appellant. Jos. Barton and Wm. Henry, for respondents.

VALLIANT, J. This is a suit in equity to set aside a deed from plaintiff to defend-

ant J. O. Harrah, conveying certain real estate in the town of Cameron, on the ground that the deed was obtained by fraudulent misrepresentations. There was a finding and judgment for the defendants in the circuit court, and the plaintiff appeals.

The evidence shows that the plaintiff's property, consisting of a house and two lots in Cameron, was worth about \$1,500; that, having expressed a desire to sell, he was approached by a real estate agent named Meservy, who introduced him to defendant Harrah as one likely to buy. Negotiations between Harrah and the plaintiff ended in plaintiff's deeding to Harrah the property for the consideration of \$1,500. Acknowledgment of payment was expressed in the deed; the conveyance being made subject to a mortgage on the property of \$700, which Harrah assumed to pay, as part of the consideration. The \$1,500 was in fact not paid in cash, but by the assumption of the \$700 mortgage, and the transfer to plaintiff of a note for \$500, and three-fifths of another \$500 note owned by Harrah's wife. These two \$500 notes were a part of \$2,000 deed of trust incumbrance on 240 acres of land in Camden county. At the time the trade was made, one of the \$500 notes was given to the plaintiff, and one placed in the hands of a third person to be collected; \$300 of the proceeds to be delivered to plaintiff, and \$200 to Harrah. The remaining \$1,000 note was retained by Harrah. It turned out that the notes were entirely worthless, and the plaintiff has received nothing for his property. The question of fact as to the representations made by defendant Harrah depends chiefly, though not entirely, on the testimony of the plaintiff. He testified that Harrah told him that the \$2,000 note represented a loan of that amount made on the Camden county land; that it was under cultivation, and was at that time rented for \$230 a year; part of it was valley land, and the rest valuable timber; that the title was perfect; that he had had it examined by a lawyer, who pronounced it good. The fact developed that the land was of very little value, not under cultivation, scarcely susceptible of it, and not rented at all. The grantor in the deed of trust, and maker of the notes, had no title, and was himself unknown to any one who testified in the case. The negotiations began on June 8, 1898, and the trade was closed the next day. During the negotiations, on the 9th of June, Harrah showed the plaintiff the deed of trust and notes, and a paper containing a description of the land; also a paper which is spoken of in the testimony as an "abstract of title." What the contents of the abstract were, or by whom made, does not appear, as it was not produced at the trial. At that time the plaintiff stated that he would take time to investigate the title; but Harrah told him that the trade would have to be made then, or not at all, because he was

going to Kansas City that evening. Then they went to the office of another real estate agent,—a Mr. Cornish,—whom plaintiff requested to examine the papers; and he did so, and said the papers were regular. Thereupon the trade was concluded. One \$500 note and the deed of trust were given to plaintiff, and one note left with Cornish for collection; the defendant Harrah retaining the abstract and the remaining \$1,000 note. Two days afterwards Harrah conveyed the property by deed to defendant Kenner, but the conveyance, according to Kenner's testimony, was without consideration, and really without his knowledge or consent at the time it was made. Harrah, in his testimony, denied that he made any representations as to the title or the land. He testified that he told the plaintiff he knew nothing about either; that he had taken the notes in trade for a stock of goods, and believed them to be good, but that the plaintiff must take the risk himself. He said he told him: "Now, when I make a deal of this kind, I try to make it all right, and I will sign the papers over to you just as I got them. They were signed over to me without recourse, and I will do the same. I wouldn't be responsible for anything. I said: 'I have got \$1,200 back, besides your \$800, and, if I can lose the \$1,200, you can lose the \$800. I know nothing about it, only by the papers; and, if you trade, you will have to trade this evening, because I am going to Kansas City this evening.'" He admitted that he told plaintiff he had had a lawyer in Gallatin to go over the papers, and that the lawyer said everything was all right, and also that he gave the plaintiff a written description of the land, which contained the representations plaintiff charges he had made. He said: "I told him nothing about the value of the land and its quality; that I didn't know anything about it, aside from the description. I gave the description to Morley, and I suppose he kept it. He started off with it. * * * I told him I knew nothing about the land renting for \$250, but that the description said it was rented for some amount of that kind. I made no such statement to him. It was only from them papers he got it,—that description." There was testimony showing that shortly before this trade Harrah had attempted to trade the same notes to a Mr. Burr, who lives in Cameron, for a farm, and in doing so told Burr that the notes were well secured; that it was good, tillable land, and rented for \$250. It was also shown by the deposition of Judge J. B. Malone that in the early part of 1898 Harrah was talking to him about his indebtedness growing out of his business in Chillicothe, and his inability to pay, and witness suggested that he sell these notes for that purpose, but Harrah said the notes were worthless. Harrah was present when that deposition was being taken, and at the conclusion

the plaintiff called him to the witness stand, and he was sworn, but refused to testify. At the trial he testified that this conversation with Judge Malone was two or three months after the trade in question.

Upon weighing the evidence in the case, we cannot doubt that the plaintiff's is the true version of the transaction. It is perfectly clear from the evidence that the defendant Harrah knew that the notes were worthless, and he knew the plaintiff did not know it. He testified that his conversation with Judge Malone was two or three months after the trade, and that he had in the meantime discovered the truth. But his conduct in refusing to testify in the presence of the witness looks badly, and justifies an adverse conclusion. He not only knew that the notes were worthless, and that the man he was trading with did not know, but he also knew that by his conduct, if not by his words, he led his adversary in the trade to believe that the notes were valuable. He said he made no such representations, but he admits that he gave the plaintiff what purported to be a written description of the land, which contained the representations and the information on which he knew the plaintiff relied. There was no difference in the natural effect produced on the mind of the man he was dealing with, whether he used words or writings or symbols; and there is no difference, in law, in the consequence. He knew that by those papers, in connection with what he said and did, he was inducing the plaintiff to believe that he was giving him well-secured notes, and he knew that the plaintiff had had no opportunity to learn the contrary at the time the trade was closed. He testified that at the date of the trade he knew nothing about the character of the land, or about the title of the grantor in the deed of trust. He testified, also, that he had been in business in Chillicothe, and had sold out his stock of goods, taking these notes in payment. The particulars of that transaction are not in evidence, but he leaves the inference that he took them at their face value and gave the equivalent without knowing anything about them. Whether he was misled in that transaction by false representations, we are not informed; but when the trade in this case was made he had had plenty of time to learn the truth, and it is hardly believable that he continued to confide in the misrepresentations, if there were such, and hold the notes, which, judging from the testimony of the witness Malone, constituted no inconsiderable proportion of his assets, without making any inquiry about them. The circumstances corroborate the testimony of the witness last named, and justify the conclusion that Harrah did know the truth when he made this trade; and if he told the plaintiff, as he says he did, that he knew nothing about it, he made a misstatement, and it was as effective in fact and as

vicious in law as if he had made the statements that plaintiff says he made. The willful and conscious suppression of the truth, under such circumstances, is as blameworthy as the willful and conscious expression of an untruth. The fact that immediately after this trade he attempted to pass the title to defendant Kenner, also looks badly. The purpose of that deed is very apparent, and shows how the defendant Harrah himself interpreted his own conduct in obtaining the deed from the plaintiff. The preponderance of the evidence on all the issues is with the plaintiff, and he is entitled to the relief prayed.

The judgment is reversed, and the cause remanded to the circuit court, with directions to take an account to ascertain the amount of the rents of the property in the town of Cameron received by defendant J. C. Harrah, less taxes and cost of insurance and repairs, if any, paid by him, and enter a decree in conformity with the prayer of the plaintiff's petition, canceling the deed from plaintiff and wife to defendant J. C. Harrah, described in the petition dated June 9, 1898, and the deed from Harrah to defendant Kenner, mentioned in the petition dated June 11, 1898, and reinvesting the title to the property in those deeds described in the plaintiff, and render judgment in his favor against defendant J. C. Harrah for the net amount of rents ascertained by the accounting as above indicated, and judgment against all the defendants for costs of suit. All concur.

MEADOR v. TEXAS COUNTY.

(Supreme Court of Missouri, Division No. 1
Feb. 19, 1902.)

PROSECUTING ATTORNEYS—APPEARANCE ON APPEAL—COMPENSATION—QUESTION OF FACT—EVIDENCE—ADMISSIBILITY.

1. Rev. St. 1899, § 637 (Rev. St. 1899, § 4951), providing that, when any criminal case shall be taken to the court of appeals, it shall be the duty of the prosecuting attorneys to represent the state in such case in said courts, and make out and cause to be printed all necessary abstracts of record and briefs, and, "if necessary," appear in said court in person, or employ some attorney at their own expense to represent the state in such court, for which service they shall receive such compensation as may be proper, not to exceed a certain amount and necessary traveling expenses. *Held*, that the question of the necessity of such attorneys appearing in the court of appeals and that of the quantum meruit are questions of fact to be tried on the evidence by the court which is to pass judgment on the claim when presented,—the county court in the first instance and the circuit court if appeal is taken,—and neither the attorney nor the county court in its administrative capacity is the sole judge on such questions.

2. In an action by a prosecuting attorney to recover for appearing in the court of appeals it is error to admit testimony tending to show that the county court had not ordered him to so appear, and had made no order signifying that such attendance was necessary.

Appeal from circuit court, Texas county;
L. B. Woodside, Judge.

Action by George T. Meador against Texas county. From a judgment for defendant, plaintiff appeals. Reversed.

Lamar, Barton & Meador, for appellant.
John H. Sanks, for respondent.

VALLIANT, J. Plaintiff is the prosecuting attorney of Texas county. As such he attended in person and made oral arguments for the state in the St. Louis court of appeals in two misdemeanor cases which had gone to that court by appeals from the circuit court of Texas county, and also prepared the necessary abstracts of records and briefs. He presented his bill for these services and for his necessary traveling expenses to the county court of Texas county, itemized at \$25 for his services in briefing and arguing each case and \$16 for traveling expenses. The county court allowed the claim for \$15, specifying that the allowance was \$7.50 in each case for preparing the brief, discarding the considerations of attending the court of appeals in person and making oral arguments, and the item of traveling expenses. Plaintiff appealed to the circuit court, where the cause was tried *de novo*, and the same result reached as in the county court, and the plaintiff brings the cause here by appeal.

On the trial in the circuit court the evidence on the part of the plaintiff tended to show that as prosecuting attorney of the county, familiar with the cases in question in the court of appeals, he regarded it necessary for him to attend in the appellate court, and make oral arguments, and did so; that he also made the necessary abstracts and briefs; that his services were reasonably worth \$25 in each case; and that he expended \$16 in traveling expenses, which was reasonable. On the part of defendant the evidence tended to show that the county court had not ordered or requested the plaintiff to attend in the court of appeals to argue the cases, and had made no order signifying that, in the judgment of the county court such attendance was necessary. This testimony was admitted over the objection of plaintiff, and exception was taken. It was admitted that the county court had paid for printing the briefs. The plaintiff asked the following instruction or declaration of law, which the court refused: "The court declares the law to be that section 637, Rev. St. 1889, makes it the duty of the prosecuting attorney, when criminal cases are taken from counties in which he is elected to the court of appeals by appeal or writ of error, to be his duty to represent the state in such cases, and, if necessary, to appear in person before said court and represent the state, of which necessity the prosecuting attorney is the sole judge; for which he is entitled to a reasonable compensation not to exceed \$25 per case and necessary traveling expenses." Of its own motion the court gave the following: "No. 1. The court declares the law to be that section 637 of the Re-

vised Statutes of 1889 does not authorize the prosecuting attorney to determine the necessity of appearing in the court of appeals, and, there being no reason why he should attend such court other than his own opinion as to the necessity thereof, he is not entitled to pay for services for attendance in the court of appeals. No. 2. The county court having allowed the sum of fifteen dollars for the preparing of the briefs, such act by the county court will be accepted by the court, and that allowance allowed the plaintiff for preparing the briefs in said cases." Plaintiff duly excepted to the ruling of the court on the instructions refused and given.

The law governing this case is found in section 637, Rev. St. 1889 (section 4950, Rev. St. 1899), and is as follows: "When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their [prosecuting attorneys] duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of 300,000 inhabitants by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such court, and for their services shall receive such compensation as may be proper, not to exceed \$25 for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court, of such county, and in such cities by the proper authorities of the city." This statute makes it the duty of the prosecuting attorney to represent the state in all criminal cases in the court of appeals from his county, and it specifies that in the performance of that duty he shall make and cause to be printed, at the expense of the county, all necessary abstracts of record and briefs. Those duties are required of him unconditionally. In addition to those absolute duties, the statute further declares that, "if necessary," he shall appear in court in person. His personal appearance in court is the only duty prescribed in that section that is to be performed upon condition; that is, "if necessary." The word "necessary" is used twice in the sentence above quoted, but it is not used in the same sense in both connections. First, it is used as an adjective, afterwards as a noun. The term "all necessary abstracts of record and briefs" assumes that abstracts of record and briefs are necessary in appellate courts, and those the prosecuting attorney is required to prepare. But personal appearance is not always necessary. Many cases are submitted to appellate courts on abstracts and briefs, and therefore the statute imposes the duty on the prosecuting attorney to appear and make oral argument only if the circumstances of the case render it necessary. Should the conditions not require his personal appearance, he is to make the abstract and brief, and is to be paid for that.

but if it is necessary for him to appear personally, and he does so, he is to be paid for that also what it is reasonably worth and his necessary traveling expenses. The main difference between the contending parties in the trial court seems to have been on the question as to who should decide when it was necessary for the prosecuting attorney to attend in person in the court of appeals; the plaintiff holding that, as the prosecuting attorney knew more about the condition surrounding the case than any one else, he was the sole judge in the question of necessity, while the defendant contended that, as the county court had to audit and pay the bills, it was the tribunal to decide. The ruling of the trial court indicated that it took the defendant's view of the question. This view is shown by admitting over the plaintiff's objection evidence to show that the county court had not ordered the prosecuting attorney to appear in person before the court of appeals, as well as by the instructions given and refused. The position of neither the plaintiff nor the defendant was correct on that point. The statute does not make either the prosecuting attorney or the county court the sole arbiter of that matter. The statute says he should go if necessary, and shall be paid a reasonable fee for his services. But the question of the necessity and that of the quantum meruit are open questions of fact, to be tried on the evidence by the court, which is to pass judgment on the claim when presented,—the county court in the first instance, and the circuit court if appeal is taken. And in passing on the question the county court is to act judicially in its capacity as a court, and not in its administrative capacity. Was it necessary in this case for the prosecuting attorney to attend on the court of appeals in person? That must be decided by the triers of the fact, like any other question of fact in the case. The court erred in admitting the testimony tending to show that the county court had not ordered the plaintiff to attend in person on the court of appeals, and had made no order signifying that such attendance was necessary.

The judgment is reversed, and the cause remanded to be retried according to the law as herein expressed. All concur.

WEIL et al. v. REISS et al.

(Supreme Court of Missouri, Division No. 1
Feb. 19, 1902.)

KNOWLEDGE OF ATTORNEY—NOTICE TO CLIENT—FRAUDULENT TRANSFERS—PARTICIPATION BY PURCHASER.

1. Knowledge of attorney, employed by the purchaser of land only to examine the title, that the vendor was insolvent, is not imputable to the purchaser.

2. A purchaser of land, who, shortly after giving his check for the purchase money, learns that the vendor has given a deed of trust for certain of his creditors, and is summoned as garnishee by unpreferred creditors of the ven-

dor, is not thereby charged with notice of fraud in the sale to him, so as to make him a participant in the fraud; he having made no effort to stop payment of the check, which, though he did not know it, was not cashed for several days thereafter.

Appeal from circuit court, Jackson county; Jas. H. Slover, Judge.

Suit by Samuel N. Weil and others, partners as Samuel N. Weil & Co., against Morris Reiss and others. Bill dismissed. Plaintiffs and certain defendants appeal. Affirmed.

Wallace & Wallace, Wollman, Solomon & Cooper, J. A. Harzfeld, and I. J. Ringolsky, for appellants. Karnes, New, Hall & Krauthoff, for respondents.

BRACE, P. J. By general warranty deed dated December 26, 1895, and on the same day duly acknowledged, and filed for record at 5:03 p. m., Morris Reiss and wife conveyed a tract of land containing three acres, described in the petition, to Joseph Lorie. By a deed of trust of the same date, on the same day duly acknowledged, and filed for record at 6:10 p. m., the said Reiss conveyed all of his goods, wares, and merchandise, consisting of a stock of liquors, together with the fixtures and furniture in his storeroom at 608 Delaware street, Kansas City, Mo., to Sigmund Harzfeld, in trust to secure the payment of certain debts therein described to several of his creditors therein named. Afterwards, on the 28th of December, 1895, Samuel N. Weil & Co., the Corning Company, and Kate J. Rosenheim, creditors of the said Reiss, who were not secured by said deed of trust, instituted suits by attachment against said Reiss, which on the same day were duly levied on said real estate, and thereafter, on the 10th of January, 1896, the said Samuel N. Weil & Co. instituted this suit against the said Morris Reiss, Joseph Lorie, the Corning Company, and Kate J. Rosenheim to set aside and annul said warranty deed from Reiss and wife to Lorie on the ground that the same was without consideration, and executed for the purpose of hindering, delaying, and defrauding the creditors of the said Reiss. The answers of the defendants Reiss and Lorie were a general denial. The answers of the Corning Company and Mrs. Rosenheim were each a cross bill setting up, respectively, their claims, and for like cause a joinder in the prayer of the petition. On the hearing, the plaintiff's bill and the cross bills of the defendants the Corning Company and Mrs. Rosenheim were dismissed, and from the judgment rendered accordingly Weil & Co., the Corning Company, and Kate J. Rosenheim appeal. The trial court held that, while the evidence was sufficient to sustain the charge of fraud as to Reiss, it was insufficient as to Lorie, whom the court found to be an innocent purchaser for value. The only ground urged for reversal is that the court erred in holding, on

the evidence, that Lorie was an innocent purchaser.

1. The evidence tended to prove that the tract of land in question was worth from \$900 to \$1,000; that some time in the latter part of the fall of 1895 the attention of Lorie was called to this tract of land by a Mr. Lietsberg, who told him it belonged to Reiss, and asked him if he wanted to buy it; that in pursuance of this suggestion he called on Reiss the next day, ascertained his price, got a description of the property, and told Reiss he would look it up and might buy it. Thereafter Lorie examined the tract, consulted with his real estate agent, Mr. Phelps, as to the value of it, and subsequently made Reiss an offer of \$900 for the tract, if Reiss would furnish an abstract of the title, whereupon Reiss told him to order the abstract and he would pay for it. Lorie ordered the abstract, which was completed and delivered to him on the 20th of December, 1895. He thereupon turned the same over to Edwin F. Weil, a young attorney and notary public, a relative of his, and who was living with him, for the purpose of having the same examined and a deed drawn. Weil examined the abstract, reported the title all right, and on the 24th of December drew the deed in question, made an appointment for the parties to meet at his office on the morning of the 26th of December to close up the trade, and on that morning, on his way from his home to his office, called at the Washington Hotel, where Mrs. Reiss boarded, obtained their signatures to the deed, took their acknowledgment, and with Mr. Reiss went to his office, where they met Mr. Lorie, who gave Mr. Reiss a check on the Metropolitan National Bank for \$900, and Reiss delivered the deed to him. Lorie then handed the deed to Weil, with the request that he file it for record when he went to court. Thereupon the parties separated. This was about 9 o'clock a. m. Weil filed the deed for record that day at the hour hereinbefore stated. It appears from the evidence that this young man, Weil, was in partnership with another young lawyer by the name of Silverman, and that they were practicing law under the firm name of Silverman & Weil; that their office, on the fifth floor of the New York Life Building, consisted of one room, with a single door from the public hall, divided into two compartments by a partition running across the room from the door, extending from the floor nearly to the ceiling. The entrance from the hall was into Weil's compartment; thence, near the door, into Silverman's. The evidence further tended to prove that, about noon on the 26th of December, Meyer Stern, a friend of Reiss, came to Silverman in his office, and requested him to draw the deed of trust in question, and suggested the name of Benjamin F. Joffe as trustee; that after he left Silverman drew the deed of trust as directed; that about 4 o'clock p. m. Reiss and Stern came in, when Stern informed Silver-

man that Reiss objected to Joffe, and that they had agreed upon Mr. Harzfeld for trustee. Thereupon the name of Joffe was erased, and the name of Harzfeld inserted, as trustee in the deed. The instrument was then signed by Reiss, acknowledged by him before Andrew E. Gallagher, notary public, delivered to Mr. Silverman, by him submitted to the officers of the Bank of Commerce, the largest preferred creditor, for approval, and afterwards filed for record as hereinbefore stated. Lorie testifies that he knew nothing about Reiss' financial condition, and first heard of the deed of trust at his club on the night of that day. He was summoned as garnishee in the attachment suits on the 28th of December, and his check to Reiss was not cashed by the bank until the 30th of December. At the time of these transactions Reiss was, and for some time prior thereto had been, insolvent. The foregoing presents the main features of the case made by the evidence from one standpoint, which must now be considered in connection with the other evidence, presenting a different phase of the case, from another standpoint.

Benjamin F. Joffe, before mentioned, was introduced by the plaintiff as a witness, who testified in substance that he was a liquor dealer; had known Reiss about seven years; that four or five days before the deed of trust was executed, at the instance of Meyer Stern, he had an interview with Reiss in regard to his affairs; that Reiss informed him of his financial condition, what he wanted to do, and that Silverman & Weil were his attorneys; that after five or six interviews on the subject, about 5 o'clock p. m. of the 25th of December, 1895, Reiss and Silverman came to his place of business, and remained until 8 o'clock, during which time it was arranged that Silverman should draw the deed of trust and have it ready by 10 o'clock the next morning at Silverman & Weil's office, where it was to be executed and turned over to him; that in pursuance of a telephone message next morning he went to Silverman & Weil's office, arrived there about 11 o'clock, met Reiss and Lorie in the hall, and went with them into Silverman's office; that Silverman was there, and had the deed of trust prepared; that Lorie read it, and while the instrument was being read Julian Haas came in, soliciting for the Cleveland Orphan Asylum; that in the conference between Reiss, Silverman, Lorie, and witness it was arranged that another trustee should be named in the deed, and that witness should go out and find cash purchasers for some of the goods; that in pursuance of this arrangement he did go out, and negotiated sales of liquors to Wolfson for \$400 and to Baruch for \$500. These sales were consummated and the goods paid for at Stern's office about 2 o'clock in the afternoon, Reiss, Stern, Baruch, Wolfson, and witness being then present, and the goods delivered to the purchaser later, in the evening of that day. The fact

of the sale and delivery of these goods, and that Joffee figured in these sales, is substantiated by other evidence. The fact that Reiss was insolvent, that Joffee and Stern were advised of his financial condition, and that on the 26th day of December, 1895, as previously arranged between them, they were engaged in disposing of his stock in trade in the manner stated, for the purpose of preferring some of his creditors, defeating others, and securing the proceeds of a part thereof for Reiss' own use, is well established by the evidence. But, except in the testimony of Joffee as to what transpired in Silverman's office about 11 o'clock on the morning of the 26th of December, when, as he testified, Lorie, Reiss, Silverman, and himself, were there present, and Eugene Haar came in. There is not a particle of evidence tending to prove that Lorie knew anything about Reiss' financial condition, or had anything to do with, or knew anything about, the scheme for the disposition of his property. Lorie testified that he was not there, and Reiss and Silverman testified that neither Joffee nor Lorie were there upon that occasion; and Eugene Haar testified that the occasion when he came into Silverman's office, and saw Lorie and Joffee there, was on the 4th of December, 1895. So that, by a great preponderance of the positive evidence, Lorie was not there, and had nothing to do with the fraudulent scheme to which Joffee testified; and this conclusion is reinforced by the improbability of the story of Lorie's connection therewith. There is no reason why he should have been there, or should have taken any part in those proceedings. His business with Reiss had been concluded some two hours before, and thereafter he had no interest whatever in Reiss' affairs, and in the facts of the case no motive can be found for his taking the part assigned to him in Joffee's testimony. The evidence in the case is voluminous, variant, and conflicting. We have given all of it mature consideration, and, rejecting the discredited evidence aforesaid of Joffee as to Lorie, we think the conclusion of the chancellor is well sustained by the preponderance of the evidence upon which reliance can be placed.

2. It is contended, however, that, although Lorie may not have had any knowledge of Reiss' fraudulent purposes when his purchase of the real estate was consummated, yet that Silverman & Well had such knowledge, and their knowledge should be imputed to him. It is but fair to these young men to say that it does not appear from the evidence that Well had such knowledge, and that the main support of the charge that Silverman had is the evidence of the discredited witness Joffee. But, whatever their knowledge, it is not imputable to Lorie. They were not his agents to negotiate the trade, and did not negotiate it. Lorie in this contest is not seeking to retain the fruits of a contract made by them, but of one made by himself,

in conducting which Well was simply employed by him to examine the abstract, report upon the title shown by it, and draw the deed. The case does not fall within the principle of the cases cited by counsel in support of this contention.

3. Finally, it is contended that, although Lorie had no knowledge of Reiss' purpose to defraud his creditors when he gave his check for the purchase money, accepted the deed, and placed it upon record on the 26th of December, yet, as he afterwards, on the night of that day, learned that Reiss had made the deed of trust, of that day, and was on the 28th of December summoned as a garnishee in the attachment proceedings by the unpreferred creditors, and his check was in fact not cashed by the bank until the morning of the 30th of December, and he made no effort to countermand the check, he ought to be held a participant of Reiss' fraud. If, after Lorie had given his check to Reiss, and before he had reason to believe his check had been cashed by the bank, it had come to his knowledge that the sale and conveyance to him had been made by Reiss for the purpose of defrauding his creditors, or if the facts and circumstances, brought to light on the trial of this cause, tending to prove that such was the purpose of Reiss, had so come to his knowledge, and he had taken no steps to countermand the check before it was cashed, then the cause would have been brought within the principle of the authorities cited in support of this contention. But the facts stated do not so bring it. Lorie had no knowledge of the fact that his check had not been cashed before the 30th of December, and no reason to believe it had not been cashed, in the ordinary course of business, within a short time after it was given. The fact that Reiss had executed a deed of trust to some of his creditors, while it advised Lorie that Reiss was in failing circumstances, did not tend to show any fraud upon his part in the transaction Lorie had had with him, or with any one else, for that matter, as it is perfectly legitimate for a debtor in failing circumstances to prefer one or more of his creditors in this manner, if he sees proper to do so. The garnishment advised him of no fact tending to show fraud upon the part of Reiss in the transaction with him. On the contrary, its tendency was to show an affirmance thereof. So that, when the check was cashed on the 30th of December, Lorie was just as ignorant of any fraudulent intent on the part of Reiss in making the sale and conveyance to him as he was on the 26th of December, when the check was given, and just as ignorant of the material facts, disclosed by the evidence on the trial of this cause, tending to show such fraudulent intent.

It follows, from what has been said, that the judgment of the circuit court ought to be affirmed, and it is accordingly so ordered. All concur.

ULLMAN et al. v. ST. LOUIS FAIR ASS'N.
(Supreme Court of Missouri, Division No. 2.
Feb. 25, 1902.)

GAMING CONTRACT—RACE TRACK—BOOKMAKING AND POOL-SELLING—SALE OF PRIVILEGE—PARTIAL EXECUTION—RECOVERY OF PARTIAL PAYMENTS—CONTRACT—CONSTRUCTION—ABANDONMENT—APPORTIONMENT OF PURCHASE MONEY.

1. In consideration of a specified sum, part cash and the balance in installments, defendant, by written agreement, sold plaintiffs the "exclusive betting and bookmaking privileges, including also auction, official pool-selling," etc., on its race track, for a certain period. Plaintiffs made the cash payment, and enjoyed for a short time the privileges specified, in the meantime paying several installments. They then abandoned the contract on the ground that defendant interfered with the privileges sold them, and sought to have the purchase money apportioned to the time during which they had enjoyed the privileges, and to recover the excess paid by them above such apportioned amount. *Held*, that the contract was not a lease, but a sale, and hence the purchase money paid could not be apportioned as sought by plaintiffs.

2. The contract amounted to a sale of the privilege of gambling with the public who patronized defendant's race track, and hence the court would not aid either party in the enforcement thereof.

3. A contract for the sale of betting privileges at a race track having been executed to the extent of the partial payment of the purchase money and partial enjoyment of the illegal privileges sold, the rule that money paid in advance for illegal purposes may be recovered back where the contract is wholly executory does not apply, and the purchaser cannot recover what he has paid in the partial execution of the contract.

Appeal from St. Louis circuit court; Franklin Ferris, Judge.

Action by Alexander Ullman and others against the St. Louis Fair Association. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

The defendant, on and prior to May 1, 1896, was a corporation, and was the owner and in possession of a race track, with stands and grounds for spectators, a club house, and betting ring, with stalls and conveniences for "pool-selling" and "bookmaking," all inclosed, to which the public were admitted during the racing season on payment of an admission fee. On the 1st day of May, 1896, the defendant, through its officers, made and entered into the following contract with the firm of Alex. Ullman & Co., composed of Alexander Ullman and Edward W. Sinclair: "This agreement, made and entered into this first day of May, 1896, by and between the St. Louis Fair Association, a corporation created and existing under the laws of the state of Missouri, party of the first part, and Messrs. Alex. Ullman & Company, of St. Louis, Missouri, party of the second part, witnesseth: That said party of the first part does hereby sell and convey to the said party of the second part the exclusive betting and bookmaking privileges, including also auction, official pool-selling, water, calling, and form-book privileges, on its race

track in the city of St. Louis during the ensuing race meeting, which will begin on Saturday, May 9, 1896, Sundays excepted, for forty-nine (49) days, until and including the 4th day of July, 1896. Said meeting is to be conducted in every feature and particularly in accordance with and subject to the rules and regulations of the American Turf Congress, of which it is a member. It is agreed and understood that the party of the second part will allow any reputable bookmaker so desiring to operate on said track under the regulations enforced by the party of the second part. For the above-enumerated exclusive betting, official pool-selling, water, calling, and form-book privileges on said track during said meeting the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of ninety thousand dollars (\$90,000), payable in installments, as follows, to wit: Eighteen thousand dollars in hand, paid on entering into this agreement, the receipt of which is hereby acknowledged. The further sum of seventy-two thousand (\$72,000) dollars is to be paid on the dates and in the sums hereinafter immediately set forth, to wit: On Saturday, May 9, 1896, nine thousand dollars (\$9,000); on Thursday, May 14, 1896, nine thousand dollars (\$9,000); on Thursday, May 21, 1896, nine thousand dollars (\$9,000); on Thursday, May 28, 1896, nine thousand dollars (\$9,000); on Thursday, June 4, 1896, nine thousand dollars (\$9,000); on Thursday, June 11, 1896, nine thousand dollars (\$9,000); on Thursday, June 18, 1896, nine thousand dollars (\$9,000); on Thursday, June 25, 1896, four thousand five hundred dollars (\$4,500); on Thursday, July 2, 1896, four thousand five hundred dollars (\$4,500). The said party of the first part agrees to furnish said party of the second part the necessary tickets of admission to said track for all employees engaged by said party of the second part, or required by him to properly conduct and operate the auction mutual system of betting of said track during said race meeting. And the party of the first part also agrees to furnish said party of the second part five (5) daily tickets for admission to said course for each betting book employed in recording and making bets on said course, or, at the election of the said party of the first part, to allow a credit of five (\$5) dollars per day for each book employed on said course in lieu of said five tickets or daily admissions." Ullman & Co. paid the cash payment of \$18,000 stipulated, and began and enjoyed the rights thereby secured, and paid the first two weekly installments, to wit, \$9,000, on May 9th and a like sum on May 14th. Plaintiffs did not themselves make wagers, or directly and personally conduct the betting on races run at defendant's track, but farmed out the betting monopolies to professional operators, known in race-track parlance as "bookmakers," who each paid plaintiffs for the privilege to make wagers on the

paces with the attending public \$100 a day, which seems to have been the customary price on that track for several years previous to that season. From plaintiff Ullman's testimony it appears the business was very dull, and only about one-half of the usual number of bookmakers applied for the privilege, and as plaintiffs' means of making themselves whole on their contract with defendant depended on the bookmakers, plaintiffs determined to increase the assessment upon the bookmakers to make up for the loss in numbers, and gave and posted a notice to that effect, and thereupon the following correspondence ensued:

"St. Louis, May 16, 1896. Messrs. Alex. Ullman & Co., City—Gentlemen: We are advised that you have posted the following notice, to wit: 'Bookmakers wishing to draw in for the next three days can do so by paying their pro rata of \$1,600 per day for five races in case books average less 16. Closes at 1:45 p. m.' Your contract with this association does not justify you in making such a rule. It is not in accord with custom, and is unreasonable. I am instructed to advise you that it is the view of this association that any reputable bookmaker shall be permitted for the consideration of \$100 per day, as usual, to sell pools, subject to such reasonable rules as to mode of selling and such as are customary as you may prescribe. If you persist in the course which the association has condemned and thinks unwarranted, it will exercise the authority to grant to reputable bookmakers the right to conduct business at the association grounds without your consent. [Signed] Very truly yours, St. Louis Fair Association. C. C. Maffit, President."

"St. Louis, Mo., May 16, 1896. St. Louis Fair Association, C. C. Maffit, Esq., President, City—Gentlemen: We beg leave to acknowledge receipt of your communication of even date, relative to the bookmaking privilege at the St. Louis Fair Association race meeting of 1896, and in reply permit us to say that we are merely pursuing our rights under the contract between your association and ourselves, and we must insist on our right to prescribe the terms upon which any reputable bookmaker shall do business in the ring during the life of said contract. We deny the right of the association to allow any one to carry on business in the ring without our consent, and beg leave to notify your association that we will resist to the utmost any attempt on the part of your association to interfere with us in this or any other particular, or with our conduct under the terms of said contract. Respectfully, Alex. Ullman & Co."

On the 18th of May, 1896, plaintiffs filed their application for a temporary injunction against defendant to enjoin it from placing or permitting bookmakers on said track without consent of plaintiffs, which was subsequently denied by the circuit court.

Plaintiffs continued to exercise their privileges of selling rights to make books and wagers on said track until May 23, 1896, but refused on May 21, 1896, to pay the installment of \$9,000 due by their contract on that date. On May 23, 1896, they abandoned the further enjoyment of their privileges under their contract, and afterwards on the 10th of September, 1896, began this action, in which, after pleading said written contract, and alleging that defendant sold to plaintiffs the exclusive betting and bookmaking privileges mentioned therein, they made the following averments: "Plaintiffs state that they had in all things complied with the terms and conditions of said contract on their part to be performed, and that they had paid to defendant such sums as fell due under said contract, to wit, \$18,000 on May 1, 1896, \$9,000 on May 9, 1896, and \$9,000 on May 14, 1896, and were ready and willing to pay the remaining installments in the amounts named in said contract and on the terms therein specified. Plaintiffs state that, notwithstanding the promises, the payments of said installments, and their readiness to perform the contract on their part, defendant refused to permit plaintiffs to exercise said rights and privileges secured to them by said contract, and insisted on controlling and fixing the terms of compensation for which privileges shall be sublet by plaintiffs, and refused to permit plaintiffs to continue in their exclusive privileges secured by said contract, so that on May 23, 1896, plaintiffs were compelled by this illegal interference of defendant to abandon, and did abandon, the performance of said contract. Plaintiffs aver that this interference by defendant with plaintiffs' rights under their contract was wholly illegal; that by reason thereof plaintiffs were compelled to abandon the performance of said contract. Plaintiffs aver that they exercised the privileges and franchises secured to them by said contract only for the term of twelve (12) days, and at the rate of consideration therefor fixed by said contract there was due defendant therefor, to wit, for said term of twelve days, only the sum of twenty-two thousand and forty and $\frac{81}{100}$ dollars (\$22,040.81) out of the thirty-six thousand dollars (\$36,000) paid by plaintiffs to defendant. Wherefore plaintiffs state that they have paid to defendant the sum of thirteen thousand nine hundred fifty-nine and $\frac{19}{100}$ dollars (\$13,959.19) in excess of the sum under said contract for the time they, said plaintiffs, were permitted by defendant to exercise and enjoy the rights and franchises secured to plaintiffs by their said contract, and this excess so paid is justly due from defendant to plaintiffs, and defendant insists on retaining said excess payments, and refuses to repay the same, or any part thereof, though demanded by plaintiffs. Wherefore plaintiffs pray judgment for \$13,959.19, with interest and costs."

In its answer defendant pleaded the contract in *hæc verba*, and alleged that it believed this was the same contract described and referred to in plaintiffs' petition, and alleged that it did not contract with plaintiffs otherwise than therein set forth; denied that plaintiffs did in all things comply with their contract, but, on the contrary, failed and refused to do so; admitted that plaintiffs paid it \$36,000, including the installment due May 15, 1896, but averred that they failed and refused to pay the installment of \$9,000 due May 21, 1896; denied that the contract fixed any rate per day for the privileges which it sold plaintiffs, and denies that plaintiffs only owed it \$22,040.81 for 12 days, but alleges that by the said contract there was then due defendant \$36,000 for the time during which plaintiffs exercised the privileges conferred on them; denied plaintiffs paid the defendant \$13,959.19 in excess of the sum due on said contract for the time plaintiffs enjoyed the rights secured to them by said contract, or any other sum whatever in excess of the amount due defendant. Defendant then pleaded the provision that any other reputable bookmaker should be allowed by plaintiffs to operate on said track under the regulations enforced by plaintiffs. It then pleaded the custom of allowing bookmakers to sell pools and make books for \$100 per day, and then pleaded the correspondence between defendant and plaintiffs with reference thereto as set out in the statement. Defendant then averred that otherwise than by making such protest it in no manner or form interfered with or interrupted plaintiffs in the enjoyment of their rights under the contract. Defendant then averred that said contract is void as against public policy in that it tends to encourage gambling, but, if not so void, then an action had accrued to defendant for breach of said contract, whereby it was damaged \$12,000, for which it prayed judgment.

The cause was tried to the court without a jury, and judgment was rendered for defendant, and plaintiffs appeal.

Judson & Green and G. L. Stern, for appellants. Valle Reyburn, for respondent.

GANTT, J. (after stating the facts). The petition alleges and the written contract conclusively shows that defendant agreed, in consideration of \$90,000, to be paid in certain installments by plaintiffs, to sell and did sell to plaintiffs the exclusive betting and book-making privileges on its race track for the May meeting in 1896, beginning May 9, 1896, and including July 4, 1896. The effort to have this contract declared a lease, and thereby furnish a basis for an apportionment of it in accordance with the principles governing leases, finds no support either in the pleadings or the evidence. It is a plain, simple agreement, by which plaintiffs bought and partially paid for, and for a time fully

enjoyed the profits arising from, the monopoly of controlling all the betting and wagering on the horse races to be run during the May meeting on defendant's track. It was in no sense a lease, but an exclusive privilege of reselling to the various bookmakers the privilege of "making books," or, to use plain English, of gambling with the public who patronized that track. This privilege concerned no interest in the realty, and defendant's right of possession was in no manner affected by the contract. Whatever rights plaintiffs may have had under the contract, they are not referable to any lease acquired by the said agreement, and the argument based upon such a premise cannot, under the pleadings and evidence, be seriously entertained. Betting on horse races is gambling in this state, and has been so adjudged since the decision in *Shropshire v. Glascock*, 4 Mo. 536, 31 Am. Dec. 189; *Boynton v. Curle*, 4 Mo. 600; *Hayden v. Little*, 85 Mo. 418; *Association v. Carmody*, 151 Mo., loc. cit. 571, 52 S. W. 365, 74 Am. St. Rep. 571. And it is not to be questioned that the phrases "bookmaking" and "pool-selling" in the contract before us are but other names for "betting" and "gambling" on horse races, as in "bookmaking" the betting is with the "bookmakers" and in "pool-selling" the betting is among the purchasers of the pool. *Swigart v. People*, 154 Ill. 284, 40 N. E. 422. The contract, then, was by its terms an agreement and sale by defendant to plaintiffs to allow plaintiffs the exclusive privilege of gambling with the public on defendant's race course at its May meeting in 1896, and the sole question is, will the courts of this state aid either party in the enforcement of such a contract? That they will not no longer admits of a doubt. In *Association v. Carmody*, 151 Mo. 566, 52 S. W. 365, 74 Am. St. Rep. 571, the defendant herein sought to enforce a similar contract against Carmody, but this court held the contract was founded upon an unlawful consideration, was against public policy, and invalid. The maxim of the common law that "no right of action can arise from an illegal contract" obtains in all its vigor in this state. But counsel for plaintiffs, while admitting this general principle of law, invokes the rule applicable to illegal and immoral contracts that, so long as such a contract is executory only, the right to recover back whatever had been paid thereon will be sustained by the courts on the ground that it is not in affirmance of such contract, but a disaffirmance thereof. The rule is succinctly stated by Judge Scott in *Skinner v. Henderson*, 10 Mo. 205, in which he says: "The rule in respect of money paid on illegal contracts appears in general to be that money so advanced may be recovered in an action for money had and received while the contract remains executory, because a violation of the law is thereby prevented; but, if the contract be executed, it cannot be recovered back. When both parties are in pari delicto, 'melior est conditio defendentis,'

not because he is favored in law, but because the plaintiff must draw his justice from pure sources. Bull. N. P. 132; Doug. 470 (a).” The underlying reason of the rule permitting a recovery when the contract is still merely executory is the encouragement of the abandonment of illegal contracts and to prevent a violation of the law. Plaintiffs seek to bring themselves within the protection of this rule to recover \$13,959.19 of the \$36,000 which they paid defendant while they were receiving the benefits of their unlawful contract on the theory that, as they only took the profits of their contract for 12 days, and by dividing the \$90,000 by the whole number of days of the meeting, the pro rata due defendant for 12 days would be only \$22,040.81 and consequently they had overpaid defendant \$13,959.19. Counsel, in applying the rule that, so long as the illegal contract is executory, the party paying the money on it can recover it, say of the facts in this case: “So far as the contract had been performed, it was executed; so far as unperformed it was executory; and that the contract was divisible, and therefore, when they abandoned it on May 23, 1896, they were not only not liable and could not be compelled to pay the installments thereafter due, but could recover a proportionate part of that which they had paid.” Among other cases counsel cite *Express Co. v. Reno*, 48 Mo. 264. In that case John Reno had been convicted of robbing the county treasury of Daviess county, and was in the Missouri penitentiary. The county court of said county authorized Ballinger, the sheriff of said county, to submit a proposition to Clinton Reno, who resided in Indiana, that, if he would pay \$5,000 to the county by way of reimbursement of the amount stolen by John Reno, they would use their influence to procure a pardon. Clinton was able to raise only \$4,400. This sum he intrusted to his sister, Laura, to bring to Missouri, thinking Ballinger would accept it, and effect the pardon. He instructed her to bring the money back if the pardon was not procured, and to pay it to no one but Ballinger. She came to Jefferson City, but did not see Ballinger, and nothing was done toward the pardon. Wilson, the warden, persuaded her to leave the money with him, that Ballinger might come and take it, but she informed him of Clinton’s directions. She was finally induced to do so, however, and took Wilson’s receipt. Wilson thereupon deposited the money in bank for use of John Reno, and it was attached by the express company as the property of John, to recover damages for a robbery alleged to have been committed by John Reno. Clinton Reno interpleaded, and obtained judgment, and the express company appealed, and insisted that, as the money was sent to this state for an illegal purpose, the law would not assist Clinton Reno to recover it. But this court held that there was no executed agreement between Ballinger and Clinton Reno; in fact, none at all, as Clinton

never raised the amount for which the county court and Ballinger were to try to procure John’s pardon. No effort was made to influence the governor, and Clinton had a right to recover. It will be observed that in that case the court based its opinion upon the fact that the illegal purpose of attempting to or procuring the pardon was never consummated, nor in fact entered upon. But apply that rule to this case. Here the plaintiffs entered upon the performance of the illegal and immoral contract, paid the installments due thereon until and including the 14th of May, sold the privileges of gambling without molestation until May 23, 1896. During this time the law was being violated by them as the result of the moneys they had paid to defendant, and which in part they now seek to recover. The prime object of the rule, to wit, the prevention of a violation of the law, cannot then apply to this case. If this court should, by its judgment, now decree a division of the purchase price paid by plaintiff for this unlawful arrangement,—a contract, we have declared, immoral and unenforceable,—we would be giving it all the sanction which we could give a lawful contract; and would permit plaintiffs to enforce the privileges secured by it so long as they deemed them profitable, reserving to them the right to abandon them whenever they elected so to do, and recover by legal process that portion of the consideration already paid which they might deem not then earned, and that without a corresponding accounting for the pro rata portion of their illegal gains, taken by virtue of their gambling privileges. The rule invoked by plaintiffs has no application to a state of facts like those disclosed by the petition and evidence. Where both parties, as in this case, are in pari delicto, the courts of justice will not aid either to undo that which has already been done under the illegal and prohibited contract, nor to recover money paid in pursuance thereof, but will leave them in the position in which their unlawful acts have placed them. It is only where the contract remains wholly unexecuted on one side, and where, by its abandonment, the act which the law forbids will be averted, that the courts will lend a willing ear to the repentant party, and, if he has paid money in advance, will permit its recovery; but when, as in this case, he has carried into effect the unlawful design, and in part, at least, violated the law in furtherance of such contract, the time for repentance has passed in which the law will let him recover moneys which he has embarked in the enterprise. The proportion of the moneys which plaintiffs now seek to recover is earmarked with illegality, and “the gates of legal and equitable relief and remedy are shut against them.” *Sprague v. Rooney*, 104 Mo. 358, 6 S. W. 505; *Hooker v. DePalos*, 28 Ohio St., loc. cit. 262; *Nellis v. Clark*, 20 Wend. 24; *Perkins v. Savage*, 15 Wend. 412; *Miller v. Larson*, 19 Wis. 466. While the law

will not permit defendant to enforce the unpaid installments, or render plaintiffs liable for damages for a failure to perform their contract, it will not disturb the portion of the contract which has been executed by both parties.

The judgment of the circuit court that plaintiffs could not recover the part of the money which they paid in fulfillment of their illegal contract after they had partially received its illegal benefits was right, and is affirmed. All concur.

STATE ex rel. DOWELL, County Collector, v. RENSHAW.

(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

PERSONAL TAXES—WHEN DELINQUENT—RESIDENCE—SITUS—PLEADING—OBJECTIONS WAIVED AND CURED.

1. A finding that defendant was on June 1, 1895, a resident of A. county, for purpose of taxation, is sustained by evidence,—it appearing that he was in A., boarding at a hotel from March 31 to May 22, and from November 15 to December 31, 1894, and that year told the assessor of C. county that his home was in A.; that in 1895 he lived at said hotel at intervals from May to August 23d, and again told the assessor of C. county that he was still living in A.; that he rented a house in Virginia for the first time September 1, 1895, became a registered voter there for the first time March 10, 1896, and told the Virginia assessor in 1895 that he was assessed in Missouri,—though he testified that he visited in Virginia in 1892 and 1893, and in 1894 determined to take up his residence there permanently, and lived there in 1894 and 1895.

2. The situs on June 1, 1895, for purpose of taxation, of notes owned by defendant secured by mortgage on lands in A. county, is established by evidence that he carried them with him wherever he went, sending them to such county or depositing them there when interest or principal was to be paid, and that on such date he was in such county and there resided.

3. Objection that petition to recover personal property tax did not allege defendant was a resident of the county is waived, there having been no demurrer, and the motion in arrest of judgment, while containing the ground that the petition does not state facts sufficient to constitute a cause of action, having qualified the point by the words, "because the action on the face of the petition is prematurely brought."

4. Allegation, in petition to recover personal taxes, that the collector called on defendant at his place of business in A. county and served him with an assessment blank, is, after verdict, in absence of special demurrer, a good allegation of defendant's residence in the county.

5. Rev. St. 1880, § 7605, making the personal tax delinquent after January 1st, it may be then sued on, it not being necessary that the delinquent lists required by section 7624 be first returned to the county court, as required by section 7627, and then redelivered by the county court to the collector, as required by section 7653; these provisions being only for effecting settlements with the collector.

Appeal from circuit court, Callaway county: John A. Hockaday, Judge.

Action by the state, on the relation of J. W. Dowell, collector of Audrain county, against J. C. Renshaw. Judgment for plaintiff. Defendant appeals. Affirmed.

D. P. Bailey and Geo. Robertson, for appellant. H. D. Rogers, for respondent.

MARSHALL, J. This is an action to recover back taxes on personal property for the year 1896. The defense is that the defendant was not on June 1, 1895, a resident of Audrain county, and never had been such resident, but that he was at that time a resident of Albemarle county, Va. The court instructed the jury that the plaintiff could not recover if the defendant was a resident of Virginia at that time. The jury, however, found for the plaintiff, and the defendant appealed. The facts and the law will be discussed together for the sake of simplicity and for a better understanding of the case.

1. The defendant contends that there is no substantial evidence that he ever was a resident of Audrain county, and therefore there is no fact to support the verdict, which is claimed to be the result of passion and prejudice. The defendant's evidence tended to show that for about 25 years prior to 1886 he lived in Callaway county; that about 1886 he moved to St. Louis, where he remained until 1892, and while he lived in St. Louis he voted once or twice; that he had a married daughter, who lived in Howardville, Albemarle county, Va., and that in 1892 he and his wife visited her, and stayed with her as her guests during 1892 and 1893, but that during 1894 he went to his daughter's said home to live permanently, and lived there during the year 1894 and during the year 1895, until September 1, 1895, when he moved to Charlottesville, Albemarle county, Va., rented a house, and remained there until 1898, when he returned to his daughter's home in Howardville, where he remained a short time, and then moved again to Charlottesville, where he has resided ever since; that he first registered as voter in Virginia on the 10th of March, 1896, and attended the state Democratic convention in 1896, as a delegate from Charlottesville; that he was assessed for taxes in Virginia for the year 1895; that in 1896 he made a return of personal property for taxes in Charlottesville, Va., and was listed or assessed in 1897, but made no return and was not assessed for 1898. The evidence for the plaintiff showed that on the 31st of March, 1894, the defendant came to Mexico, Audrain county, and boarded at the Ringo Hotel from that date until December 31, 1894, and that he returned on May 2, 1895, and remained until the latter part of July, 1895; that in 1894 he was in Callaway county, and the assessor of that county tried to assess him, but the defendant refused to be assessed in Callaway county, and said, "My home is in Mexico;" that in 1896, when the assessor in Virginia assessed him, the defendant said he was assessed in Missouri; that in 1895 the defendant again told the former assessor of Callaway county that he was living in Mexico;

that after June 1, 1895, the assessor of Audrain county called upon the defendant, at the Mexico Savings Bank, where he usually transacted his business, through which bank he collected interest on loans he had outstanding in Audrain county, and in which bank he kept a deposit, and furnished him an assessment blank, and asked him to make a return; that the defendant refused to do so, and said he was not a resident of Audrain county; that thereupon the assessor examined the records of the county, and found that the defendant held mortgages amounting to \$34,550 for money he had loaned in that county; that thereupon the assessor assessed him for that amount of personal property, and, the defendant refusing to pay, this suit was brought. Upon this showing it cannot be said that there is no evidence to support the verdict of the jury, finding that on June 1, 1895, the defendant was a resident of Audrain county; but, on the contrary, the great weight of the evidence and the physical facts support the finding of the jury. Thus, on the defendant's showing, he was a visitor at his daughter's home in Virginia during the years 1892 and 1893, and in 1894 he determined to take up his residence there permanently, and that he lived there in 1894 and 1895. As against this is the fact that he was actually in Mexico, boarding at the Ringo Hotel, from March 31 to May 22, and from November 15 to December 31, 1894, and also his own declaration to the assessor in 1894 that his home was in Mexico, and the fact that in 1895 he was actually in Mexico, stopping at said hotel, at intervals from May until August 23, 1895, and again told the ex-collector of Callaway county that he was still living in Mexico, and, in addition, the further fact that he rented a house for the first time in Virginia on September 1, 1895, and became a registered voter there for the first time on March 10, 1896, and furthermore told the Virginia assessor in 1895 that he was assessed in Missouri. This being the state of the evidence, the finding of fact by the jury that the defendant was a resident of Audrain county on June 1, 1895, will not be reviewed or disturbed by this court.

2. The evidence shows that the defendant carried the notes secured by said mortgages with him wherever he went, and that when the interest or principal was to be paid he deposited or sent them for collection to the Mexico Savings Bank. This is sufficient to show that the personal property was physically in Mexico on June 1, 1895, and, as that was found to be the defendant's residence at that date, that established the situs of the property for the purpose of taxation.

3. The defendant's next contention is that the petition does not state facts sufficient to constitute a cause of action, because it does not expressly state that the defendant was a resident of Audrain county on June 1, 1895. Two complete answers to this contention are

furnished by the record: (1) The petition was not demurred to ore tenus, at the beginning of the trial, and, while the motion in arrest contains the ground that the petition does not state facts sufficient to constitute a cause of action, it qualifies and explains the point thereby called to the attention of the trial court by the addition of the words, "because the action on the face of the petition is prematurely brought," thus limiting the general objection. The remainder of the motion in arrest relates to other specific objections, properly belonging to a motion for a new trial and not to a motion in arrest, e. g., that there was a variance between the *allegata* and *probata*, and that upon the whole record the defendant is entitled to the judgment. (2) Because, while the petition does not in words charge that defendant was a resident of Audrain county on June 1, 1895, it does state that the collector called on him "at his place of doing business in said county of Audrain," and served him with an assessment blank, etc. This, therefore, is an imperfect statement of a good cause of action, and, the defendant not having demurred specially to the petition, it makes the petition good after verdict. *Gustia v. Insurance Co.* (Mo.) 64 S. W. 178.

4. The next contention is that the court erred in admitting in evidence a tax bill made out by the collector from the tax book. This bill was objected to for the reason that "it is not a tax bill within the contemplation of the law, and is not the tax bill sued on in this case, and is for different taxes than those declared on in this petition, and does not represent the taxes sued for." The tax bill is the same that was filed with the petition as "Exhibit A." It contains in tabulated form all the items the petition charges the plaintiff is entitled to recover. So that this disposes of all of the objections except that it is not a tax bill in contemplation of law. Briefly stated, the law in reference to the assessment and collection of taxes on personal property outside of St. Louis, so far as it is necessary to refer to it in this case, is as follows: Section 7555, Rev. St. 1889, requires the assessor to make out a "personal assessment book," and prescribes the form of the book. Section 7571, *Id.*, requires the assessor to deliver a fair copy of such book to the county court by the 20th of January each year, and requires the clerk of the county court to make an abstract of such book and forward it to the state auditor, to be laid before the state board of equalization. Section 7576, *Id.*, requires the clerk of the county court to make a fair copy of the assessment book, authenticated by the seal of the court, for the use of the collector. Section 7598, *Id.*, requires, as soon as may be after the tax book of each year has been corrected and adjusted and the amount of the county tax stated therein, the county court to deliver the tax book to the proper collector, who is then required to receipt to the

county clerk therefor; and the collector is charged by the clerk with the whole amount of the tax books so delivered to him. Section 7608, Id., requires the collector to make diligent effort to collect the taxes. Section 7624, Id., provides that: "Wherever any collector shall be unable to collect any taxes specified in the tax book, having diligently endeavored and used all lawful means to collect the same, he shall make lists thereof," to be called the "personal delinquent list," etc. Section 7625, Id., requires the said list to be posted. Section 7626, Id., provides: "Personal taxes assessed on and after June 1, 1887, shall constitute a debt for which a personal judgment may be recovered in the circuit courts of this state, against the party assessed with said taxes. All actions commenced under this law shall be prosecuted in the name of the state of Missouri, at the relation and to the use of the collector, and against the person or persons named in the tax bill, and said taxes shall be set forth in a tax bill of said personal back taxes, duly authenticated by the certificate of the collector and filed with the petition, and said tax bill or bills so certified shall be prima facie evidence that the amount claimed in said suit is just and correct," etc. The petition alleges substantially a compliance with all these provisions. The form of the tax bill filed with the petition is fully authorized by the provisions of section 7555, Rev. St. 1880. It is made out and authenticated by the certificate of the collector. This being so, section 7626, Id., makes the tax bill prima facie evidence that the amount claimed in the suit is just and correct. The defendant, however, claims that the tax does not become delinquent until after the collector has returned the delinquent lists (required to be made by section 7624) and the back tax books (in St. Louis the uncollected tax bills and the back tax books) to the county court, as required by section 7627, Rev. St. 1889, and until after the delinquent lists have been again delivered by the county court to the collector, as required by section 7653, Id. This is a misapprehension. The purpose of these provisions is this: At the beginning of the year the tax books (in St. Louis the tax bills) are delivered to the collector (section 7598), and he is charged with the whole amount of the taxes specified in the tax book. On the first Monday in March of the next year he is required to settle with the county court. He does this by returning the tax book and delinquent list, and the amount shown thereby to have been uncollected, deducted from the total amount specified in the tax books, shows how much cash he has collected, and the collector is then credited with the cash collected and the uncollected tax bills, and thus the charge of the full amount specified in the tax book is balanced. Thereafter the delinquent list is again turned over to the collector, and he is again charged with the whole amount there-

of as so much cash, and at his next annual settlement this is returned, and his account balanced as before. But this is only for the purpose of effecting a settlement with the collector. It has nothing to do with the question of when the tax becomes delinquent and may be sued on as between the taxpayer and the state. Section 7606, Rev. St. 1889, makes the tax delinquent after the 1st of January.

It follows that the circuit court properly held that the tax bill offered in evidence complied with the requirements of the law and made a prima facie case against the defendant. The judgment of the circuit court is affirmed. All concur.

WILLIAMS v. CARROLL COUNTY.

(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

COUNTY SCHOOL FUND BOND—INTEREST—MISTAKE IN COMPUTATION—PETITION FOR RESCINDMENT—NECESSITY OF ALLEGING FRAUD—SUFFICIENCY—DETERMINATION—MISTAKE OF LAW—PRESUMPTION—RIGHT TO COMPOUND INTEREST.

1. A petition against a county charged that plaintiff went to the county clerk to pay the amount due on his school fund bond, trusting to the clerk to calculate the interest, and that the clerk made a mistake in such calculation, and that plaintiff paid the same in the belief that it was correct. *Held* to aver a mistake against which he was entitled to relief.

2. A petition, predicated plaintiff's right of recovery solely on a mistake in the calculation of interest by the payee, need not allege any actual fraud in the computation, and that the overpayment was induced thereby.

3. In determining the sufficiency of a petition to recover an overpayment of interest on a bond, alleged to have been induced by a mistake of the payee, on whom plaintiff relied to properly compute the same, it cannot be assumed that the overpayment arose from a pure mistake of law, due to a misconstruction of the bond by plaintiff, because the amount paid by him shows a computation on such a misconstruction.

4. A bond provided for the payment of the principal, with interest from date, and "all interest" not punctually paid was to bear interest at the same rate as the principal. *Held*, that the term "all interest," as used therein, applied solely to defaulted interest on the principal, and compounding interest on the defaulted interest was unauthorized.

Appeal from circuit court, Carroll county; W. W. Rucker, Judge.

Action by J. S. Williams against Carroll county. From a judgment for defendant, plaintiff appeals. Reversed.

This is an action to recover \$156.36, alleged to have been erroneously and mistakenly paid by plaintiff to defendant in paying off a certain school fund bond. On January 3, 1887, plaintiff borrowed from the school fund of Carroll county the sum of \$2,000, and the bond in question was given therefor. Interest was paid to February 1, 1890, and on the 7th day of February, 1894, there was paid on account of interest the further sum of \$160. Afterwards default occurred in

payment of interest. This controversy arises over the mistake of the county clerk in computing the amount due on the bond. Omitting caption, the petition is as follows: "Plaintiff for his cause of action states that on the 3d day of January, 1887, he borrowed from the defendant county the sum of two thousand (\$2,000.00) dollars, and executed therefor his bond, which is in words and figures, as follows, to wit: 'County School Fund. \$2,000.00. Twelve months after date we promise to pay to Carroll county, to the use of the county school fund of said county, the sum of two thousand dollars, for value received, with interest at the rate of eight per cent. per annum from date till paid, and payable on the first day of February in each year, unless otherwise ordered by the Carroll county court. And it is agreed that in case of default in the payment of the interest, or failure of the principal in this bond to give additional security when thereto lawfully required, both the principal sum and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate as the principal. Witness our hands and seals this 3d day of January, A. D. 1887. J. S. Williams. [Seal.] J. W. Edmonds. [Seal.] Bradley A. Wilmot. [Seal.]" Plaintiff further says: That at the same time and on the same date, and as security for said bond, he executed a 'county mortgage' on lands belonging to him in Carroll county, Missouri, described as follows, to wit: The north half of the south half of section thirteen (13), township fifty-five (55), range twenty-three (23); said mortgage being recorded in Book 29, at page 434, of the records in the office of the recorder of deeds, in Carroll county, Missouri; said bond and mortgage being hereto attached, and marked Exhibits 'A' and 'B,' respectively. That said bond and mortgage fully set forth and express all of the conditions and terms upon which said sum of \$2,000 was borrowed. That the indorsements on the back of said bond are as follows, to wit: 'Feb. 8, 1888, by interest on within to amt., \$160.00. March 4, '89, by interest on within to Feb'y 1, 1889, \$175.00. Nov. 6, 1890, by interest on within to Feb'y 1, 1890, \$170.00. Feb'y 7, 1894, by interest on within to amt., \$160.00.' That said indorsements correctly represent the dates and amounts of all payments made by plaintiff on said bond, up to the 6th day of October, 1897. That on said date, October 6, 1897, plaintiff, intending to pay off and discharge said bond in full, paid to defendant thereon the sum of thirty-three hundred and ninety-eight and $\frac{14}{100}$ (\$3,398.14) dollars. That said sum so paid was by the clerk of the county court of said defendant county computed to be the amount due on said bond at said date of payment, and that plaintiff, relying on said computation and believing it to be correct, and without himself making any computation, paid said sum of \$3,398.14. That said computa-

tion was erroneous, and not correct. That there was not due on said bond at that time \$3,398.14. That said sum was paid to defendant by mistake, and under the mistaken belief that said sum was still due on said bond, and that it was necessary for plaintiff to make said payment in order to release his land, above described, from the lien of said county mortgage. Plaintiff states that the error of said computation, made by said clerk, consisted in charging compound interest, and not simple interest, on the interest that became and was due on the principal sum of said bond; that the amount of compound interest, so computed, on the interest due on said bond, was \$156.36 in excess of simple interest thereon; and that, in accepting said computation of said clerk, this plaintiff was ignorant of the fact of said error of said clerk. Plaintiff further states that said sum of \$3,398.14 so paid by him as aforesaid was \$156.36 in excess of the actual amount due on said bond on the said date of payment, and that on the 6th day of April, 1898, he made demand in writing of defendant for the return of said \$156.36; that plaintiff refused and still refuses to return the same, and now wrongfully retains and withholds said sum of \$156.36 from plaintiff. Wherefore plaintiff prays judgment against said defendant for the recovery of one hundred and fifty-six and $\frac{14}{100}$ (\$156.36) dollars, with 8 per cent. interest thereon from the 6th day of April, 1898, together with his costs herein expended." To this petition defendant demurred, on the ground that the facts stated are not sufficient to constitute a cause of action. The circuit court held the petition insufficient, and, plaintiff declining to plead further, final judgment was rendered for defendant on the demurrer; and plaintiff brings the case here on appeal.

Geo. D. Williams, for appellant. S. J. Jones, for respondent.

ROBINSON, J. (after stating the facts). Does the petition state a cause of action? It is claimed, first, by respondent, to be fatally defective, "because it does not allege a mutual mistake of facts, and because it does not allege that the calculation of interest on the bond in question by the county clerk was the result of a mistake." This is a clear misapprehension of the petition. The basis of recovery assumed in the petition is the mistake of the county clerk in charging or calculating compound interest, when simple interest only was contemplated by the bond. Looking, then, at the allegations of the petition, it is clear that a mistake committed by the clerk in calculating the interest is averred. The petition in effect charges that the plaintiff went to the clerk, and stated that he had come to pay the amount due on his bond, trusting to the latter to calculate the interest and compute the amount due thereon; and this the clerk undertook to do, but made a mistake in calculating the interest, and there-

upon the plaintiff paid the same in the belief of the correctness of such computation, without attempting to verify the same. This is such a mistake as a court will give its aid to correct, and with respect to which the plaintiff has a clear right of restitution. The plaintiff, according to the allegations of the petition, having overpaid the defendant \$156.36 more than he was bound by the contract to pay, by reason of a mistake in the calculation of the interest by the county clerk, in whom the plaintiff had placed full reliance, is, we think, entitled to the amount of such overpayment. *Boon v. Miller's Ex'rs*, 16 Mo. 457; *Wilson v. Boughton*, 50 Mo. 17.

Respondent's next contention is that the petition is defective because it does not allege "that the county clerk purposely or by false or fraudulent misrepresentations misled plaintiff, and that on account of such representations plaintiff was induced to make the alleged payments." There is nothing in this point, for the reason that plaintiff's right of recovery is predicated solely on the mistake of the clerk in the calculation and computation of interest. There is no pretense that an actual fraud was perpetrated on the plaintiff, nor is such an allegation necessary to entitle him to recover the overpayment made.

It is further insisted by respondent that "the petition shows on its face that the payment made was not the result of a mistake of fact, but a mistake of law." While there is no doubt of the general proposition, urged by respondent, that where a payment like the one made by plaintiff is under a mistake of law pure and simple, when all the facts are known and understood, the law furnishes him no relief, it is equally clear that where parties act under a mistake as to the fact, and one party gets an advantage by reason of such mistake, relief will be granted. This court cannot assume that the payment made by plaintiff in this case arose from an erroneous construction of the bond by plaintiff, because the amount paid by him shows a calculation and computation on such a construction of the bond. According to the allegations of the petition, the payment made in excess of the amount of the bond with simple interest was the result of a mistake of fact, caused by the improper computation of interest made, not by the plaintiff, but by one on whom he relied to make the computation properly, and there ought to be no doubt as to his right of relief from the consequences of such a mistake; otherwise, from a simple mistake of fact, that plaintiff was led into by giving his confidence to the clerk of the county court, the defendant county would obtain an unjust advantage over the plaintiff.

The only remaining point requiring consideration, then, is whether the bond in question is a compound or a simple interest bearing obligation. It is conceded the statute as it stood at the time of the execution of

the bond did not require the interest to be paid annually, leaving that matter entirely to the agreement of the parties. The bond in this case, however, provides that the interest shall be paid annually. The first clause of the bond simply provides for the payment of the principal sum 12 months after date thereof, with 8 per cent. interest thereon from date. By the second paragraph it is provided "that all interest not punctually paid shall bear interest at the same rate as the principal." Clearly this clause refers to interest earned by the principal, and does not include interest on interest. The term "all interest," as used in the bond, was evidently intended to apply to the defaulted interest on the principal sum. The plain, unequivocal language of the bond provides that all interest not punctually paid shall bear the same rate as the principal, viz., 8 per cent. But this does not authorize the compounding of interest on interest. While the plaintiff's obligation to pay interest rendered him liable for 8 per cent. simple interest on the defaulted interest, yet it does not mean compounding interest on such interest. 16 Am. & Eng. Enc. Law, p. 1074. There is no provision in the bond that the interest, when due and not paid, became a part of the principal, and thereafter bore the same interest, as would seem to be necessary where interest is sought to be compounded. Compound interest having been computed by the county clerk on the bond, as the amount paid clearly indicates, and upon such computation, in ignorance of such error, and acting under the mistaken belief that the interest had been correctly calculated, the plaintiff, having so overpaid the bond, is entitled to recover the excess. It follows that the circuit court erred in sustaining the demurrer.

The judgment will therefore be reversed, and the cause remanded.

BRACE, P. J., and MARSHALL and VAL-
LIANT, JJ., concur.

YEAMANS et ux. v. LEPP.

(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

TAXATION—SEPARATE TRACTS OR LOTS—IL- LEGAL SALES—SUIT TO SET ASIDE— TENDER—PRESUMPTION.

1. The terms "tract" or "lot," in Rev. St. 1889, § 7703, providing each tract or lot shall be chargeable with its own taxes, and section 7683, providing that the judgment for taxes shall state the amount of taxes due on each tract or lot, and decree that the real estate, or so much thereof as may be necessary to satisfy the judgment, be sold, are used as defined in section 7553, providing the assessor shall consolidate all lands owned by one person in a section, and all lands owned by one person in a block, into one tract or lot, where it is practicable, and section 7664, providing each tract and lot shall be assessed separately, but all land in a section and lots in a block, owned by one person, which are contiguous or can be

consolidated, shall be valued as one tract or lot.

2. Where several tracts of land are properly assessed separately, the sale of all in bulk for the total of all the taxes is invalid, being a contravention of Rev. St. 1889, § 7703, charging each tract with its own taxes.

3. Where land lies in the same section, is contiguous, can be consolidated into one tract, and is owned by the same persons, it will be presumed, in the absence of anything to the contrary, that, as provided by Rev. St. § 7564, it was assessed as one tract.

4. Violation of Rev. St. 1889, § 7683, requiring subdivision of land in sale for taxes, while not rendering the sale void, authorizes it to be set aside on a direct proceeding in equity against the purchaser.

5. A legal tender is not necessary for maintenance of bill in equity to set aside a tax deed, but it is enough that the owner offered to pay the purchaser the amount he paid, with costs and expenses, and renews such offer; and, even without the offer, equity may grant the relief on terms.

Appeal from circuit court, Jefferson county.

Suit by Stephen M. Yeamans and wife against Henry Lepp. Judgment for defendant, and plaintiffs appeal. Reversed.

This is a bill in equity to set aside a sheriff's deed to the defendant, made under a special *fi. fa.* issued upon a judgment for taxes, amounting to \$9.75, and costs, \$15.18, assessed against the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$, and W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 28, township 39, range 4 E., in Jefferson county, containing 260 acres, being the property of the plaintiffs. The petition alleges that in June, 1897, the plaintiffs were made defendants in a tax suit filed in Jefferson county by the tax collector of that county to recover said taxes assessed against said land; that at the September term, 1897, a judgment was rendered for said taxes and costs, and foreclosing the lien of the state upon said land therefor; that on October 7, 1897, a special execution was issued to the sheriff, commanding him to sell said land, or so much thereof as was necessary, to satisfy the debt and costs; that the sheriff sold the said land to defendant for \$190, and made him a deed thereto, under which the defendant now claims the land. The petition then alleges the following: "Plaintiffs claim that said land is reasonably worth the sum of \$800, and that at said sale of said land the sheriff wholly violated the law and the commands of the execution in this respect: that he did not offer for sale the said land in its subdivision, or in any natural or artificial subdivision of the same; and plaintiffs allege that any one of said natural subdivisions would have sold for more than enough to pay said debt and costs, leaving remaining for these plaintiffs the larger part of said 260 acres of land, but that, unmindful of his duty to these plaintiffs, the said sheriff, at the request of parties interested in the sacrifice of plaintiffs' land, and wholly unmindful of the commands of the execution and his duty to the plaintiffs, never once offered said land in smaller divisions than the whole, whereas the land has three

natural subdivisions, one of 20, one of 80, and one of 160 acres, and that the said 80-acre and 160-acre subdivision of the whole could have been conveniently divided into at least six subdivisions of 40 acres each, and so sold, but the said sheriff proceeded to sell the whole, thus attempting, in the interest of parties interested in acquiring all of said land, to confiscate the whole of the property of the plaintiffs in an unlawful and illegal way, for about one-quarter of its reasonable value, but for which he realized on said illegal sale the sum of \$190, or about seven times the taxes and costs, or the amount of said judgment. Plaintiffs show that there is now in the hands of the sheriff of said county the sum of \$146.57, the proceeds in excess of the amount of said judgment, and that these plaintiffs have refused to receive the same, but they here now request that this honorable court by its order have the same paid into this court to await the final disposition of this suit; that plaintiffs have offered before the institution of this suit to reimburse and pay the said defendant, Lepp, his money, costs, and expenses, if he would reconvey said property to plaintiffs, but he has refused so to do, thus persisting in carrying out the conspiracy to confiscate the whole of plaintiffs' land to pay a small judgment for taxes, and showing his disposition to retain an illegal and unjust advantage of plaintiffs. A plat of said land is hereto attached, marked 'Exhibit A,' showing the position of said land and the subdivisions of the same, any one of which would have sold, as plaintiffs believe, for sufficient to satisfy and discharge said debt and costs. Plaintiffs here now offer to pay to said defendant, Lepp, the said amount of money by him bid for said land, or so much thereof as will be necessary, in addition to said \$146.57, to equal the amount of his bid, \$190. Plaintiffs show that they had no knowledge of said sale, nor as to the time or place when the same was to be sold, until some months after the sale; that they never consented to nor requested that said land be sold in a body; that, had they known of the contemplated sale of said land, they would have directed the sale of said land in tracts or subdivisions as the law directs and contemplates; that plaintiffs employed attorneys to institute these proceedings to have said sale set aside as soon as they became aware of the facts. Wherefore plaintiffs pray that said sale be set aside, that said deed be canceled and held for naught, and for such other orders and decrees as to the court may seem equitable and just in the premises." The defendant demurred to the petition, generally because it did not state facts sufficient to constitute a cause of action or to entitle the plaintiffs to the equitable relief sought, and specially because it did not allege that the plaintiffs had tendered to the defendant, before the institution of the suit, the amount of the purchase price paid by the defendant.

The circuit court sustained the demurrer, the plaintiffs refused to plead further, a final judgment was rendered for the defendant on demurrer, and the plaintiffs appealed.

Warren D. Isenberg and Jos. G. Williams, for appellants. Kleinschmidt & Reppy, for respondent.

MARSHALL, J. (after stating the facts).

1. The question presented for adjudication is whether the petition states a cause of action. The plaintiffs' contention is that, "the property being susceptible to division and being one tract, a portion of one section, all connected, and sued on as one tract, it was the duty of the sheriff to subdivide the land and sell only so much as was necessary to satisfy the judgment and costs." On the contrary, the defendant's contention is that the provision of the statute requiring a sheriff to subdivide real estate offered for sale under execution is only directory, and, further, that, "there being no allegation in the petition that the real estate was assessed and sued on as one tract, or that the lands were owned by the plaintiffs [the plaintiffs are Stephen M. Yeamans and Alice A., his wife] as tenants in common or by the entirety, each 40-acre tract was liable for its own taxes, and no parcel was liable for the taxes of any other." And in support of the special demurrer the defendant claims that the petition does not state that the plaintiffs tendered to the defendant the cost of the sheriff's deed, amounting to \$2.50. In other words, the plaintiffs contend that the land consisted of three legal divisions, of 160 acres, 80 acres, and 20 acres, respectively, and that it was assessed as one tract, and was sold as one tract, when, according to the command of the special f. fa. and of the statute, the sheriff should have sold each legal division separately, and should have sold only so much as was necessary to satisfy the debt and costs, while, on the other hand, the defendant contends that there is no allegation in the petition that the land was assessed as one tract, that each 40 acres was liable for its own taxes, and that no parcel was liable for taxes assessed against any other parcel. In either view, the result is that the circuit court erred in sustaining the demurrer. If the land was assessed as one tract and sold as a whole, the sheriff did not obey the command of the f. fa., nor the provision of the statute, and sell only so much as was necessary to satisfy the debt and costs, and, this being a direct attack in equity, the sale must be set aside. If, on the other hand, each 40 was assessed separately, and was only liable for its own taxes, then each 40 should have been sold separately, and, as the petition charges that this was not done, but that the land was sold as a whole (and the demurrer admits this fact), then the sheriff acted illegally, and the sale must be set aside.

The petition does not state whether the land was assessed as one tract, or each fractional part of the section separately, nor does it state what the form of the judgment was, but it does state that it was sold as one tract. But, however it was assessed, the sheriff acted contrary to law in selling it in bulk. The statute (section 7703, Rev. St. 1889) provides that "each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed." Section 7553, Id., which relates to the arrangement of the assessor's books, provides: "When any person shall be the owner or original purchaser of a section, half section, quarter section or half quarter section, block, half block or quarter block, the same shall be assessed as one tract, and the name of such person placed opposite thereto, the lowest numbered range, township, section, block, lot, or survey always to be placed first in the 'land list.' The assessor shall consolidate all lands owned by one person in a section, and all town lots owned by one person in a square or block, into one tract, lot or call, where it is practicable; and for any violation of this section in unnecessarily dividing up the same into more tracts than one, or more lots than one, the county court shall deduct from his account, for making the county assessment, ten cents for each tract or lot not so consolidated." Section 7559, Id., contains the same provisions. Section 7564, Id., relating to the valuation to be placed on property, provides: "The assessor shall value and assess all the property on the assessor's books according to its true value in money at the time of the assessment; and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation. Each tract of land and town lot shall be assessed and valued separately; but all land in a section and lots in a square or block, owned by one person, which are contiguous, or which can be consolidated into one tract, lot or call, shall be valued as one tract, lot or call, as contemplated in section 7553." Section 7682, Id., regulating suits to collect back taxes, provides that "all lands owned by the same person or persons may be included in one petition and in one count thereof," etc. Section 7683, Id., provides: "The judgment, if against the defendant, shall describe the land upon which taxes are found to be due; shall state the amount of taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof; shall decree that the lien of the state be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold; and a special fieri facias shall be issued thereon, which shall be executed as in other cases of special judgment and execution, and said judgment shall be first lien upon said land," etc. So that

provisions of section 7703, providing that each tract of land or lot shall be chargeable only with its own taxes, must be read and construed in connection with section 7553, defining what constitutes a tract or lot, and with section 7564, which requires the assessor to value each tract or lot, as defined by section 7553, separately, and with sections 7682 and 7683, which govern the manner of bringing suit to collect back taxes and the form of the judgment to be rendered, and the duty of the sheriff in executing the special *fi. fa.* In other words, section 7553 requires all land owned by the same person in the same section, or all lands so owned in the same block, to be consolidated and treated as one tract or one lot; and section 7564 requires each consolidated tract or lot to be assessed separately, when the land lies in the same section or the lots lie in the same square or block, and if they are contiguous or can be consolidated into one tract, lot, or call. It is in this sense that the terms "tract" or "lot," as used in section 7703 and in section 7683, were employed by the lawmakers when they enacted those sections.

The defendant's contention that each 40 acres is liable for its own taxes is therefore untenable. But, as shown herein, even if it was the proper construction to place upon the statute, the sale in the case at bar is unlawful, because the 260 acres were sold in bulk, and not separately, as 40-acre tracts. The land in controversy lies in the same section, is contiguous, could be consolidated into one tract, and is owned by the same persons; and while it is true the petition does not state that it was assessed as one tract, still the law required it to be so assessed and listed, and it will be presumed, in the absence of averment or proof to the contrary, that the officers charged with the assessment and collection of the taxes did their duty and assessed it as one tract. *Lenox v. Harrison*, 88 Mo. 491; *Mathias v. O'Neill*, 94 Mo. 520, 6 S. W. 253; *Blodgett v. Schaffer*, 94 Mo. 652, 7 S. W. 436; *Agan v. Shannon*, 103 Mo. 681, 15 S. W. 757; *State v. Bank of Neosho*, 120 Mo. 161, 25 S. W. 372. Hence the petition must be construed as charging that the 260 acres were treated as one tract in the assessment, in the suit for taxes, and in the judgment, and that the judgment and special *fi. fa.* commanded the sheriff to sell the land, or only so much thereof as was necessary to satisfy the judgment, interest, and costs. The petition charges, and the demurrer admits, that it was not necessary to sell the whole tract to satisfy the judgment, which was for only \$0.75 and the costs, which amounted to only \$15.18, aggregating \$24.93, with interest from September, 1897, the date of the judgment, to the date of the sale, which date is not stated, but is alleged to have occurred before this suit was begun on August 12, 1898; and it further alleges that the sheriff did sell the land in bulk, and that it brought

\$190, or about seven times the amount of the judgment, interest, and costs, and that the land was really worth \$800. The petition further charges that the land was easily susceptible of division and sale either according to the recognized portions of the section, as established by the United States surveys and recognized by chapter 156, Rev. St. 1889, in which the three parts lay, or into even smaller subdivisions, and that a sale of even the smallest subdivision would have yielded enough to pay the whole amount of the judgment, interest, and costs. This is not only sufficiently averred, but the amount realized at the sale shows that it was not necessary to sell the whole tract in order to produce enough money to pay the judgment, interest, and costs. The petition, therefore, clearly stated a violation of duty by the sheriff under the statute, which entitles the plaintiffs to have the sale set aside upon terms. In reaching this conclusion the case of *State v. Sargeant*, 76 Mo. 557, has not been overlooked. That case is clearly distinguishable from the case at bar in this: that the judgment was against each lot separately, and the *fi. fa.* commanded the sheriff to sell each lot separately, and in the further particular that sections 7553 and 7555 do not apply to the city of St. Louis, in which jurisdiction that case arose, and where a different method of assessing and collecting taxes is provided by the charter of that city. Article 5, charter of St. Louis (page 2112, 2 Rev. St. 1889).

Counsel for defendant cite *Rector v. Hartt*, 8 Mo. 448, 41 Am. Dec. 650, *Bouldin v. Ewart*, 63 Mo. 330, and *Lewis v. Whitten*, 112 Mo. 318, 20 S. W. 617, as authority for the claim that the provisions of the statutes requiring a sheriff to subdivide a tract of land sold under execution based upon a general judgment or upon a special judgment for taxes is only directory, and contend that the failure of the sheriff to comply with the statute in this regard does not render the sale void or affect the title of the purchaser. Those cases, and others that might be cited, do hold that such violation of duty by the sheriff does not render the sale void, so that the title conveyed by the sale can be attacked collaterally; but those cases also hold that the sale may be attacked directly, either by a proper motion at the proper time, in the court that rendered the judgment and while the matter is still within the control of the court, or by a bill in equity, and in this way the sale may be set aside. This is a direct proceeding in equity, and hence is within the rule.

It only remains to consider whether the petition sufficiently alleges a tender; for, of course, a court of equity would not set aside the sale, except upon equitable terms. The allegation of the petition is "that plaintiffs have offered before the institution of this suit to reimburse and pay the said defendant, Lepp, his money, costs, and expenses,

If he would reconvey said property to plaintiffs, but he has refused so to do"; and it further offers to pay Lepp "the amount of money by him bid for said land, or so much thereof as will be necessary, in addition to said \$146.57 [which is the balance of the \$190 bid by Lepp at the sheriff's sale after paying the judgment, interest, and costs], to equal the amount of his bid of \$190." This is not a direct averment of a tender in its legal sense,—that is, an offer of the money; but it does allege and offer to pay the amount the defendant bid and paid for the land, with all his costs and expenses, and that the defendant refused the offer, and it renews the offer, and this is all that is necessary in equity. *Whelan v. Reilly*, 61 Mo. 505. And, even if no offer was so made, a court of equity has power to impose the terms upon which it will lend its aid, and would require the amount paid to be refunded as a condition precedent to granting the relief. *Kline v. Vogel*, 99 Mo. 239, 1 S. W. 733, 2 S. W. 408.

It is further contended that as the sheriff, who has possession of the \$146.57, balance aforesaid, is not a party to this action, the court cannot order that sum returned to the defendant, or the plaintiff, or any one else. But this does not impair the power of the court to set aside the sale, and to require the plaintiffs to reimburse the defendant; for the court could impose those terms upon the plaintiffs, and it would rest with them to produce the necessary amount of money. If the funds in the hands of the sheriff were not available to the plaintiffs, for the reason given by the defendant, the plaintiffs would have to get that amount from other sources. However, as this case must be retried, the plaintiffs should be granted leave to amend by making the sheriff a party defendant, if they are so advised.

The circuit court erred in sustaining the demurrer to the petition, and its judgment is therefore reversed, and the cause remanded to be proceeded with in accordance herewith. All concur.

STATE v. ARMSTRONG.

(Supreme Court of Missouri, Division No. 2.
Feb. 4, 1902.)

RAPE—GRAND AND PETIT JURY—INDICTMENT—EVIDENCE—CONFESSIONS—ADMISSIBILITY—INSTRUCTIONS—REMARKS OF COUNSEL.

1. An indictment for rape, averring that defendant did "in and upon T. unlawfully, violently, and feloniously make an assault, and her, the said T., then and there unlawfully, forcibly, and against her will did ravish," sufficiently charges that T. is of the female sex.

2. An objection that an indictment, indorsed "John L. Clark, Foreman of the Grand Jury," was not indorsed by the duly appointed foreman, was untenable, though in the transcript sent on change of venue the typewriter made the record state that the "court appoints John L. Clark as foreman," where the full entry of the impaneling of the grand jury showed that John L. Clark was duly summoned and sworn,

and it appeared that no such person as "Calrk" was a member of the panel, and the record recited that the indictment was "by the court examined and found to be indorsed 'A true bill' by the foreman, John L. Clark."

3. An objection that the grand juror "Charles Hallm," as his name appeared in the transcript on change of venue, was not impaneled, charged, and sworn, was untenable, where the record showed that Charles Hall was duly summoned, impaneled, charged, and sworn, and that no such person as "Charles Hallm" was ever a member.

4. It was not necessary to swear the jury to try the case before placing them in charge of a sworn officer, where they were duly sworn the following day, and where no pretense was made that they were guilty of the slightest impropriety, and there was no separation of the jury at any time.

5. Under Rev. St. 1899, § 2629, providing that, when the argument is concluded, the jury "may retire under the charge of an officer, who, in case of a felony, shall be sworn to keep them together," etc., the special oath need not be administered to the officer at the time the jury is placed in his charge.

6. A 16 year old white girl was overtaken by a young negro, who demanded a dollar from her. She said she would give him everything she had if he would leave her alone. She testified that he dragged her from the buggy, and struck her in the face, etc., and that she became unconscious. When she regained consciousness, she found her skirt down and her underclothing torn. Neighbors afterwards caught defendant, who was identified by the girl as her assailant. A doctor testified that he found the girl considerably bruised, the hymen absent, and menstruation present. The girl testified to a soreness never before experienced, but could not tell whether penetration occurred. The doctor examined defendant some two or three hours after the alleged outrage, but discovered no stains on his clothing or person. The parties who arrested defendant testified that he had on a fresh laundered shirt. His mother and father testified that he had not changed his shirt for several days. Alleged confessions of defendant were also admitted. *Held*, in a prosecution for rape, sufficient to go to the jury.

7. A requested instruction is properly refused, where covered by one already given of the court's own motion.

8. An instruction that "there was no direct evidence of penetration," and invoking the rule as to circumstantial evidence, was properly refused, where two officers testified to confessions made by accused that he committed the crime.

9. The sheriff testified that, on taking him off the train at a certain point, the boy asked if a mob at the station were looking for him, and he replied he supposed so, but he did not know; that he told the boy he had better tell the truth; that he made no threats and held out no promises; that the boy thereupon confessed the crime. The boy denied making any confession, but testified that the officer drew a revolver on him and attempted to compel one, and that he did not know the mob was after him. *Held*, that the confession was admissible.

10. A deputy sheriff testified that he asked defendant if he knew he had had a pretty narrow escape, that the people were after him pretty hard, etc., and asked him, "Did you do it?" to which defendant first nodded his head, and then said, "Yes," and that he did not know why he did it. *Held*, that the confession was admissible.

11. Evidence of the finding of a hair ornament of the prosecutrix at the place of the alleged assault was admissible.

12. It was proper to permit witnesses to testify as to defendant's age, especially where it bore on his capacity to commit the crime.

13. Remarks of the prosecuting attorney, in arguing a rape case, that if the jury gave defendant a penitentiary sentence he could only be sent to the reform school on account of his age, was not ground for new trial, where brought to the attention of the court by affidavit; no exception being taken at the time.

Appeal from circuit court, Platte county; A. D. Burnes, Judge.

General Armstrong was convicted of rape, and appeals. Affirmed.

E. C. Hall, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

GANTT, J. At the September term, 1900, of the circuit court of Clinton county, the defendant, General Armstrong, was indicted for rape. He applied for and obtained a change of venue from Clinton county to Platte county. He was tried in the circuit court of Platte county at the December term, 1900, and convicted, and from that conviction and his sentence thereon he appeals.

The indictment is in these words: "State of Missouri, County of Clinton--ss. In the Circuit Court, September Term, 1900. The grand jurors for the state of Missouri, summoned from the body of Clinton county, charged, and sworn, upon their oaths present that one General Armstrong, late of the county aforesaid, on the 12th day of July, 1900, at the county of Clinton, state aforesaid, did in and upon Ivy B. Turney unlawfully, violently, and feloniously make an assault, and her, the said Ivy B. Turney, then and there unlawfully, forcibly, and against her will feloniously did ravish and carnally know, against the peace and dignity of the state. Thomas W. Walker, Prosecuting Attorney. A true bill. John L. Clark, Foreman of the Grand Jury." He was duly arraigned and entered his plea of not guilty.

The evidence was in substance the following: Ivy B. Turney, a young white girl of the age of 16 years, lived at the village of Turney, in Clinton county, Mo., on the 12th day of July, 1900, and had lived there since she was 8 years old, and gone to school. She had engaged in delivering baking powders on that day to different families in the neighborhood of Perrin, another village in said county. She had a buggy and horse, and went alone. She started about 9 o'clock in the morning of July 12, 1900, from Perrin, to deliver the baking powders. She had stopped at the homes of several families. After leaving Mrs. Dunn's, and while driving along on the public road to the residence of Mrs. Carey to make another delivery of goods, she testified she saw the defendant, a negro boy, riding a white horse, herding some cows along the road. Between Mrs. Dunn's and Mrs. Carey's there was a small ravine, out of the sight of each of these houses. After leaving Mrs. Dunn's, she looked back, and saw the defendant was following her in a gallop, whereupon she drove rapidly to get away from him, but he overtook her, caught the lines, and pulled her

horse to the right side of the road, and said to her "Give me a dollar." She told him she would give him everything she had if he would only leave her alone. At this, she says, he became very angry, and gritted his teeth, and caught her, and dragged her from the buggy, and struck her in the face. She resisted him with all her strength, and tried to scream; but he caught her by the throat and she became unconscious. When she regained consciousness, she found her skirt was down, her underclothes torn and rumpled, and the napkin she wore, on account of her menstruation at the time, removed. She saw him going down the road. She drove first to Carey's, and stopped about five minutes, and then she drove at once to Mrs. Boone's, about one-half mile, where she told the story of her frightful experience. Mr. Boone gathered two or three neighbors, and they immediately went to the house of defendant's parents, took defendant in charge, and carried him to Mr. Boone's, where the prosecutrix was in bed, and she identified him positively as her assailant. In the meantime Dr. Sturges, who resided in Perrin, was called in, and he testified that he found prosecutrix suffering from extreme nervousness; her pulse about 90. He found her right hip and right side considerably bruised, and her right arm partially paralyzed. He made a digital examination, and found the hymen absent and menstruation present. He treated her seven or eight days before she was able to go to her parents at Turney. Prosecutrix testified to a soreness in her private parts, which she had never before experienced, but was unable to state, from her unconscious condition, whether penetration had occurred. Examination was made by Dr. Sturges of the defendant's person, but he discovered no stains upon his clothing or person at that time, some two or three hours after the alleged outrage. The witnesses who arrested defendant at his father's testified he had on a freshly laundered shirt. On the other hand, his mother and father testified he had not changed his shirt since Sunday, and this was on Thursday. The weather was very warm, and the roads dry and dusty at the time. The defendant was taken to Plattsburg, the county seat, and, as the indignation was very great, the sheriff, Wiser, took the prisoner to Kansas City for safe-keeping and to protect him from violence. On the 14th of July, the marshal of Plattsburg, Mr. Moody, and Joseph Shoemaker were returning from Kansas City with the prisoner, taking him to the Plattsburg jail. It seems they were in some way advised that a large crowd had assembled at Kearney, a station in Clay county on the road from Kansas City to Plattsburg, and there was danger of violence to the prisoner. When they reached Kearney, Edgar Cave, the deputy sheriff of Clay, and Moody, the marshal, managed to keep the attention of the crowd while Shoemaker took the pris-

oner off the train and down the railroad track about a quarter of a mile. On this trip, and while hiding from the crowd, Shoemaker testified the defendant asked him what the crowd was doing, and he told him it was a mob, and told him that, if he did do this, it would be better to tell the truth about it. Thereupon the prisoner told Shoemaker that on the morning of the 12th he was passing the place where Mr. Berryman lived, and saw the prosecutrix in a buggy. "I rode after her, and caught up with her, and grabbed her by the shoulder, and pulled her out of the buggy, and she fell almost on top of me." Shoemaker asked if he struck her, and he said, "Yes; I struck her once, and then I tore her drawers, and got on her, and" accomplished the rape. "After a little while I got scared, and got up and started to my horse, and I saw her get up and get in the buggy and drive on. I got on my horse and went home, and then these men came and got me." Shoemaker testified positively that he held out no inducement to defendant to make this statement. Sheriff Wisner testified that defendant seemed to be very much frightened when he was taking him to Kansas City. The defendant in his own behalf testified that Mr. Shoemaker tried to make him confess, and he would not do it; that he then said he would let the mob get him, and drew his revolver on him; but he made no confession to him such as detailed by Shoemaker. Shoemaker denied that he drew his revolver on the defendant, and denied that he told him he would let the mob get him; denied that he threatened him in any way. The court ruled the admissions of defendant were competent, to which defendant by his counsel excepted, for the reason that the evidence showed defendant was under 16 years old, and under duress and in great fear at the time, and the evidence was incompetent for these reasons. Edgar Cave, deputy sheriff of Clay county, testified that he was on the train with Moody and Shoemaker on the day they returned with the prisoner from Kansas City to Plattsburg, and said to defendant, "General, do you know you had a pretty narrow escape Saturday night?" He answered he did not. Cave then said, "The people seem to be after you pretty hard, and he must have committed an awful crime the way they were after him," and said, "Did you do it?" to which defendant first nodded his head by way of assent, and then looked up and said, "Yes." Mr. Cave asked him what made him do it, and he said he did not know. Mr. Wingate, a gentleman living in the neighborhood of Perrin, testified that on the afternoon of the 12th of July, 1900, he found a pin, a lady's hair ornament, and a blood-stained cloth on the west side of the road, about a quarter of a mile south of Mr. Dunn's house, and had kept the pin in his possession from that time until he testified. This pin the prosecutrix identified as

one she wore on the day she was outraged, but had never known before when she had lost it. David Cook testified that he went with Mr. Boone on the 12th of July, 1900, to arrest defendant. When they took him to the school house, they examined him, and he noticed defendant's shirt was clean, and they asked him if he had changed his clothes after he came home, and he first said, "Yes," but almost immediately he said, "I was not thinking what I said; No." He also denied seeing the girl at all, but he had seen a white man with some kind of blacking brush in his hip pocket going down the field, and he expected he went down there to black himself. Numerous grounds for reversal have been urged in the argument and brief of counsel for defendant.

1. The indictment it will be observed does not specifically allege that the prosecutrix was of the female sex, but charges that defendant did in and upon her (setting out her name in full) "unlawfully, violently, and feloniously make an assault, and her, the said Ivy B. Turney, then and there unlawfully, forcibly, and against her will did ravish and carnally know." The objection is without merit. The exact point was ruled adversely to the defendant's contention in *State v. Hammond*, 77 Mo. 157, and *State v. Warner*, 74 Mo. 83. *Whart. Cr. Law*, §§ 5, 74.

2. It is further insisted that the foreman of the grand jury did not indorse the indictment. To make plain the point made under this assignment, it should be stated that in the transcript sent to the Platte court on the change of venue from Clinton county the typewriter makes the record state that the "court appoints John L. Clark as foreman" of the grand jury, and the indictment returned in the case against defendant is indorsed by John L. Clark, and hence the contention that the duly appointed foreman did not indorse the indictment. Now the full entry of the impaneling of the grand jury shows John L. Clark was duly summoned as a member of the panel of grand jurors, and was duly sworn as such. It further appears that no such person as Clark was a member of said panel, and on the 13th day of September, 1900, the record of said court at the same term recites that the grand jury returned and presented a bill of indictment No. 905, *State of Missouri v. General Armstrong*, for rape, "which said indictment is by the court examined and found to be indorsed 'A true bill' by the foreman, John L. Clark." It is apparent that John L. Clark was a member of the grand jury, and he was recognized by the court which appointed the foreman as the foreman, and it is equally obvious and clear that no such person as Clark was a member of the grand jury, and that Clark's name was by misprision of the typewriter who copied the transcript misspelt; and hence there is nothing in the objection. *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329.

Equally as frivolous is the assignment t

the grand juror Charles Hallm was not impaneled, charged, and sworn. The record shows that Charles Hall was duly summoned, impaneled, charged, and sworn, and no such person as Charles Hallm was ever a member of the grand jury. The sole foundation for this point is that the typewriter who copied the transcript on the change of venue, in striking for the space bar on the machine, evidently inadvertently struck the key that contained the "m," and this added the superfluous letter to the name of Charles Hall, who in fact was one of the grand jurors. Counsel is right in saying that Charles Hallm was never sworn or charged as a grand juror; but the failure to make him, if he ever existed, a juror, does not affect this case.

3. After the panel was selected, and before they were sworn to try the case, they were placed in charge of a sworn officer and kept together until the next day, when they were duly sworn to try the case. It is now urged as error that the jury was not sworn before they were placed in charge of the officer. No pretense is made that the officer tampered with the jury, or permitted any one to approach them, or that they were guilty of the slightest impropriety. There was no separation of the jury at any time. Clearly no error was committed by this action of the court; neither was it necessary to administer the special oath to the officer in charge at that time. When finally the evidence was all in, and the arguments closed, it affirmatively appears that the jury was placed in charge of an officer sworn in accordance with the requirements of section 2629, Rev. St. 1890. *State v. Underwood*, 76 Mo. 630.

4. Error is also predicated upon the refusal of three instructions prayed by defendant. One was a peremptory direction to find defendant not guilty. Clearly no mistake was made in denying this request. There was ample evidence to justify the submission of the case to the jury under proper instructions. The court properly refused the first instruction asked by defendant, because it had already been given by the court of its own motion in its third instruction. Neither did the court err in refusing to give defendant's second instruction, which declared "there was no direct evidence of penetration," and then invoked the rule as to circumstantial evidence. There was direct evidence of the fact, out of the mouth of defendant, detailed by two witnesses, and this court cannot and will not assume that both or either of the officers deliberately perjured themselves.

In this connection should be considered the objection to the admission of the confessions or admissions by defendant to Shoemaker and Cave. It will be recalled that Shoemaker testified that, after he had taken the prisoner off at Kearney, the prisoner asked him if those men were hunting for

him, and he told him he supposed they were, but did not know. Shoemaker said to him he had better tell the truth about this. Shoemaker positively testifies that he made no threats and held out no promises to defendant to obtain a confession. The defendant was put on the stand in his own behalf, and, instead of testifying he had made confessions under threats or promises, denied that he made any confessions whatever; but he testifies Shoemaker drew his revolver on him, but he did not tell anything. He testified, moreover, he did not know the mob was after him. Shoemaker denied that he drew a revolver on the prisoner. It is the settled law of this state that a mere adjuration to speak the truth does not vitiate a confession; no threats or promises being employed. *State v. Patterson*, 73 Mo. 707; *Whart. Cr. Ev.* 647, and cases cited. In order to exclude the confession, it must appear affirmatively that some inducement to confess was held out to him by or in the presence of some one having authority. *Rosc. Cr. Ev.* 54; *Whart. Cr. Ev.* § 689; *State v. Patterson*, 73 Mo. 705. All that can be made out of Shoemaker's testimony in the way of an inducement amounts to no more than a statement that he had better tell the truth, without promise or hope of leniency, and without any threat. We think it was clearly admissible. *State v. Hopkirk*, 84 Mo. 278; *State v. Phelps*, 74 Mo. 128. And the same rule must govern as to the evidence of Cave, which was entirely free of any promise or threat.

We are unable to discover any principle of law to sustain the objection to the introduction of the evidence as to the finding of the hair ornament of the prosecutrix at the place where she testified the assault had been made. It was a circumstance corroborating both her testimony and the confessions of the defendant.

Neither was there error in allowing the witnesses to tell the age of the defendant. It is always competent to show the size and age of the defendant, and the knowledge of the witnesses in respect thereto; and particularly is this true when the evidence bears directly upon his capacity to commit the crime charged. The jury having assessed the punishment at death, the defendant was punishable in the same manner and to the same extent as provided by law for persons over the age of 18 years.

In his motion for new trial defendant assigned as ground for a new trial that the prosecuting attorney, in his address to the jury, made the statement that, if the jury gave defendant a penitentiary sentence, he could only be sent to the reform school on account of his age. No objection or exception was taken to this statement at the time, as counsel for defendant made affidavits they did not hear it. This matter was brought to the attention of the court by affidavit, and he denied the motion on this ground, and

correctly so. No affiant made oath that the statement of the prosecuting attorney was made in a low tone, and, if counsel desired to except to the argument for the state, he should have listened to it. No reason is shown why the defendant should not have been required to save his exceptions at the time, and the prosecuting attorney made no misstatement of the law. *State v. Emery*, 76 Mo. 348.

The evidence supports the verdict. The character of the prosecutrix was not challenged. Her testimony was delivered without the slightest exaggeration. Her evidence, locating the defendant in the immediate neighborhood, riding a white horse and herding cows, about the time she testifies he assaulted her, was corroborated by disinterested gentlemen in the neighborhood, even by defendant himself, though he denies in his evidence seeing her in the buggy, although she rode along the road in which he was herding. The evidence of the brutal assault was corroborated by Mrs. Boone and Dr. Sturgis; the latter testifying to her bruised condition and her partially paralyzed arm. The confessions of the defendant corroborated the evidence of the unprotected girl that he struck her and succeeded in his infamous purpose.

Horrible as the crime, and loth as we are to credit such a charge, the evidence was sufficient, if believed by the jury, to sustain the charge; and, the jury having seen the witnesses and heard them deliver their testimony, there is no reason why this court should disregard their verdict, and the judgment is affirmed, and the sentence which the law imposes must be executed. All concur.

On Rehearing.

(Feb. 25, 1902.)

The defendant by his counsel has moved for a rehearing on the ground that in our opinion we overlooked the point made in his brief and argument at the hearing that the circuit court failed to instruct the jury upon the punishment prescribed by section 7759, Rev. St. 1899. We did not fail to consider this point made by counsel; but, inasmuch as examination of the record disclosed that the defendant saved no exceptions to the failure of the circuit court to instruct upon all the law of the case, his appeal presented no such question, and hence it was deemed unnecessary to embody the point in our opinion. We say this much now to advise counsel why we do not enter upon a discussion of the point he made. *State v. Cantlin*, 118 Mo. 111, 23 S. W. 1091, and numerous subsequent cases. We cannot convict the trial courts of alleged errors which they have had no opportunity to correct. As this is the only ground for a rehearing, the motion is overruled. All concur.

FEEBACK v. MISSOURI PAC. RY. CO.
(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

RAILROADS—COLLISION—TRESPASSERS—LIABILITY FOR INJURIES—NEGLIGENCE.

1. Where deceased was a trespasser on a freight train when killed, and was hiding between the cars, it was proper to refuse evidence, in an action for his death, that passengers were habitually allowed to ride on freight trains with the knowledge of defendant's employes.

2. Where a petition for wrongful death avers that persons were carried on freight trains with full knowledge of defendant, it is proper to refuse, as irrelevant, evidence that persons were in the habit of riding, without objection, on freight trains, regardless of defendant's rules.

3. Where deceased, when killed in a collision, was a trespasser on defendant's train, and the collision was the result of careless conduct of the engineer on one of the trains, defendant is not liable for negligently causing the death, since such engineer violated no duty owing to deceased.

Error to circuit court, Cass county; W. W. Wood, Judge.

Action by Lucy Feedback against the Missouri Pacific Railway Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Plaintiff sues to recover damages for the death of her husband, who was killed in a railroad wreck caused by the collision of two freight trains owned and operated by the defendant. The accident occurred at Adrian, in Bates county. The petition avers that it was the custom of defendant, its officers, agents, and employes, to carry "passengers and other persons on all its trains, including freight trains, and that on this occasion the plaintiff's husband was on the freight train that was wrecked, "with the permission, knowledge, and consent of the defendant, its officers, agents, servants, and employes," for the purpose of being carried from Butler to Harrisonville. By the plaintiff's evidence the following facts were shown: These two freight trains were to pass each other at Adrian. The north-bound train had the right of way, and the south-bound train, arriving first, switched onto the side track to clear the main track for the other train, which was due. After passing onto the side track the engineer in charge of the south-bound train stepped off his engine while it was moving, and went towards the depot to get his orders. The fireman was on the train, but whether he knew the engineer had left it or not does not appear. It was down grade, and the steam was not shut off, nor the brakes set, though the train was moving slowly. While the engineer was walking towards the depot, one of the witnesses said to him, "The fireman don't know you are off," to which the engineer replied, "He does." But witness repeated, "He does not." Then the engineer said, "Let him go to hell, then." But when the engine reached a point with-

in about three rods of the main line, the engineer, seeming to realize the danger, ran to the train, and jumped on a car, and then ran ahead along the cars towards the locomotive. The fireman about that time reversed the engine, but it was too late. It had passed onto the main track, and the north-bound train, running at a rate of 18 or 20 miles an hour, struck it, and the wreck ensued. As soon as the engineer on the north-bound train discovered the other locomotive on the main track, it being then too late to avoid collision, he sounded the danger signal; and he and the rest of the train crew jumped off, and thus saved themselves. This north-bound train was what was called a "through freight." It consisted of 25 or 30 cars,—4 or 5 box cars next to the engine, a lot of coal cars, and a caboose at the end. The plaintiff's husband, in company with his brother and another companion, was at Butler, which is south of Adrian, when this north-bound train stopped there. He went to the caboose alone, and when he returned he told his brother and his other companion that he had asked the brakeman (the conductor not being there at the time) for permission to ride to Harrisonville, and the brakeman refused to allow him to get on the train. Then he and his brother and the other companion started walking up the track, and when the train came along, moving slowly, he climbed on it; taking a position on the front end of the front coal car, just in the rear of the box cars. The train stopped in a short distance, and two of the box cars were cut off and side-tracked, then the engine reattached to the train, and it moved on. When this stop was made, the plaintiff's husband got off and joined his companions, but when it started he got on again in the same position, the train moved on, and that is the last time those companions saw him alive. When the work of removing the wreck was going on, the cars were pulled apart, and his dead body fell down in the track. It had been crushed between the cars. The counsel for the plaintiff asked one of his witnesses this question: "Do you know of any parties riding backwards and forwards on the road there on this freight train?" to which defendant objected, the objection was sustained, and the plaintiff excepted. At the close of the plaintiff's case defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused. Then the defendant introduced evidence which tended to show: That the deceased came into the caboose at Butler, and asked to be allowed to ride to Harrisonville; the conductor at the time being in or about the depot. The brakeman told the deceased that this was a through freight, and did not carry passengers. Deceased said he had money to pay, but the brakeman still refused. That he then tried to get on the engine, and told the engineer that he had money to pay, but the

engineer refused to allow him to get on. That none of the crew knew that he was on the train until his dead body was discovered when the wreck was being removed. At the close of all the evidence the court instructed the jury that the plaintiff was not entitled to recover. The plaintiff took a nonsuit, with leave, and, after due course, brings the cause here by appeal.

Geo. Bird and Jas. T. Burney, for plaintiff in error. R. T. Bailey, for defendant in error.

VALLIANT, J. (after stating the facts).

1. It is assigned for error that the court refused to allow the plaintiff to introduce evidence to the effect that passengers were habitually allowed to ride upon the freight trains of defendant, with the knowledge and consent of its employes. Evidence tending to show that passengers were allowed to ride on freight trains, with the knowledge and consent of employes, would not tend to show that persons were allowed to ride as the deceased in this instance was riding,—hidden between the front end of a coal car and the rear end of a box car. There was a caboose on this train, and, if passengers were allowed on the train, they would be in the caboose. In the brief for appellant it is said that the court erred in refusing evidence offered by plaintiff to the effect that persons were in the habit of riding, without objection, on the freight trains of defendant, regardless of the rules of the company. The plaintiff's offer did not include evidence to show that the deceased was on the train regardless of the rules of the company. And if the offer had been made, it would have been irrelevant, under the averments of the petition, which were that passengers and other persons were carried on all the freight trains, even in flat or box cars, with the full knowledge and consent not only of the employes and servants, but of the defendant itself and its officers. And the petition avers that the plaintiff's husband was on this train, "with the permission, knowledge, and consent of the defendant, * * * for the purpose of going to Harrisonville." If he was there under those conditions, he was a passenger; and evidence tending to show that he was a trespasser, or that he was there with the connivance of the train crew, in violation of the rules of the defendant, would have been in contradiction of the petition. The court did not err in sustaining the objection to the evidence.

2. There was no evidence tending to show that the engineer or any of the crew of the north-bound train committed any breach of duty. The wreck was due to the act of the engineer of the south-bound train in leaving his engine, with steam on and brakes open, moving towards and near the point of contact with the train coming in the opposite direction. Whether or not that act was negligence, in the technical sense, as affecting

the plaintiff's cause of action, depends on the answer that must be given to the question whether or not the engineer, in that act, failed to discharge a duty the defendant then owed to the plaintiff's husband under the circumstances of the case. The term "negligence," in its technical sense, embraces in its definition a failure to discharge a legal duty owing to the injured person. A right of action does not accrue to a plaintiff for an accidental damage sustained in consequence of the failure of a defendant to discharge a duty owing to a third person. *Roddy v. Railway Co.*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 383; 1 *Thomp. Neg. (New Ed.)* § 2. The legal duty here referred to may be assumed voluntarily, as by contract, or it may be imposed involuntarily by the relation of the parties and the environments. But unless the damage complained of arises out of a failure to perform a legal duty to the person injured, there is no cause of action. It is not necessary that the duty be owing to the person in particular. It is sufficient if it be owing to a class which embraces him, or to the public, where he is concerned. Now, what duty did the defendant corporation owe to the plaintiff's husband under the circumstances of this case? According to the petition, he was a passenger, and consequently the corporation owed him a duty to exercise a high degree of care for his protection. True, the petition does not call him by that name, but it declares that he was on a train of defendant's on which it usually carried passengers, and was there, with the knowledge and consent of the defendant, to be carried to his appointed destination on the defendant's road. If that declaration were true, he was a passenger. But on the trial the plaintiff did not attempt to maintain that position, but contended that the conduct of the engineer in fault was so grossly negligent that the defendant was liable, although the plaintiff's husband was a mere trespasser. Thus the plaintiff is in the attitude of suing in one capacity, and trying to recover in another. But even a trespasser has some rights. If a man intrudes into your house when you have forbidden him to enter, you have no right to kill him, but you may expel him by using just sufficient force for that purpose. You owe him, under those conditions, the duty to avoid inflicting on him unnecessary injury. But if the man is secreted in a closet without your knowledge, and you are carelessly handling a gun, and allow it to be discharged and wound him, you are not liable, however careless you may have been; nor was your conduct negligence, in the technical sense. There is a difference between carelessness, in common parlance, and negligence, in the technical sense. The plaintiff's husband was a trespasser on the train, and the only duty the defendant owed him was to avoid inflicting injury on him wantonly. He had no share in the duty the engineer owed

to the train crew or to possible passengers on the train. How can it be said, therefore, that the careless engineer of the south-bound train neglected any duty he owed to this man, when he had no knowledge of, or reason to apprehend, his presence? It is argued by the learned counsel that the engineer knew that those trains habitually carried passengers, and therefore he ought to have apprehended that passengers were on this train, and his conduct was a reckless disregard of his duty in that respect. But disregard of a duty owing to passengers gives no cause of action to one who was not a passenger. The petition does not aver that the engineer had reason to apprehend that the plaintiff's husband was on the train in a position of extraordinary danger, where passengers do not ordinarily ride. If the case had been stated in the petition as it was made out by the plaintiff's evidence on the trial, it would probably have been ended on demurrer. There is nothing in the facts of this case to bring it within the doctrine announced in *Kellay v. Railway Co.*, 101 Mo. 72, 15 S. W. 806, 8 L. R. A. 783, and *Morgan v. Railroad Co.*, 150 Mo. 202, 60 S. W. 195, cited in the briefs. However careless the conduct of the engineer of the south-bound train may be considered, it cannot be adjudged to have been a violation of any duty the defendant owed the plaintiff's husband, and therefore it was not negligence for which the defendant is liable in this suit.

The judgment of the circuit court is affirmed. All concur.

STATE v. KOPLAN.

(Supreme Court of Missouri, Division No. 2.
Feb. 25, 1902.)

LARCENY — ASPORTATION — INDICTMENT —
VALUE OF PROPERTY STOLEN—EVIDENCE—
SUFFICIENCY—EVIDENCE OF ACCOMPLICE—
CORROBORATION — INSTRUCTIONS — APPEAL
—FAILURE TO EXCEPT.

1. Where no exception is taken to the refusal to give an instruction to acquit, the questions presented thereby will not be considered on appeal.

2. An indictment for grand larceny which charges the taking of various articles is not bad, in fixing the value thereof in one sum, and in failing to give the separate values of the various articles taken.

3. The owner of a law library worth at least \$305 left the same in his home in care of a negro servant; and defendant, knowing of the owner's absence, asked the servant if he did not have some books to sell, and the servant sold the entire library to defendant for \$1.50. The servant testified that defendant removed the books. *Held* to sustain a conviction of larceny by both defendant and the servant, and that the asportation of the books by the defendant could not be considered as being merely the servant's asportation, which would reduce defendant's crime to that of receiving stolen property with knowledge thereof.

4. Evidence of persons not connected with the crime that they saw defendant and the servant carrying books out of the house and placing them in defendant's wagon is a sufficient corroboration of the servant to authorize the

fusal of a cautionary instruction that the uncorroborated testimony of an accomplice should be received with caution.

5. Where the defendant testifies that he was not present at the place where the crime was committed, the failure to instruct as to the effect of an alibi is erroneous; the attention of the court being called thereto by the allegation that the instructions given "do not cover the whole law of the case."

Appeal from St. Louis circuit court; Franklin Ferris, Judge.

Abraham Koplan was convicted of larceny, and he appeals. Reversed.

S. S. Bass and Thos. B. Harvey, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

BURGESS, J. Defendant was convicted in the circuit court of the city of St. Louis of grand larceny, in feloniously stealing a number of law books, and his punishment fixed at two years' imprisonment in the penitentiary, under an indictment charging him and one Louis Dryden with stealing "two dozen silver forks, two dozen silver teaspoons, four hundred law books (or more), one shotgun, three clocks, one seal sacque, one opera cloak, and one lot of bedclothing, of the aggregate value of fifteen hundred dollars, the property of one Selden P. Spencer." He appeals.

The facts, briefly stated, are about as follows: In the absence of Judge Selden P. Spencer and his family from their home, in the city of St. Louis, during the summer and the month of September, 1900, his residence was left in the charge of one Louis Dryden, a negro servant. In his residence Judge Spencer had his law library, of some four or five hundred books. Some time in September, 1900, Dryden met the defendant near Judge Spencer's residence, when defendant asked him if there was not something there he could buy. This was on the morning of September 27, 1900, at which time Dryden sold defendant some bottles in the cellar. While they were in the cellar, getting the bottles, defendant asked Dryden if he had any books down in the cellar. He told him "Yes," and they went to the third floor, where the books were, and got from a trunk some rags, which Dryden sold to defendant; and while there Dryden also sold him the law books, for \$4.50, which defendant returned for with his wagon the next day and hauled away. Dryden rendered him no assistance in any way in removing the books. On his return home, the last of September, Judge Spencer found that his law books had been taken. The bedclothing from all of the beds, quilts, spreads, and all of his personal clothing that had been left there, his own and Mrs. Spencer's clocks and silverware, and Judge Spencer's gun, had all disappeared. Upon an examination, he found that they had been stolen, and the negro left in charge had disappeared. He was afterwards apprehended in Kansas City, Mo., and

brought back to St. Louis. It appears from the record and the evidence that Dryden had perpetrated another crime; that he had forged Judge Spencer's name; that he entered a plea of guilty, and was sentenced to the penitentiary for five years for that crime. Before the case against Koplan came for hearing, the charge against Dryden was nolle pros'd, and while under sentence on a term in the penitentiary he was used in the trial of this cause as a witness against the defendant.

It is said that the indictment is bad, in that the various articles therein alleged to have been stolen were of an aggregate value, and, as there was nothing on the face of the indictment to show that the books, the one article proven to have been stolen, were of the value of more than \$30, that the instruction to acquit requested by defendant at the close of the state's evidence should have been given. The action of the court in this regard was a matter of exception, and, as the record does not show that an exception was taken and saved at the time to the court's ruling, that matter cannot be considered on this appeal. *State v. Marshall*, 38 Mo. 400; *State v. Harvey*, 105 Mo. 316, 16 S. W. 886; *Ross v. Railroad Co.*, 141 Mo. 390, 38 S. W. 926, 42 S. W. 957, and authorities cited; *State v. Murray*, 126 Mo. 523, 29 S. W. 590.

Nor is there merit in the contention that the indictment is bad because it charges the value of the articles stolen in the aggregate. While the better practice doubtless is, when the articles alleged to have been stolen are of a different character, to assign a value to each article or separate piece of property, it is almost universally held that an indictment which charges their value in the aggregate is good. *State v. Beatty*, 90 Mo. 143, 2 S. W. 215; and authorities cited. To which may be added 2 Hale, P. C. 183; Whart. Cr. Pl. (9th Ed.) §§ 206-217; Bac. Abr. 560; *Meyer v. State*, 4 Tex. App. 121; *Clark, Cr. Proc.* p. 226; *State v. Buck*, 46 Me. 531; *Kelly, Cr. Law*, § 648; *State v. Mook*, 40 Ohio St. 588; 2 Bish. New Cr. Proc. § 714; 1 McClain, Cr. Law, § 586.

It is insisted that as Dryden was the servant of Judge Spencer, and as such in the possession of the law books which he sold to defendant for \$4.50, the asportation of defendant was Dryden's asportation, and that defendant was only guilty of receiving stolen property, knowing it to be stolen. Dryden testified that he had nothing whatever to do with the removal of the books, but that defendant himself removed them from the third story of the house, and carried them down from there,—some of them in sacks,—and put them in his wagon which he had standing in the alley near the house. Under these circumstances, can it be said that the removal of the books was Dryden's asportation, alone, and not the asportation of both of them? We think not. The evidence all

shows to the contrary, and that Koplan was not acting in good faith. The physical facts, namely, the absence of Judge Spencer, which he knew; that Dryden was his servant, and in possession of his residence and contents; his inquiry of him if he had any books to sell; his purchase of them for the insignificant sum of \$4.50, when they were worth at least \$365,—are absolutely inconsistent with the idea that he did not steal the books. There can be no larceny in the absence of an asportation of the property alleged to have been stolen, but it is immaterial how slightly (2 Blash. New Cr. Law [8th Ed.] § 794) which in this case was by defendant, but in completion of the theft committed by them both.

The books were not removed by defendant by the order of Dryden, but by his knowledge and consent, and as part of the execution of the scheme to steal them, in which they were accomplices; and it is said that the court erred in refusing the instruction asked by defendant upon the theory that they were accomplices. It is well settled that, when a conviction is sought upon the testimony of an accomplice alone, a cautionary instruction to the effect that the jury are at liberty to convict the defendant on the uncorroborated testimony of an accomplice alone, if they believe the statements as given by such accomplice in his testimony are true in fact, and sufficient in proof to establish the guilt of defendant, but that the testimony of an accomplice, when not corroborated by some person or persons not implicated, as to matters material to the issue (that is, matters connecting the defendant with the commission of the crime charged against him, and identifying him as the perpetrator thereof), ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they should convict the defendant on such testimony, should be given (*State v. Sprague*, 149 Mo. 409, 50 S. W. 901, and authorities cited); but, where there is other evidence than the accomplice identifying the defendant as the perpetrator of the crime, no such instruction is necessary. Now, while Dryden was not corroborated as to anything that was said in the house, he was as to the asportation of the books, by two disinterested witnesses,—William Green and James Osborn,—the former of whom testified to having seen defendant put a sack of books in his wagon, which was standing in the alley in the rear of Judge Spencer's residence, and the latter to having seen both Dryden and defendant packing out books from the same place, and pouring them into a wagon standing in the alley at the same place. The removal of the books was necessary in order to constitute the offense of larceny, and the testimony of these witnesses with respect to the larceny connected him with the commission of the crime; hence no error was committed in not giving a cautionary instruction with refer-

ence to the testimony of Dryden as an accomplice.

The defense was an alibi; that is, that the defendant was elsewhere than at the place of the commission of the crime at the time it was committed. The court gave no instruction upon this theory of the case, although defendant testified that he was not present at the commission of the offense, and called the court's attention to the fact that the instructions given "do not cover the whole law of the case," and in this, we are of the opinion, committed reversible error.

For these considerations, the judgment is reversed and the cause remanded. All concur.

GIPSON v. POWELL et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

COURT OF APPEALS—CERTIFICATE TO SUPREME COURT—DECISION.

On plaintiff's appeal the court of appeals held that an application for change of venue which had been granted was insufficient, and that the trial court had no jurisdiction; and, one of the judges being of opinion that such holding was in conflict with a decision of the supreme court, the case was certified, without a decision on the merits. The constitution (section 6, amendment of 1884) provides that a cause must be so certified when the court of appeals renders a decision which one of the judges therein shall deem contrary to any previous decision of the supreme court. *Held*, that the word "decision" refers to a decision of the case, and not to a point therein, and until the case is decided by the court of appeals it cannot be so certified.

Appeal from circuit court, Daviess county; R. J. Broadus, Judge.

Action by William Gipson against I. W. Powell and others. Judgment for defendants was reversed by court of appeals. Certified from the court of appeals after decision of a point relating to change of venue. Remanded.

O. M. Shanklin, O. G. Williams, and Hall & Hall, for appellant. O. P. Hubbell, Harber & Knight, and Rieger & Rieger, for respondents.

VALLIANT, J. This is a suit in equity to enjoin the defendants from prosecuting a replevin suit. It was begun in the circuit court of Grundy county, and sent by change of venue to the circuit court of Daviess county, where the trial resulted in a decree for defendants, dismissing the plaintiff's bill. Plaintiff appealed to the Kansas City court of appeals, which court had appellate jurisdiction of the case. The order for the change of venue having been made on the application of the defendant, and over the objection of the plaintiff, one of the questions in the record relates to the sufficiency of that application and validity of that order; the plaintiff maintaining that the application was insufficient, the order unwarranted, and

the circuit court of Daviess county had no jurisdiction to try the cause. When the cause reached the Kansas City court of appeals, that court decided that the Daviess circuit court had jurisdiction of the case; but one of the judges being of the opinion that that decision on that point was contrary to the decision of this court in *Gee v. Railway Co.*, 140 Mo. 314, 41 S. W. 790, that court proceeded no further with the case, but transferred it to this court for determination.

The language of our constitution (section 6, amendment of 1884) is: "When any one of said courts of appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said courts of appeals or of the supreme court, the said court of appeals must, of its own motion, pending the same term and not afterward, certify and transfer said cause or proceeding," etc., to the supreme court. A decision in the court of appeals that will authorize a transfer of the cause to this court under that clause of the constitution is a decision of the cause. A decision of one question in the case not decisive of the controversy will not authorize the transfer. In the case at bar, if the decision on the particular question had been that the circuit court of Daviess county had not jurisdiction, that would have been decisive of the controversy, and would have resulted in annulling the judgment; and, if one of the judges sitting had been of the opinion that that decision was contrary to a previous decision of this court, the cause was transferable. But deciding that the Daviess circuit court had jurisdiction left the proceeding and judgment of that court open to review. Until the case is decided on its merits, we cannot know that the questions relating to the change of venue will remain in it for decision. As the change of venue was made on application of the defendants, they are not in position to say it was wrong; and, if the decision in the court of appeals on the merits should be in favor of appellant, he cannot question it. Therefore there would be no litigated point to certify to this court.

The cause is returned to the Kansas City court of appeals. All concur.

BURNHAM et al. v. ROGERS, Tax Collector.
(Supreme Court of Missouri, Division No. 1
Feb. 19, 1902.)

MUNICIPAL CORPORATIONS—TOWNS—SCHOOL DISTRICTS—ORGANIZATION—COLLATERAL ATTACK—RESTRAINING COLLECTION OF TAX—SCHOOL BOARD—EXCEEDING POWERS—REMEDY—SPECIAL MEETINGS—ELECTION ON QUESTION SUBMITTED—DIVIDING DISTRICT—EFFECT—VOTING—TAXATION—INVALID INCREASED ASSESSMENT—TENDER OF VALID PORTION—NECESSITY.

1. Where a township and a school district have been organized for several years, and are discharging the functions of such corporations, their right to exist and act as such corpora-

tions cannot be impeached collaterally in a suit to enjoin the collection of school taxes.

2. Injunction to restrain the collection of a school tax lawfully assessed is not the remedy of a taxpayer for any improper conduct of a school board in the performance of their duties as prescribed by law, or under Rev. St. 1889, § 8088, relating to the division of a district into school wards, etc.

3. The fact that the election on a question submitted at a special school meeting did not begin at 7 o'clock a. m. and close at 6 o'clock p. m., and that a chairman and secretary were elected, and tellers appointed, instead of electing three election judges, as required by Rev. St. 1889, § 8096, prescribing the mode of holding elections at the annual school meetings, does not invalidate such election, since the statute applies to the annual meetings only.

4. Under Rev. St. 1889, § 8088, a school board may divide the district into school wards, and erect suitable school buildings therein. Held, that the action of a school board in so dividing a district and providing for the erection of a school house in one of the wards was not equivalent to creating a separate district of such ward, so that taxpayers in the other ward had no right to vote and were not liable to taxation therein.

5. Since a school board had authority to make a regular assessment of a certain sum on each \$100, and, under Rev. St. 1889, §§ 7962, 7966, 7987, the power to assess an additional tax to pay the interest on bonds and create a sinking fund, a taxpayer who, after an opportunity to do so, has failed to tender or make offer to pay the valid tax, cannot enjoin the collection of an increased assessment claimed to have been made without notice and a vote thereon as required by law.

Appeal from circuit court, Bates county: C. A. Denton, Special Judge.

Suit by J. H. Burnham and others against John H. Rogers, tax collector. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

This is a suit in equity to enjoin the collection of certain school taxes in Amoret school district, in Bates county; the plaintiffs owning property in the district assessed for such taxes in 1897, and the defendant being township tax collector. The petition goes back to the organization of the town of Amoret, and makes statements tending to show that the town was not lawfully organized. Then it takes up the Amoret school district, organized in 1892, and makes statements designed to show that its organization was not legal. It then states, in effect: That upon the organization in May, 1892, the board of directors of the Amoret school district held a meeting, and determined that more than one school house was required in the district, and divided the district into two wards, by a line running north and south, and decided to build a school house on the east of the line, on lots designated. The plaintiffs live and their property lies west of that line. That at the time there was a good school house west of the line, but the directors afterwards sold it, and since then there has been no school house west of the line, although that part has ever since been treated by the directors as a part of the school district for purposes of taxation, and such taxes have every year been paid by plain-

tiffs, up to the year 1897. That pursuant to the resolution of the board of directors in May, 1892, dividing the district into two wards, and looking to the building of a school house east of the dividing line, an election was held in the district on the proposition to issue bonds and borrow \$2,000 thereon, to be used in building and furnishing the contemplated school house, at which election the proposition was declared carried, and the bonds were duly issued. The petition avers that that election and the bonds issued in pursuance of it were void, for three reasons: First, it "should have been held beginning at 7 o'clock a. m., and closing at 6 p. m., of said day, and the board should have elected three judges of election, etc., as required by section 8096, Rev. St. Mo. 1889, instead as was done, by electing a chairman and secretary and appointing tellers; second, said proposition was not carried by two-thirds of the votes cast by persons who were legal voters at the time; third, none but the legal voters residing east of said division line dividing said school district No. 4 had any right to vote at said election, voting on the question of said loan, when in fact said proposition was submitted indiscriminately to all the voters of said school district No. 4." Coming down to the assessment of 1897 complained of, the petition avers that notice that a proposition to increase the rate of taxation would be made at the annual school meeting was not given, and that such a proposition was not voted upon, but that the board of directors, "in disregard of legal authority," made the assessment for that year in excess of the constitutional limit; that is, made an assessment of 90 cents on the \$100, being 40 cents for teachers' wages, 10 cents for incidental purposes, 28 cents for sinking fund, 9 cents for interest, and 3 cents for purposes not specified. The prayer is for an injunction to restrain the collection of this assessment. A temporary injunction was awarded. When the cause came on to be considered, a demurrer to the petition was filed, which was sustained by the court, and plaintiffs declined to plead further. Thereupon a judgment for defendant was rendered, and the plaintiffs appeal.

Chas. Kroff, for appellants. H. O. Clark, for respondent.

VALLIANT, J. (after stating the facts). It sufficiently appears from the petition that, whatever irregularities may have occurred in the organization of the town of Amoret and the Amoret school district, those two corporations were organized and are existing and discharging the functions of such corporations, and have been since 1892. Their right to exist and act as such corporations cannot be impeached collaterally in the manner attempted in this petition. Confusion amounting to chaos would result if the

life of every municipal or other public corporation in the state could be assailed in this manner. *State v. Fuller*, 96 Mo. 165, 9 S. W. 583; *Catholic Church v. Tobbein*, 82 Mo. 418; *Board v. Shields*, 62 Mo. 247. Assuming, therefore, as we must, for the purposes of this suit, that the Amoret school district was regularly framed, it had authority, under section 8068, Rev. St. 1889 (section 9865, Rev. St. 1899), to divide the district into school wards, to erect a suitable school building in each ward, and to sell any school property not required for use of the district. Of course, in the performance of these and all other duties prescribed by law, the board must act in good faith and according to the course pointed out by statute; but if the board should, in the opinion of a taxpayer in the district, deviate from that course, his remedy is not by injunction to restrain the collection of the tax lawfully assessed.

As to the charges in the petition that the election held May 20, 1892, at which the bonds were authorized, was illegal, the statements are not sufficient to give us a definite idea of how that election was conducted, or in what particulars, if any, it was not conducted according to law. It is said that the election should have begun at 7 a. m. and closed at 6 p. m., and that three judges should have been elected, as required by section 8096, Rev. St. 1889, instead, as was done, of electing chairman and secretary and appointing tellers. Section 8096, referred to, prescribes the mode of holding elections at the annual meetings in April, but it does not apply to other meetings. Under section 7981, Rev. St. 1889 (section 9752, Rev. St. 1899), the issuance of bonds for this purpose may be authorized at an annual or special meeting, and, if at a special meeting, notice of the time, place, and purpose must be given. Whether the meeting of May 23, 1892, at which the bonds were authorized, was called and conducted as required by section 8008, Rev. St. 1889 (section 9780, Rev. St. 1899), which prescribes how special meetings shall be called and conducted, the statements in the petition do not show. The statement that the proposition to issue the bonds was not carried by two-thirds of those who were legal voters at the time is supplemented by the further statement that only those living east of the division line were legal voters, and that all the voters in the old district were permitted to vote. Those statements, taken together, are interpreted to mean that, in the opinion of the pleader, when the directors determined to divide the district into two wards, and made provision for the erection of a school house in the ward lying east of the division line, it was equivalent to creating a separate district east of the line, in which those who lived west had no concern, had no right to vote, and were not liable to taxation therein. This idea is expressed in the petition in these words: "That the plaintiffs reside west of the line in the

territory so stricken off from said Amoret school district,—the town of Amoret, where the school house is located, being east of said line,—whereby said so-called board of directors of said Amoret school district no longer retained any jurisdiction over the persons or property for the purpose of assessing them or their property for school purposes." But this is a mistaken view of the law. The board of directors, as we have seen, by section 8088, Rev. St. 1889, had authority to divide the district into two or more wards without affecting the integrity of the district. The statements in the petition do not show that the action of the meeting of May 23, 1892, was illegal.

The petition avers that no notice was given of the purpose to submit the proposition to increase the usual rate of taxation at the annual meeting in 1897, and that no vote on such a proposition was taken. The proposition could have been voted on at the annual meeting without such notice. Section 7979, Rev. St. 1889 (section 9750, Rev. St. 1899); *State v. Edwards*, 151 Mo. 472, 52 S. W. 373. But if no such vote was taken, no authority was given the board to make the increased assessment. The board, however, had authority to make the regular assessment of 40 cents on the \$100, and an additional tax to pay the interest on the bonds, and to create a sinking fund. Sections 7982, 7986, 7987, Rev. St. 1889. Therefore, if the increased assessment was not authorized, it would only affect the items of 10 cents for incidentals and 3 cents for unnamed purposes, leaving 77 of the 90 cents assessment valid and binding. The plaintiffs have shown no disposition to pay the proportion of the assessment that is valid. Not only have they made no tender of it, but they sought and obtained a temporary injunction against the whole assessment, and still are in the attitude of refusing to pay that part which by their own showing they are justly liable to pay. The maxim, "He who seeks equity must do equity," applies in this case. This equitable maxim would not be enforced so strictly as to defeat the plaintiffs if they had inadvertently omitted to tender payment or make offer to pay, but their attention was called in the circuit court to this omission in their bill by the demurrer, which assigned this as one of the defects in the petition. Yet after the court ruled on the demurrer the plaintiffs declined to amend or place themselves in any better attitude than they at first presented. Under those conditions, the court could do nothing but render judgment for the defendant. In an equity suit a formal tender, under these circumstances, is not always essential, because the court, in its decree, can grant relief on terms it may prescribe, and thus force the plaintiff to do equity; but a disposition to comply with the maxim is essential, and, in a case like this, if the plaintiff will concede nothing, he must recover all or

nothing. These plaintiffs, however, are not quibbling on a small point. They have not come into court to obtain relief only against the collection of a tax of 13 cents on the \$100 valuation of their property. They conceive themselves aggrieved by the action of the board of school directors in dividing the district into two wards, leaving them in what they call the part of the district "stricken off," abandoning and selling the school house they formerly had, and taxing them to pay for a school house and maintaining a school in that part of the district which lies in the town of Amoret. They may have been unjustly treated in this respect. We do not know. But if they have been, their remedy does not lie in a suit of this kind. While their property lies in the school district, it is subject to the lawfully assessed school tax; and, if the board of directors is treating them unfairly in the administration of the affairs of the school district, they must seek redress in some other mode than that by injunction to restrain the collection of the tax.

The judgment of the circuit court is affirmed. All concur.

WILSON v. JACKSON et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

DEEDS—VALIDITY—COMPETENCY OF GRANTOR —FRAUD—DISCREPANCY IN VALUE —FAILING TO RECORD.

1. In a suit by a grantor to avoid his deed on the ground of his mental incapacity, evidence examined, and *held* insufficient to show that he was incompetent.

2. In a suit to avoid a deed of conveyance executed in consideration of a deed to other lands, on the ground that the transaction was induced by the fraudulent representations of the owners of the land given in exchange, the evidence showed the representations related to what could be produced on the latter land and the value of such products. The grantor examined the land he received in exchange. *Held*, that the evidence not only failed to prove representations of facts, which, if false, would vitiate the transaction, but showed that the grantor did not in fact rely on them.

3. Where a tract of land worth \$1,600 is exchanged for a tract worth \$1,000, there is no such discrepancy in their value as to authorize a cancellation of the transaction, though the owner of the latter tract had purchased it for a less sum for purposes of speculation.

4. In a suit to avoid a transaction consisting of an exchange of tracts of land, on the ground of fraud in procuring the execution and delivery of one of the deeds, evidence examined, and *held* insufficient to prove any fraud.

5. A grantee who fails to record his deed of conveyance must bear the loss resulting from a sale of the land under an execution against the grantor.

Appeal from circuit court, Harrison county; P. C. Stepp, Judge.

Ejectment by William J. Wilson against Jacob Jackson and another. From a judgment for defendants, plaintiff appeals. Reversed.

J. C. Wilson and Peery & Lyons, for appellant. Wanamaker & Barlow and J. W. Alexander, for respondents.

VALLIANT, J. Ejectment for 80 acres of land in Harrison county. Defendant Jackson claims to be the owner of the land, and is in possession by his codefendant, Cupp, who is his tenant. Plaintiff claims title under a deed from defendant Jackson. The petition is in the usual form. The answer of defendant Cupp is in substance a general denial; that of defendant Jackson is in the nature of a cross bill in equity to set aside his deed, under which the plaintiff claims, on the ground that it was obtained by fraud. Jackson, whom we will hereinafter call the defendant, by his answer states substantially that he is a man of weak mind, 70 years old, of no education, living in Monticello, Ill., and owning the land in question; that in September, 1895, one L. B. Wilson, son of the plaintiff, came to defendant's house, and, with the intent to cheat and defraud him out of his land, represented that he (Wilson) was the owner of large tracts of lands in Alabama of great value, which he would sell or trade, and that those who would buy of him would make great profits; that he had learned that defendant was a man of prominence and influence in the community, and that, as he was desirous of establishing a colony on this Alabama land, he wished defendant to go with him and see the land, with a view that on his return he would influence others to go and buy land there; that by such means he did influence defendant to go with him to Alabama, and there traded 200 acres of land to him for this 80 acres in suit; that he represented to defendant that on that 200 acres of Alabama land were 50 acres of valuable timber, that lumber could be sold there for \$50 a thousand, the land yielded from three to four tons of grass annually, worth in the markets from \$10 to \$15 a ton, and would also yield 60 to 80 bushels of dry ground rice per acre, worth \$1 a bushel, and that he had a complete record title, all of which representations were false, and made with the fraudulent intent to cheat the defendant; that Wilson also proposed to defendant that, if he did not care to farm the Alabama land himself, he (Wilson) would take a lease from him for five years of the 200-acre tract, and pay him \$800 a year for rent, giving him well-secured bankable notes for the same; that on October 26, 1895, after defendant and Wilson returned from Alabama, the latter sent his agent, one Hicks, to defendant's home, who, fraudulently pretending to have defendant execute the five-year lease spoken of, in duplicate, obtained, not only his signature to the lease, but also a deed from defendant to Wilson of the 80 acres in suit, which Hicks carried away, leaving with defendant a deed from Wilson to defendant of the 200 acres of Alabama

land, and a duplicate of the lease, and, instead of the five well-secured notes for \$800 each, agreed on, he left only five unsecured notes of Wilson for \$200 each; that at the time defendant thought he was signing only the lease, and that the execution of the deed to the Missouri land was to be postponed until the security was given on the rent notes; that defendant, believing all the representations of Wilson above mentioned, was ready to close the trade on that day, as soon as Wilson should give the security on the rent notes; that the plaintiff in this suit claims to have received a deed to the land from L. B. Wilson, but that he took such deed with knowledge that the deed from defendant was obtained by the fraud above mentioned. The prayer of the answer is that the deed from defendant to Wilson be canceled, and for general relief. The reply joins issue on all the averments in the answer.

Upon the trial the plaintiff introduced evidence tending to show that the rental value of the land in suit was \$100 or \$125 a year, and rested. The defendant's evidence was first directed to the question of his mental capacity. This began in the cross-examination of one of plaintiff's witnesses, a farmer living near the land in suit, who had seen defendant on his visits to Missouri to look after this farm. This witness said that in his opinion, although defendant did in fact transact his own business, yet he was not competent to do so. The witness said: "He was looking after his land when he was here. He made a contract for his board with my wife, paid part of it, and part is not paid. So far as him contracting and using this land, and taking care of himself, he made fair contracts." When asked for facts on which he based his unfavorable opinion of the defendant's mental capacity, the witness said that on one occasion he (the witness) had cut down a hedge, and defendant had hauled it and put it in a branch, and it was washed away; that defendant had made a maul out of an old hard knot, which came to pieces before he got one post made; that he would pick up little sticks and pile them up for wood, and would begin one conversation and go right off on another. Witness bought this land from him once, but he backed out; that is, witness had offered him the full value of the land, he agreed to take it, and then backed out. Then defendant read on this point depositions of several persons living in Monticello, Ill., who had known defendant for years, as follows: A. L. Rodgers, clerk of the county court, said: "I don't think he is competent to transact business. I don't think he is competent to undertake the exchange of properties or their sale, or to make papers transferring real estate." Witness stated no facts on which he based his opinion. Frank Harrington thought he was not competent to transact business. "A man who would take a shovel, and dig

up the streets for gold, I consider that is a man not being sound." Charles Bryden: "I should not say his mind was strong. I should say he was not competent to do business. His conversations were incoherent. He had an idea that this whole country was inlaid with gold. * * * I do not think he would be able to comprehend the meaning and purport of a legal instrument." Mary J. Bryden: "I considered him queer. He was constantly talking of his expectations of finding gold. I don't think he had any knowledge of the real value of property. I have often said to my sons that I would not want Jacob to sell a calf for us. * * * He didn't seem to know what his work was worth. He did work for us. He would sometimes charge big prices. Unloading a load of hay, he thought it was worth as much as the hay was. He didn't say he thought it was worth as much as the hay was, but I thought his price was a little high. It was nearly what the hay was worth. * * * I paid him what I would any other man for the same work, and after he was over with it, and, as we say, got cooled off, it seemed all right." N. E. Rhoades: "I never thought he was a man of very strong mind; thought he was a little off. I wouldn't consider him qualified to transact business such as trading, exchanging real estate, and buying and selling farms. I refer to his mental capacity on quite a number of different conversations I have had, more upon this mining question than anything else." Witness then went on to state substantially that defendant thought that gold ore existed in the soil in and around Monticello, that he thought he had discovered it in places, and that if any one would back him with capital he would develop the mine. He had a rod with a ball on the end, which he believed would indicate the presence and depth of gold ore. Witness had him experiment with the rod, but it indicated nothing. Defendant was peculiar in his manner of buying goods at witness' store. He would sometimes come in and look over a suit of clothes or a hat several times before he would purchase. "I should doubt very much his ability to make a careful deal, if he was dealing for land. He was rather peculiar in a good many things." John W. Dighton: "I have thought for a good many years back that he was not responsible for his actions. His conduct is unusual. I noticed him on a good many occasions, sort of picking up gold out on our farm. He had a little hunting bag, and used to pick up all sorts of little glittering rock, and carry it off, and I was informed, though I did not see it, that he dug some holes in our woods; but I didn't think it was altogether the work of one man. He impressed me as a man who wouldn't be responsible for his actions. His conversations were not normal, but seemed unconnected." In 1906 he applied to witness for a loan on a piece of woodland, which witness declined, because

he did not think him responsible. Dr. J. D. Knott: "I couldn't say that I have had any conversation with him; have observed his conduct and demeanor some. I don't think he was of sound mind. I don't think he was fit to transact business. I couldn't say that I observed anything in particular as to his ability to comprehend the extent and value of property and of general business affairs. Everything I have observed has been in a general way. I couldn't observe anything in particular. I don't think he was competent to make a transfer of real estate." Witness said that he never treated defendant professionally, and that the opinion given was nonprofessional; had not conversed with him to any extent, and never transacted any business with him. Defendant's idea of gold in the country had something to do with the opinion given. M. R. Davidson, a lawyer, lived just across the street from defendant, and saw and talked with him frequently. "I don't think, from my observation of his conduct and talks with him, he would be competent to transact such business as you have mentioned. His ideas about the value and extent of property, in my opinion, would be very vague and uncertain." Witness knew the defendant and his brothers and sister, and visited them socially, but never had any business transaction with defendant. Defendant and his brother Henry both had the idea that gold could be found in that country. William P. Smith testified to a conversation he had with W. J. Wilson, in which witness told Wilson that defendant was considered to be on the weak-minded order, and that Wilson said the reason he had employed Hicks was that Hicks could get defendant's signatures to the papers, while he himself could not. Geo. Miller, former sheriff of the county in which Monticello, Ill., is situated, stated that he did not think defendant was competent to transact business. "Have had some little transactions with him. He seems to have the opinion that gold may be found in this locality. That may have made me think he was not strong-minded. When I was sheriff, I sold a piece of land of his for taxes; could not get him to understand he had to redeem it. I have found a good many people whose land was sold who were the same way. I haven't had any deals with him. I couldn't say as to whether he is a man who guards his property interests very close. I have sold him goods, and he was always pretty hard to trade with. Whether he wasn't a judge of the goods, or whether he wanted to get it as cheap as he could. I could not say. The question of his mental capacity has been talked of more since this trade than it was before." H. P. Harris: "I would not think, from my observations and conversations with him, that he was competent to transact business, such as buying and selling real estate." Witness had had no transactions with defendant, except that defendant would come into witness' store and

buy things, as other people did, in which he displayed no want of mental capacity. He was an economical man. Dr. W. B. Campbell: "My observation would be that he was not capable of buying and selling real estate. * * * He seems to be just weak-minded. He has a great notion about minerals,—about finding minerals in the ground. That is the ground on which I base my opinion that he is weak-minded. It might be that Mr. Jackson is right about that, but it isn't very probable. I have frequently heard of gold being discovered just over the Indiana line. * * * His weakness of mind, so far as I am able to state, is manifested by the fact that he believes in the presence of gold in the vicinity. So far as I know, he seems to be rational on all other subjects. It is true that a great many good business men have hobbies of some kind." Dr. J. W. Coleman: "My knowledge of the man is somewhat limited in a certain sense. I have known him, as I have testified, a number of years. I have regarded him as rather a weak-minded man. * * * I have never examined Mr. Jackson for the purpose of ascertaining his mental condition; nothing more than a casual observation of the man. I don't know that there is anything in his mental make-up that would prevent him from caring for his financial interests in a deal as men of ordinary prudence usually care for their business. The fact that he believes in the presence of gold in this vicinity constitutes largely, but not altogether, the ground upon which I base my opinion that he is weak-minded. I would judge that he is easily influenced. I never saw him put to the test. There might be a little gold in this vicinity, but in the true sense there is none. I couldn't say, outside of this one thing, that he is wrong."

In addition to the foregoing depositions, the following named witnesses testified at the trial on this point: W. T. Chipps, who lives in Harrison county, near this land, became acquainted with defendant on the occasion of his visits to Missouri, in 1894 and 1897. His estimate of the defendant was: "I wouldn't call him a very bright man. That is my judgment. He was more of a feeble-minded man. He was not stout." The facts upon which this witness based his opinion were that defendant would sometimes want to fix his pasture one way, and then would change to another way, and did not seem to know just what he did want; and he tried to dam the branch with the brush from the hedge, which was foolish, because the branch was too large. He was interested in his land, and wanted to stop the washes. He made a contract with witness, renting the pasture. It was a reasonable contract. No one came with him from Illinois to take care of him. He had full charge of the land. John W. Smith: "I pronounced him a feeble-minded man. In my own mind, I don't believe he was capable of transacting business and

making bargains. * * * I base my opinion on the fact that he said he was going to take in a pasture, and then he would take up a subject and talk, and fly off, without finishing it, onto other subjects, just like I have seen men before now do. Did not seem like his mind was settled fairly." John T. Price testified that he had a conversation with defendant, when the latter came to Missouri in 1897, in which, defendant having said that he formerly lived in Miami, Ind., witness asked him if he knew his father-in-law, Dr. Miller, who lived there. Defendant said he did not, but in a subsequent conversation he said he knew him very well; that Dr. Miller had practiced in his family; and then after that, in another conversation, he said he did not know Dr. Miller,—never heard of him. "His mind wandered in every direction. * * * I would not want to testify that the man was insane, or anything of that kind, at all. I don't think he was aware of the fact that he was going from one subject to another. I don't know whether his mind was so far gone as to be incapable of doing business. I would not state that." Miss Jackson, sister of defendant, testified: "For nearly 20 years my brother's mental condition has not been so that he was really competent to attend to business at all. I have been attending to his business."

On the other branch of the case, the defendant's testimony tended to show that L. B. Wilson and others were interested in Alabama lands under the firm name of Illinois & Alabama Land Company, and that L. B. Wilson came to defendant, and made representations concerning these lands. What those representations were are thus stated in the testimony of Miss Jackson, the defendant's sister and chief witness: "Well, he told my brother that the land was so valuable down there, and he could raise so many bushels of dry ground rice on this land, and how valuable it was, and everything of that kind, until he got my brother to go down there. Said he could raise hay to great abundance, cotton grown, and anything, he said, that could be raised in the North, could be raised there just as plentifully. He said the timber was valuable there,—very large timber and valuable. He said it could be sold at great value. I don't remember just how much it was, but then it was a great deal more than what we could get for timber here." Henry Jackson, a brother of defendant, stated that Wilson called at their house, and asked for him and his brother, and stated to him that "he was selling Alabama land; black land; rich land. Said it was very rich land; produced a great deal. * * * He said it would produce about 400 bushels of potatoes to the acre,—Irish potatoes and sweet potatoes until you couldn't rest,—and beans and dry land rice. Beat anything in the world pretty near, and it would raise cane to make 600 gallons to the acre. Said it was splendid timber on the land. There was all kinds, pretty near,

except sugar tree,—black walnut, hickory, burr oak, white oak, black oak, chinquapin; and this black oak was very large, and hickory was splendid. He said the price would run from \$15 to \$20 an acre along there." Then the witness states that they went over to where the defendant was: "Well, the conversation was with brother Jacob more, and the same they said to me, stating about the land, you know, and what it would produce, and so on,—this dry land rice, corn, and grass, and oats, and sweet potatoes, and Irish, and sugar cane (they called it ribbon cane); that on an acre you could make 600 gallons to the acre." There was testimony on the part of defendant, also, to the effect that on the strength of these representations the defendant concluded to go to Alabama with Wilson to look at the lands, and invited one of his neighbors, James Honselman, to go with him, agreeing to pay his expenses. The party were to have taken a train that passed through Monticello at a late hour at night, but when Wilson and Honselman got on the train they discovered that defendant had not come; he having gone to sleep and failed to awaken in time. Wilson telegraphed back to the operator to awaken William Honselman, brother of James, and have him tell defendant that he (Wilson) would pay his expenses if he would go. Defendant went on the next train, joined the party at East St. Louis, and they all went to Alabama together. It was September 22, 1895, they started on the trip, and returned in about one week. While in Alabama a contract was made between Wilson and defendant to exchange the Alabama 200 acres for the Missouri 80 acres. About a week after their return, Wilson was at defendant's house and talking about this business. Miss Jackson, sister of defendant, hearing, as she said, loud talking, went into the room and told Wilson that she attended to her brother's business, and the defendant then said whatever she did would be satisfactory to him; that then the agreement was reached that the trade would be carried out on condition that Wilson would take a five-year lease of the Alabama land at \$200 a year, and give good bankable notes with security for the rent; that some days after Mr. Hicks, a lawyer in Monticello, called at the Jackson home, and saw defendant and his sister together, and in the conversation that ensued Hicks said that, if defendant did not execute the deed to the Missouri land, he would enter suit, to which the sister replied, "The quicker you enter suit, the quicker we will know it is over with." She then told him what Wilson had agreed about renting the Alabama land, and said, if he did that, they would trade, otherwise not, and Hicks went away. On the following Saturday, which was October 26th, Hicks returned, and had an interview with defendant,—the sister then being absent, but defendant's brother Henry was present,—in the course of which the deed to the Missouri land was executed

by defendant; his signature being witnessed by Henry and acknowledgment taken by Hicks, notary public. At the same time defendant executed a five-year lease of the Alabama land to Wilson, his signature to that being also witnessed by his brother Henry, and Hicks delivered to defendant Wilson's deed to the Alabama land, his five rent notes for \$200 each, and \$30 to pay the expenses of the trip to Alabama. According to Henry's testimony, he was able to read and write; but he witnessed the signatures of his brother to the deed and lease under the belief that it was only the lease he was signing, as Hicks said it was,—did not know it was a deed. He said he looked at the notes, and called attention of Hicks to the fact that the dates were wrong, and Hicks corrected them; also objected that the notes had no security. As soon as he discovered that he had signed his name as witness to a deed, which was the next day, he went to Hicks' office and asked for the paper he had signed, and Hicks gave him another paper that was of no consequence. Defendant's testimony also tended to show that on the next day, or shortly after, he returned the papers Hicks had left with him, including the deed to the Alabama land, to Hicks; but Hicks refused to receive them, and sent them back, and they were passed to and fro between the parties in the mails. Defendant never sent the deed to Alabama to be recorded, never paid taxes on the land, and it was sold for taxes, and afterwards, in 1897, the record title still being in Wilson, it was sold under execution against Wilson by the sheriff in Alabama. The deed to Wilson of the Alabama land shows that he paid \$500 for it. There was also some discrepancy in the dates, which indicated that Wilson did not obtain a deed to the Alabama land until October 29th, whereas the exchange of deeds on the occasion of Hicks' visit occurred on October 26th.

On the part of plaintiff the testimony was to the effect that, when the party got to Alabama, the defendant and his friend Honselman (who was a neighbor of his in Monticello, Ill., 61 years old, and fruit grower by occupation) went out to look at the land. Wilson did not go with them. They were accompanied by two men, a Mr. King and a Mr. Bohanon, who lived in that county, both of whom were farmers, and King owned the land adjoining the 200 acres in question. In this company defendant rode over the land and examined it, after which they drove four miles to the residence of King, and there Wilson joined the party. Then the subject of trade was discussed between Wilson and defendant. The latter expressed himself as pleased with the land he had seen, and offered to exchange his 80 acres in Missouri for the 200 acres in Alabama, saying that his Missouri land was worth \$2,500. The negotiation resulted in a written contract, then and there, for the exchange of one tract for the other, conditioned that Wilson was to

have two weeks' time in which to examine the Missouri land, and he had the option to refuse the trade, if, on such examination, the land was not satisfactory; but, if satisfactory, the deeds were to be exchanged within 30 days. Wilson at that time did not have a deed to the Alabama land, but had written contract giving him an option on it, which he afterwards closed, and took the deed, in time to carry out his contract with defendant. After their return to Illinois, defendant asked Honselman to write to Mr. King, and inquire if he would sell 100 acres of his land, adjoining the 200 acres, that defendant had just bought. While in Alabama a verbal agreement was entered into whereby Wilson agreed to take a lease of the Alabama land for five years at \$200 a year, on condition that defendant would make some little improvement required. Two or three weeks after their return to Illinois defendant began to indicate a disinclination to carry out the contract of exchange of lands. Wilson employed Mr. Hicks, a lawyer in Monticello, to attend to closing the matter. Hicks drew the necessary deeds, and went to the home of defendant to see him about it. There he had an interview with defendant and his sister. The latter objected to exchanging the deeds then, on the ground that Wilson had agreed to pay the expenses of her brother's trip to Alabama, and had also agreed to take a five years' lease on the land, and insisted that those conditions should be complied with; nothing being said about security of the rent. Hicks said he had not been informed by his client on those points, but would see him about it, and, if the agreement was that way, would try to have it fulfilled. Hicks then left them, and in a few days, after seeing Wilson, and he agreeing to the terms, returned to defendant's home with a draft of the deeds, lease in duplicate, notes, and the \$30 to refund the expense of the trip. At this interview the sister was not present, but the defendant's brother Henry was, and the papers were all read over to defendant and inspected by his brother; the latter discovering error in the dates of the rent notes, which Hicks corrected. An abstract of title to the Alabama land was there, and was examined, discussed, and found satisfactory. Then the defendant executed a deed to the Missouri land, making his mark for signature, which Henry witnessed, acknowledging it before Hicks as notary public, and in like manner executed the five-year lease to the Alabama land. Hicks delivered the deed from Wilson for the Alabama land to defendant, and the rent notes, and the \$30, receiving the deed from defendant to the Missouri land, and the lease, and, at the request of defendant, Hicks, as he was leaving, took the Alabama deed to forward it to Alabama, to be recorded. Shortly after Hicks returned to his office, Henry Jackson came and said he wanted to see the deed. Hicks gave him the deed to the Alabama

land, and he carried it away. Shortly after Hicks delivered the deed to the Missouri land to Wilson, and his connection with the matter ended. The plaintiff's testimony also tended to show that no representations were made as to the character of the Alabama land, except in a general way,—that it would produce corn, oats, and cotton, and almost all the products of land in the North. The assessor of the county in Alabama where the land is situate testified that it was worth \$5 an acre, and that it and lands adjoining were assessed at that price. Wilson testified that he had theretofore been advised that it was for sale at a sacrifice, and had bought it with a view of selling it at a profit; that after he returned from Alabama, being indebted to his father, the plaintiff in this case, for money advanced to him in his business, he deeded this Missouri land to him for \$1,500, taking credit on his account for that amount; that the plaintiff, when he took the deed, had no notice of any claim of defendant that he had been imposed upon in the trade. Plaintiff's testimony also tended to show that defendant was a man of ordinary intelligence.

The court found for defendant on the issues tendered in the answer, and rendered a decree canceling the deed from defendant to L. B. Wilson, and the deed from the latter to the plaintiff, and that defendant was entitled to hold possession of the land, and that plaintiff pay costs, etc., from which decree the plaintiff appeals.

We have been compelled to go through the evidence in this record, and make extracts from it of unusual length, for the reason that the case must turn rather on questions of fact than of law; for, if all the propositions of law contended for by the learned counsel for respondent be correct, still, if the evidence does not sustain the findings as to the facts, the principles of law invoked do not justify the decree. Of course, if a man has not sufficient mental capacity to make a deed, the deed he attempts to make will be set aside; and it is true, as contended for respondent, that one may have mental capacity to make a will, when there is no overreaching mind to contend with, and yet be incompetent to deal with an adversary mind in a contract. *Martin v. Baker*, 135 Mo. 495, 36 S. W. 369. But if, in making a will, the weakened mind, though not incompetent to act alone, is overpowered by a stronger, the will cannot stand. The making of a will is the act of one mind, whereas the making of a deed is the coming together of two minds, each ordinarily seeking its own advantage. It is in that light that we say that a man may sometimes have strength of mind to make a will, but not to make a deed. The principle of law is the same in each case, but it must be applied according to the circumstances in each. It is not sufficient, in order to set aside a contract, to show that the man who complains was not as strong-

mind as the one with whom he dealt. The wheels of commerce would cease to turn if that were the law.

Now, what does the evidence of mental incapacity in this case amount to? At most it is mere opinions of nonexperts, founded on facts from which no such conclusions can be legitimately drawn. The most of them rest their opinions on the fact that the defendant believed that in and around Monticello, Ill., gold ore could be found,—a belief in which his brother Henry, whom no one intimated was weak or unsound in mind, shared. Two of the witnesses thought that it was evidence of weak-mindedness for a man to attempt to stop the injury to his land from the washing of a branch by putting brush from a cut hedge into the branch. One founded his opinion on the fact that, when first questioned, defendant had no recollection of a man whom he had known when he lived in Indiana,—how many years ago was not shown; that he afterwards recollected him well, and afterwards again said he did not recollect him. Another thought it foolish to plan his pasture one way, and then change to another. None of them ventured to say he was of unsound mind, nor would all of them say he could not transact ordinary business. The fact is he did transact ordinary business, came to Missouri alone, attended to his farm, and made discreet contracts in relation to it. The opinions were generally qualified to the effect that he was not of sufficient intelligence to deal in real estate, buying and exchanging farms, or to understand the effect of a legal document. The business of buying, selling, and exchanging real estate, and understanding the effect of legal documents connected with such business, requires, in the opinion of some people, so much intelligence that a witness might with very good conscience give an unfavorable opinion of the capacity of many men to do that kind of business, who are engaged in ordinary business every day, and whom the law holds to their contracts. There is no claim of abuse of confidence here, for there was no fiduciary relation shown. These men traded at arm's length. Neither had the right to trust the other beyond the bounds of common honesty.

Nor does the defendant's evidence support the allegations of fraudulent misrepresentations. Those representations related to what the Alabama land was capable of producing,—evidently a matter of opinion, and not shown by the evidence to have been unwarranted. The evidence does not show that it was represented that the land had produced, but that it could produce, the articles mentioned in abundance. Representations of that character, even if unwarranted, are not misrepresentations of facts that would vitiate a contract. *Cornwell v. Real Estate Co.*, 150 Mo. 377, 51 S. W. 736. Whether the land was capable of such pro-

duction we do not know from this record. Besides, this defendant did not rely on those representations. He went to Alabama to see for himself, and took with him a neighbor and friend in whose judgment he had confidence. There is nothing in the record that justifies any reflection on the good sense or honesty of Mr. Honselman, who accompanied the defendant on his trip. In addition to that, there were these two men, farmers who lived in that vicinity, who went with him over the land. Can we suppose he asked no questions, nor tried to learn anything? or are we warranted in concluding that every one he came in contact with was in a conspiracy to defraud him?

Nor was there such a discrepancy in the value as to call for equitable relief. The defendant's land was worth \$1,600, and the Alabama land was, according to the testimony of the assessor, worth \$1,000, and was assessed at that value. It does not appear at what value the defendant's land was assessed. The fact that Wilson found an opportunity to acquire the Alabama land for \$2.50 an acre, and bought it on speculation, is no evidence of fraud. He did not tell defendant what he had paid for it, and was under no obligation to do so. He told him, when he talked with him about going to Alabama, that the price would be \$15 or \$20 an acre; that was his selling price.

As to the allegations of fraud in the act of exchanging the deeds, the preponderance of the evidence is against the defendant. Mr. Hicks, whom the evidence shows was at one time prosecuting attorney of his county and is a reputable lawyer, gives a very straightforward history of the transaction, and it carries the air of truth with it. It is idle to pretend that the defendant and his brother Henry, who was present and actively participated in the execution of the deeds, believed they were executing only a lease to the Alabama land and taking rent notes for the same, while refusing to accept a deed to it, and refusing to execute his deed in exchange. Why should Wilson take a lease of the Alabama land, and give his notes for the rent, if the land belonged to him, and defendant refused to have it? By what principle of justice could defendant take the five rent notes, for \$200 each, and repudiate the rest of the contract? The answer avers that the agreement was that Wilson was to pay \$800 a year for five years, and give good security for the payments. In other words, defendant was to get in exchange for his 80 acres of Missouri land, worth \$1,600, 200 acres of Alabama land, leased for five years at an annual rental of 50 per cent. of the total value of the Missouri land. While there was no attempt to sustain that averment by proof, the fact seems to illustrate the wide difference between the defendant's allegation and his probata. If the Alabama land has been suffered to be sold, so that it is now lost to

defendant, he has only himself to reproach for the loss.

The answer having converted the case into a suit in equity, it is proper that the chancellor should dispose of the whole controversy by decree. The judgment is reversed, and the cause remanded to the circuit court of Harrison county, with directions to enter judgment for the plaintiff on the defendant's equity answer, and for the plaintiff for the possession of the land in suit and \$100 damages, assessing the rental value of the land at \$100 a year from the 10th day of May, 1890, the date of the decree appealed from, and costs of suit, and award a writ of possession and execution for the damages, rents, and costs. All concur.

SALES v. BARBER ASPHALT PAV. CO. et al.

(Supreme Court of Missouri. Feb. 19, 1902.)

MUNICIPAL OFFICERS — CITY ENGINEER — STATUTE—REPEAL—EFFECT—CONSTRUCTION—LEGISLATIVE INTENT.

Rev. St. 1890, § 5537, provided that there should be appointed by the mayor certain officers, including a city engineer. Section 5508 gives a city power by ordinance to provide for the appointment of all officers not otherwise provided for. Laws 1901, p. 60, repeals section 5537, and enacts a substitute of the same number, in which the city engineer is omitted; and the same act, on page 61, provides that "there shall also be such other officers as may be provided by ordinance." The same legislature enacted a statute (Laws 1901, p. 74) creating a board of public works, and authorizing such board to appoint the city engineer. Neither section 5541, prescribing the general duties of the engineer, nor sections 5663, 5664, and 5686, prescribing specific duties of such officer, were changed. After the act of 1901, p. 74, was pronounced unconstitutional, the city of St. Joseph adopted an ordinance creating the office of city engineer, and providing for his appointment by the mayor. *Held*, that the legislature of 1901 did not intend to abolish the office of city engineer, but merely to change the appointing power to the board of public works, and, the act so providing having failed, an appointment by the mayor as provided by the ordinance is valid.

In banc. Appeal from circuit court, Buchanan county; A. M. Woodson, Judge.

Action by Mary A. Sales against the Barber Asphalt Paving Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

Kendall B. Randolph, H. M. Ramey, O. F. Strop, Scarritt, Griffith & Jones, and R. A. Brown, for appellants. Brown & Dolman, for respondent.

SHERWOOD, J. 1. The trial court, upon final hearing, perpetually enjoined defendants from doing any work under a certain contract for street improvement and under Ordinance 2647, and from issuing any tax bills against plaintiff's land, or beclouding the title of the same, etc. The correctness of this decree defendants deny, and have

appealed to this court in order here to challenge its correctness.

In the revision of 1890 (volume 2), under the title of "Cities, Towns and Villages," there was section 5537, which provided that "In all such cities there shall be a city clerk, city engineer, city assessor, city counselor and city comptroller, who shall be appointed by the mayor, by and with the advice and consent of the common council, and shall hold their office for the term of two years unless sooner removed, and who shall perform such duties as may be prescribed by this article or any ordinance of the city." This section, as shown in the margin, has been in existence since 1880 (and before), and was known as "Section 1284." That section created the offices of city clerk, city engineer, city assessor, city counselor, and city comptroller, who were to be appointed by the mayor, who were to perform such duties as might be prescribed by article 3 of chapter 91, or any ordinance of the city. In 1901 (Laws of that year, page 60) the legislature repealed that section, and in lieu thereof substituted the following section of the same number: "In all such cities there shall be a city clerk, city assessor and city counselor, who shall be appointed by the mayor, by and with the advice and consent of the common council, and shall hold their office for the term of two years unless sooner removed, and who shall perform such duties as may be prescribed by this article or any ordinance of the city." This new section only mentioned the offices of city clerk, city assessor, and city counselor. The same statute also repealed section 5538 of the same chapter (Rev. St. 1890), and enacted as a substitute a section of like number (Laws 1901, p. 61). That section relates to and creates the offices of city attorney, judge of police court, city auditor, city treasurer, and city comptroller. The section concludes by saying, "There shall also be such other officers, servants and agents of the corporation as may be provided by ordinance, who shall perform such duties as may be prescribed by ordinance." The statute in question also repeals section 5548 of the same chapter (Rev. St. 1890), and enacts a new section of the same number (Laws 1901, pp. 61, 62), which new section relates to the duties of a comptroller, and is a mere duplicate of the section repealed. But these were all the sections which were repealed by the act of March 13, 1901; section 5541 of the revision of 1890 being left unmentioned and untouched by the repealing act of 1901. That section reads this way: "Sec. 5541. City Engineer. The city engineer shall superintend the construction of all public works ordered by the common council; shall make out plans, specifications and estimates thereof, and do the surveying and engineering ordered by the city, and perform such other duties as may be prescribed by ordinance."

Now, if there is anything well settled in statutory construction, it is this: that where a repealing statute expressly repeals certain sections of a statute by numbers, or a specified portion of another act, or even repeals one clause of a certain section, it follows that in the judgment of the legislature no further repeal was necessary or intended. *Suth. St. Const. § 327*. To the like effect is *State v. Morrow*, 26 Mo., loc. cit. 141. If the legislature had intended to have abolished the office of city engineer altogether, they surely would not, while and when repealing other and adjacent sections on the same and the next preceding pages, have omitted to repeal, by number, section 5541 which prescribed the duties of such officer. And we may summon further aids and further rules of statutory construction in following after the meaning of the legislature in the present instance. Thus the rule in *pari materia* is applicable here. "All consistent statutes relating to the same subject, and hence briefly called statutes in *pari materia*, are treated prospectively, and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session, or on the same day." *Suth. St. Const. § 283*. And "A statute must be construed with reference to the system of which it forms a part. And statutes on cognate subjects may be referred to, though not strictly in *pari materia*." *Id. § 284*. Further on the learned author, discussing and discoursing upon the same subject, says: "Where enactments separately made are read in *pari materia*, they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such a body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and, so far as still in force, brought into harmony, if possible, by interpretation, though they may not refer to each other, even after some of them have expired or been repealed." *Id. § 288*. Now, if statutes which have expired or been repealed may be consulted and compared with existent statutes in order to discover the intention of the legislature in enacting the latter, no reason is seen why resort may not be had to the provisions of an unconsti-

tutional law in order to ascertain the intention of the legislature in regard to the continued existence of the office of city engineer. The legislature in 1901 (*Laws of that year*, page 74) enacted a statute creating a board of public works in cities of 100,000 and less than 150,000 inhabitants. Section 5 of the act authorizes such board to appoint the city engineer, etc. This act was approved March 14, 1901,—the day next after the approval of the act in this behalf first aforesaid, which repealed section 5537. Both these statutes in their various provisions must have been in the minds of the legislature at the session of 1901, and their intention to continue in existence the office of city engineer seems too plain to be reasonably questioned. The repealed section 5537 took away the appointment of the city engineer from the mayor, and the act approved March 14, 1901, gave the appointment to the board of public works; but in neither case was there the slightest intimation of abolishing the office. The contrary intention, indeed, is clearly and indisputably manifested. The only difference, so far as concerns the point in hand, between section 5537, as originally drafted, and section 5 of the act of March 14, 1901, is the change in the agency whereby the city engineer was to be appointed,—taken away from the mayor and given to the board of public works. True, the statute creating that board was pronounced unconstitutional by this court. *State v. Borden* (Mo.) 64 S. W. 172. But it is thought that, notwithstanding this ruling, the principle heretofore announced respecting the discovery of the legislative intention by consulting expired or repealed statutes may well be applied, and with equal force and propriety, to an unconstitutional statute. Such statute, though abortive because unconstitutional, nevertheless is valuable as a medium through which may be discovered and disclosed the intention of the legislature when enacting the concurrent legislation which repealed the original section 5537. Concluding this paragraph we hold that—First, the legislature never repealed section 5541, relating to the office and duties of the city engineer; second, that the legislature never gave any intimation of any intention to repeal that section, but, on the contrary, their intention is manifested in the opposite direction, and with a clearness that admits of no dispute.

2. If section 5541 is to be regarded as unrepealed, then such unrepeal amounts to a legislative recognition of the continued existence of such office and such officer, and such legislative recognition is equivalent in point of law to prior legislative creation or prior authorization, and of equal force and effect. This point is settled by abundant authority. *State v. Evans*, 161 Mo. 96, 61 S. W. 590, and cases cited.

3. The city of St. Joseph had cast upon it

by the statute relating to cities of the second class the power and the duty to open, widen, grade, improve, and pave its streets. Subdivisions 7 and 12 of section 5508, and sections 5648, 5660-5663, Rev. St. 1899. Section 5663, *supra*, provides that after a contract has been made for the grading of any street, and ordinance has been passed for the assessment of the value of all the property, etc., the city assessor is to make such assessment, and to deliver the same to the "city engineer," and requires the latter (repeating his official title), when the grading is completed, to compute the cost thereof, etc.; and requiring that the "city engineer" shall compute the cost thereof, and apportion such costs among the several lots and parcels of property to be charged therewith, etc.; after so apportioning and charging the cost of any work, to make out and specify special tax bills according to such apportionment, and charge the same in favor of the contractor, to be paid against the several lots or parcels of lands charged, and register the same in full in his office, and deliver such bills to the party in whose favor issued for collection, and take his receipt therefor, etc. And section 5664 provides and requires that "every such tax-bill shall be a lien on the property therein described, against which the same may be issued on the date of the receipt to the 'city engineer' therefor," etc. As to building sewers, etc., sections 5685 and 5686 make provision; the latter section requiring that when a district sewer shall have been completed the "city engineer shall compute the whole cost thereof." None of these sections quoted from, which fully prescribe and define the duties of the "city engineer," were mentioned or touched upon, by either name or number, by the act of 1901 aforesaid, which repealed the original section 5537. The office of city engineer of cities of the second class, with its duties defined, then, still remains intact. The only question which remains is whether such a city could provide by ordinance for the appointment of an officer to fill that position. Respecting that point, we have subdivision 39 of section 5508, which gives the city power by ordinance "to provide for the appointment of all officers, servants and agents of the corporation not otherwise provided for." And in addition thereto we have the concluding portion of section 5538, as found on page 61 of the Laws of 1901, already quoted, which says, "There shall also be such other officers, servants and agents of the corporation as may be provided for by ordinance, who shall perform such duties as may be prescribed by ordinance." Under these powers an appropriate ordinance has been passed, creating the office of city engineer, and authorizing him to be appointed by the mayor, etc. This appointment has been made, and, as the office of city engineer was never repealed, it was competent, under the statutory

power conferred, for the defendant city by ordinance to empower the mayor to fill the position of city engineer.

The premises considered, we reverse the decree entered, and remand the cause, with directions to the circuit court to dismiss plaintiff's petition.

BURGESS, C. J., and ROBINSON, MARSHALL, VALLIANT, and GANTT, JJ., concur; BRACE, J., in result.

JONES v. MURRAY.

(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

LIBEL—ACTIONABLE WORDS PER SE—MALICE—MITIGATION—EFFECT—EVIDENCE—CONDUCT OF ATTORNEY—REMARKS—INSTRUCTIONS—DUTY OF COURT.

1. A false publication that a person is implicated in a robbery and murder, and referring to him as "robber number three, who killed the farmer," is libelous *per se*, from which malice is implied.

2. When a part of a plea in mitigation of a libel contains matters properly admissible in mitigation, a motion to strike out the whole plea is properly denied.

3. The court must instruct that evidence of defendant's good faith in publishing a libel is admissible only in mitigation of exemplary damages.

4. Where a plea in mitigation of a libel alleged that a certain person became suspicious that plaintiff and another had committed the crime charged in the libelous article, and had informed officers of such suspicions, together with his reasons therefor, and defendant's reporter testified that such person gave to him these matters before the publication, it was error not to permit plaintiff to show that such person did not communicate with the reporter.

5. A plea in mitigation of a libel, that the officer who furnished defendant's reporter with the alleged facts on which the libelous article was based knew of plaintiff's bad reputation, was not sustained by the evidence, the record not disclosing that the officer knew plaintiff's reputation, and another officer testifying that he had heard nothing against plaintiff except that he occasionally got drunk.

6. A plea in mitigation of a libel, alleging that the officer who furnished defendant's reporter with the alleged facts on which the libelous article was based submitted the information in his possession connecting plaintiff and another with the crime charged in the article to the county prosecuting attorney, who stated that the facts justified the arrest of plaintiff and such other person, is not sustained by the evidence, the record containing no testimony that the prosecuting attorney gave such advice.

7. The remarks of defendant's counsel at the trial for libel, that plaintiff committed the murder charged in the alleged libelous article, should have been rebuked by the court, and the jury informed that the evidence did not sustain the charge.

8. Though the constitution provides that in an action for libel the jury shall be the judges of the law and the facts, the court must properly and carefully advise the jury as to the law.

Appeal from circuit court, Greene county; C. B. McAfee, Judge.

Action by George Jones against L. H. Murray. From a judgment for defendant, plaintiff appeals. Reversed.

This is an action for \$5,000 damages for a libel of the plaintiff published in the Springfield Republican on September 22, 1898. The defendant is and was the owner of the paper. The libel is as follows: "A Murderer Captured—Officer Foster Burns Arrested Charles Carroll for Duffner Tragedy—He is a Cousin of the Notorious Jones Boys—George Jones Implicated—He is Robber Number Three, Who Killed the Farmer—He has Skipped the Country. One of the murderers of Charles Duffner, the Dallas county farmer, is confined in the Greene county jail. The arrest was made at 11 o'clock Tuesday night by Deputy Constable Foster Burns and Constable George Green at the Farmers' Home, a boarding house on North Campbell street. There is little doubt but Officer Burns has placed behind the bars one of the daring robbers and will capture the other robber. The man now in jail is named Charles Carroll, son of Henry Carroll, who lives three miles south of Buffalo and about eight miles from the Duffner home. Ever since the murder of Mr. Duffner last Thursday Officer Burns has been on the lookout for the culprits, and Monday his vigilance was rewarded by hearing that two Dallas county boys had been boarding at the Farmers' Home. They gave their names as George Jones and Charles Carroll. The officer ascertained that they arrived in the city the 1st of September, and two days later left the boarding house, telling the proprietor that they were going to work in the Gulf shops, and would board on the south side, but they told several people they were going to Christian county, and also stated they were going to Galena, Kan. Nothing was heard of the men until Monday, September 12, when they were seen by Mr. Williams, proprietor of the Farmers' Home boarding house, who saw them going east on Commercial street. Next heard of the men was last Saturday night, when they returned to the Farmers' Home with their clothing in a muddy condition. Carroll's shirt was badly torn and had blood on the front. They took a room and changed their clothing. Both Carroll and Jones were in a state of anxiety and very nervous. Sunday morning Jones left the boarding house, stating he was going home, and Carroll remained. Officer Burns learned that the two men had been stopping at Mr. Williams' place. He was acquainted with them, having been raised in that section of Dallas county, and his suspicions were aroused that they might be implicated in the Duffner tragedy, and after a thorough investigation became convinced that they were implicated in the murder, and Tuesday night placed Carroll under arrest. George Jones is a son of Sam Jones and a brother of the notorious Jim Jones, who killed the Texas sheriff and his deputy, and is believed to have been implicated in the Duffner affair. Carroll is a cousin of the Jones boys. Deputy Constable Burns found

a valise at the boarding house which contained three shirts, two pair of pants, a pair of shoes, and stale bread. The shirts had blood on them, and were taken to Prosecuting Attorney Wear's office, where that gentleman heard the story and stated he believed Carroll was one of the robbers and advised that Otto Duffner, a son of Charles Duffner, be notified to come to Springfield and identify the prisoner. The officers are satisfied that Carroll is the man whom Otto Duffner held while his father struggled with the robber, on whom he succeeded in inflicting fatal wounds. When Carroll was placed under arrest by Officer Burns he became very much agitated and acted like a guilty person. Mr. Burns was raised in the neighborhood of the Jones and Carrolls and well acquainted with the family. Charles Carroll is about 25 years of age. He said he was innocent of the crime for which he was arrested and would be able to prove an alibi. While he was told he would be taken to Dallas county he became very pale and said he did not want to go there. Officer Burns telegraphed to Buffalo yesterday morning to the sheriff notifying him to arrest George Jones, who is robber number three, the one who killed Duffner. The officer believes that Jones has skipped the country and had no idea of returning home. Otto Duffner is expected to arrive in the city to-day to identify Carroll. When the attempted robbery occurred the robbers wore false beards, and it may be difficult for young Duffner to identify him. Although living within eight miles of each other, Carroll stated yesterday he was not acquainted with the Duffner family. The capture of Carroll, if he proves to be one of the robbers, is a neat piece of detective work, and Officer Burns will receive a reward of \$500 from the county and widow of Charles Duffner."

The second amended answer, upon which the case was tried, is as follows: "Now comes the defendant, and for amended answer to plaintiff's petition denies each and every allegation therein contained. Wherefore he prays judgment, and for further answer to said petition the defendant pleads the following mitigating circumstances, to wit: That about sundown of Thursday, September 15, 1898, in the county of Dallas and state of Missouri, there was committed a most foul, bloody, cruel, and cowardly murder; that at said time and place one Charles Duffner, his wife and son, were assaulted by two masked robbers, and one of the robbers shot at and tried to kill Miss Duffner; that after a hard struggle one of said robbers was killed and the other was overpowered and captured; that the son of said Charles Duffner was then dispatched to arouse the neighbors and fetch the officers of the law; that thereupon a third robber appeared upon the scene and shot and killed Ohas. Duffner and liberated his companion in crime. The murderers then fled on horses

belonging to the Duffner family to a point about two miles north of the scene of the tragedy, and then killed the said horses and mounted their own animals and rode away. That on account of the masks and excitement the family were unable to fully describe the murderers, but in their flight they dropped a sack which contained some crusts of bread and three tin cups; that on said tin cups was engraved or cut the name of the Mrs. Sprague children; that plaintiff herein is the uncle of said children. That on or about September 1, 1898, the plaintiff and one Chas. Carroll, both being residents of Dallas county, Missouri, and living about 10 miles north of the scene of the tragedy, left their homes in said county and came to Springfield, where they remained for some days; that during this time they boarded at a house kept by one Williams, and during said time they made contradictory statements as to where they intended going; that upon leaving Springfield they landed at Nixa on or about Saturday, September 10, 1898; they were supposed to have been next seen in Springfield on Monday, September 12th, or Tuesday, September 13th; they hired to one Jerome Bolin near Nixa, and on Wednesday, September 14, 1898, they quit work at the threshing machine and went to Nixa, where they began drinking heavily; that they were not seen again from Wednesday afternoon until Friday morning, September 16th, when they again reported for work at the threshing machine in Christian county, but again quit work that day and started to Springfield, Missouri, where they arrived at 5 p. m., September 17, 1898; that upon arriving at Springfield they went to the Farmers' Home in Springfield and also went to the home of Peyton Kelly, a distant relative of plaintiff; that by this time the whole country was aflame in the search of the two escaped murderers and in the effort to identify the dead robber; that Peyton Kelly knew that said plaintiff and his companion Carroll lived in Dallas county, and knew that the reputation of plaintiff and several of his brothers was not good, and knew of the commission of this crime; that said Kelly became suspicious of said parties, and noticed especially their strange manner and nervousness, and observed that their clothes were muddy and the shirt of one of them torn and bloody; that after being at Kelly's they went to another relative, to wit, John Hendrickson, and thereupon Peyton Kelly communicated his suspicion to George Green, constable of Campbell township, and to Foster Burns, deputy constable of said township; that these officers then possessed themselves of all the foregoing facts; that said Officer Burns also knew the Jones family, and knew that the reputation of plaintiff was not good, and said Burns then found the valise kept by plaintiff, and in the same was found some stale bread and muddy clothing and a torn shirt with blood thereon, and also

on a shirt was found the imprint of the muzzle of a freshly discharged pistol; that thereupon said officers submitted all of said facts to Hon. A. H. Wear, prosecuting attorney of Greene county, who stated as his opinion that the facts justified an arrest; that thereupon said Green and Burns arrested the said Carroll on September 20, 1898, and caused the arrest of plaintiff herein either on the same day or on September 21st; that on the 21st day of September, 1898, defendant was the owner and publisher of the Springfield Republican, but had nothing to do with the gathering of the news items, leaving this to his corps of reporters; that one H. S. Geddes was then in his employ, and said Geddes was a careful, discreet, and prudent reporter; that said Officers Green and Burns were painstaking and careful officers, and said A. H. Wear was a cautious and prudent adviser; that all of said facts were made known to said H. S. Geddes, and then to defendant herein, and defendant and said Geddes believed that the real murderers had been captured; that, acting upon such belief, and in the interest of public justice, and not out of any malice or ill will towards either plaintiff or Carroll, defendant published said article. Defendant states, as a matter of fact, plaintiff's reputation and character is not good. Defendant further states that no request was ever made by plaintiff of defendant to publish a statement of his side of the case, which defendant would cheerfully have done, and would cheerfully have corrected any erroneous statement of facts, and would cheerfully have made any and all amends consistent with the facts submitted; but that plaintiff was, on the contrary, induced and prompted by A. D. Bennett, one of the counsel in this case, to institute this suit. Wherefore defendant prays that these matters may be inquired of in mitigation of said publication."

The answer, as filed, contained a further attempted plea of privileged communication; but the court adjudged it insufficient and struck it out. The plaintiff moved separately in the same motion to strike out the plea of mitigation, but the court overruled the motion in that particular, and the plaintiff preserved an exception, and filed a reply, which was a general denial. The defendant disqualified the regular judge of the trial court, and by agreement a special judge was selected to try the case.

The trial developed the facts to be substantially as follows: That the defendant owned the Springfield Republican, and that the libel was published on the 22d of September, 1898; that the defendant never saw the libel until it appeared in his paper, but was told the substance of it by Geddes, a reporter employed by him, the day before it was published. The plaintiff offered in evidence a copy of the paper of the 23d of September, 1898, which contained an article to the effect that Carroll was released on the

day previous because Otto Duffner, after seeing him, declared that he was not one of the men who was at his father's house. The court also excluded a copy of the weekly edition of the paper containing the libel complained of. The evidence further showed that on the 15th of September, 1898, between 6 and 7 o'clock in the evening, two men went to Andrew Duffner's house in Dallas county. One of them attacked and shot Duffner, and the other attacked his son Otto. Duffner succeeded in killing the man that attacked him, and he and his son overpowered and captured the man that attacked the son. About that time a third man appeared on the scene, and shot and killed Duffner, shot at his son and daughter, and rescued the captured man, and they two escaped on Duffner's horses, which were found next day, some miles from the place, shot to death. The two men who made the first attack wore false beards, and Mrs. Duffner, while assisting her husband in his fight with the man that was killed, pulled his false beard off, and recognized him as one of three men who had been to their house about 10 or 11 o'clock that day and had purchased a bottle of wine; but she positively testified that the plaintiff was not one of the men that came to her house at either of the times mentioned. It further appeared that after the tragedy a satchel was found where the third man jumped over the fence, which contained some food and some cups, on which were scratched or engraved the names "Marvin Leroy Sprague" and "Mabel Sprague," respectively, which by general reputation was shown to be the names of Mrs. Sarah Sprague's children, and it was shown by the testimony of Burns, the deputy constable, that he had heard that Mrs. Sprague is a sister of the plaintiff, and by the testimony of the sheriff of Dallas county that she is his sister, and when she was on the witness stand neither party asked her whether she was or not; so it stands proved for the purposes of this case. The court refused, however, to permit Mrs. Sprague to testify that the cups so found were not, and never were, the cups of her children. The only attempt made to prove that the plaintiff's character was bad was by the testimony of W. H. Ruth, the sheriff of Dallas county; and this attempt failed, for, instead of his testimony showing such bad character, the sheriff said he never heard anything about his character "more than he gets drunk once in a while."

Burns, the deputy constable, living in Greene county, who was acting as a detective in the matter, in hopes of earning the \$500 reward that the county of Dallas and the family had offered, testified as follows: "Q. Just go ahead and tell as an officer what you learned as an officer, and what you found on investigation that led you to make the arrest of Mr. Carroll. Did you telegraph to have Jones arrested? A. After Carroll's arrest I consulted the prosecuting attorney.

Q. You telegraphed to have him arrested? A. Yes. Q. Go ahead and tell all you learned and all you saw and heard as an officer that led you to make the arrest of Carroll and to telegraph the arrest of Jones. Tell it in your own way and all the facts and circumstances? (Objected to as irrelevant, incompetent, and immaterial. Objection overruled. Plaintiff excepted.) A. It was the next day, or possibly might have been two days, after the murder. I was informed by some one from Dallas county that Jones and Carroll had been up here; that they had come by Mr. Duffner's about a week or such a matter prior to the murder, and I afterwards found out that they had been at Nixa, and also found out they had stopped over here at Mr. Williams', the boarding house in north town, and had made contradictory statements as to where they were going. One man told Mr. Stewart that they were going to Galena, Kan., and that evening about 4 or 5 o'clock George Green and I were at Judge Ferguson's office, and Peyton Kelly, mail carrier, a cousin of these boys, came along, and we talked with him about the matter, and he said, 'Yes, they had been to his house.' They came in, I think, Saturday evening. He said 'from Nixa.' He said they told him they had been down to Nixa, Christian county. He went on to tell us about it after we had talked with him quite a good while, and of course he didn't want to tell anything on the boys, because they were relatives of his, I suppose; but he told about their muddy clothing, and about one of them having blood on his shirt. Q. Did he tell about their actions? A. I don't remember which one of them it was he said had blood on his shirt. Q. Did he tell about their actions? A. They acted very nervous, —one of them at least. I don't remember which one it was. May have been Charlie, or may be George. Q. Then where did you learn they had gone? A. I found George had gone back home to Dallas county, and that night Green arrested Charlie at Williams' house, going in there that night. The next morning we went there and found a grip and in it some working clothes. I didn't find anything else, with exception of some old dried up bread,—looked like a piece of light bread. Q. Did you find the shirt? A. Yes. Q. Torn? A. Yes; it was torn in the side. Q. Did Carroll make any statement about how the blood come there. (Objected to. Question withdrawn.) Q. Did you or any one find anything else on that shirt? A. I brought the grip of clothing to Mr. Wear's office. He first discovered that place in the sleeve of shirt that looked like where a man had taken the end of a pistol barrel and put it against his sleeve and turned it around. You could see the print of the powder mark, or it looked like it; it might have been something else. Q. You judged at that time it was the muzzle of a pistol? A. I wouldn't swear it was, but it looked that way. Q.

State what explanation was made at that time about how the blood come on the shirt? (Objected to as incompetent and immaterial. The court: 'Gentlemen of the Jury: No part of this testimony is intended to show guilt upon the part of this plaintiff, or to show any discrepancy in his statement; but the purpose and object of it is to mitigate the offense of publishing about a man that which was not true, and the law permits such mitigation by showing the circumstances surrounding it, and the reason why it was done, to show the absence of any express malice upon the part of the defendant, and it is admitted for no other purpose.') Q. Tell what statement he made about how the shirt became bloody. First, did he say it was his shirt,—Jones? A. I don't remember that. Q. What is your best recollection as to whose shirt he said it was? A. I will tell if you will let me. He said that at Nixa, that him and George was on a little drunk that day, and he thought George got his shirt bloody while he was drunk perhaps,—that George got his nose bleeding while he was drunk at Nixa. That is what Charlie told me. Q. You say you submitted these facts to Mr. Wear, the prosecuting attorney? Q. At that time did you know, or think you knew, the reputation of these men in Dallas county? A. No, sir; I knew George when we were little boys. Q. From the facts you were possessed of, did you make the arrest? A. Yes. Q. And after having the talk with Wear? A. Yes; I thought that I had plenty of evidence to warrant the arrest. Q. You wouldn't have arrested them if you hadn't believed you were on the right track? A. I hardly would. I had nothing against the boys. Q. Did you learn all the facts before the article was published on the 22d of the following week? A. I had heard all about that shirt business and the powder business. Q. And the tin cups? A. I heard about that before I arrested Charlie. Q. What had you heard about the tin cups? A. I don't know; only what different parties would tell me from down there. Q. You had heard that there had been cups left on the ground with the names of the Sprague children on them? A. Yes; I knew them. Q. Didn't you know Mrs. Sprague was his sister? A. I didn't know it as a fact, but I had heard it possibly some time before. Q. Did you tell H. S. Geddes all of these facts when you were relating it? A. Yes, sir; he asked me all about it. Q. You disclosed to him all you knew? A. All that I remembered of knowing. Geddes was a reporter on the Republican. Q. Wasn't there pretty general talk all around town when the facts became known that Jones and Carroll were the ones implicated, and if that wasn't before the article appeared? The article appeared on the 22d and your arrest was on the 20th? A. I can't remember that. Q. You can't remember whether it was talked of or not? A. Oh, I know, of course, there was lots of talk, like any other arrest. There are

always some people who will believe it and some who won't. Q. The arrest caused lots of talk, and these facts you are speaking of were generally discussed? A. Yes, sir. Q. That they were implicated in the murder? By the Court: Was it pretty generally known at that time that the murder had been committed? A. Yes; most everybody here knew it; that is, all the officers, I think. I don't think there were any of them but what knew it. By Mr. Delaney: I will ask you if you didn't give this information to Mr. Geddes and ask him to withhold it from publication until you could look up some further facts and also located Jones? A. Yes; that is a fact, too,—until we heard if Jones were arrested. Q. And the Republican did hold it up? A. I think it was one or two days; I am not sure. Q. Held up at the request of the officers? A. Yes. Q. Now, in the meantime, where was Carroll after you had had Mr. Geddes hold up the publication? A. That was right at the time we arrested Carroll and had him in jail and were waiting to hear from George. He was in jail a day or so before this article appeared. We only kept him from one evening until the next day sometime. We had Duffner brought up to see him. Q. Geddes withheld the publication at your request until you got these further facts? A. He withheld publication for one issue, at least, I think. One is all I remember. Q. Did or not Carroll make contradictory verbal statements as to when he left Nixa different from the writing he gave? By the Court: Go ahead and state anything that induced you to believe he might be the man. A. Well, I will go ahead and explain just how he told it to me if you will let me. Charlie first stated that they stopped with Dug Chapman while he was down there. Q. Did he make any statement different from the written one? A. Yes, sir; I wanted to go ahead and explain it. He said that they first stopped at Chapman's and Bill Myers' and stayed there, and I asked him if he stayed any place else, and so next morning or possibly that night I went to the jail and got him to give a written statement of each date and place, and it is here. Q. Was that different about his movement in Christian county? A. Yes; there was difference. I have been an officer 10 or 11 years. Green was constable. I was working under him. We were working on this case."

H. S. Geddes, the reporter, testified as follows: "I am 26 years of age. Newspaper man on 22d last September. Nine years' experience. Was at that date working for the Springfield Republican. I heard of killing of Duffner. We published account of killing on next or second day after it happened. Killed on September 15th. I knew of the killing long before this article was published. I wrote it. Q. Tell whether or not you believed at that time that Carroll and Jones were the real murderers? A. Yes; I believed it firmly. Q. Did you write that ar-

ticle intending malice towards them or intending just to defame them? Why did you write it and publish it? A. Because I believed it was true. Q. What ground had you in mind for believing it true? Tell all the facts and circumstances that come to your knowledge? A. Several days before the article appeared Foster Burns— I asked him if he heard anything about as to who did it. I knew he was on the lookout for the murderers, and he said, 'Yes, I wouldn't be surprised in a couple of days but what I would have something pretty good for you'; and about 11:30 o'clock of the night Carroll was arrested I met Burns, and I knew it was unusual for him to be out at that time of night, and I asked him again if he had heard anything. It was my business to be out at night up to 2 or 3 o'clock. He had at first told me that he would tell me something next day. I told him I wanted it then. He told me that he had arrested Carroll, and that Jones had gone back to Dallas county, and that he had notified the officers there, at Buffalo, to arrest Jones, and that he had evidence which showed beyond a doubt that they were the guilty parties, and I asked him what it was, and he told me all about it, and said they had found the bloody shirt, and told me about finding these tin cups with the names on them, and the relationship, that Jones was the cousin of these children, and he told me that Jones had a bad reputation, that he come from a bad family, and told me all about his brothers, and that Carroll was Jones' cousin. Q. Did he say anything about the powder burns or pistol marks on the shirt? A. No; I don't remember that. He told me about the blood on the shirt. Q. Did he tell you about consulting the county officer, Mr. Wear? A. Yes, sir; he said Mr. Wear advised him to make the arrest. I knew Mr. Wear was prosecuting attorney of the county. Q. Did you rely upon these statements and believe them to be true when you published this article? A. Oh, yes; I thought there was no way out of it for Jones and Carroll; I had never seen them. Never saw Jones until yesterday. I had never heard of them until after the murder. A man from Dallas county, I forget his name, told me the story of the killing, and about the Jones boys living in the neighborhood, and that probably it was done— that these Jones boys, one or two of them down in Texas maybe had come home and they had done it, and they were looking for them. I remember now when I first got the story. Q. A man came from Dallas county with Lohmeyer? A. Yes. Q. Now tell what the man said about the suspicions in the country there? A. He said they believed the Jones boys were in that neighborhood, and had returned home, and that they were outlaws, and that it was believed they had committed this crime. Q. And that fact was in your mind also? A. Yes. Q. So, the first you

heard of the Jones name connected with the tragedy was a rumor that came from Dallas county? A. Yes, before ever I talked with Burns about it. Q. Did he tell you in this conversation what these other Jones boys were accused of? A. Well, murder I think. Q. To refresh your memory, your article so states. Is that a fact? Did he tell about one of them being in a killing scrape with the sheriff in Texas? (Objected to as irrelevant, incompetent, and immaterial.) By the Court: Q. They say it is in this article. Now had you heard about the murder there before you wrote it? A. Oh, yes; this man from Dallas county told me that. Q. He first gave you the information? A. He told me all about the Jones boys' reputation and what they were wanted for there. By Mr. Delaney: Do you know how many of the Jones boys there are? Three of them? A. I think he said two. Q. Did you hear anything before you published this article about their making contradictory statements of where they were going when they were at the Farmers' Home? A. Oh, yes; Burns told me all about that. Here is one thing I didn't explain, that is, that Burns told me not to publish the article that very morning that he arrested Carroll, and I agreed with him not to do it, but I said, 'Why, the Leader will get it' 'No,' he says, 'we won't say anything about that'; and that is the reason we didn't publish it. I was afraid the next morning, and along about 10 o'clock I went to him, and I told him that the Leader would get this, because I had heard a number of places that Carroll was arrested. He says 'Yes, I am afraid they will get it,' and I thought sure the Leader would get it; and I went out to the race track, and the Leader man come out there, and he heard it out there about 3 o'clock,—too late to be published. It was talked of out there. Burns was out there, and I knew the Leader man was hot at Burns. Q. You wished he had got it first, didn't you? A. Yes, sir. Q. You were in Mr. Murray's employ at that time? A. Yes. Q. Didn't you tell in a general way all of these facts to him,—if he didn't have cognizance in a general way of all these facts before the publication? A. Yes, sir; I told him I had a pretty good story, and I told him what Burns told me, and of this arrest being made. Of course, we have to depend upon officers for these things. Q. Had you any malice in writing or publishing this article? A. No, sir. Q. Or any ill will toward him? A. No, sir; I never knew him. Q. Why did you publish it? A. Because I believed it was true, as we were in the habit of doing articles of that kind. Q. And to bring the parties to justice? A. Well, I wanted to— Q. Did Jones ever ask you to take any of this back? A. No; I never talked to him about it. Cross-Examination: By Mr. Wright: Q. You got a scoop on the Leader? A. Yes, sir. Q. When did you tell Col. Murray about this? A. I think it was next

morning or next day. Q. Next morning after publication? A. No, before. He never saw the article until after it was in the paper. I told him about it. Q. Who was this Dallas county man that told you about this? A. The paper, I think, contains his name that published the first story,—all about the killing. Q. This paper was published by the Republican? A. Yes. (Paper referred to being dated December 2, 1898.)

L. H. Murray testified for defendant as follows: "I am the publisher of the Springfield Republican, and was on September 15th. Q. Before that article appeared, had you heard about these suspicious facts and circumstances that were surrounding Mr. Jones and Mr. Carroll? A. Yes, sir; I had heard something of them. Q. In the publication of this article had you any ill will or malice towards the plaintiff? (Objected to as incompetent and immaterial.) Q. Just state all you knew about this thing in your own way. A. Well, the judge expresses it so well that a man cannot have malice with any one unless you have had a difficulty with him; but I never heard of the man. I have heard of plenty of Joneses, but I never heard of this one until after the killing of Duffner, after the great murder, and it was in the papers and mouths of everybody, why I heard this man's name mentioned. I didn't know who he was. I just heard there was a man named Jones. I had no idea what neighborhood he lived in, nor what Jones he was, nor anything of the kind. Neither did I of Carroll. I never heard of them, to identify either; therefore I couldn't have malice. It's against nature to have malice against a man you never heard of and have never seen. In fact, you cannot hate a man until you have first loved him. Then, to come down to the first information that amounted to anything, Mr. Lohmeyer brought a gentleman into the office in the night and told us about the murder. He seems to have been a friend and acquaintance, and to have done some business for Duffner, and was perhaps the first man in town to know of the difficulty. This man came to him (Lohmeyer) I reckon, or was sent there; I don't know but he brought him up there and told us about it. Then there was a write up about the murder generally. I don't think either Carroll or Jones were mentioned in that connection at all. If they were I have forgotten it. Then Mr. Burns, the deputy constable, should have told Mr. Geddes that conversation; I didn't hear that. I did the other, that he was on the trail of these men, etc., and so on, and that he must not publish it until another issue; that they had then arrested Mr. Carroll, and that they hadn't got Jones; and, if it went broadcast, if he was guilty he might escape. So he kept it quiet for them and didn't publish it until the next day. He came back and told us he had a telegram from the sheriff that they had him up there, and then he gave the whole story away and

published it the next morning. I never saw the article until I saw it in the paper, but I heard this conversation. Q. You heard the circumstances, as stated in this article? A. Yes, sir; as stated in this article, similar to that. The thing I never saw until I saw it in the paper."

In rebuttal the plaintiff endeavored and offered to prove by Peyton R. Kelly that he never told Burns, the deputy constable, any of the matters that Burns swore he (Kelly) had told him. The court excluded the testimony, and the plaintiff preserved an exception.

The instructions given and refused will be considered hereinafter. The jury found for the defendant, and plaintiff appealed.

A. D. Bennett and Chas. J. Wright, for appellant. T. H. McGregor and T. J. Delaney, for respondent.

MARSHALL, J. (after stating the facts). 1. The publication complained of is libelous per se, particularly the part of the head line, "George Jones Implicated—He Is Robber Number Three, Who Killed the Farmer—He has Skipped the Country," and the part of the body of the publication, "Officer Burns telegraphed to Buffalo yesterday morning to the sheriff notifying him to arrest George Jones, who is robber number three, the one who killed Duffner." Being libelous per se, the law implies malice. *Buckley v. Knapp*, 48 Mo. 161; *Hall v. Adkins*, 59 Mo. 144; *Price v. Whitley*, 50 Mo. 439; *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592; *Callahan v. Ingram*, 122 Mo., loc. cit. 869, 26 S. W. 1024, 43 Am. St. Rep. 583. "Malice, whether express or implied, means the same, the only difference being in the establishment of it. When malice is implied from the words spoken or published, the burden is on the defendant to prove lawful justification or excuse, or the absence of a malicious intent." *Callahan v. Ingram*, supra. "The absence of a malicious intent" here spoken of is not a complete defense; it is admissible only in mitigation of damages. *Callahan v. Ingram*, 122 Mo., loc. cit. 373, 26 S. W. 1025, 43 Am. St. Rep. 583, citing with approval *McGinnis v. George Knapp & Co.*, 100 Mo. 148, 18 S. W. 1134; *Newell*, Defam. p. 301, § 22; and *Odgers*, Lib. & Sland. 317. See, also, *Wozelka v. Hettrick*, 98 N. C. 10. In *Callahan v. Ingram*, 122 Mo., loc. cit. 374, 26 S. W. 1025, 43 Am. St. Rep. 583, this court, per Macfarlane, J., said: "We think evidence of intention and motive of defendant was admissible for the purpose of mitigating the punishment by way of exemplary damages; but the jury should have been cautioned not to allow such evidence to operate as a defense to the action, or to mitigate the actual damages sustained." The answer is a general denial and a plea in mitigation. The ruling of the trial court upon the motion to

strike out the portion of the answer pleading in mitigation was proper. There are some matters stated therein which are properly admissible in mitigation, and which, if proved, would and should diminish the damages, and therefore the motion to strike out the whole plea was properly overruled. Newell, Defam. (2d Ed.) p. 882, c. 26, § 62 et seq., lays down the rule that, "where a defendant does not justify, he may mitigate the damages in two ways—First, by showing the general bad character of the plaintiff; second, by showing any circumstances which tend to disprove malice but do not tend to prove the truth of the charge." And in section 63 the author quotes from Storey v. Early, 86 Ill. 461, where, after stating the rule above, the supreme court of that state held that, "This qualification excludes not only such circumstances as the law recognizes as competent evidence tending to prove the truth of the charge, but all circumstances which, in the popular mind, tend to cast suspicion of guilt upon the plaintiff." The same author in the same section cites Marker v. Dunn, 68 Iowa, 720, 28 N. W. 38, holding that, "Where slanderous words do not, on their face, purport to be spoken on the authority of another, but are spoken as of defendant's own knowledge, it cannot be shown in mitigation of damages that they originated with another." And in section 78 (page 901) the author says: "As a rule, unless the matter complained of be privileged, the motive or intention of the speaker or writer is immaterial to the right of action. The law looks only at the words employed and their effect on the plaintiff's reputation. But in all cases the absence of malice, though it may not be a bar to the action, may yet have a material effect in reducing the damages. The plaintiff is still entitled to reasonable compensation for the injury he has suffered; but if the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, clearly no vindictive damages should be given. In every case therefore the defendant may, in mitigation of damages, give evidence to show that he acted in good faith and with honesty of purpose, and not maliciously. He may show that the remainder of the libel not set out in the pleadings modifies the words sued on, or that other passages in the same publication qualify them. But he may not put in passages contained in a subsequent and distinct publication, unless the words sued on are equivocal or ambiguous. The fact that the defendant did not originate the calumny, but innocently repeated it, is admissible if he gave it as hearsay, and named his authority when he repeated it, but not otherwise." The sum of the rule is this: If the publication is false, and the plaintiff has suffered actual damages, he is entitled to recover such damages, no matter how innocently or with what purpose, intent, or motive the defendant acted; but if the defendant acted in good faith and without malice,

this fact mitigates his punishment and diminishes the exemplary damages the plaintiff is entitled to recover. Or, otherwise stated, the plaintiff is entitled to compensatory damages, but the defendant's punishment is lessened because of want of malice. But in all such cases it is the duty of the trial court to caution the jury not to allow evidence of mitigation to operate as a defense to the action, or to mitigate the actual damages sustained. Callahan v. Ingram, 122 Mo. loc. cit. 374, 26 S. W. 1020, 43 Am. St. Rep. 583. In this respect the trial court fell into error by refusing the plaintiff's instruction, "You are instructed that in this case there is no justification pleaded, but only a general denial and a plea of mitigation, and the publication is admitted in the pleadings. Under the evidence and the pleadings the defendant can only mitigate the damages." This instruction was right as far as it goes; but the plaintiff was entitled to even a stronger declaration of the law, to the effect that the mitigation must not be taken as a defense nor as mitigating the actual damages, but could only reduce the punitive damages. The fact that a plea in mitigation may rest upon hearsay testimony; that is, that some one told the defendant, and he believed it and acted in good faith,—emphasizes the imperative necessity for carefully instructing the jury as to the nature, effect, and extent of a plea in mitigation; for unless so instructed the untrained minds of the laymen are likely to be confused and misled into accepting such mitigating circumstances as a complete defense, and so not only temper the defendant's punishment, but also, in so doing, deny compensation to the plaintiff for the wrongs he has suffered at the hands of the defendant. The answer and the testimony set out so fully herein illustrates the necessity of properly instructing, or, more correctly speaking, advising, the jury in libel cases. To illustrate: First. The answer alleges that Kelly became suspicious of Carroll and Jones, and noticed their strange manner, their nervousness, their muddy clothes, and that the shirt of one of them was torn and bloody, and after they left his house he communicated his suspicion to the constable and deputy constable, etc. It will be observed that this is not averred to be stated upon the information of Burns, the deputy constable, to Geddes, the reporter, but is stated as of the defendant's own information. The trial court permitted the defendant to show that Kelly told the reporter these things, notwithstanding it was not averred in the answer that he had done so, and then refused to permit the plaintiff to show by Kelly that he never told the reporter anything of the kind. This ruling was based upon the erroneous conception of the pleadings that the issue was that Kelly told the deputy constable, and he told the reporter, who was the alter ego of the defendant, and therefore it was immaterial whether the facts stated

were true or not. The trial court erred in this respect. For the issue was not so framed. It was averred that such was the fact, and not that the deputy constable told the reporter that Kelly told him that such was the fact. Being alleged as a fact that Kelly told the deputy constable, it was competent for the plaintiff to show by Kelly that he never so told the deputy constable. Under this issue it was the fact stated by Kelly, and not what the deputy constable told the reporter that Kelly told him was the fact, that was to be inquired into. This shows that even a court may fail to distinguish between the various kinds of pleas in mitigation, and illustrates the necessity of clearly informing the jury as to what constitutes matters of defense and what only mitigating circumstances. Again, it is alleged in the answer that Burns, the deputy constable, "knew the Jones family, and knew that the reputation of plaintiff was not good, and said Burns then found the valise kept by plaintiff, and in the same was found some stale bread and muddy clothing and a torn shirt with blood thereon, and also on a shirt was found the imprint of the muzzle of a freshly discharged pistol; that thereupon said officers submitted all of said facts to Hon. A. H. Wear, prosecuting attorney of Greene county, who stated as his opinion that the facts justified an arrest," etc. Here again these matters are alleged as facts within the defendant's own knowledge of such occurrences, and not merely hearsay. The testimony wholly failed to support this allegation in the following respects: First. If Burns knew the reputation of the plaintiff, it is not disclosed, for he was not even asked if he did, and he never said his reputation was bad. The only witness who was interrogated as to the plaintiff's reputation was W. H. Ruth, the sheriff of Dallas county, and here is what he said: "Q. You may state what his general reputation is as a peaceable, moral man? A. I never heard anything, I think, more than he gets drunk once in a while. Q. How is he generally regarded as to being a good citizen,—what the people think? A. I don't think I can answer. Q. Did you know his brother Jim? A. Yes, sir." This and this only is the evidence, or, more properly speaking, the lack of evidence, to support the statement in the answer that Burns knew that the plaintiff's reputation was bad. Second. It is alleged that the deputy constable submitted all the alleged facts to the prosecuting attorney of Greene county, and that he stated that in his opinion the facts justified an arrest. There is not a word of testimony in this case that the prosecuting attorney gave any such advice. Upon this branch of the case the record discloses the following as a part of Burns' testimony: "Q. You submitted these facts to Mr. Wear, the prosecuting attorney?" The record discloses no answer whatever to this question. Proceeding: "Q. At that time did you know or

think you knew the reputation of these men in Dallas county? A. No, sir; I knew George when we were little boys. Q. From the facts you were possessed of, did you make the arrest? A. Yes. Q. And after having the talk with Wear? [No talk with Wear is disclosed.] A. Yes; I thought I had plenty of evidence to warrant the arrest. Q. You wouldn't have arrested them if you hadn't believed you were on the right track? A. I hardly would. I had nothing against the boys." This testimony shows that Burns did not know the plaintiff's reputation to be bad; that the prosecuting attorney did not advise that the facts justified an arrest; in fact does not show what, if any, facts were submitted to the prosecuting attorney, but, on the contrary, shows that Burns expressly testified that he did not know the plaintiff's reputation or Carroll's reputation, and that he did not act on the advice of the prosecuting attorney in making the arrest, but acted on his own motion. And this is the result: Burns arrested Carroll without a warrant, and he was discharged the next day because Otto Duffner, the son of the murdered farmer, declared that he was not one of the three men who were engaged in the murder. Burns telegraphed the sheriff of Dallas county to arrest the plaintiff, and he was arrested without a warrant. The record does not show what became of the arrest; but from the existence of this suit it is fair to presume he was discharged. At any rate, at the trial of this case Mrs. Duffner distinctly testified that the plaintiff was not one of the three men engaged in the murder. It is too clear for discussion that the arrest of the plaintiff was a gross abuse of authority, and without any evidence that raises even a reasonable suspicion of his connection with the murder. Counsel for the defendant went therefore entirely outside of the limits of legitimate debate when they charged that the plaintiff murdered old man Duffner, and the court erred in not rebuking them for so doing, and in not telling the jury there was no evidence to support such a charge. All of these things took place under a plea in mitigation. If such a plea opens the door to such proceeding, it is so broad and all sufficient that a plea of justification is superfluous and too narrow and embarrassing.

Under the constitution of this state the jury in a libel case are the judges of the law and the fact. *Heller v. Publishing Co.*, 153 Mo. 205, 54 S. W. 457. But the province of the court is not entirely taken away. Because of this provision of law, and because of the character and scope of the various excusatory and mitigating pleas that may be interposed, it is the more necessary that the court should properly and carefully advise the jury as to the law. *Heller v. Publishing Co.*, 153 Mo., loc. cit. 215, 54 S. W. 457. And when the trial court errs in so doing it is necessary to the protection of the

rights of the citizen, and to the proper administration of the law, that this court should correct the error. The liberty of the press must be assured, but at the same time the liberty and rights of the people must be protected. The publication in this case is the product of a too credulous reporter and of a reckless deputy constable and would-be detective.

The judgment of the circuit court is reversed, and the cause remanded for further trial in conformity herewith. All concur.

**FIDELITY TRUST & SAFETY VAULT CO.
v. CARR et al. LOUISVILLE BANKING
CO. v. SAME. MURRAY v. SAME. CARR
et al. v. ROSS et al.¹**

(Court of Appeals of Kentucky. Feb. 28, 1902.)

PAYMENT—NOTICE OF ASSIGNMENT—ESTOPPEL—AUTHORITY OF AGENT.

1. A recital in nonnegotiable coupon bonds executed to a title company that they were secured by a deed of trust showed merely, as would have been implied by law without such recital, that the mortgage or deed of trust was a security for the payment of the bonds, and there was nothing in the recital indicating a purpose on the obligor's part that the bonds should be sold to raise money for her use; and therefore she is not estopped from the form of the bonds to plead that she did not know, when she subsequently paid the bonds to the payee, that they had been assigned.

2. The fact that the obligor left in the hands of the title company the money due her on the bonds to be paid out by it upon her orders in extinguishing a lien upon and in improving the mortgaged property did not make the title company her agent.

3. The fact that at the foot of a deed executed by the mortgagor, conveying the mortgaged property to persons to whom she had sold it, there was an unsigned release by the title company of all its interest in the property, gave the purchasers at most only notice that the title company had a claim; and as the title company notified them that the property was free from incumbrance, and agreed to give them a certificate to that effect, they were not charged with notice that the mortgage bonds had been assigned.

4. Payment having been made by the purchasers to the title company, which retained a sufficient amount to extinguish the bonds, and paid the remainder to the mortgagor, there was a payment of the bonds, the mortgagor having no actual notice that they had been assigned, and the assignment not being noted of record; and this is true whether or not the act of March 18, 1876 (Gen. St. p. 837), providing for noting of record the assignment of mortgage notes had been repealed.

5. The mortgagor's employment of the title company to examine her title was not notice to her of the assignment by that company of the bonds which she subsequently executed to it.

6. The fact that the agent of the assignee of the bonds, prior to their purchase, made inquiry of one whom the obligor had employed as her agent in improving the mortgaged property as to her solvency, was not notice to her of the subsequent sale of the bonds, her agent having no authority to bind her as to that matter.

7. The mortgagor not being estopped to plead payment, those who claim under her are in an equally good position.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by Blanche Carr and Annie Carr against Kate S. Murray and others for an injunction and to have the amount of certain mortgage bonds credited upon certain purchase-money notes. Judgment determining priority of liens and granting certain other relief, and the Fidelity Trust & Safety Vault Company and others appeal. Reversed.

Shackelford Miller, Thos. W. Bullitt, and Barnett & Barnett, for appellant Fidelity Trust & Safety Vault Co. W. W. Thum, Phelps & Thum, W. S. Pryor, and J. T. O'Neal, for appellant Murray. Matt O'Doherty, for appellees Blanche and Annie Carr. Isaac T. Woodson, for appellee Jean Ross.

DU RELLE, J. On August 23, 1895, Mrs. Kate S. Murray, desiring to improve certain property owned by her, executed to the German-American Title Company her three bonds for \$500 each, one for \$300, and one for \$50, all due two years from date, with interest coupons attached, payable to the company or bearer at its office. To secure the payment of these bonds, she executed and delivered to the company a mortgage upon a lot 30x180 feet on the west side of Second street in the city of Louisville. The company was organized under chapter 56, Gen. St., and authorized by its articles to examine titles, lend money on coupon bonds and notes secured by mortgage of real estate, to sell, assign, transfer, and pledge the same to investors, and to act as agent in such transactions and in the sale of real estate. On August 26, 1895, the company sold and delivered the five bonds to Miss Jean Ross. The assignment of the bonds was not noted of record upon the deed book, as it is provided may be done by the act of March 18, 1876, to regulate the release of liens. Gen. St. p. 837. Negotiations were pending between Mrs. Murray, through a real-estate agent, and the Misses Carr, for a sale of the land in question, and, an agreement having been reached, the Misses Carr employed the title company to examine the title to the land for them, and a certificate of title was issued to them by the company. On December 7, 1895, Mrs. Murray sold the Second street lot to Misses Blanche and Annie Carr for \$3,800, \$750 of which was paid by each of the Misses Carr by her check drawn on the Louisville Trust Company, payable to the title company, and for the remaining \$2,300 of which the Carrs executed three notes to Mrs. Murray,—two for \$800 each, and one for \$700,—due in one, two, and three years, respectively. These notes were delivered to the title company, which delivered Mrs. Murray's deed. The deed, which had already been acknowledged by the vendor, contained

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

at the foot, and after the signature and certificate, this unsigned release: "Being fully satisfied, the German-American Title Company, by its president, hereby joins in this deed for the purpose of releasing, and does hereby release, all its right, title, and interest in the within property, and for this purpose only." After the delivery of the deed and its receipt of the checks and notes, the title company proceeded to adjust matters with Mrs. Murray. It retained the check of the Carrs and one of the notes for \$800 which Mrs. Murray assigned to it, and delivered to her the remaining notes, one for \$800 and one for \$700, paying her the difference between the \$1,850 of bonds and the \$2,300 which it had thus received in the two \$750 checks and the \$800 note. It pledged the \$800 note in December, 1895, to the Louisville Banking Company as collateral security for certain indebtedness owing by it to the banking company. About the same time Mrs. Murray sold the two notes held by her to the Fidelity Trust & Safety Vault Company. In May, 1896, the German-American Title Company made an assignment of all its property for the benefit of its creditors. Some time after the assignment of the title company, Mr. Friddle, the uncle of Miss Jean Ross, called upon the Carrs, and informed them that his niece was the holder of the \$1,850 of mortgage bonds upon the property. This, they claim, was the first intimation they had received of the existence of the mortgage. In great alarm they proceeded to file their petition in this case against Mrs. Murray, the banking company, the trust company, Miss Ross, and the title company, averring a breach of the covenant of good title and against incumbrances in the deed from Mrs. Murray, seeking an injunction against the banking company and the trust company to prevent them from discounting the purchase-money notes, and praying that the amount of the mortgage bonds, with interest, be credited upon the purchase-money notes in the hands of the trust company and the banking company. They also sued out an attachment against Mrs. Murray. Both the banking company and the trust company denied the right of the Carrs to the relief sought, prayed judgment for interest installments due on the purchase-money notes, and also pleaded as an estoppel the release at the foot of the deed immediately following the signature of Mrs. Murray, as giving actual notice to the Carrs and putting them upon inquiry when they received the deed. It was claimed that the disregard by the Carrs of this notice was the cause of the loss; that they are, therefore, estopped to question their notes; and that the banking company and the trust company had no notice from this release, which was not copied into the record of the deed. The trust company also pleaded a provision of its charter, as amended, providing, "All promissory notes secured by lien on real es-

tate or collateral made negotiable and payable at a chartered bank, or at the office of said company, shall, when indorsed to and purchased by said company, be placed on the footing of foreign bills of exchange;" and that by the purchase by it of the two notes which it holds they were placed on the footing of foreign bills of exchange. The Carrs demurred to that part of the answer of the trust company which claimed that the notes held by it had been placed upon the footing of bills of exchange, and this demurrer was sustained by the trial court. The banking company pleaded in addition that, after the assignment of the title company, it notified the Carrs that it held one of the notes, and that they called at its office, and stated they had no defense to it; but for which statement the banking company would have discounted the note, and placed it upon the footing of a foreign bill of exchange. In response to the cross petition of Miss Ross, setting up her purchase of the Murray bonds, and calling upon the banking company and the trust company to assert their claims, they answered, denying her ownership of the bonds, or that they were unpaid, and pleading that no assignment had been noted on the record in the county clerk's office; that the title company was the owner and holder of the bonds, and that on December 10th Mrs. Murray paid for and satisfied the bonds issued by her to the title company, now claimed by Miss Ross. Mrs. Murray also pleaded her transaction with the title company as a payment of the bonds held by Miss Ross. The trial court, upon final hearing, held the Murray bonds a superior lien upon the land; that their existence was a breach of the warranty against incumbrances in Mrs. Murray's deed to the Carrs, and therefore the Carrs were entitled to be credited pro rata with the amount of the Murray bonds upon their purchase-money notes in the hands of the banking company and the trust company; that neither the title company nor Speckert, its managing officer, was agent of the Carrs, but that they were the agents of Mrs. Murray; that, as Mrs. Murray had executed the bonds to the title company to be sold to investors, and knew they were not due, and knew also that if the title company had sold them it had no right to receive payment before maturity, a payment by her to the title company of the bonds before maturity would not be a payment so far as Miss Ross, the innocent purchaser, was concerned; and that Mrs. Murray and her assignees were estopped from disputing the right of Miss Ross to collect her bonds and enforce her lien. It therefore gave personal judgment in favor of Miss Ross against Mrs. Murray for the amount of the bonds, with interest and costs; adjudged Miss Ross a first lien upon the land; prorated the aggregate amount of the bonds, interest, and costs upon the purchase-money notes in the hands of the banking company and the trust

company; gave a second lien in favor of the banking company and the trust company for the remainder of the purchase-money notes, after crediting the bonds held by Miss Ross, with interest and costs; and gave judgment against the Carrs in favor of the trust company and the banking company for the balance of the purchase-money notes held by them after crediting the pro rata amounts of the Murray bonds thereon.

A number of exceedingly interesting legal questions are presented and elaborately argued by counsel, but, in the view we have taken, it is not necessary to consider them all. The first question to be considered is as to the effect of the transaction between the Carrs, the title company, and Mrs. Murray upon the relative rights of Mrs. Murray and Miss Ross. Mrs. Murray had borrowed from the title company \$1,850. She executed therefor nonnegotiable obligations called "bonds," secured by mortgage upon the real estate which she desired to improve. The mortgage was in the ordinary form. There was an indorsement upon the bonds reciting that they were secured by a deed of trust, and a recital to the same effect was included in the face thereof. But this recital, in our opinion, showed nothing except what the law itself implied, viz., that the mortgage (called a deed of trust), was a security for the payment of the bonds, which the law made assignable, and which Mrs. Murray is presumed to have known were assignable, under the statute. There is nothing in the recital to indicate a purpose on her part that the bonds should be sold to raise money for her use any more than there is on the face of any assignable instrument. There was, therefore, no estoppel against Mrs. Murray to be raised from the form of the bonds or of the mortgage. Nor do we think that leaving the money in the hands of the title company by Mrs. Murray was in any sense the creation of an agency, whether, as she claims, she left the money on deposit with the title company because Speckert told her the rule of the company required it in such a case, where it was borrowed for the purpose of improving the mortgaged property, or whether she did so for her own convenience. Giving the fullest effect to the evidence which tends to show the title company was her agent, it tends to show only an agency for the expenditure of the money she borrowed in the improvement of her property, and it seems to us insufficient to show that. The title company held her money. By her direction, and upon her orders, it paid the money out in extinguishing the vendor's lien against the property, in payments to the contractor who was building her house, and in addition seems to have charged for its services in examination of the title for her and in surveying the property. She employed a real-estate agent (one Gardner) to sell the property. When he reported that a sale had been ac-

complished to the Misses Carr for \$3,800, she went to his office, and from there went with a clerk to the county clerk's office, where she signed and acknowledged the deed prepared by Gardner. This deed was left with Gardner. Gardner left the deed with the title company to be delivered to the Carrs upon their payment of the money. The Carrs had employed the title company to examine the title, and had received a certificate that the title was good. When they went to the title company's office to conclude the transaction with Mrs. Murray, she was not there, but Speckert, the president of the company, told them he had the deed. It is not necessary to consider the discrepancy between their statement and that of Waters as to what they said on that occasion, or whether they said anything which indicated they had actual knowledge of the existence of the mortgage bonds. They looked at the deed to see whether it had been signed by Mrs. Murray. They then delivered to Speckert their two checks for \$750 each, payable to the order of the title company, and their three notes, aggregating \$2,300, payable to the order of Mrs. Murray. We do not consider it essential to determine whether they thereby created an agency in the title company for them, or thought they were dealing with the agent of Mrs. Murray, or intended to pay off the bonded indebtedness upon the property. The probabilities seem to be that they knew nothing of the outstanding bonds; that they had no idea of creating an agency, except for the mere purpose of turning over the checks and notes to Mrs. Murray; and that the checks were made payable to the title company on the suggestion of Speckert, and the deed left with him to be recorded. Whether the Carrs saw the unsigned release, purporting to be made by the title company, at the foot of the deed, seems to us to be immaterial. If they saw it, it gave them notice of nothing except that the title company had a claim, and the title company had notified them, and had agreed to give them a certificate that the property was free from incumbrance. When Mrs. Murray saw Speckert he appears to have informed her of what had taken place, to have kept the two checks, which were payable to his company, and obtained from her the assignment of one of the notes, for the purpose of extinguishing the mortgage and bonds executed to his company, paying her the difference between the amount of the checks and note and the amount of the mortgage bonds. This, we think, under numerous and recent decisions of this court, was a payment of the bonds, of whose transfer to Miss Ross Mrs. Murray had no knowledge. *Insurance Co. v. Hall*, 50 S. W. 254; *Insurance Co. v. Hoffman*, Id. 979; *Schnabel v. Title Co.*, 53 S. W. 1081; *Waggoner v. Same*, 56 S. W. 961; *Levy v. Rudolph*, Id. 988. *Coleb. Coll. Sec. (2d Ed.)* §§ 187-192.

In this connection it may be observed that some stress is laid by counsel for Miss Ross on what is claimed to be an insufficiency of denial of notice by Mrs. Murray of the transfer of the bonds. A careful examination of the pleadings has led us to the conclusion that the denial was sufficient, and the issue throughout the case was treated as made up on this question. Nor do we think that Mrs. Murray's employment of the title company to examine her title can be treated as notice to her, in any sense of the word, of the assignment by that company of the bonds which she subsequently executed to it. When Mr. Friddle, acting for Miss Ross, bought the bonds, he seems to have inquired of Mr. Gardner as to Mrs. Murray's solvency, and to have been assured that she was solvent. Assuming that Mr. Gardner was Mrs. Murray's agent in the building of the house, it does not at all follow that he had authority to bind her in any way by his representations upon another matter, or that notice to him that Friddle was thinking of buying the bonds was notice to Mrs. Murray that Friddle subsequently did so. The bonds were bought by Miss Ross, and assigned to her by the title company.

Some question is made as to whether the act of March 18, 1876, "To regulate the release of liens" (Gen. St. p. 837), providing for the noting of record of assignments of notes named in any deed or mortgage, is repealed by the failure to re-enact it in any session act since the adoption of the present constitution. On the other hand, it is suggested that "An act concerning liens," approved February 25, 1893, has no repealing clause, and that in that act (Acts 1891-93, p. 518; Ky. St. § 2498) a reference is made to the act of March 18, 1876, by the provision that "the assignment of the purchase-money notes or bonds may be noted of record, as in cases of assignment of lien notes in deeds." But the decision of this question is not necessary, for the reason that Mrs. Murray had the right, in the absence of notice of the transfer, to pay the bonds to the payee, even if the act of March 18, 1876, was repealed. If, as seems probable, the act was not repealed, she had the right to so pay them, if Miss Ross, by her own laches, had failed to give constructive notice of the transfer by having it noted of record in accordance with that act. It follows, therefore, that, Mrs. Murray not being estopped to plead payment as to the bonds held by Miss Ross, those who claim under her are in an equally good position. The Ross bonds being paid, there is no conflict between the Carrs and Mrs. Murray, nor between the Carrs and holders of their purchase-money notes. So it becomes unnecessary to consider either the elaborately argued question of the unconstitutionality of the provision in the charter of the Fidelity Trust & Safety Vault Com-

pany or the plea of estoppel by the banking company against the Carrs.

For the reasons given, the judgment is reversed upon all the appeals, and the cause remanded, with directions to enter a judgment in accordance with this opinion.

THOMAS et al. v. WRIGHT et al.¹

(Court of Appeals of Kentucky. Feb. 27, 1902.)

DEEDS—EXECUTION OF POWER.

Where a testator, by his will, gave his entire estate to his wife for life, with power to dispose of half thereof among the children of his brother and sister in any proportion she might choose, the other half to go to a grandniece, and then provided by the third clause that his wife should "have full power to sell and convey any or all of said estate at her pleasure, the proceeds to be held subject to the same limitations as the property sold," a deed executed by the widow purporting to convey the fee-simple title to land belonging to the estate, which was signed by her as executrix and also as an individual, must be regarded as in execution of the power conferred by the third clause of the will, it not being necessary that the deed, in order to have that effect, should recite that it was made in execution of the power.

Appeal from circuit court, Scott county.

"Not to be officially reported."

Action by S. A. Thomas and others against George C. Wright and others to recover land. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. A. Violet, H. P. Montgomery, and John L. Scott, for appellants. R. E. Roberts, for appellees.

PAYNTER, J. The appellants, heirs of Alexander Thomas, seek to recover a boundary of land containing 20 acres. It belonged to Alexander Thomas, deceased. His widow, Eliza Thomas, sold and conveyed it to the appellee G. O. Wright for the sum of \$400. The question involved must be determined by the interpretation of the will of Alexander Thomas. The parts necessary to be considered read as follows: "I, Alexander Thomas, of Scott county, Ky., do make this, my last will and testament, hereby revoking all others heretofore made by me. (1) I give to my wife, Eliza Thomas, all my estate of every description that I may own at my death, for her sole and separate use, to the exclusion of any husband she may hereafter have, for and during her natural life, with power to dispose of half thereof among the children of my brothers Robert and G. F. Thomas and my sister Keziah Thomas in any way or in any proportion she may choose, during her life, or by last will when she dies. (2) At the death of my wife one half of said estate is to go to my grandniece Emma Lee Kenney, granddaughter of my brother G. F. Thomas, and in default of the execution of the power of appointment

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

given my wife in the first clause of this will the other half of my estate is to go to the children of my brothers Robert and G. F. Thomas and my sister Kexiah Thomas, to take per capita. (3) My said wife is to have full power to sell and convey any or all of said estate at her pleasure, the proceeds to be held subject to the same limitations as the property sold." The widow is now dead. For Wright it is claimed that the testator's wife had the power to and did sell the land by virtue of the third clause of the will. For the appellants it is claimed that the making of the deed was not in execution of the power of appointment given her under the will, because there is no recitation in the deed made to Wright that it was made in the execution of the power. The wife took a life estate in the property. There was a power of appointment under the first clause of the will, by which she could dispose of the property to certain persons in any proportion she chose during her life or by will. Under the second clause of the will one half was to go to her grandniece Emma Lee Kenney; in default of the execution of the power of appointment given the wife, the other half of the estate was to go to the children of two brothers and a sister. By the third clause, if she sold the estate as authorized, then she was to hold the proceeds subject to the same limitations as the property sold. Some of the authorities cited from other jurisdictions seem to be to the effect that, where the testator creates a life estate with the power of appointment, then the deed must recite that it was made in the execution of the power; otherwise it will be held to be a conveyance of the life estate. This is not the rule of this court. Neither does *Payne v. Johnson's Ex'rs*, 95 Ky. 175, 24 S. W. 238, 609, so announce that to be the rule. In that case the two writings under consideration were not deeds of conveyance executed for the purpose of vesting some one with the title to the property, but they were simply intended to create a lien to secure the payment of the grantor's debts. It was said in that case (page 183, 95 Ky., and page 240, 24 S. W.), "The execution of the power must be in express terms or by necessary implication;" and also the court quoted with approval from *Funk v. Eggleston*, 92 Ill. 515, 84 Am. Rep. 136, where it was said: "But it is not necessary that the intention to execute the power shall appear by express terms or recitals in the instrument. It is enough that it shall appear by words, acts, or deeds demonstrating the intention." The deed to Wright purports to convey a fee-simple title to the land "and forever." It is signed, "Eliza Thomas, Executrix of A. Thomas," and "Eliza Thomas." Evidently it was so signed with the intention of conveying whatever interest she held as executrix and as an individual. It was intended by signing the deed in that way to convey the whole estate. Had she desired

to sell and convey her life estate, she would not have also executed the deed as executrix, because the other devisees had no interest in her life estate. For the reasons we have given, we think the purpose to convey the land by virtue of the third clause of the will is made manifest by the deed itself.

The judgment is affirmed.

BLANKENSHIP et al. v. COMMON-WEALTH.¹

(Court of Appeals of Kentucky. Feb. 28, 1902.)

HOMICIDE—INDICTMENT—INSTRUCTION AS TO SELF-DEFENSE.

1. An indictment for murder, charging that defendants murdered deceased "by shooting him with powder and leaden balls," is sufficient, though it does not state the kind of firearm used, and does not state that the weapon used was a deadly weapon.

2. The court properly instructed the jury that they could not acquit on the ground of self-defense if they believed that accused "sought out the difficulty with the deceased, and continued to engage in and urge the difficulty up to and including the time of firing the fatal shot."

Appeal from circuit court, Pike county.

"Not to be officially reported."

Mont Blankenship and others were convicted of the offense of manslaughter under an indictment for murder, and they appeal. Affirmed.

W. S. Harkins, for appellants. R. J. Breckinridge, for the Commonwealth.

WHITE, J. The appellants were indicted by the grand jury of Pike county charged with the murder of Meyer Hurley. Upon trial they were convicted of manslaughter, and their punishment was fixed at 21 years for each in the penitentiary. To reverse that judgment this appeal is prosecuted.

Objection is made to the sufficiency of the indictment, the accusing part of which reads: "The said defendants, on the 29th day of January, 1901, in the county and circuit aforesaid, did unlawfully, willfully, maliciously, feloniously, by and of their malice aforethought, kill and murder Meyer Hurley by shooting him with powder and leaden balls." Then follows the charge that one shot and killed and the other two were there present encouraging the act. The criticism counsel makes on the indictment is that there is no weapon used, there is no allegation that deceased was shot with a gun or pistol or other weapon, and that, therefore, he was not notified as to what charge he would be called upon to meet. The requirements of an indictment are that it must contain a statement of the acts constituting the offense in ordinary and concise language, so that a person of common understanding may know what is intended, and with such degree of certainty as to enable the court to pro-

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nounce judgment of conviction. Section 122, Cr. Code Prac. It has been held that on a charge that shooting was done with a gun proof that the weapon used was a pistol was not a variance. Whart. Cr. Law, § 519; Rob. Cr. Law, § 215. Following that rule, the indictment would have been sufficient if any firearm had been charged as the weapon used to fire the shot, and, although one firearm was charged, any other firearm might have been proved. In the indictment here the charge is "by shooting him with powder and leaden balls." This to a person of common understanding would mean and does mean that some sort of firearm was used, because it is only by means of some sort of firearm that powder and leaden balls may be shot. It would be just as technical to require the word "gunpowder" to be used in an indictment as it would be to require an averment that a gun, meaning some sort of firearm, was used. Technically, powder may be a mass of fine particles of any substance, yet, when used in connection with an allegation of shooting and the use of leaden balls, any person would know that gunpowder was meant. So, when the averment of a shooting with powder and leaden balls is made, the most ordinary person would understand that some sort of firearm was used in the shooting. The kind of firearm is immaterial. It was also unnecessary to aver that the weapon used was a deadly weapon, as the averment is that appellants shot and killed deceased using powder and leaden balls. *Jeffries v. Com.*, 84 Ky. 237, 1 S. W. 442; *Sims v. Same* (Ky.) 13 S. W. 1079. We are of opinion the indictment was sufficient and there was therefore no error in overruling the demurrer.

Counsel insists that instruction No. 4, given, is erroneous. It reads: "If the jury believe from the evidence that the accused sought out the difficulty with the deceased, and continued to engage in and urge the difficulty up to and including the time of firing the fatal shot, they cannot acquit the accused upon the ground of self-defense or apparent necessity as defined in instruction No. 3." It will be noticed that this is not the oft-condemned instruction using the words "brought on the difficulty." This instruction uses the expression "sought out the difficulty with the deceased and continued," etc. The word "out" might have been omitted, but its use does not change the meaning. It is well-settled law that a person may do acts that will deprive himself of the right to plead self-defense, and we are of opinion that the instruction given states clearly under what circumstances and by what acts appellants had been deprived of the right to claim self-defense or apparent necessity. Counsel admits that, as an abstract proposition of law, this instruction is correct, but argues that there was no testimony by which it was authorized. We are of opinion, however, that there was testimony that authorized the giv-

ing of that instruction. There was testimony of at least one witness that tended to show that appellants sought the difficulty, and continued to engage in and urge the difficulty up to the shooting. There was no error in giving instruction No. 4, supra, nor in any other instruction given. They seem to present the law of the case under the testimony as given, fairly. Counsel complains of no error in the admission of evidence, and we have discovered none.

Appellants have had a fair trial before a jury of their county, and, as there is no error of law shown by this record, the judgment of conviction will be affirmed.

PEAK'S ADM'R v. LOUISVILLE & N. R. CO.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

CARRIERS—DUTY TO LICENSEE ON FREIGHT TRAIN—ALIGHTING FROM RAPIDLY MOVING TRAIN.

Where one who was permitted to ride on a freight train as a mere matter of accommodation was thrown from the train by its motion as he was in the act of leaving it as it moved rapidly past a station at which the servants in charge had assured him it would stop, the railroad company was not liable for his death resulting therefrom, though one of the servants in charge had told him that it was time to prepare to get off; the danger of doing so being obvious.

Appeal from circuit court, Christian county.

"Not to be officially reported."

Action by the administrator of Joseph Peak against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

J. T. Hanberry, for appellant. Joe McCarroll and E. W. Hines, for appellee.

PAYNTER, J. This appeal is prosecuted from a judgment of the court sustaining a demurrer to the petition, and dismissing the petition upon appellant's failure to plead further. It is averred in the petition that the decedent, Peak, lived at Crofton, Ky.; that he approached a section of the appellee's freight train standing upon the side track, and made arrangements with its agents and employes to allow him to ride to Crofton on it; that he was told that it would stop at Crofton; that, relying upon that statement, he boarded the train before it started; that the conductor was informed that he had boarded the train for the purpose of going to Crofton; that the train started on its journey; that, with great recklessness and gross negligence, the train ran through Crofton at a very rapid and dangerous rate of speed, without slacking up or lowering its speed; that while it was passing through Crofton one of the employes in charge of the train told him that it was time he was getting ready to get off; that the train had

¹Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

not then lessened its speed, but it was gaining momentum at every revolution of the wheels; that, in obedience to the instruction of the appellee's employé, he began preparing to get off, but while he was in the act of doing so he was jerked or thrown upon the track, and killed by the train. It was averred that the conductor knew of the presence of the decedent on the train, although he made no effort to advise him that the train would not stop at Crofton; that the decedent was a man entirely unused to trains and railroads, and relied upon the representations of appellee's employés. The inferences to be drawn from the allegations are that decedent was not a passenger on the train, and that he was merely permitted to ride as a matter of accommodation; from the averment, the train was running at a rapid rate of speed at the time the decedent attempted to leave it. He knew the train did not slacken its speed for him to alight. He knew that it was increasing its speed. He was bound to know that it was extremely hazardous to attempt to alight from it under such circumstances. He was not placed in a perilous position by any negligence of the agents or servants of the appellee, which required him to exercise a judgment as to whether it was less hazardous for him to remain upon the train or leave it. The most that could be said is that the agents of appellee violated their promise to stop the train at Crofton to permit him to alight therefrom in safety. He was bound to know that he imperiled his life or limb in attempting to leave the train under the circumstances detailed in the petition. If he were a sane man,—and we must presume he was,—he knew that, although an employé suggested it was time to get ready to leave the train, he endangered his life by attempting it. The danger was so obvious and apparent that he should not have attempted to leave the train, although he was advised by some one connected with the train that it was time to get ready to do so. There may have been a promise by the employés of appellee to stop the train at Crofton, and he would have been inconvenienced by being carried by that place. Still that would not authorize him to attempt to alight from a rapidly moving train at the risk of appellee. It was said in *Durham v. Railroad Co. (Ky.)* 20 S. W. 737: "It cannot be said that a passenger might, under such circumstances, jump from the moving train simply because the servant of the company told him to do so." In that case the injured party was a passenger, and jumped from a train running 10 or 15 miles an hour under the advice of the servant on the train. The court held he was not entitled to recover. The death of Peak was the result of his own recklessness, and his personal representative is not entitled to recover for the loss of his life.

The judgment is affirmed.

CASTEEL et al. v. BAUGH'S ADM'R.¹
(Court of Appeals of Kentucky. Feb. 26, 1902.)

VENDOR AND PURCHASER—CONTEST BETWEEN EQUITIES.

Where the holder of a title bond sold his equity, executing to the purchaser a new title bond, and thereafter attempted to sell his equity to another, delivering to him the original bond, the equity of the first purchaser, being the older, must prevail.

Appeal from circuit court, Laurel county.

"Not to be officially reported."

Action by J. R. Baugh's administrator against H. R. Casteel and others to enforce a purchase-money lien. Judgment for plaintiff, and defendants appeal. **Affirmed.**

H. C. Eversole, for appellants. Charles R. Brock, for appellee.

O'REAR, J. H. R. Casteel was the owner of an undivided half interest in a tract of land in Laurel county. He conveyed this interest by title bond to Richard Wilson. Wilson, by another bond for title, conveyed the interest thus acquired to Isaac Hughes on January 4, 1873. Hughes executed to Wilson the note sued on in this action, as evidence of the purchase price, or a part of it. On March 4, 1873, Wilson assigned that note to J. R. Baugh. Some years after the transaction above set out, D. W. Casteel, a brother of H. R. Casteel, and brother-in-law of Wilson, obtained possession of the original title bond from H. R. Casteel to Wilson; D. W. claiming that he had bought the land of Wilson. In this suit by Baugh to enforce the purchase-money lien evidenced by Hughes' note, the Casteels and Wilson and Hughes are made parties defendant. Baugh charged in his petition that D. W. Casteel knew of his (Baugh's) ownership of the Hughes note and of Hughes' claim at the time of his purchase from Wilson, if he did purchase it. He further pleaded that in fact Hughes never rescinded the sale to him from Wilson, and that the claim of D. W. Casteel that he had purchased Wilson's title was a pretense and a fraudulent transaction. There is proof to support appellee's claim that D. W. Casteel knew of Hughes' title and knew of appellee's lien before he acquired the Wilson bond. While this is denied by appellants' testimony, many circumstances shown in the record tend to corroborate appellee's version of the transaction. The evidence showed that Isaac Hughes did not in fact rescind his trade with Wilson, but, having become involved in some difficulty, had for a time left that community. His wife then delivered his bond to Wilson, for what consideration is not shown. She is not shown to have had express authority to represent her husband in that transaction, and, in the absence of such authority, she had no right to dispose of his property, without or

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

for consideration. Therefore Wilson's equity remained in Isaac Hughes, his first vendee. He owned nothing to transfer to D. W. Casteel. The record does not clearly show whether Hughes' family was living on the land at that time. But it does show that they had been just before, with claim of ownership under purchase from Wilson, and had, as such purchasers and owners, set improvements on the premises. This was notorious in that community. But what we decide is that Wilson had originally but an equity, by his bond from H. R. Casteel. This he transferred to Hughes by his title bond, and to appellee by assignment of Hughes' purchase-money note. Any subsequent purchaser from Wilson, buying that same equity, must take notice of its actual status. His position is different from one who buys the legal title from the apparent owner. The latter purchaser's diligence is made satisfactory, ordinarily, when he has examined the proper public records, and found nothing there, and nothing connected with the possession of the property selling, to put him upon notice of outstanding equities. But a purchaser of such an equity as this must know that he is purchasing something incomplete, and subject necessarily to some condition, which may or may not have been performed. He buys merely what his seller had,—no more. He takes the chance of its being as represented. Therefore the doctrine, "In a contest between equities, the elder prevails." In this case the elder equity is with appellee.

The circuit court so adjudged, and its judgment is affirmed.

REID'S ADM'R et al. v. BENGE.¹

(Court of Appeals of Kentucky. Feb. 23, 1902.)

WILLS—DELAY IN PROBATING—RIGHTS OF PURCHASER FROM HEIR—ESTOPPEL.

1. A will may be probated at any time within 10 years after testator's death.
2. The interest of devisees vested at the instant of testator's death, though the will was not probated for seven years thereafter.
3. Where a will was not probated for seven years after testator's death, and in the meantime the only heir had taken possession of the land devised, and executed a mortgage thereon, the devisees are not estopped to claim the land as against the mortgagee, as they were ignorant of the existence of the will, and therefore not called upon to speak sooner.
4. The failure of the testator to disclose to some person where his will could be found, so that it might have been probated sooner, cannot operate as an estoppel upon the devisees.

Appeal from circuit court, Clay county.

"To be officially reported."

Action by E. J. Benge against J. W. Reid's administrator and others to enforce a mortgage lien. Judgment for plaintiff, and defendants appeal. Reversed.

James D. Black, for appellants. D. K. Rawlings, for appellee.

WHITE, J. In October, 1888, T. T. Reid died in Clay county, never having married or had issue. His only heir at law was J. W. Reid, Sr., his father, the mother having died prior to the death of T. T. Reid. After the death of T. T. Reid, his father, as heir at law, took possession of the real estate left by T. T. Reid, containing probably 300 acres. In April, 1890, J. W. Reid, Sr., borrowed of appellee, E. J. Benge, \$600, and to secure its repayment executed a mortgage on the tract of land that had formerly been owned by T. T. Reid, and which J. W. Reid, Sr., then thought he had inherited from his son T. T. Reid. This mortgage was properly executed, delivered, and put to record in the proper office. After the execution and delivery of this mortgage to appellee, the mortgagor, J. W. Reid, Sr., died, and administration was had on his estate by J. W. Reid, Jr. The appellee instituted this action to collect her debt of \$600 from the estate of J. W. Reid, Sr., and to enforce her mortgage lien on the tract of land. The administrator and heirs at law of J. W. Reid, Sr., were all made parties. To this action certain of the children of J. W. Reid, Sr., brothers and sisters of T. T. Reid, deceased, filed answer, being already parties hereto, and denied that at the date of the execution of the mortgage by J. W. Reid, Sr., to appellee, or at all, the said J. W. Reid, Sr., had title to the land, or that the same ever descended to him from his son T. T. Reid, their brother. They pleaded that at the regular term of the Clay county court in May, 1895, there was produced and probated the will of T. T. Reid, by which will the land mortgaged was devised to them in conjunction with their father, J. W. Reid, Sr.; that is to say, the father was devised one-fourth the land, and the other three-fourths to appellants, his brothers and sisters. Appellants therefore denied appellee's right to a lien upon the land, at least to the extent of their interest,—three-fourths,—derived under the will of T. T. Reid. By reply the existence and probate of the will was formally denied. The only proof taken was that of appellee, who, if competent for any purpose, established the justness of her claim against J. W. Reid, Sr., which was never an issue, and her entire ignorance of the will of T. T. Reid until it was probated in 1895, more than five years after she had loaned the money to J. W. Reid, Sr., and accepted the mortgage as security. With this proof and the copy of the probated will and orders of the county court the case was submitted for final hearing. The court adjudged to appellee a lien on the whole of the land to satisfy her debt, and decreed a sale thereof, and to reverse that judgment this appeal is prosecuted.

It may be said at the outset that the

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is no pretense or plea that the devisees (appellants) were guilty of any fraud by suppressing the will, or in fact knew that such paper existed till long after the execution of appellee's mortgage. It seems to be conceded that all parties acted in good faith upon the facts as they knew them. The question, then, presented for our consideration, is: Is the equity of appellee, acquired under the mortgage executed by J. W. Reid, Sr., when all parties believed he was the legal owner by reason of being heir at law, and five years before the discovery of the will of T. T. Reid, superior to the legal title of the devisees under the will? It is conceded that no statute of limitation applies to bar appellants' right to recover, for it is well settled in this state that a will may be probated at any time within 10 years after the death of the testator. *Allen v. Froman*, 96 Ky. 313, 28 S. W. 497. The will in the case at bar was probated seven years after testator's death. There is no plea of fraud either in suppressing the will or in inducing the appellee to part with her money on the faith of the mortgage security by any of the appellants, at least with any knowledge or information of their rights in the land. As we understand the contention of counsel, his position is that by reason of the negligence of testator in so placing his will as not to be found for seven years after his death, though this may not have been actually intended, and by reason of laches of appellants, devisees thereunder, in not producing the will, the appellee has acquired an equitable claim superior to the legal title under the will. By section 16, c. 113, Gen. St., in force at the death of T. T. Reid, it is provided that the will speaks as of the testator's death, unless a contrary intent appear by the will. *Alexander v. Waller*, 6 Bush, 330. It was held as far back as 1827 in the case of *In re Payne's Will*, 4 T. B. Mon. 423, that the interest of a devisee vested the instant of testator's death, and was not lost by destruction of the will before probate. This case has never been questioned in this state, so far as we are informed. Applying that rule here, it is clear that at the death of T. T. Reid, in 1838, the appellants, devisees under his will, had a vested estate in his lands, as the will provided. To divest them of this title there must be either conveyance, prescription, or estoppel in some form. It is not pretended that there is a conveyance, or that their right to claim under the will is barred by any statute of limitation. An estoppel is defined by Bouvier to be "the preclusion of a person from asserting a fact by previous conduct inconsistent therewith on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question." Stephens defines "estoppel": "A preclusion in law which prevents a man from alleging or

denying a fact in consequence of his own previous act, allegation, or denial of a contrary tenor." Blackstone's definition is: "A special plea in bar, which happens where a man has done some act or executed some deed which precludes him from averring anything to the contrary." It is the foundation of the doctrine of estoppel that the party estopped has designedly so acted or spoken as to induce others to change their position injuriously to themselves; in other words, the doctrine of estoppel is founded on the fraud of the party who is held estopped. But, to be guilty of fraud, a person must knowingly do or say that which is inconsistent with honesty and truth, or, regardless of what the truth may be, induce a person to act. There can be no case found where any person was ever charged with fraud or held to be estopped where he was ignorant of the truth and did no act at all. In the case at bar the devisees under the will of T. T. Reid did nothing, said nothing, and at that time were in entire ignorance of the existence of a will, or that they had any rights in the property. In fact, if there was no will, which they then believed to be the truth, they knew that they had no right, title, or interest in the land. They knew that without a will the land descended to their father, J. W. Reid, Sr. There can be no act of appellants that could by any rule of law be held to estop them from claiming under the will of T. T. Reid. It may be said that a person may speak a falsehood or act a falsehood, but, if he does no act, and remains silent, he cannot be charged with fraud or be estopped without he knew the truth when his nonaction or being silent is said to have induced another to act to his own injury. Likewise there can be no estoppel of appellants by reason of the act of the testator in not disclosing to some person the place where his will could be found. He was not called upon to publish the fact that he had made a will for the protection of appellee, for it was some two years after T. T. Reid's death that appellee had any claim of lien upon the land. Surely, a dead person cannot be charged with negligence, or be estopped, or create matters of estoppel by a failure to act after his death; yet this would be the effect of holding that appellants are chargeable with the fact that the will was not found before appellee's mortgage was executed by reason of some act or omission of T. T. Reid. There seems to be a dearth of authority on the exact question here presented. After diligent search learned counsel for appellee finds only one case that approaches the question, and after diligent search by us we have failed to add another. The case found is *Chadwick v. Turner*, 1 Ch. App. 310. There the court held, under a registration act, that after six months, there being no registration of a will, the devise would take subject to a

mortgage executed by the heir at law. The case cited, coming from such eminent authority, would have great weight with us if it did not depend entirely on an act requiring registration of wills. But that case is not authority in this state for the reason that here we have no law requiring wills to be registered or recorded within any given time. This court has held that a will may be probated at any time till the cause of action to probate is barred by the 10-year statute of limitation. There is no statute requiring wills to be registered or recorded or probated, like there is of conveyances; and in the absence of such statute, and in the absence of fraud in suppression or destruction of wills, the devisees therein take the property when the will is probated, which, as we have said, may be at any time within 10 years from the testator's death.

We conclude, therefore, that appellants have not been divested in any way of their legal title to the three-fourths of the land devised by T. T. Reid, and, not having been divested, it is superior to appellee's mortgage; wherefore, for the reasons indicated, the judgment is reversed, and cause remanded for judgment, with decree of sale in favor of appellee, Bengé, as against one-fourth the land embraced in the mortgage only, and for proceedings consistent herewith.

RILEY v. ROWE et al.

(Court of Appeals of Kentucky. Feb. 28, 1902.)

INTOXICATING LIQUORS — DISCRETION OF TOWN TRUSTEES TO REFUSE LICENSE-APPLICATION AT MEETING CALLED FOR ANOTHER PURPOSE—MANDAMUS.

1. Under Ky. St. § 3704, subsec. 4 (part of charter of towns of sixth class), providing that the granting of licenses to sell liquor shall be "under the exclusive control of the board of trustees, who may refuse to grant license in its discretion," provided, however, that when a majority of the voters have voted in favor of the sale of liquor, "then the said board of trustees of such town shall have no right, power, privilege, or discretion to refuse to grant licenses," the board, while it has no power, after a vote has resulted in favor of the sale of liquor, to arbitrarily refuse all applications for license, still has discretion to refuse to grant a license to an improper person, or for the location of a saloon at an improper place; but it is its duty to grant license to an applicant at a proper place if he is a proper person, and applies in a proper way.

2. The board properly refused a license applied for at a special meeting called for another purpose, at which all the members of the board were not present.

3. As plaintiff has not yet applied for license in a proper way, he is not entitled to a mandamus to compel the trustees to grant him a license, though he alleges that they have declared that they will not grant any license, the presumption being that when they understand their duty, and application is properly made,

they will not refuse to grant license to a proper applicant at a proper place, and thus willfully disobey the positive mandate of the statute.

Appeal from circuit court, Marshall county.

"To be officially reported."

Action by George W. Riley against W. O. Rowe and others for a mandamus. Judgment for defendants, and plaintiff appeals. Affirmed.

Reed, Greer & Oliver and Reed & Oliver, for appellant. J. G. Lovett and L. P. Palmer, for appellees.

HOBSON, J. This case involves the construction of subdivision 4, § 3704, Ky. St., relating to the government of towns of the sixth class. It is insisted that, where a vote has been taken under the local option law, and resulted in favor of the sale, the trustees have no discretion as to the granting of license, and must license all applicants, regardless of their moral character or of the circumstances. The provision is as follows: "The license tax to sell spirituous, vinous or malt liquors shall not be less than one hundred and fifty nor more than five hundred dollars; and no such license shall be issued or granted in any town where the sale of such liquors is now forbidden by law until such law be changed; may impose penalties for violations of the conditions of said license; may provide for the annulment or suspension of the license privilege for violation of the conditions of terms of license, or of the ordinances governing the same; and no license for any business or to any person shall be granted for a longer time than one year, and the granting of licenses shall be under the exclusive control of the board of trustees who may refuse to grant license in its discretion: provided, that in any town of the sixth class, in which the question as to whether spirituous, vinous and malt liquors might or should be sold, has been since September first, one thousand eight hundred and ninety-two, or shall hereafter be submitted to the voters thereof, and the majority of votes cast thereat were or shall be in favor of the sale of such liquors therein, then the said board of trustees of such town shall have no right, power, privilege or discretion to refuse to grant licenses to sell such liquors therein until another election is held therein as provided by general laws and a majority of the voters of said town have voted against the sale of such liquors." The language, "then the said board of trustees of said town shall have no right, power, privilege or discretion to refuse to grant licenses to sell such liquors therein until another election is held," etc., does not aptly convey the idea that the trustees are to have no discretion as to what applicants shall be licensed. The terms used simply deny them power "to refuse to grant licenses." That this was all the leg

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islature had in mind seems clear from the other provisions of the statutes adopted by the same general assembly. It has long been a settled legislative policy in the state to regulate the sale of spirituous liquors, and to grant license only to persons of good character at such places as were reasonably suitable, and in such numbers as the public service probably required. Experience has shown that the selling of whisky by persons of bad character is especially injurious to the community, and most likely to bring about fraud and imposition on those who drink. It has also been shown by experience that the multiplication of saloons beyond the demands of the community also leads to bad results. Therefore, as in the statutes that had long before existed in the state, by section 4203, Ky. St., no license shall be granted if the majority of the legal voters in the neighborhood protest against it, nor to any person of bad character who does not keep an orderly, law-abiding house. These provisions apply outside of incorporated cities and towns. But in the acts for the government of cities of the first, second, third, and fourth classes substantially similar provisions are made. Thus, by section 3033, Ky. St., no license shall be granted to sell liquor in any precinct if the retailing of liquor at the place named will be injurious to the people thereof, or if a majority of them protest against it. In the second, third, and fourth classes discretion is conferred on the legislative board of the cities in general terms. In the act governing cities of the fifth class there is a provision substantially similar to that above quoted as to towns of the sixth class. See section 3637, subsec. 4, Ky. St. But in the act for the government of towns of the fifth and sixth classes large discretionary powers for legislative purposes are vested in the city council or board of trustees, and it would not seem that in the section quoted the legislature had in mind taking away the discretion from the city authorities in these two classes of towns of determining to whom a license should be granted,—a power they had always exercised and is confessedly conferred in all other cases on the authorities intrusted with the power of licensing applicants. It will be observed that in the body of the section these words are used: "The granting of licenses shall be under the exclusive control of the board of trustees, who may refuse to grant licenses." Then follows the proviso that, where a vote is taken under the local option law, and is in favor of the sale, "then the said board of trustees of such town shall have no right, power or privilege or discretion to refuse to grant licenses to sell such liquors therein until another election is held therein as provided by general laws and a majority of the voters of said town have voted against the sale of such liquors." The purpose of the proviso is to limit the general discretion conferred by the preceding words, and to require

the trustees to conform to the popular will by issuing licenses so long as it remains unchanged. Previous to the taking of the vote the sale of intoxicants had not been prohibited in the town. When a vote is taken under the local option law, resulting in favor of the sale in a community in which the sale has not been prohibited, the effect of the vote is simply that the people decline by this vote to put the local option law in effect. The vote in favor of the sale does not have the effect to vest in everybody the right to open and run a saloon who will pay the license fee, regardless of his fitness, or the judgment of the trustees as to the necessity of the saloon or the wishes of the neighborhood. The vote only settles the question that they must issue licenses. They have no discretion to refuse to grant licenses; that is, to license nobody. The trouble the legislature had in mind in adding the proviso was that in some communities, after the people had voted for the sale, the trustees arbitrarily undertook to defeat the popular will by refusing the license to all applicants. This the legislature forbade. But neither the language used nor the context requires the construction that they were to license all applicants without regard to their character, the needs of the community, or the wishes of the neighborhood in which the saloon was to be located. If they had meant to make such a radical change in the existing law, instead of saying that the trustees shall have no right "to refuse to grant licenses" they would have used other language sufficient to convey that idea to the common understanding. The denial of "discretion to refuse to grant licenses" naturally means no more than that the trustees must grant licenses after the vote has been taken and has resulted in favor of the sale. But it leaves unaffected the discretion vested in the trustees for the welfare of the town to determine who is a proper applicant to whom license should be granted. A discretionary power of this character, which is necessary for the well-being of the town, should not be deemed taken away, except by the clearest language, especially where it has been a settled legislative policy to vest it in the officers granting such licenses; and this policy is continued as to all other cities and towns and in all the country districts.

It appears from the record in this case that appellant applied to the city council at a special meeting, which was called for another purpose, and at which all the members of the board were not present. When the meeting was called, the trustees had a right to assume that no other business would be transacted at it than that specified in the notice, and the board properly refused to grant him a license at that meeting. The judgment dismissing his petition was therefore proper. 1 Dill. Mun. Corp. § 264, and note; Mor. Priv. Corp. § 359. But it is the duty of the trustees to grant the license to

an applicant at a proper place if he is a proper person, and applies in the proper way. This duty they are as much bound to perform under their official oaths as any other duty imposed on them by law. Though it is alleged in the petition that they have declared they will not grant any licenses, we cannot believe that, when they understand their duty, they will willfully refuse to obey the positive mandate of the statute, which they have sworn to execute faithfully, and to the best of their ability. It appears from the record that they have fixed the price of the license at \$500, and there is nothing before us to indicate that they will deliberately refuse to discharge their plain official duty under their oaths of office, and grant license to a proper applicant at a proper place.

Judgment affirmed.

GUFFY, C. J. This action was instituted in the Marshall circuit court by the appellant to compel the appellees, trustees of the town of Benton, a city of the sixth class, to grant him a license to retail spirituous, vinous, and malt liquors in said town. It appears from the petition that on the 10th of March, 1898, the board of trustees fixed the price of liquor license at the sum of \$500, and that in May, 1898, an election was held in said town according to law for the purpose of taking the sense of the voters upon the question as to whether or not such liquors should be sold in said town, and it is averred that a majority of those voting voted for the sale of such liquors. It is further alleged that plaintiff was, and had been for several years last past, a saloon keeper engaged in the sale of spirituous, vinous, and malt liquors at his brick storehouse on the west side of Main street opposite the court house in said town; that on the 17th of April, 1899, he appeared before the board of trustees, and made application to said board for license to sell liquor at his brick house aforesaid for a period of one year, and introduced proof that he was a man of good moral character, and kept an orderly house in all respects required by law, and tendered to said board \$500, the price fixed by law for license to sell liquor as aforesaid; whereupon the question was put before the said board by its chairman, W. C. Rowe, as to whether or not said license should be granted; and that W. C. Rowe, L. E. Dood, T. E. Barnes, and Clint Holland each wrongfully and unlawfully, and in violation of this plaintiff's right, cast their vote in the negative, and said board and each member thereof, when they had no right, power, or discretion to refuse to grant plaintiff said license, did wrongfully and unlawfully refuse to grant same. It is further alleged that said trustees each threatened to refuse and prevent this plaintiff from engaging in the said business in said town during all their term of office. Wherefore

he prayed the judge to make a temporary order requiring defendants to grant him the license aforesaid, and for a judgment and decree directing and compelling the defendants to grant him said license. The defendants entered and filed a demurrer to the petition, which demurrer was sustained by the court. Afterwards plaintiff filed an amended petition, and the defendants entered a demurrer to said petition as amended, which was overruled, but the plaintiff withdrew the amended petition, and declined to plead further, and excepted to the ruling of the court in sustaining the demurrer to the original petition, and prayed an appeal to the court of appeals, which was granted. At the March term, 1900, of the Marshall circuit court, the plaintiff offered to file an amended petition, which was objected to by the defendants, and the objection sustained by the court for the reason that it did not state a cause of action, and thereupon plaintiff's action was dismissed, and from that judgment this appeal is prosecuted.

In addition to the averments in the original petition heretofore referred to, the amendment offered alleged that prior to February, 1898, the sale of spirituous, vinous, and malt liquors was permitted in the town of Benton, a vote having been taken on the 2d of June, 1891, which resulted in a majority voting for the sale. The petition then shows that in May, 1898, an election was again held in the town of Benton, and a vote taken as to whether or not spirituous, vinous, and malt liquors should be sold in said town, and that a majority of those voting voted in favor of such sale. It is again alleged that defendants continued to refuse to grant plaintiff license to sell such liquors, and, unless required and compelled to do so by the court, they will continue to so refuse, which, it is alleged, is contrary to law, and in violation of plaintiff's rights, and will cause great irreparable injury to him in preventing him from carrying on and engaging in his business, which he has been engaged in for several years last past. It is the contention of appellant that by the provisions of subsection 4 of section 3704, Ky. St., it was the duty of the defendants to issue the license applied for, and that they had no discretion or right to refuse to grant the license. It is the contention of appellees that the statute in question is unconstitutional, and therefore void. Subsection 4 of section 3704, Ky. St., provides, among other things, that the license tax to sell spirituous, vinous, and malt liquors shall not be less than \$150 nor more than \$500; and no such license shall be granted or issued in any town where the sale of such liquors is now forbidden by law until such law be changed; may provide for the annulment or suspension of the license privileges for violation of the conditions of terms of license, or of the ordinances governing the same; "and no license for any business or to any person shall

be granted for a longer time than one year, and the granting of license shall be under the exclusive control of the board of trustees who may refuse to grant license in its discretion: provided, that in any town of the sixth class, in which the question as to whether spirituous, vinous and malt liquors might or should be sold, has been since September first, one thousand eight hundred and ninety-two, or shall hereafter be submitted to the voters thereof, and the majority of votes cast thereat were or shall be in favor of the sale of such liquors therein, then the said board of trustees of such town shall have no right, power, privilege or discretion to refuse to grant license to sell such liquor therein until another election is held therein as provided by general laws, and the majority of the voters of said town have voted against the sale of such liquors." It will be seen that the foregoing is part of the statute applicable alone to cities of the sixth class. Section 3637, Ky. St., with reference to cities of the fifth class, authorizes and provides for liquor license, and has substantially the provision above quoted from the charters of cities of the sixth class. The concluding portion of subsection 4 of section 3637, above referred to, reads as follows: "The issuing of the different licenses under this chapter shall be under the exclusive control of the city council, who may refuse to grant license, in its discretion, except as herein provided." The issuing of license in all other towns seems to be wholly left to the discretion of councils of the several cities. Subdivision 2, art. 10, c. 108, Ky. St., confers upon the county court power to license persons to vend spirituous, vinous, and malt liquors by retail; but it has been heretofore decided by this court that, in so far as the charters of the various towns conflict with the subdivision aforesaid, the town charters prevail. It is provided by section 61 of the constitution that the general assembly shall by general law provide a means whereby the sense of the people of any county, city, town, district, or precinct may be taken as to whether or not spirituous, vinous, and malt liquors shall be sold, bartered, or loaned therein, or the sale thereof regulated. Section 59 of the constitution provides that "the general assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes." Then follow quite a number of subjects or subdivisions. No. 27 reads as follows: "To provide a means of taking the sense of the people of any city, town, district, precinct, or county, whether they wish to authorize, regulate or prohibit the sale of vinous, spirituous or malt liquors or alter the liquor laws." It is provided in section 156 of the constitution that the cities and towns of this commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be

defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. It is suggested for appellees that the petition fails to show that a legal or valid election was held in May, 1898; but, taking all the averments and exhibits together as true, and must be taken on demurrer,—we are bound to the opinion that the election was legally held. It seems to be a well-settled rule of law that laws applying only to a class are not of necessity special or local legislation. But it must also be such a classification as is reasonable; or, in other words, there must be some good reason for the classification. In the case at bar it seems that the law takes away all discretion from the board of trustees as to the licensing of retailers of spirituous liquors. If the act be valid, it seems that every man in the town of Benton who would pay the license fee must of necessity be licensed by the trustees. With the exception of the trustees of the fifth and sixth class towns, no such mandatory duties have ever been required of any court or council or board authorized to grant such license as sought in this case. The authorities of all other towns are allowed a discretion as to the issue of such license. The county courts have always been allowed a discretion in such matters, and we see no reason for denying discretion to the trustees of Benton in such matters. Therefore the statute in question must be held to be local and special, and arbitrary as well. Indeed, there is less reason for making such elections mandatory upon the licensing power in a small town than in a larger one. We know from common history that the retailing of liquor in a small town like Benton affects a large portion of the people in the county, and materially so. In this case 69 men seem to have voted for the sale of liquor, and about 49 against it, which vote indicates a voting population of about 125 voters; and the contention now is that, as a result thereof, every man who will pay for a license in the town is entitled thereto, and the trustees have no power or discretion to refuse. There would be much more reason in making the vote of a large city mandatory upon its council to issue license than in the case at bar. The licensing in the large cities does not materially affect any person except the residents of the city. It seems to us that the provision of the statute in question is in conflict with subdivision 27 of section 59 of the constitution, for it will be seen that said subdivision prohibits the enactment of any special law to regulate or prohibit the sale of liquor or alter the liquor laws. The statute in question is a material alteration and a material regulation of the general liquor law of the state for the reason that the general law, as before stated, left the licensing authorities some discretion in regard thereto. In our opinion, the stat-

ute in question is unconstitutional and invalid in so far as it takes away the discretionary power of the trustees to issue or withhold license. If the trustees have any discretion at all, it follows that the injunction or mandamus sought cannot be awarded, for the reason that the mandamus cannot issue to control the discretion of an officer or city council.

DU RELLE and O'REAR, JJ., concur.

PATTON v. SCHNEIDER et al.¹

(Court of Appeals of Kentucky. Feb. 27, 1902.)

VENDOR AND PURCHASER—DEFICIENCY IN LAND—COMPENSATION.

1. A vendor who conveyed a tract of land with general warranty as containing $33\frac{1}{2}$ acres, "more or less," when the survey, as made by a competent surveyor, under his direction, showed the boundary to contain only $20\frac{1}{2}$ acres, must make good the difference.

2. Where there is a deficiency in the quantity of land sold, the purchaser is ordinarily entitled to compensation for the deficiency according to the average value of the whole tract; but, where the purchaser has received the house and other improvements which it was contemplated he should receive, that fact will be considered in fixing the value of the deficiency.

Appeal from circuit court, Hardin county.
"Not to be officially reported."

Action by Max Schneider and Agnes Schneider against T. V. Patton to recover compensation for a deficiency in land purchased from defendant. Judgment for plaintiffs, and defendant appeals. Affirmed.

Sprigg & Chelf and L. A. Faurest, for appellant. W. S. Berry and J. D. Irwin, for appellees.

BURNAM, J. On March 18, 1899, the appellant, T. V. Patton, sold and conveyed to Agnes Schneider, one of the appellees herein, a tract of land which he warranted to contain $33\frac{1}{2}$ acres, more or less, and which is described by metes and bounds, courses and distances, in consideration of \$2,000, \$950 of which was paid in cash, and the balance was to be paid in annual installments of \$250 each. On October 25, 1899, the appellee Agnes Schneider conveyed the land to her co-appellee, Max Schneider, in consideration of love and affection and the assumption of the unpaid purchase money. On the 16th day of October, 1900, the appellees brought this suit in equity against the appellant, in which they set out the above facts, and allege that the boundary of land conveyed to Agnes Schneider by appellant only contained $20\frac{1}{2}$ acres, instead of $33\frac{1}{2}$, and asked that defendant be compelled to make good the shortage in land, or that they should be compensated for such deficiency according to the average value of the whole

tract by a credit of \$750 upon their unpaid purchase notes. The defendant, in his answer, admitted the execution of the deed, but says that the property was sold to plaintiff as a whole, regardless of the number of acres contained in the boundary; and that the draftsman who wrote the deed inserted the words "containing thirty-three and one-half acres, more or less," by mistake, when there was no certain number of acres contracted for or sold. The averments of the answer were denied by reply, and upon final submission the circuit judge adjudged that plaintiffs be given a credit of \$500 upon the unpaid purchase-money notes, and the defendant appeals.

The appellee Max Schneider, who was a pastry cook, and lived in Cincinnati, having concluded to buy a farm, was attracted to Hardin county by an advertisement of a Mr. Alvey, a real-estate dealer at Elizabethtown, and went to that point, where he met the appellant, who represented to him that he had a tract of 42 acres of land, which he would sell for \$2,500. After looking over the land, Schneider informed Patton that he would give him \$2,000 for not less than 80 acres, including the improvements. Patton accepted his proposition, and pointed out where he could cut off 9 or 10 acres of land. Schneider then returned to Cincinnati, and Patton employed a surveyor to run off the land, instructing him, however, as he testifies, not to calculate the amount of land contained in the boundary. The surveyor ran off the land in accordance with Patton's order by courses and distances, and made no calculation as to the amount of land contained in the boundary, but, "by inadvertence," he says, added to the survey the words "containing thirty-three and one-half acres, more or less," having heard Patton say that this was about the quantity of land contained in the boundary. Patton sent this survey, with a plat of the land, to appellee, who thereupon returned to Elizabethtown, where he employed a lawyer to examine the title. This being satisfactory, the trade was concluded, and a deed drawn, in which the boundary surveyed by Patton's orders was inserted. Under this state of facts we are of the opinion that the trial court did not err in granting the relief as the "general principle applicable to such cases, as settled by this court, is that when it is evident that there has been a gross mistake as to the quantity, and the complaining party has not been guilty of any fraud or culpable negligence, nor otherwise impaired the equity resulting from the mistake, he is entitled to relief from the technical legal effect of his contract, whether it be executed or executory." See *Biggs v. Railroad Co.*, 79 Ky. 470; *Green v. Hackley*, 60 Ky. 386; *Harrison v. Talbot*, 32 Ky. 258; *Cleveland v. Rodgers*, 8 Ky. 193; *Whaley v. Elliot's Heirs*, 8 Ky. 343, 10 Am. Dec. 737; *London v. Todd*, 28 Ky. 182; *Cran v. Prather*, 27 Ky. 70; *Wiley v. Fitzpatrick*

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

26 Ky. 582; *Pringle v. Samuel*, 11 Ky. 44, 13 Am. Dec. 214. And a vendor who conveys a tract of land with a general warranty as containing 33½ acres, more or less, when the survey as made by a competent surveyor under his direction showed the boundary to contain only 20½ acres, is bound to make good the difference. Ordinarily, where there is a deficiency in the quantity of land sold, the purchaser will be entitled to compensation for the deficiency according to the average value of the whole tract; but, in view of the fact that appellee got all the improvements in the way of houses, etc., which it was contemplated he should receive at the date of his purchase, they constitute an important element in the value of the tract, and the trial judge did not err in taking this fact somewhat into consideration in fixing the value of the deficiency in the land.

Judgment affirmed.

FUSON et al. v. LAMBDIN.¹

(Court of Appeals of Kentucky. March 7, 1902.)

VENDOR AND PURCHASER—SALE OF LAND UNDER EXECUTION AGAINST VENDOR.

The purchaser of land by executory contract cannot resist payment of the purchase money upon the ground that after he purchased and acquired possession of the land it was sold under execution against the vendor, and that he took an assignment of the bid and procured a deed from the sheriff, as he is entitled, at most, only to credit by the amount which he paid for the assignment of the bid.

Appeal from circuit court, Whitley county.

"Not to be officially reported."

Action by John E. Lambdin against Beth Fuson and others to enforce a lien on land. Judgment for plaintiff, and defendants appeal. Affirmed.

Geo. P. Johnson, for appellants. Tye & Denham, for appellee.

PAYNTER, J. On March 23, 1883, when the appellee was a minor (he did not attain his majority until 1888), he sold to the appellant A. Lambdin an undivided interest in a certain tract of land. For the purchase money the vendee executed his note to appellee, and it seems to have been understood that it was not to be paid until the appellee arrived at the age of 21 years, and ratified the contract. The appellant A. Lambdin sold the interest purchased from appellee to the appellant Fuson, with the agreement on the part of Fuson that he was to pay the note; he being aware of the contract between the appellee and original vendee. After the appellee arrived at the age of 21, he expressed his willingness to carry out his contract of sale. The appellant Fuson took possession of the property under his purchase, and has since continued to hold it. After his purchase, and during his possession under it, one

W. R. Lambdin recovered a judgment against appellee, and had an execution issued and levied on the appellee's supposed undivided interest in the land. At this sale the plaintiff in the execution became the purchaser at the price of \$162.35. In October, 1892, he transferred his bid to appellant Fuson; whereupon the sheriff making the sale executed a deed to him for appellee's interest in the land. Subsequently Thomas Adkins filed a suit against appellee, in which he obtained a judgment against appellee, and an order to sell appellee's right of redemption. At the sale of the right of redemption, Thomas Adkins became the purchaser at \$46.18. Afterwards he assigned his bid to appellant Fuson, and by appropriate orders the commissioner of the court made Fuson a deed therefor. This action was instituted by appellee against the appellants on the \$400 note, which had been executed to him for the purchase money of his undivided interest in the land. The principal ground of defense is that the defendant Fuson acquired title to appellee's interest by virtue of the execution and decretal sales and deeds made pursuant thereto. It is claimed that the appellee lost his right to the land thereby, and is not entitled to enforce his claim for the purchase money. In view of the fact that the plaintiff was in possession of the land under his purchase from appellee, holding a title bond therefor, the sale under the execution did not affect the rights of Fuson or appellee in the land. The same is true as to the sale of the right of redemption. Appellee had no interest in the land subject to sale under the execution or judgment, unless it was a naked legal title, even if that were subject to sale. He had sold all his interest in the land at the time of the sales, and was under obligation to convey on the payment of the purchase money. The sales could not take away any right Fuson had acquired by the sale made by appellee. The most that can be said, if, indeed, that, is that they divested the appellee of the legal title to the land, and invested Fuson therewith, but it was incumbered with appellee's debt against him. Of course, the appellee's right to question the validity of the judgment is barred, in so far as his indebtedness to the plaintiffs therein was fixed by them. The transaction amounts to nothing more than that Fuson paid outstanding claims against the land which was purchased from appellee, and whatever rights he acquired inured to the benefit of himself and appellee. It would be most unconscionable and inequitable to allow Fuson to acquire the title to the land in the manner stated, and plead it as a defense to the note due the appellee for the purchase money, and which he agreed to pay. If he were allowed to do this, it would seem that the purpose of giving courts equitable jurisdiction would fail. He owed \$400 and the interest on it. If he were allowed to defeat a recovery, he would, in effect, be permitted to discharge

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his debt by paying less than one-third of it. It was conceded by appellee that he was entitled to credits for the sums which he paid for the assignments to him, and the court gave them to him.

The judgment is affirmed.

WISE et al. v. TRAYLOR.¹

(Court of Appeals of Kentucky. March 4, 1902.)

VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT—AGREEMENT TO ALLOW REDEMPTION.

The land of W. and wife, being sold to satisfy unpaid purchase money, was purchased by H., and at the request of W. and wife T., the wife's brother, purchased the land from H., and executed a writing to W. and wife agreeing to "deed" the land back to W. in 12 months, provided he and his wife should pay back the money T. had "been out," with 8 per cent. interest and a premium of \$100; the writing further stipulating that, if W. should fail to raise the money, he would give peaceable possession to T. at the end of 12 months, or "satisfy" him "in some way." *Held*, that the agreement should be construed as a title bond, the purchase price being due 12 months after date, and, though W. and wife failed to pay the price when due, they are entitled to the overplus of the proceeds of a sale thereafter made by T.

Appeal from circuit court, Scott county.
"Not to be officially reported."

Action by J. D. Wise and others against C. R. Traylor to recover the proceeds of property sold by defendant. Judgment for defendant, and plaintiffs appeal. Reversed.

Montgomery & Lee, for appellants. Victor F. Bradley, for appellee.

DU RELLE, J. J. D. Wise and wife purchased a tract of land in Montgomery county for \$1,050, \$550 of which was paid in cash out of funds coming to the wife from the estate of her father. Wise's note for the remaining \$500 fell due in September, 1890. A title bond was executed by the vendor. The note for the deferred payment was subsequently assigned to James Horton, who instituted proceedings to enforce his lien, and the property was sold at commissioner's sale to Horton for the amount of the unpaid purchase money, interest, and cost. Wise had expended a considerable sum of money belonging to his wife, besides some money of his own, in the improvement of the place. Horton seems to have agreed in parol to let Wise redeem the property for the amount of his debt, if he could raise the money, or could procure some one to advance it for him. Appellee, Traylor, who was the brother of Mrs. Wise, was finally prevailed upon, after considerable objection on his part, to agree to buy the property from Horton, and give the Wises a year in which to repay him the amount advanced by him and his expenses, with 8 per cent. interest and premium of

\$100. He did pay Horton the amount of his claim, \$670, took a deed to himself, and entered into a written agreement with the Wises as to the future disposition of the property. There seems to have been no disagreement whatever in regard to the terms of this writing, and the parties seem at least to have attempted to embody their intent therein. By the contract it was provided: "Articles of agreement between C. R. Traylor, party of the first part, and Jeff and Louvina Wise, parties of the second part. Said Traylor has this day, March 9th, come in possession of said Wise's farm at Johnson station by deed made to said Traylor by Jim Horton. Said Traylor agrees to deed this farm back to said Wise in twelve months, provided said Louvina and Jeff Wise pays money back that said Traylor has been out, and \$100 premium, and furthermore 8 per cent. interest on said money that Traylor has been out. If said Wise fails to raise said money, he binds himself to give peaceable possession to said Traylor at the end of twelve months, or satisfy said Traylor in some way." The Wises, who were about to be evicted at the time of this transaction, were thus left in possession of the farm, and remained in possession until the expiration of the year, after which a parol agreement was made for another year's occupancy by them, half the crop raised on the place to be paid Traylor. During the first year after the agreement efforts were made by Traylor—and possibly by Wise also—to sell the place. A parol agreement of sale with one Tom Thumb was made by Traylor, but Mr. Thumb seems to have refused to complete the contract. During the second year's occupancy, Traylor sold the land to N. W. and L. R. Huffman for \$1,500, \$525 of which was paid in cash, and for the remainder notes were executed, the last of which seems to have been paid some time in 1900. Traylor seems to have advanced some small sums of money to his sister from time to time, to have paid for medical attention and funeral expenses of her married daughter, her own funeral expenses when she died, and after her death to have taken one of her children by a former marriage to rear and educate. After the death of his wife, Wise seems to have married again, and to have demanded payment from Traylor of the overplus above the amount which the latter paid for the land. This being refused, suit was brought on behalf of Wise and his infant children for the whole amount for which Traylor sold the property, to be credited by the amount paid therefor by Traylor, with interest. On behalf of Traylor it is claimed that Horton was the owner and entitled to the possession of the land; that he was under no obligation to convey to Wise; and that when Traylor purchased the land from Horton he made a conditional sale thereof to Wise, which cannot be construed into a mortgage. The question presented is one of considerable diffi-

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culty. With some hesitation we have reached the conclusion that the agreement should be construed to be a title bond to the Wises from Traylor, the purchase price agreed therein being the amount paid by Traylor and his expenses, with 8 per cent. thereon and an advance of \$100; the purchase price being due twelve months from the date of the agreement. This being so, Traylor, having sold the property and received the proceeds, must account for the overplus, subject to be credited by whatever sums he advanced for the Wises. We do not think, however, that he is entitled to be reimbursed for the cost of maintenance of his niece, but her share of her mother's part should be paid to him if he qualifies as guardian. As the title bond was to both Wise and his wife, Mrs. Wise's administrator should have been made a party; but no proper objection was made on this ground. Mrs. Wise's child or children by the former marriage should also be made parties on the return of the case.

The judgment is reversed, and cause remanded for further proceedings consistent herewith.

CARTER v. LOUISVILLE & N. R. CO.¹

(Court of Appeals of Kentucky. March 6, 1902.)

EASEMENTS—OBSTRUCTION OF PASSWAY—INJURY TO PERSON HAVING NO LEGAL RIGHT TO USE.

Plaintiff, an adult, living with her mother, had no legal right to use a passway over defendant's land appurtenant to land set apart to the mother as a homestead for herself and infant children, and therefore defendant is not liable for an injury received by plaintiff in attempting to pass over a fence wrongfully built by defendant across the passway.

Appeal from circuit court, Boyle county.

"Not to be officially reported."

Action by Nannie Carter against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for defendant, and plaintiff appeals. Affirmed.

Robt. Harding and J. W. Rawlings, for appellant. Edward W. Hines, R. P. Jacobs, and C. R. McDowell, for appellee.

O'REAR, J. Appellant claims to have been injured by falling from a fence which she alleges appellee wrongfully built across a passway that she was entitled to use. It appears that appellant is an adult living with her mother. The passway in question is claimed as an appurtenant to a lot of land in which appellant's mother has a life estate. The court sustained the demurrer to appellant's petition.

At the utmost, the building of the fence by appellee constituted a nuisance to the owner of the right invaded. Under the statutes of this state, the homestead of a dece-

dent is set apart to the widow and her infant children for their occupancy during the life of the widow and the minority of the children. Therefore whatever right the owner of the lot in question had over appellee's property it was a right during the life of the widow, the use of which belonged to the widow and her infant children only. We perceive no legal distinction between appellee's situation and that of a lodger or guest in the house, or why, if appellant could maintain this action, each member of the household, including its guests and servants, could not likewise maintain his or her separate cause for an injury of the same kind. *Kavanagh v. Barber* (N. Y.) 30 N. E. 235, 15 L. R. A. 689. There is nothing stated in the petition to show that appellant was compelled to use this passway, or that she had a legal right to use it.

Judgment affirmed.

PHILLIPS v. FARLEY et al.¹

(Court of Appeals of Kentucky. Feb. 28, 1902.)

HUSBAND AND WIFE—CURTESY—VESTED RIGHT OF HUSBAND—CONSTITUTIONALITY OF STATUTE.

Where no child had been born of a marriage at the time the act of March 15, 1894, regulating the property rights of husband and wife, took effect, the husband had no vested right to an estate for life in land theretofore acquired by the wife, and therefore that statute is valid as to him to the extent that it abolishes the right of curtesy, though a child was thereafter born of the marriage.

Guffy, C. J., dissenting.

Appeal from circuit court, Henderson county.

"To be officially reported."

Action by W. C. Farley and others against Amos Phillips and Rosa Booth for a sale of land and division of proceeds. Judgment for a sale of the land, and defendant Amos Phillips appeals. Affirmed.

Thos. E. Ward, for appellant. M. Merritt and S. V. Dixon, for appellees.

DU RELLE, J. This record presents a controversy between the surviving husband of Susan Farley Phillips on one side and her relatives on the other. The appellant and his wife intermarried in December, 1892. In January, 1893, the land in controversy was conveyed to her in fee simple. On March 15, 1894, the act relating to husband and wife, known as the "Weissinger Act" (section 2127, Ky. St.), was enacted, and took effect in June, 1894. In January, 1895, Susan Farley Phillips died, leaving an infant child, Bettie Phillips, who died in June, 1895, about six months old. The trial court adjudged that the Weissinger act applied to the surviving husband's rights in the land,

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and that he took dower therein, and was not entitled to an estate by the curtesy. The appellant has appealed, contending that as section 1, art. 4, c. 52, Gen. St., was in force at the time the marriage took place and when the land was conveyed to the wife, the husband was entitled to an estate for life in the entire tract as tenant by the curtesy. In the case of *Rose v. Rose* (Ky.) 46 S. W. 524, 41 L. R. A. 363, it was held that the right of the husband given by section 1, art. 2, c. 52, Gen. St., to the use of his wife's land, and to rent it for three years at a time, and receive the rents therefrom, as a statutory substitute for the ancient tenancy by the marital right, became a vested right in the husband as to lands owned by the wife, of which he could not be constitutionally deprived by the subsequent passage of the act of 1894. In the subsequent case of *Mitchell v. Violet* (Ky.) 47 S. W. 195, it was held that where the marriage took place, the land was acquired by the wife, and a child was born alive of the marriage before the act of 1894 took effect, the surviving husband had a vested estate for life in the whole of the land owned by the wife. The writer of this opinion did not concur in the doctrines announced in the *Rose* and *Violet* Cases. But, accepting those cases as the law of this commonwealth, it follows that the case at bar must be decided in accordance with the doctrine there laid down.

On behalf of the appellees it is claimed that while the statutory right to use and lease the wife's land was vested in the one case upon the marriage, and the estate by the curtesy in the other case became vested upon the birth of a living child before the new act went into effect, in the case at bar the child was not born alive until six months after the act took effect, and until that time the husband's right was inchoate, subject to legislative control, and not protected by the constitution. In support of this contention, *Cooley, Const. Lim.* (6th Ed.) pp. 440, 441, and 2 *Bish. Mar. Wom.* § 43, cited in the *Violet* Case, *supra*, are relied on by appellees as authority for the proposition that it is not until the birth of a child capable of inheriting that "the estate by the mere marital right is extended in duration to become an estate, not for the mere joint lives of himself and wife, but for his own life," and that until the husband's estate is thus enlarged into tenancy by the curtesy initiate he had no vested right to an estate for life. The reasoning of the authorities cited seems to support counsel's contention. And in the *Violet* Case, *supra*, the doctrine there laid down as to the vested interest of the husband was expressly limited, the court, through Judge Paynter, saying: "Where the interest of the husband in the estate of his wife remains in expectancy merely,—that is to say, until it becomes initiate,—the legis-

lature must have full right to modify or even to abolish it. *Cooley, Const. Lim.* (5th Ed.) p. 442." In the case at bar the husband's estate of curtesy was in expectancy merely. It could not be initiate until the birth of a living child capable of inheriting. The child was not born until some months after the statute took effect.

This is conclusive of the case at bar, and the judgment is affirmed.

GUFFY, C. J., dissents.

THOMPSON'S ADM'X v. THOMPSON.¹

(Court of Appeals of Kentucky. March 5, 1902.)

ARBITRATION AND AWARD—EXTENT OF INTEREST IN PARTNERSHIP ASSETS—ITEMS INCLUDED IN ARBITRATION.

Where the question as to the extent of the interest of a decedent in partnership assets was submitted to arbitration, and the written award of the arbitrators was accepted by the parties,—it being agreed that, if the deceased partner owed the firm on account, the amount should be credited on the award, and that, if the firm owed him anything on account in addition to the amount of the award, it should be paid,—as the administrator of the deceased partner failed to show that the surviving partner was indebted to his intestate on any individual account in addition to the amount of the award, he was entitled to recover only that amount.

Appeal from circuit court, Laurel county. "Not to be officially reported."

Action by W. H. Thompson against J. M. Thompson and others to recover damages for the wrongful conversion by defendants of plaintiff's interest in partnership property. Plaintiff dying pending the action, the same was revived in name of his administratrix. Judgment for plaintiff, and defendant J. M. Thompson appeals. Reversed.

Henry C. Hazelwood, Chas. R. Brock, and J. W. Alcorn, for appellant.

PAYNTER, J. This action was brought by W. H. Thompson against the appellant, J. M. Thompson, and Jasper Pearl and W. M. Wadkins. It is averred in the petition that the plaintiff and defendants named were copartners doing business as coal operators under the firm name of Pearl, Thompson & Co. The plaintiff sought to recover more than \$3,000 on account of his alleged interest in the partnership property, which he claims to have been wrongfully converted to their use by other members of the firm, and for money he claimed he had advanced for the benefit of the firm. An issue was made as to whether plaintiff was a member of the firm, and also on the question of the firm's liability to him for the money claimed to have been advanced, etc. The lower court stated its conclusion on the question as to whether the plaintiff was a partner in the following language: "As to

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such of the public as had no notice to the contrary, the firm of Pearl, Thompson & Co. consisted of W. H. Thompson, J. M. Thompson, and Jasper Pearl; but, as between the said three parties, the firm consisted of J. M. Thompson alone. There is positive evidence in the record to support this conclusion and it is in harmony with the conduct of the parties and with many circumstances proven, while there is little evidence, if any, that militates against this conclusion." We concur in this finding of the facts. None of the persons claiming to be partners, other than J. M. Thompson, show that they contributed anything to create the capital upon which the business was conducted. Whatever of money or property was contributed to the capital of Pearl, Thompson & Co. was by J. M. Thompson. Plaintiff died pending the action, and it was revived in the name of his administratrix. The court found that she was entitled to recover from J. M. Thompson \$1,082.41. To find this amount, the court allowed \$225 for services supposed to have been performed by the decedent for the firm; \$248.41 which he paid the Diamond Coal Company for the firm; \$609 on account of other payments which it is claimed were made by him for the firm. The plaintiff did not seek to recover the \$225 for alleged services. Therefore the court erred in allowing that amount. It appears from the evidence that the decedent paid the Diamond Coal Company \$248.41 for the firm. We are of the opinion that the court erred in allowing this amount. It appears that the firm owed a note of \$250 to a bank at Lancaster, which it failed to pay. The decedent entered into a contract by which he was to apply certain moneys to the payment of this note, which he was to collect on account of one Crooke's liability to the firm of Pearl, Thompson & Co. He never paid the note, but the credit was passed to his individual account on the books of the Diamond Coal Company for \$248.83,—a few more cents than it is claimed the decedent paid the Diamond Coal Company for the firm. The decedent at that time was engaged in some business with Crooke. This record fails to show that decedent ever accounted in any other way for the money which he collected for Pearl, Thompson & Co. on Crooke's orders. It is fair to presume, under the facts of this case, that the credit which was passed to him on the books of the Diamond Coal Company was on account of that contract. Excluding these items from the judgment of the court, it would leave the remaining item of \$609. It is claimed that the conversion of the property took place about January, 1895. A controversy arose between W. H. Thompson and J. M. Thompson as to whether or not W. H. Thompson was one of the copartners,

and that question was submitted to arbitration. The arbitrators heard the evidence, and made an award in writing to the effect that W. H. Thompson was a partner. After this was done it was suggested that the parties should arbitrate as to what interest the decedent had in the partnership assets. Thereupon that question was submitted in writing to the same arbitrators, and they found (two of whom made the award in writing) that his interest in the partnership assets was \$400. The proof is that they accepted and agreed to the awards. After this was done, J. M. Thompson tendered his notes to the decedent for the amount of the award, and in some way they disagreed as to the matter, and the notes were not accepted. It appears, also, that at the time of this last arbitration it was agreed between the parties that, if the decedent owed the firm on account, it was to be credited on the amount of the award, and, if the firm owed him anything on account in addition to the amount of the award, it was to be paid. The evidence shows that when the decedent refused to accept the notes the papers, including the notes, were turned over to Mr. Coleman, one of the arbitrators, to be held by him. Afterwards the decedent obtained them from Coleman, including the notes, but he never returned them. The court made, as a basis of its judgment, a certain statement, which it is claimed, shows an admission of the liability by appellant to the decedent of the amounts allowed. It is also claimed that this statement was before the arbitrators upon the hearing of the question submitted to them. Each one of the items allowed by the court should have been considered by the arbitrators in fixing the interest of the decedent in the partnership assets. Neither of these items could have been matters of account which were left for future adjustment. We must presume the claims allowed by the court were considered by the arbitrators in ascertaining and fixing the value of the decedent's interest in the firm's assets. The testimony clearly shows that the matters were submitted to the arbitrators in writing; that they made their award in writing; that the parties accepted the award. They are bound by it. As the appellee failed to show that the appellant was indebted to decedent in any sum in addition to the amount of the award on any individual account, we are of the opinion that W. H. Thompson's personal representative is only entitled to recover of appellant \$400, the amount of the award, and interest thereon from date of the award. The court below is directed to enter judgment against J. M. Thompson for that amount and interest.

The judgment is reversed for proceedings consistent with this opinion.

GRAHAM et al. v. JACKSON et al.¹

(Court of Appeals of Kentucky. March 6, 1902.)

SCHOOLS AND SCHOOL DISTRICTS—RESIGNATION OF TRUSTEE—ADMINISTRATION OF OATH TO TRUSTEE.

1. Neither a parol resignation by a school trustee nor a written resignation to which his name was signed by another was valid.

2. Where a school trustee took the oath of office before the county superintendent, the failure of the record of the superintendent to show that fact does not deprive the trustee of his right to the office.

Appeal from circuit court, Allen county.

"To be officially reported."

Action by W. R. Jackson and others against Wilson Graham and others for an injunction. Judgment for plaintiffs, and defendants appeal. Affirmed.

Gilliam & Oliver, for appellants. W. C. Goad and J. S. Carpenter, for appellees.

WHITE, J. This is an action for an injunction, instituted by appellees Jackson and Hood, claiming to be trustees of common school district No. 52 in Allen county, and Mollis Slate, claiming to be the regularly employed teacher of that school, against E. W. Oliphant, an admitted trustee of that district, and Walter Whitney and Thos. Reynolds, claiming to be trustees, and Wilson Graham claiming to be teacher, in that district. It is sought to restrain appellants from the use of the school house or in any way interfering with the appellee Slate in conducting the common school for the school year ending June 30, 1902. The determination of the question depends on a decision of who were the legal trustees. It being admitted by both sides that Oliphant is one, the contest is as to the other two. Oliphant, with Whitney and Reynolds, employed appellant Graham, while appellees Jackson and Hood employed appellee Slate, to teach the school. On the trial below the court determined that the board of trustees consisted of Oliphant, Jackson, and Hood, and that the employment of Miss Slate by a majority was legal, and that she was authorized to teach the school, and entitled to the school house for that purpose, and enjoined appellants from interfering with her or the house during the school session for the year ending June 30, 1902. To reverse that judgment this appeal is prosecuted.

The facts admitted by all parties are that Oliphant is a legal trustee; that Jackson was regularly elected trustee in October, 1900, to succeed Whitney; that Hood was regularly appointed a trustee in January, 1901, to fill a vacancy. The contest between Jackson and Whitney for one place arises over a dispute as to whether Jackson ever qualified—took the oath of office—as trustee, it being claimed by appellants that he did

not, and that Whitney held over. By appellees it is claimed that Jackson took the oath of office before the county superintendent. The contest between Hood and Reynolds for one place arises over an alleged resignation of Hood and the appointment by the county superintendent of Reynolds. It seems to be admitted that Hood never presented his resignation in writing, but a paper purporting to be his resignation was presented to the county superintendent, and the appointment was made. It is admitted that Hood never signed this paper, but that it was written, or at least signed, by Reynolds, who testifies he had been authorized so to do by Hood. The case of Davis v. Connor (Ky.) 52 S. W. 945, is decisive of the question as to the verbal resignation of a trustee. The court there held, by the present chief justice, that a verbal resignation was not a resignation, and did not create or cause a vacancy in the office, and an appointment by the county superintendent to fill the supposed vacancy gave no rights to the appointee. The written resignation signed by Reynolds as that of Hood was void, and added nothing to the verbal resignation. There is some question made as to whether he did not in fact withdraw his verbal resignation before the appointment of Reynolds, but in view of the case supra that is immaterial. We are of opinion and hold on the authority of the Davis Case that Hood was a legal trustee, never having resigned. The only question as to Jackson is whether he took the oath of office before he made the contract with Miss Slate. On this question Jackson testifies clear and explicit that he took the oath of office before the county superintendent, Lewis, giving the time and place where the oath was administered. The superintendent testifies that he has no recollection of administering the oath of office to Jackson, and that he has no record of such fact being done. The record of the superintendent shows that on June 12, 1901, Jackson appeared, and claimed to have been elected, and that he had been sworn in as trustee by the superintendent on the street, and the superintendent failed to make a record of the fact, and failed to call to mind the time or circumstance. This record bears date before the employment of Miss Slate or of appellant Graham. Jackson testifies that on that occasion in June he said to the superintendent, if there was any doubt about his having been sworn, he would again take the oath of office, but it was not again administered, only the record made. It is admitted that Jackson was duly elected by the people to succeed Whitney, whose term expired. We conclude from the proof that Jackson took the oath of office as trustee, and thereby became a legal trustee succeeding Whitney. His title to office did not depend on the record made by the county superintendent, but on the fact of his taking the required oath of office after his election. This fact being

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

shown, and coming to the knowledge of the county superintendent, he was bound to recognize Jackson as a trustee, which it seems he did on June 12, 1901, by the entry on the record of that date. The oath of office having been administered by the county superintendent, it was his duty to make the proper record of the fact, and his failure to do so would not deprive Jackson of his right to the office. We are therefore of the opinion, as was the trial court, that Jackson and Hood were legal trustees at the time they employed Miss Slate to teach the school, and, being a majority of the board, they had a right to make a valid contract at a regular meeting for that purpose. It being admitted that Miss Slate was qualified to teach, having a first-class certificate, the contract made by her with appellees is valid, and authorizes her to teach the common school in that district for the school year ending June 30th, 1902.

The judgment of the lower court is therefore affirmed.

LAWSON v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 23, 1902.)

INTOXICATING LIQUORS—LOCAL OPTION—FAILURE OF DRUGGIST TO KEEP REGISTER OF SALES OF LIQUOR—APPLICATION OF PROVISIONS OF GENERAL LAW WHERE SPECIAL LAW IS IN FORCE.

Ky. St. § 2558, part of general local option law, providing that it shall be the duty of every druggist to keep an accurate register of every sale of liquor made by him, to whom made, and upon whose prescription, applies to localities where local option prevails under special laws as well as where it exists by virtue of a vote taken under the general law, provided there is nothing in the special law in conflict therewith.

Appeal from circuit court, Fleming county. "Not to be officially reported."

C. H. Lawson was convicted of the offense of failing to keep register of sales of liquor on prescription, and he appeals. Affirmed.

W. G. Dearing, G. A. Cassidy, J. Maher, and J. D. Pumphrey, for appellant. Morrison Breckenridge and R. J. Breckenridge, for the Commonwealth.

BURNAM, J. Local option prevailed in Fleming county by virtue of an election held therein on the 26th day of August, 1886, under the provisions of the Fleming county prohibition law found in the acts of 1886. And this case presents for decision the question whether section 2558 of the Kentucky Statutes, which is a section of the general local option law of March 10, 1894, applies to druggists in so far as it says: "It shall be the duty of every druggist to keep an accurate register in a book kept for that special purpose of every sale of such liquor made by him, his clerk or employes, which shall show as to each sale, the date, the quantity, to

whom made and upon whose prescription, which prescription shall be preserved by said druggists for twelve months, and only one sale shall be made on any prescription; which register shall be open for inspection at all reasonable times by the county or commonwealth's attorney, and the grand juries of the county in which such sale is made." It is insisted that this provision of the general law does not apply to localities where local option prevails by virtue of special acts which do not contain a similar requirement. Section 61 of the constitution is as follows: "The general assembly shall by general law provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken as to whether or not spirituous, vinous, or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated, but nothing herein shall be construed to interfere with or repeal any law in force, relating to the sale or gift of such liquors." In commenting upon the effect of this provision of the constitution upon existing local laws, and the duty enjoined upon the general assembly to enact a general law with reference thereto enforceable uniformly throughout the state, this court said, in *Stamper v. Com.* (Ky.) 42 S. W. 915: "A general law was enacted March 10, 1894, which not only does provide the means whereby the sense of the people of each county, city, town, district, or precinct may be taken on the question mentioned, and the mode of ascertaining results of such election, but it is made applicable to and paramount in every such local subdivision of the state in respect to the condition of holding the election, how often they may be held, the class of persons excepted, the condition upon and extent to which they are excepted from the operation of the law, and also the manner of enforcing the penalties for violation of it. If that general law does not supersede all local laws on the subject, the policy of uniformity in character and administration of law, which was the leading idea of those who framed the constitution, would be defeated, and subdivision 29 of section 59 of that instrument, which provides that in all cases where the general law can be made applicable no special law shall be enacted, would have to be disregarded." And this question was again considered by this court in *Thompson v. Com.* (Ky.) 45 S. W. 1039, 46 S. W. 492, 696, and, in response to a petition for rehearing, the court said: "Wherever a local law was in force, either by a vote of the people or by legislative will, the sale of liquor by retail remained prohibited, not according to the terms of the local act, but as if a vote had been had in such local district against the sale of liquor under the act of March 10, 1894. * * * This was done for the purpose of securing uniformity in the character and administration of the law. * * * The effect therefore of the opinion in the *Stamper Case* and in this case is the law embodied in

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section 2557 and section 2558 of the Kentucky Statutes is in force in all localities in which prohibitory laws were in force before the adoption of the act of March 10, 1894, and those sections will so remain in force until the people in such localities shall vote otherwise." Section 2558 clearly made it the duty of appellant to keep an accurate register in a book kept for that special purpose of every sale of liquor made by him. There is nothing in this requirement which conflicts with any section of the special law of 1896; on the contrary its tendency is to render the existing law more effectual, and to carry out its spirit and purpose. And the many violations of law by those who sell whisky under the pretense of being druggists requires that some evidence of the character of such sales should be preserved by them for the inspection of those who have charge of the administration of the law. We therefore conclude that all of the provisions of sections 2557 and 2558 of the Statutes apply to those localities where local option prevails under special laws, as well as in those in which the vote has been taken under the provisions of the general law.

Judgment affirmed.

MANN v. ALVES et al.¹

(Court of Appeals of Kentucky. Feb. 27, 1902.)

EVIDENCE—BURDEN OF PROOF.

In an action to recover money alleged to have been paid by plaintiff as surety of defendants, in which defendants pleaded that they had executed a deed of assignment of all their property for the benefit of their creditors, and that their creditors, including plaintiff, had signed a composition agreement to accept a certain part of their claims and release defendants, plaintiff having filed a reply admitting the assignment and the agreement, but averring that when the paper was signed defendants agreed to pay him the balance of his debt, and that, if the paper did not so recite, that part of the agreement was omitted by mistake, the burden of proof was on plaintiff, as judgment would have gone against him if no evidence had been offered.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by W. Z. Mann against Thomas D. Alves and another to recover money alleged to have been paid by plaintiff as surety of defendants. Judgment for defendants, and plaintiff appeals. Affirmed.

S. V. Dixon and M. C. & G. D. Givens, for appellant. Montgomery Merritt, for appellees.

PAYNTER, J. The only question in this case is as to who had the burden of proof. The appellant sought to recover \$893 of the appellees for money which he alleged that he paid as their surety. The defendants

pleaded that they had made to James S. Alves, trustee, a deed of assignment of all their property for the benefit of their creditors; that their creditors, including the plaintiff, signed a composition agreement to accept 35 per cent. of their claims in cash, and release the defendants from the payment of the balance of their claims. In his reply the plaintiff admitted that the defendants made the assignment of their property for the benefit of their creditors; that he had signed the agreement; but averred that when the paper was signed the defendants agreed and promised to pay him the balance of his debt, and that, if the paper did not so recite, that part of the agreement was omitted by oversight or mistake. Following the rule that the pleadings should be construed most strongly against the pleader, it is our opinion that the averments of the answer were admitted with reference to the composition agreement, and that the plaintiff sought to avoid the effect of it by pleading that the defendants promised to pay the balance of his debt, and that that part of the agreement was omitted from the writing by mistake. Under the Civil Code of Practice and the repeated adjudication of this court, the burden rests upon the party against whom the judgment would go if no evidence was offered. The plaintiff having admitted he signed the agreement, judgment would have gone against him unless he had shown the state of facts pleaded in his reply. We are of the opinion that the court properly ruled that the burden was upon the plaintiff.

The judgment is affirmed.

BRASHEARS et al. v. DICKINSON et al.¹

(Court of Appeals of Kentucky. Feb. 27, 1902.)

RECEIVERS—APPOINTMENT PENDING ACTION TO VACATE JUDGMENT.

The plaintiffs in an action to vacate a judgment for the recovery of land are not entitled to the appointment of a receiver to take charge of the land, where they have not manifested a right to have the judgment vacated.

Appeal from circuit court, Perry county.

"Not to be officially reported."

Motion by R. O. Brashears and others for the appointment of a receiver. Judgment denying motion, and they appeal. Affirmed.

R. O. Brashears, for appellants. J. J. C. Back, for appellees.

PAYNTER, J. This is an appeal from a judgment of the court overruling a motion to appoint a receiver to take charge of certain lands. As we understand the averments of the petition, an action was pending in the Perry circuit court, in which the appellants sought to recover from appellees about 1,700 acres of land; and that the case was tried September 28, 1896, and a judg-

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ment rendered for the defendants. There was no appeal from the judgment, and the time has long since passed for prosecuting one. An action is now pending to vacate that judgment, and it does not appear that the appellants have manifested a right to have the judgment vacated. Therefore we cannot hold that the court abused its discretion in failing to place the property in the hands of a receiver; on the contrary we are of the opinion that the court properly overruled the motion.

The judgment is affirmed.

ROEDERER et al. v. HESS et al.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

CONSTRUCTION OF WILL—CONDITION AGAINST ALIENATION.

Where testator devised his entire estate to his children, to be equally divided among them, a proviso "that none of the real estate so devised shall be sold until my youngest child shall be of lawful age" does not prohibit any devisees from selling his undivided interest at any time; the purchaser becoming tenant in common with the other devisees, and subject to the provision forbidding a sale of the land until the majority of the youngest child.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by David Roederer and others against Charles Roederer, H. C. Hess, and others, to settle the estate of Jacob Roederer, deceased, and for allotment of dower. Judgment sustaining exceptions to report of sale of land, and David Roederer and others appeal. Reversed.

Marret & Marret, J. N. Demblitz, Isaac T. Woodson, and Pryor & Sapinsky, for appellants.

HOBSON, J. Jacob Roederer died on March 6, 1879. He devised the property in contest to his children. The will provided that the real estate should not be sold until the youngest child was of age. He left 11 children. The youngest was of age on August 6, 1900. Previous to this, however, one of the sons sold and conveyed, with general warranty, his interest in the land to appellant C. Mann, in October, 1894, and shortly thereafter three of the other children conveyed their interest to one of their brothers by like deeds. On August 7, 1900, or the day after the youngest child was of age, this suit was filed for a sale of the property and division of the proceeds. The four children who had conveyed their interest were not made parties to the action, but their vendees were. The court ordered the property sold. Appellees purchased it, and then filed exceptions to the sale on the ground that the title they acquired was not good. The court sus-

tained these exceptions and set aside the sale. The ruling of the court was based on the fact that four of the devisees had sold and conveyed their interest in the land before the youngest child was of age, and it was held that this was in violation of the provisions of the will. The will contains no devise over. The clauses of the will referred to are in these words: "I give and devise the residue of all my property, real, personal, and mixed, of which I may be possessed at the time of my death, to my children that may be then living, or may be afterwards lawfully born of me after my death, to be equally divided between them all: * * * provided, however, that none of the real estate so devised shall be sold until my youngest child shall be of lawful age." The thing in the mind of the testator was the equal division of the estate among his children. The restriction on the sale of any of the land until the youngest child was of age was aimed to secure this equality. Conditions against alienation are strictly construed. *Warfield v. English* (Ky.) 11 S. W. 662; *Lindemeler v. Lindemeler*, 91 Ky. 264, 15 S. W. 524. The language of the clause before us is entirely different from one whereby one or more of the joint owners of the property is prohibited from alienating his interest in it until a given date. *Young v. Young* (Ky.) 49 S. W. 1074. At the death of the testator one of the children was unborn. The provision of the will was designed to forbid a sale of the land until the youngest child was of age, so as to protect the interest of the infant children, but no restraint was imposed upon the devisees' selling their interest in the land. The purchaser from them took their undivided share subject to the terms of the will forbidding a sale of the land until the youngest was of age, but the language of the will does not go further than this. It appears from the will that the testator had made advancements to two of his children, and there is nothing in the will to indicate that the testator intended to tie the hands of the older children for something like 21 years, and prevent them from disposing of their interest in the property devised, regardless of the necessities which changing conditions might bring about. It must be presumed that, if the testator had designed to forbid all his 11 children alienating their interest in the land until the youngest was of age, he would have used words more aptly expressing this intention. He knew that some of his sons before that time might be nearly 40 years old. There appears no reason for such a restriction on all the children. The language of the will does not require this construction. It goes no further than to postpone the period of distribution. The title vested in the devisees immediately, and this title they could sell. *Kean v. Tilford*, 81 Ky. 600; *Young v. Kinkead's Adm'rs*, 101 Ky. 252, 40 S. W. 776. By section 490, Ky. St., the owner may convey any interest in

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lands not in the adverse possession of another. By section 1681, "land to which the defendant has a legal title in fee, for life or for term, whether in possession, reversion or remainder, may be taken and sold under execution." The interest of each of the children in this land was subject to execution, under this provision. If sold under execution, it would pass to the purchaser subject to the restrictions of the will, and he would then become tenant in common with the other children. The devisees could do directly what might have been accomplished through the form of an execution or judicial sale for debt. Their selling the land prejudiced no one. It defeated no purpose of the testator, and it is not within the language or spirit of the provision of the will forbidding a sale of the land until the majority of the youngest child.

Judgment reversed and cause remanded, with directions to the circuit court to overrule the exceptions and confirm the sale.

LOUISVILLE & N. R. CO. v. PENROD'S ADM'R.¹

(Court of Appeals of Kentucky. March 7, 1902.)

RAILROADS—FAILURE TO GIVE SIGNAL FOR CROSSING—INSTRUCTIONS TO JURY—MAKING OF CUSTOMARY NOISES AFTER NOTICE OF PERIL OF DRIVER—APPELLANT ESTOPPED TO COMPLAIN OF INSTRUCTION LIKE ONE ASKED BY HIM—SECOND APPEAL—LAW OF CASE.

1. Defendant railroad company cannot complain of an instruction authorizing the jury to find for plaintiff administrator if they believed the death of his intestate was caused by the failure to give timely warning by whistle or bell "or other suitable signals" of the approach of a train to a street crossing, though no other signal could have been given than by the sounding of the whistle or bell.

2. It is negligence to make the customary noises incident to the movement of a train where the servants in charge have reason to apprehend injury therefrom to the driver of a team near the track, whose perilous position they have discovered, unless it is reasonably necessary to do so for the protection of the property and lives in their charge.

3. Appellant cannot complain of an erroneous instruction given on motion of appellee, where he asked an instruction of the same import.

4. In an action to recover damages for a death alleged to have resulted from the failure to give a signal of the approach of a train to a crossing an instruction as to punitive damages was proper, the degree of the negligence, if any, being for the jury.

5. Upon a second appeal the opinion of the court on the former appeal is the law of the case.

Du Relle and O'Rear, JJ., dissenting.

Appeal from circuit court, Hopkins county.

"Not to be officially reported."

Action by the administrator of John Penrod against the Louisville & Nashville Railroad Company to recover damages for the

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death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Affirmed.

For former report, see 56 S. W. 1.

Gordon & Gordon, E. W. Hines, and B. D. Warfield, for appellant. C. J. Waddill, for appellee.

PAYNTER, J. This is the second appeal in this case. 56 S. W. 1. On the former appeal the court held that under the petition the plaintiff, if entitled to recover at all, could only do so because there was negligence in letting off steam or blowing the whistle, thus causing the team to take fright and run away. It held that the petition did not authorize the question to be submitted to the jury as to whether the train came up quietly, and without proper signals of its approach, so that the driver was without warning of the danger; but held that on the return of the case an amendment should be permitted to be filed embodying such averments. The plaintiff filed an amendment in which it is averred that, in addition to the negligent acts set forth in the original petition and amendment, and as concurrent acts of negligence, the defendant's agents and servants in charge of the engine and train negligently caused the same to run within the city, and to approach Broadway street crossing and the place where the decedent and his team were, slowly, quietly, noiselessly, and without ringing a bell or sounding of a whistle, and without giving any signal or warning of any kind; that the train was an extra freight, coming from the north, some 10 minutes before a passenger train was due from the south; that it came in unexpectedly, and not on schedule time; that it ran through the city without ringing a bell, or sounding the whistle, or giving any signal of its approach; that it ran to Broadway street, in close proximity to the decedent and his team, with steam shut off, without giving any warning by bell or whistle or otherwise; that it stopped near the decedent and his team, when it negligently sounded its whistle, and emitted great quantity of steam, with the knowledge at the time and prior thereto on defendant's part of the presence and peril of the decedent; that the negligent acts stated caused the team to take fright and run away, whereby the plaintiff's intestate was instantly killed. Several witnesses were introduced, who did not testify on the former trial, whose testimony tended to support the averments that the train did not give any signal or warning of its approach to the city or at the station or the Broadway street crossing; that it drew up near to Broadway crossing, near which the plaintiff's intestate was unloading coal from a wagon to which the horses were attached; that upon stopping the engine gave some loud whistles, and let off a great quantity of steam, and began to back, thus causing the horses to run away. There was some testimony tending to show that some

of those in charge of the engine were looking out in such a way that they could not have helped seeing the position of the decedent, and therefore made themselves aware of his perilous position, if it was so.

Under the instructions of the court, the jury was not authorized to find for the plaintiff, because of any noise, usual or unusual, in blowing the whistle or in letting steam escape. The court gave eight instructions. Nos. 1 and 8 on motion of the plaintiff, 2 and 4 on its own motion, 3, 5, 6, and 7 on motion of the defendant. Under instruction No. 1 the jury could only find against defendant if it believed from the evidence that the defendant failed to give reasonable and timely warning by ringing its bell, or sounding its whistle, or by giving other suitable signals of its approach to the Broadway street crossing, and that, if the death of Penrod resulted from such failure, it could not so find if he knew or had reason to know of the train's approach to the crossing in time to have saved himself by the exercise of ordinary care for his own safety. It is urged that the words "other suitable signals" should not have been in the instruction, as there was but two ways to give warning of the train's approach, and that was by bell or whistle. The instruction follows the language of the former opinion with reference to the method to be employed by those in charge of the train in giving warning of its approach. If the words in question had any effect one way or the other, their use was beneficial to the defendant, because, under the instruction, if the train gave any kind of suitable signals, whether by bell, whistle, or otherwise, it was not guilty of negligence. No. 2 is criticised because it is claimed that it assumes that Penrod's peril was discovered by those in charge of the train, and that it assumed that a recovery might be had "if any person on the train saw Penrod's peril." It is therefore criticised because it is claimed that it assumed that there may have been some other care for the safety of Penrod which the servants of the train might have used in addition to giving the signals of the approach of the train. As we understand the instruction, there is no assumption of fact in it. The facts upon which the instruction was predicated were not assumed, but the question as to whether they existed was submitted to the jury. The use of the words, "agents or servants in charge of the train," in the instruction, are such as are usually employed in instructions in cases like the one under consideration. These words were used in the instructions which the court gave on its own motion, and were substantially used when necessary in the instructions offered by the plaintiff and defendant. The words "defendant's agents and servants" are used in No. 5 given on motion of defendant. When the court said in the instruction, "failed to give any signals of warning of its

approach," it certainly did not prejudice the rights of defendant, because the jury under that instruction could not have found that the defendant was guilty of negligence if it gave any signals. Over the objection of the parties, the court gave instruction No. 4, which reads as follows: "The court instructs the jury that defendant's agents or servants in charge of the train had the right to make the usual and customary noises and proper and necessary signals incident to the movement of the train; and if the jury believes from the evidence that said horses took fright, which caused the loss of Penrod's life, by the acts of defendant's agents or servants in blowing the whistle or causing the escape of steam, they must find for the defendant if they believe from the evidence that said blowing of the whistle and escape of steam was usual, necessary, and proper in the handling and movement of the train, unless they further believe that said agents or servants at the time saw or knew the perilous position of Penrod, if perilous, and had reason to apprehend that injury would result to him if such noises or signals were made; in such case said signals and escape of steam was improper, unless same was then necessary, or reasonably necessary, for the protection of the property and lives in their charge." Before instruction No. 4 was given by the court, the appellant offered a series of instructions, among which is "F." It reads as follows: "The court instructs the jury that the defendant's agents or servants in charge of the engine had the right to make the usual and customary noises and proper and necessary signals incident to the movement of the train, and if the jury believe from the evidence that said horses took fright, *ran away, and thereby caused the death of John Penrod*, by the acts of defendant's agents or servants in blowing the whistle or causing the escape of steam, they must find for the defendant if they believe from the evidence that said blowing of the whistle or escape of steam was usual, necessary, and proper in the handling and *management* of the train, unless they should further believe *from the evidence* that said agents or servants at the time saw or knew the perilous position of Penrod, if perilous, and had reason to apprehend that injury would result to him if such noises or signals were made. In such case such signals and escape of steam were improper, unless same were necessary, or reasonably necessary, for the protection of the property and lives in their charge." The underscoring is ours, and which suggests the words which are used in that which are not used in the other. The instructions are practically the same. The change in the phraseology had not invited criticism from counsel for appellant. This instruction was given for the benefit of the appellant, and to present the view of the law which was expressed by it in instruction "F," which it

offered. In it the court told the jury that those in charge of the train had the right to make the usual and customary noises and proper and necessary signals incident to the movement of the train; and, although those in charge of the train may have seen and known of the perilous position of Penrod, and had reason to apprehend that injury would result to him if such noises or signals were made, still they had the right to make them with such knowledge if it was necessary or reasonably necessary for the protection of the property and lives in their charge. If they discovered his perilous position, and had reason to apprehend that injury would result to him if such noises or signals were made, it was negligent to do so, unless it was necessary, or reasonably necessary, for the protection of the property and lives in their charge. This is the law, because, if those in charge of the train should discover the perilous position of one riding or driving a frightened horse, and then would unnecessarily blow the whistle or ring the bell, and thus cause it to run away, it would certainly be gross negligence on their part. This was the idea which the court and attorneys for appellant had of the law when the case was tried. It is a well-settled rule that, although the court may have given an erroneous instruction, still, if the complaining party offered one of the same import, this court will not reverse the case because of the erroneous instruction. *First Nat. Bank v. Germania Safety Vault & Trust Co. (Ky.)* 66 S. W. 716; *Insurance Co. v. Hughes' Adm'r (Ky.)* 60 S. W. 850.

The question of contributory negligence was fully submitted by instructions Nos. 5 and 7. Instruction No. 7 was given by reason of the former opinion in this case. It is insisted that the court erred in giving instructions authorizing the jury to award punitive damages. In response to this we quote *Eskridge v. Railroad Co.*, 89 Ky. 367, 12 S. W. 580, where the court said: "It is the policy of the law, as has been often held by this court, to treat the duty of those in charge of a railroad train to give timely and sufficient warning of its approach to the crossing of a public road as imperative, and a failure to perform it is in legal contemplation negligence, the degree of which depends upon the facts and circumstances of each case, to be determined by the jury." In the former opinion this court expressly said that the plaintiff might file an amended petition containing the averments alleging the grounds upon which a recovery was based in this action. The pleadings and proof make such a case for the jury as this court said should be submitted to it, and which was done. The opinion is the law of the case, whether or not it correctly announced the rule which should govern. The doctrine of *stare decisis* should be respected in this as in other cases. When the facts authorize the submission of a case like this to a jury,

this court has no more right to say what the verdict should be than the jury has to say to this court what principles of law should be applied by it to the facts submitted in evidence. The only seeming qualification to this general principle is that the court may set aside the verdict when it is flagrantly against the weight of the evidence, or grant a new trial where the verdict is so excessive as to indicate it was given as a result of passion or prejudice. For none of these reasons can we say that the appellant is entitled to a new trial.

The judgment is affirmed.

DU RELLE and O'REAR, JJ., dissenting.

FRASURE v. MCGUIRE.¹

(Court of Appeals of Kentucky. Feb. 26, 1902.)

HUSBAND AND WIFE—VALIDITY OF WIFE'S DEED—ESTOPPEL TO PLEAD DURESS.

Where plaintiff solicited defendant to buy her land from one to whom her husband had sold it, and to whom she and the husband jointly had executed a title bond, agreeing to execute to him a deed if he would buy the land, which he did, paying to plaintiff a small part of the purchase price, plaintiff is estopped to claim that she was forced by the threats of her husband to sign either the title bond to defendant's vendor, or the deed which she and her husband jointly executed to defendant; defendant being ignorant of any duress.

Appeal from circuit court, Floyd county.

"Not to be officially reported."

Action by Julia E. Frasure against S. W. McGuire to quiet title to land. Judgment for defendant, and plaintiff appeals. Affirmed.

May & May, for appellant. James Goble, for appellee.

O'REAR, J. Appellant owned by inheritance an undivided one-tenth of a farm in Floyd county. Her interest was worth from \$200 to \$500. She claims that her husband sold it to one Hatfield, and he sold it to appellee. She did not convey to Hatfield, but executed a bond for title, in which her husband joined. This was October 8, 1887. The consideration was \$200 paid. She admits signing the bond, but claims that it was procured by the fraud and misrepresentation of her husband and Hatfield. The following February she and her husband joined in a deed conveying the land to appellee, the vendee of Hatfield. Appellee claims she induced him to buy from Hatfield, agreeing to sign the deed if he would, and that thereupon he paid her \$15 and paid Hatfield \$105. She says she was forced to sign the deed by the threats of her husband. She denies having received \$10 of the money paid by appellee, and says that she went after and received the other \$5 because her husband threatened her violence if she re-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

fused. She brought this suit about 12 years after making the deed to appellee, in which she seeks to recover the land and its rents. The proof is somewhat conflicting, but the weight of it seems to us to be that appellant wrote appellee, soliciting him to buy the land from Hatfield, agreeing to execute to him a deed if he would buy it; that she signed and acknowledged the deed, and afterwards received some small part of the purchase money from appellee; that, if she was forced by the threats of her husband to sign either the bond or deed, appellee, who is her brother-in-law, was in entire ignorance of it. From these facts we conclude that appellant was estopped from claiming that the sale and conveyance to appellee were not effectual to pass her title.

Such having been the judgment of the circuit court, it is affirmed.

COMMONWEALTH v. BAVARIAN BREW- ING CO. et al.¹

(Court of Appeals of Kentucky. March 7,
1902.)

CONSPIRACY—COMBINATION OF MANUFACTUR- ERS TO RAISE THE PRICE OF BEER—CON- STITUTIONALITY OF STATUTE.

1. Ky. St. § 3915, providing for the punishment of any corporation or person who shall "become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding, * * * for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured article, or property of any kind," though it forbids combinations to fix prices, without regard to the value of the property, does not violate Const. § 198, providing that it shall be the duty of the general assembly "to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

2. A combination of a number of brewers to raise the price of beer to the extent of the amount of the war tax thereon was a violation of the statute, though it had for its purpose the raising of the price of an intoxicant the increased use of which the law does not favor.

Burnam, J., dissenting.

Appeal from circuit court, Kenton county.
"To be officially reported."

An indictment against the Bavarian Brewing Company and others for combining to raise the price of beer was dismissed, and the commonwealth appeals. Reversed.

D. A. Glenn and R. J. Breckinridge, for the Commonwealth. H. R. Probasco, Geo. Washington, B. F. Graziani, and J. L. Ellison, for appellees.

HOBSON, J. As a part of the war tax levied by the congress of the United States during the war with Spain a tax of \$1 per barrel was imposed on beer. Appellees, who are brewers of Cincinnati, Covington,

and Newport, then by agreement raised the price of beer \$1 per barrel, and sent out the following: "Special Notice to the Patrons of the Brewers of Cincinnati, Covington, and Newport: We, the undersigned brewers of Cincinnati, Covington, and Newport, hereby notify our respective patrons that, owing to the heavy additional war tax imposed upon beer, the price of keg beer to the trade will be increased at the rate of \$1.00 (one dollar) per barrel, and the price of bottle beer will be advanced at the rate of ten cents per dozen quarts and five cents per dozen pints, and that such advance will take effect after midnight the 27th day of June, 1898. This increase covers the additional tax only, and we do not ask the trade to share the advance in price of brewing material, which in some instances amounts to more than seventy-five cents per barrel." This notice was signed by each of the 25 parties to the arrangement. They were indicted for violating section 3915, Ky. St.: "That if any corporation under the laws of Kentucky, or under the laws of any other state or country, for transacting or conducting any kind of business in this state, or any partnership, company, firm or individual, or other association of persons, shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles, or property of any kind, or shall enter into, become a member of, or party to or in any way interested in any pool, agreement, contract, understanding, combination or confederation, having for its object the fixing, or in any way limiting the amount or quantity of any article of property, commodity or merchandise, to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act." The evidence introduced on the trial established the making of the agreement, the sending out of the notice, and the advance in the price of beer by appellees according to its terms. At the conclusion of the evidence the court peremptorily instructed the jury to find for the defendants, and the commonwealth has appealed.

It is earnestly argued that the statute is in conflict with section 198 of the constitution: "It shall be the duty of the general assembly from time to time as necessity may require to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value." It is insisted that the thing forbidden by the constitution is

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the combination to depreciate an article below its real value, or to enhance its cost above its real value, and that the statute is in conflict with the constitution in so far as it ignores the real value of the property and forbids combinations to fix prices without regard to the value of the property. It is urged that, the government having imposed a tax of \$1 a barrel on beer, this added that much to the value of the beer, and the combination of the appellees to this end was not in violation of the constitutional rule. In *Com. v. Grinstead* (Ky.) 55 S. W. 720, this precise question was decided. It was there held that the statute is not in conflict with the constitution, and, upon a reconsideration of the subject, we adhere to the rule there laid down. It is also maintained that the tax was something unforeseen, which neither the brewers nor any one else could anticipate; that it came as a war measure, deemed of necessity by the federal congress, and that the arrangement was only for an advance on beer to the extent of the tax, so that beer which had sold for two, four, and six dollars a barrel was thereafter sold at three, five, and seven dollars. It is said that this was not an agreement fixing or regulating or controlling the price of beer, but a simple raise to meet a business necessity, and that it was reasonable. The purpose of the arrangement is not difficult to see. Its aim was to throw upon the purchaser the entire burden of the tax, and exempt the brewers from bearing any part of it. The agreement to this end by the 25 establishments making beer had the effect to advance the price of beer \$1 a barrel. As to whether the purchasers of the beer sustained this loss or made an advance in price to the consumer, to throw the burden of the tax on him, the record does not show. The statute forbids any arrangement, agreement, or understanding for the purpose of regulating or controlling or fixing the price of any merchandise or property of any kind. The fact that there was a horizontal raise of the same amount on all classes of beer, irrespective of the price at which it had been selling, does not seem to us any more to take the case out of the operation of the statute than if the agreement had been to raise some grades in price more than others. The purpose of the statute is to forbid all combinations to regulate, fix, or control prices, and to leave prices to be regulated entirely by the law of supply and demand. The arrangement in question entirely defeated this purpose. If it had not been made, some manufacturers, who had not as many customers as they desired, might have endeavored to increase their trade by dividing the tax burden with their customers. It is a matter of common knowledge that when an article cannot be sold above a certain price, and the retailer cannot handle it unless it is sold to him at a reduced price, manufacturers sometimes cut their prices to

a smaller margin of profit rather than give up the trade entirely. The purpose of the agreement before us was to prevent any cut in the prices of the manufacturers. It had the effect to regulate and control prices, as it was designed to do, and was in our judgment a violation of the statute.

It is also earnestly maintained that the combination, having for its purpose the raising of the price of beer, was not illegal, for the reason that the cheaper the drink the more of it will be used, and the law does not favor the increased use of intoxicants. But the statute makes no such exception. It makes unlawful, and undertakes to punish, all agreements for the purpose of controlling the prices of any article. The legislature has thus defined the offense, and the court must enforce the law as it finds it.

Judgment reversed, and cause remanded for a new trial.

BURNAM, J., dissenting.

PULASKI COUNTY v. ELROD et al.¹
(Court of Appeals of Kentucky. March 4, 1902.)

SHERIFFS—LIABILITY ON BOND—FAILURE TO PAY OVER UNEXPENDED AMOUNT OF ROAD TAX.

A sheriff was bound to pay over to the county treasurer the unexpended amount of a road tax in his hands upon an order by the fiscal court requiring him to do so; and for his failure to do so he is liable on his bond.

Appeal from circuit court, Pulaski county.
"Not to be officially reported."

Action by Pulaski county against Walter Elrod and others on the bond of Walter Elrod as sheriff. Judgment for defendants, and plaintiff appeals. Reversed.

G. W. Shadoan, for appellant. Jas. Denton and H. S. Robinson, for appellees.

DU RELLE, J. Pulaski county instituted an action against Elrod, as sheriff of Pulaski county, and the sureties on his official bond, to compel a settlement of his accounts of receipts and disbursements of a "road tax or fund," alleging the amount received by him during the year 1897; that there were outstanding "road orders or certificates" ordered by the fiscal court to be paid out of the road fund for that year, the amount of which was unknown, and which Elrod had refused to pay; that commissioners had been appointed to make settlement of his account as to the road fund, but that, owing to a difference as to the amount of the commission to be allowed him, he had refused to complete the settlement; that, if the settlement were completed, he would be found owing the county a considerable amount. The prayer was that a settlement be compelled, and for a judgment for the amount found due thereon. An amended petition

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was filed, alleging the full amount collected on the road tax to be \$4,180.45; that he paid out on road orders \$3,605.47; that, after crediting him with his commission for collection and distribution, there was a balance due to the county of \$317.75; that the treasurer of the county had been, by order of the fiscal court, ordered and directed to make demand and collect that amount, and had made demand, but payment had been refused. The judgment prayed was for \$317.75, with interest. A demurrer to the petition as amended was sustained.

Counsel for appellees assumes that the action is by the county to recover the amounts ordered to be paid out of the road tax upon claims. We do not so understand the petition as amended. The action is for the amount which he was ordered by the fiscal court to pay the county treasurer. Whether the original petition was in pursuance of the proper mode to compel a settlement need not be considered, as that relief seems abandoned. But it seems clear that, if the averments of the amendment are true, the sheriff was bound to pay over to the county treasurer the unexpended amount of the road tax in his hands upon the order alleged to have been made by the fiscal court. We think, therefore, that the petition states a cause of action, and the judgment is reversed, with directions to set aside the order sustaining the demurrer, and for further proceedings consistent herewith.

ILLINOIS CENT. R. CO. v. GHOLSON et al.¹

(Court of Appeals of Kentucky. March 4, 1902.)

RAILROADS—NEGLIGENT KILLING OF STOCK— PRESUMPTION OF NEGLIGENCE—REBUT- TAL—PEREMPTORY INSTRUCTION.

Where the uncontradicted and unimpeached testimony of the servants in charge of a train by which mules were struck and killed showed that the mules could not have been seen in time to prevent the injury, the presumption of negligence on the part of the railroad company was overcome; and the fact that two or three days after the accident tracks of mules were seen, which, if they were the tracks of the mules killed, and made just before the killing, tended to show that the mules could have been seen in time to prevent the injury, did not tend to prove negligence, as horses and mules were permitted to run at large in great numbers in that section, and the jury would not have been authorized to infer that the tracks in question were made by the mules killed, or just before they were killed; and therefore a peremptory instruction to find for defendant railroad company should have been given.

Appeal from circuit court, Ballard county.
"Not to be officially reported."

Action by R. L. Gholson and Lloyd Gholson against the Illinois Central Railroad Company to recover damages for the negligent

killing of live stock. Judgment for plaintiffs and defendant appeals. Reversed.

Corbett & White and Pirtle & Trabue, for appellant. Shelbourne & Kane, for appellees.

O'REAR, J. Appellees brought this suit against appellant railroad company to recover for the negligent killing of a number of mules by its railroad train on the 17th day of June, 1900. There were but three eyewitnesses to the act, so far as the record shows. The mules were struck at a point on the railroad track between Filmore yards and Minor Slough trestle. Between Filmore and the trestle was a curve, and it was directly after coming off this curve that the stock was hit by the locomotive. The accident occurred about 2 o'clock in the afternoon. The engineer testified that he was on the lookout, and as they came off the curve onto the straight track he for the first time saw the mules, which were feeding beside the track. They ran onto the track, and about 25 yards ahead of the locomotive. He immediately sounded the whistle when he discovered them starting towards the track, and applied the emergency brakes, stopping his train in the shortest possible distance,—within less than 200 yards,—but not until the mules had been run into. The train was a fast passenger train, running from New Orleans to Chicago, not stopping at way stations. It consisted of about six coaches and the locomotive. The fireman's testimony was that, before entering upon the curve, the train crossed a public crossing, at which he rang the bell until the crossing was passed; that he noticed up the track, and saw no obstructions, nor did he see any live stock. He then turned to put in coal, and was so engaged when he heard the engineer's whistle of alarm, and felt the shock of the sudden application of the emergency air brakes. Looking up, he saw the stock as it was struck, and felt the shock of the striking. A short distance beyond, and in plain view of the point where the stock was struck, was a pump house. The person in charge of it testified that on this occasion he was standing on the platform, looking down the railroad track in the direction whence the passenger train was coming; that he saw the mules grazing between the two tracks,—that is, the track of appellant railroad and that of the Mobile & Ohio Railroad, which was probably some 50 yards distant; that when the locomotive came into view around the curve the mules ran onto the track, evidently attempting to cross over; that they were but a few yards ahead of the locomotive when they reached the track, and that the engineer was whistling with the alarm signal, and did stop the train within 200 yards of the point when he first could have seen the stock, but not until after the mules had been struck. The country was unfenced for many miles. Stock was turned loose in great numbers, the neigh-

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borhood affording good grazing. Horses and mules were frequently seen on the track at and near the point where these mules were killed. Two days after the killing of the stock, appellee and another person found them, though some of them had been buried. They went down the track some several hundred yards to a pond or pool of water, and they discovered, as they testified, tracks of horses and mules coming from the direction of this pool to the point near the trestle where these mules were killed. They further testified that some of these tracks indicated that the mules had been running.

From the fact that live stock is killed by a railroad train, the statute raises a presumption of negligence in the killing. In this case the testimony of the trainmen and all the eyewitnesses clearly refuted this presumption. It then became the duty of appellees to show negligence by direct proof. It should be such as to of itself establish the negligence. It is not sufficient if it merely shows circumstances indicating the possibility of negligence in the case. The fact of finding the stock killed by the railroad train showed that much, at least. The statutory presumption above stated is a rule of necessity. But the ends of justice do not require it to be further extended. We are of opinion that, in view of the evidence that horses and mules were permitted to run at large in great numbers and indiscriminately in this section, that they were frequently seen in this particular neighborhood, the evidence merely of tracks, seen two days after the accident, was not a circumstance sufficient to overcome the positive testimony of appellant's witnesses. In fact, there is no conflict of testimony in this case. Taking all as true that was said by appellees' witnesses, it does not involve the disbelief of any statement made by appellant's witnesses; for it may be admitted as true that there were tracks as deposited to by appellees' witnesses, that these tracks showed for some 200 yards or 300 that the mules had run up the railroad track; yet it is not shown that the tracks mentioned were made by these mules, or that they were made on the occasion of the killing. If there was not the statutory presumption of negligence (and when it has been sufficiently overcome by positive evidence it is the same as if there was no such presumption, for all practical ends), and plaintiff was under the necessity of proving negligence on the part of the railroad company in killing the stock, then the mere presence of tracks, found two days after the accident, and which, as shown by the evidence, may or may not have been made by these mules, or may or may not have been made on this occasion, the plaintiff's case would fail for want of proof. If there was evidence for the plaintiff discrediting or contradicting appellant's witnesses, and which would, therefore, tend to destroy appellant's rebutting testimony, leaving the statutory presumption, the case would have been properly submitted

to the jury. But there is none. All of appellees' evidence may be believed without in the slightest discrediting any of the other testimony in the case. We do not have to weigh the credibility of witnesses, nor consider the probability of their tales. Whatever may have been their motive of bias to be gathered from the fact of their connection with appellant, or whether it was as great or greater than that of the owner of the stock upon the other side, we are not here concerned with. Nor is it necessary for us to find that men in such employment, whose occupation through many years of trial has been that of handling train loads of people, so many human lives and so much of valuable property committed to their fidelity, to their courage, and to their judgment and skill, would perjure themselves for the inconsiderable interest to them involved in this case. Were the evidence conflicting, the credibility of the witnesses must be passed upon by the jury; but we cannot agree that such a slight circumstance, one so commonplace, and so naturally explained in consonance with the integrity of the testimony of eyewitnesses who are unimpeached as to their character, and whose testimony bears every evidence upon its face of being straightforward and truthful, is sufficient to authorize the submission of the case to the jury. Therefore the peremptory instruction asked for by appellant should have been given at the close of the evidence.

The judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

MAYS et al. v. CARMAN.¹

(Court of Appeals of Kentucky. March 5, 1902.)

JUDICIAL SALES—PRESUMPTION AS TO DIVISIBILITY OF LAND—FIXTURES—PLEADING CONSTRUED MOST STRONGLY AGAINST PLEADER.

1. Under Civ. Code Prac. § 604, providing that, before ordering a sale of real property for the payment of debts, the court must be satisfied "whether or not the property can be divided without materially impairing its value," the court was authorized to presume, in the absence of allegation or proof as to that matter, that a tract of $3\frac{1}{2}$ acres was divisible, and it was therefore proper to adjudge a sale of only so much of the tract as was necessary to pay plaintiff's debt.

2. As pleadings must be construed most strongly against the pleader, the averment of defendant's answer in an action to enforce a purchase-money lien that "there was a telephone line along and into the house, and a telephone box in and affixed to the house for the use of its residents," and that plaintiff removed said telephone box after he conveyed the property to defendant, without her consent, does not raise the question whether the telephone line and box were fixtures and passed under the deed, as it is not sufficiently alleged that the telephone line ran into a house which was on the land embraced in the deed, or that the telephone box was attached to the house.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Hardin county.
"Not to be officially reported."

Action by J. W. Carman against Lydia E. Mays and another to enforce a vendor's lien. Judgment for plaintiff, and defendants appealed. Affirmed.

Jas. Montgomery, for appellants. L. A. Faurest, for appellee.

PAYNTER, J. The appellee sought to enforce a lien for the purchase money on a tract of land containing 34½ acres. It is urged that the case should be reversed because the court violated section 694, Civ. Code Prac., in ordering so much of the tract sold as was necessary to pay the plaintiff's debt against it. That section provides that the court must be satisfied by the pleadings and by the agreement of the parties, by affidavits filed, or by the report of a commissioner or commissioners, whether or not the property can be divided without materially impairing its value. This court, in *Sears v. Henry*, 13 Bush, 413, held that it did not require an allegation to be made in the pleadings to the effect that the property is divisible or indivisible; that if the court is satisfied from the character of the boundary, or the number of acres in it, that a division can be had, it is all that is required. In that case it was held that the court should conclude that a 30-acre tract could be divided without impairing or lessening its value, and that it was incumbent upon the defendant to show that the division would affect its value. In this case the defendants did not attempt to do this, and the court properly adjudged that a sufficient quantity should be sold to pay the plaintiff's debt.

It is also urged that the case should be reversed because the court sustained a demurrer to part of defendants' answer. The part of the answer to which a demurrer was sustained reads as follows: "They say there was a telephone line along and into the house, and a telephone box in and affixed to the house for the use of its residents, and that said line was made for its and other houses' convenience and betterment by the plaintiff and other persons, and, to represent each person's interest therein, writings were given, and one of these to plaintiff for \$10 tax, who sold and assigned to William Nall, and removed, said telephone box, after he had conveyed the property to her, without her consent, against their will and protest, which caused great damage to the farm; and, by reason of all the aforesaid acts and doing of plaintiff, they say she has been damaged \$350, which they plead as a counterclaim and set-off, and pray for judgment over and for all relief." It is contended that the telephone box passed under the deed to the grantee, and that the appellee had no right thereafter to sell it. It is not sufficiently alleged that the telephone line ran into a house which was on the land embraced in the deed, or that the telephone box was

attached to the house; nor is there any averment to show that it was a fixture to the realty conveyed. Under the rule that pleadings must be construed most strongly against the pleader, we are of the opinion that the averments in the answer do not raise the question discussed in the brief of counsel for the appellants, to wit, that the telephone line and box were fixtures and passed under the deed to the appellants. We therefore do not decide the question as to whether a telephone box may or may not be a fixture, and pass by the deed conveying the realty.

The judgment is affirmed.

HINKLE v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 28, 1902.)

INTOXICATING LIQUORS—INDICTMENT—STATEMENT OF CASE BY PROSECUTING ATTORNEY—PLEA OF DEFENDANT—SALE OF LIQUOR BY RETAIL—EVIASION OF LAW.

1. Under Act May 7, 1896, prohibiting the sale of liquor and intoxicating beverages within five miles of Union College, in Knox county, an indictment charging that defendant did "unlawfully sell, directly and indirectly, spirituous, vinous, and malt liquors, and intoxicating beverages, by the drink, half pint, quart, gallon, and in other quantities less than five gallons," to a person named, within five miles of Union College, located in Barbourville, Knox county, Ky., in violation of the provisions of said act,—giving its title and date,—is sufficient.

2. Where the county attorney read to the jury the indictment and the indorsements thereon, whereupon the attorney for the commonwealth said to the jury the indictment was his statement, no further statement to the jury was necessary.

3. The indictment being read to the jury, it will be presumed, unless the contrary appears, that the plea of not guilty was entered.

4. Where a witness testified that, as defendant was taking the names of persons who wanted whisky, he gave him his name, together with 25 cents to pay for a pint of whisky, whereupon they went towards a distillery, and that, hearing some time thereafter that the whisky was made up, he went to a house near the distillery and there received a pint from some person, the court properly instructed the jury to find defendant guilty if they believed he directly or indirectly sold whisky to the witness in quantities less than five gallons, or acted as agent of others in doing so; the evidence tending to show that the transaction was an attempt to evade the law prohibiting the sale of whisky by retail.

Appeal from circuit court, Knox county.

"Not to be officially reported."

George Hinkle was convicted of the offense of selling liquor in violation of a local prohibitory law, and he appeals. Affirmed.

B. B. Golden, for appellant. Robt. J. Breckinridge, for the Commonwealth.

GUFFY, O. J. The indictment in this case accuses the appellant of the offense of selling, directly and indirectly, spirituous, vinous, and malt liquors, and intoxicating

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

beverages, in quantities of less than five gallons, within five miles of Union College, located in Barbourville, Knox county, Ky., committed in manner and form as follows: "The said George Hinkle did on the 15th day of July, 1900, in the county aforesaid, unlawfully sell, directly and indirectly, spirituous, vinous, and malt liquors, and intoxicating beverages, by the drink, half pint, quart, gallon; and in other quantities less than five gallons, to Wm. Gregory, within five miles of Union College, located in Barbourville, Knox county, Kentucky, in violation of the provisions of act of the general assembly of the commonwealth of Kentucky entitled 'An act to prohibit the sale of spirituous, vinous or malt liquors, or intoxicating beverage, in quantities less than ten gallons, within five miles of Union College, in Knox county' (2 Acts 1885-86, p. 494), which act became a law, and was approved May 7, 1886, against the peace and dignity of the commonwealth." A trial resulted in a verdict and judgment finding the defendant guilty, and fixing his fine at \$100; and, his motion for a new trial having been overruled, he prosecutes this appeal.

The grounds relied upon for a new trial were: "(1) Because the court erred in overruling the demurrer to the indictment. (2) Because the court erred in overruling defendant's motion to find him not guilty at the close of the evidence for the plaintiff. (3) Because the court erred in overruling the defendant's motion to instruct the jury to find defendant not guilty at the close of all the evidence. (4) Because the court misinstructed the jury, and refused to properly instruct the jury. (5) Because of the misconduct of the county attorney in the argument of the case. (6) Because the verdict is against the law and evidence. (7) Because the court erred in refusing to require the attorney for the commonwealth to state the case to the jury."

It seems to us that the indictment is sufficient; hence the demurrer was properly overruled. It appears from the bill of exceptions that the county attorney read to the jury the indictment and the indorsements thereon, and sat down, to which the defendant objected, whereupon the attorney for the commonwealth said to the jury the indictment was his statement, and this is all the statement to the jury. It does not appear that the plea of not guilty was not entered or stated; hence the inference is that the plea of not guilty was properly entered. We are not aware of any rule of law that requires the commonwealth to state in detail the testimony which is expected to be introduced. We therefore conclude that there was no error in the proceedings in this regard.

The testimony of the commonwealth is, in substance, as stated by Wm. Gregory, as follows: "I saw the defendant standing near Stanfill's store, and he was taking names for a 'divide,'—I cannot say that he took all the

names,—and told him that I wanted a pint of whisky. He took a paper from his pocket and wrote my name on it. I gave him 25c., and we went down towards the distillery. Some time after this I heard that they had the whisky made up, and I went to the distillery, or a little house near it, and they were dividing out the whisky. My name was called, and I spoke up and answered. Somebody, but I do not remember who, drew my pint of whisky and gave it to me. I got it and left. I did not get this whisky from the defendant, George Hinkle. I do not know where he was when it was drawn. This was within five miles of Union College, and within Knox county, and within twelve months before this indictment was made." Thereupon the defendant moved the court to find the defendant not guilty, which motion was overruled, with exceptions. The defendant testified as follows: "At the time stated by the witness, he asked me to take his money and put it in with a number of others who were preparing to purchase ten gallons of whisky from the Chamberlain & Hinkle Distillery, in Barbourville. As an accommodation to him, I did so. I was preparing to go home, anyhow. My home is beyond the distillery, and as I went home I stopped at a little house near the distillery, where several men had gotten together. Some of them had a list of names, and a pile of money was laying by. I told the man who was taking the names to put down the name of Wm. Gregory, and whoever it was did so. I do not remember the man who had the list. I do not know whether I knew this man, or not, who had the list. He took Gregory's name, and I laid Gregory's money down in the pile and went on home. I was not back there. Do not know whether Gregory got the whisky or not. I did not deliver it to him. I had no interest in the whisky, and was not in any way connected, as agent or otherwise, with the owners of the whisky. I do not know whose whisky it was, and do not know who had control of the house." The defendant again moved the court to find him not guilty, which motion was overruled, with exceptions.

The court instructed the jury as follows:

"Gentlemen of the Jury: If you believe from the evidence, beyond a reasonable doubt, that the defendant, George Hinkle, in Knox county, within twelve months before the finding of the indictment herein, and within five miles of Union College, sold to the witness, directly or indirectly, spirituous, vinous, or malt liquors, or whisky or brandy, in quantities less than five gallons, you will find him guilty as charged in the indictment, and fix his punishment at a fine of not less than \$100 nor more than \$200 in your discretion."

"If you believe from the evidence, beyond a reasonable doubt, that the defendant acted as agent, or assisted Isaac Hinkle or W. B. Chamberlain, directly or indirectly,

in selling said liquors in quantities as stated in instruction No. 1, whether he had any interest or not, you will find him guilty as charged in the indictment, and fix his punishment as stated in instruction No. 1.

"If you believe from the evidence that the defendant acted in good faith, and purely as a matter of accommodation, in procuring the whisky for the witness, and had no interest therein, and that he was not acting as agent of Isaac Hinkle or any other person in selling said liquor, etc., you will find him not guilty.

"If the jury have a reasonable doubt of the defendant having been proven guilty, they will find him not guilty."

We are of opinion that the instructions given by the court correctly presented the law applicable to the case on trial. The testimony of the witness introduced for the commonwealth seems clearly to authorize the jury to believe that the defendant sold to, and arranged with the witness to procure for him, a pint of whisky, which agreement and contract were fully proven; and the mere fact that the defendant was not present when the delivery of the whisky was made in no wise excuses him from the effect of the contract, or sale made to the witness.

If it be conceded that the testimony of the defendant contradicted the testimony of the witness for the commonwealth, it was the province of the jury to weigh and determine the testimony, and determine as to the real truth of the transaction. The Code of Practice does not authorize this court to reverse a judgment on account of the weight of evidence; the provision being that, if there is any evidence tending to show the guilt of the party, this court cannot reverse on account of the insufficiency of the evidence. It may not be improper to add that the testimony in this case tends to show that the defendant was arranging to sell to the witness a pint of whisky, and that the whole transaction is but an attempt to avoid the provisions of the law prohibiting the sale of whisky by retail within the prohibited distance of Union College.

After a careful consideration of the law and facts in this case, we conclude that the judgment is sustained by the law and facts, and the judgment appealed from is therefore affirmed.

ILLINOIS CENT. R. CO. v. GHOLSON,¹
(Court of Appeals of Kentucky. March 4,
1902.)

RAILROADS—NEGLIGENT KILLING OF LIVE STOCK.

Where a number of horses and mules were struck and killed by two trains running close together, and the engineer of the first train testified that the accident occurred on or directly after leaving a curve, and that he

did not see the stock, or know of it, until he felt his locomotive strike it, the second engineer testifying that he saw an indistinct object 25 or 30 yards ahead, but before he could do more than apply the brakes he had struck the object, and the testimony for plaintiff tended to show that the stock had been running for a distance of several hundred yards before being struck, and might have been seen by the engineer for a distance of from 50 to 100 yards, the question of negligence was for the jury.

Appeal from circuit court, Ballard county.
"Not to be officially reported."

Action by R. L. Gholson against the Illinois Central Railroad Company to recover damages for the killing of live stock. Judgment for plaintiff, and defendant appeals. Affirmed.

Corbett & White and Pirtle & Trabue, for appellant. Shelbourne & White, for appellee.

O'REAR, J. Two freight trains on appellant's railroad injured and killed eight horses and mules belonging to appellee on August 19, 1900. The trains were running close together, and the stock was killed and injured between 3 and 3:30 o'clock in the morning. The engineers each testified that the accident occurred on or directly after they came off a curve. The first one did not see the stock, or know of it, till he felt his locomotive strike it and smelled the blood. The second engineer saw an indistinct object 25 or 30 yards ahead, but before he could do more than apply the brakes he had struck the object. He did not see it plainly enough to know what it was, but from the odor of the flesh and blood upon his engine thought it was a horse or cow. The firemen each say they were engaged in firing their engines. The night was dark. For appellee it was shown by a number of witnesses that the horses, as were shown by the location of their carcasses, had been struck at different times, except two, which were probably struck at the same time. The carcasses were strewn for a distance of about 100 yards. These witnesses further testified that the tracks seen between and beside the rails showed that they were fresh horse and mule tracks, and that the stock had been running for a distance of several hundred yards before being struck. The accident occurred on a long fill. The headlights on these engines were in good condition, and would have shown far enough ahead to give warning of the presence of such obstructions for a distance of from 50 to 100 yards, at least. Yet they were not seen. We are of opinion that the verdict for appellee was clearly sustained by the evidence. The instructions given to the jury presented simply and fairly the question of negligence. We perceive no error in them; indeed, none is urged in argument. The amount of the verdict, measured by the evidence, is temperate.

The judgment is affirmed, with damages

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ATKINS et al. v. BAKER.¹

(Court of Appeals of Kentucky. March 6, 1902.)

CONSTRUCTION OF DEED—ALL PARTS OF DEED CONSIDERED TOGETHER—ADDITION TO HABENDUM CLAUSE LIMITING ESTATE GRANTED.

1. In construing a deed, all parts of the instrument must be considered together, and therefore technical words in the granting and habendum clauses importing a fee must yield to a clause following the covenant of general warranty limiting the interest of the grantee to a life estate.

2. Under Ky. St. § 1707, the widow is entitled to a homestead in land of the husband occupied by him as such, subject to the right of his unmarried infant children to joint occupancy.

Appeal from circuit court, Marion county. "To be officially reported."

Action by W. H. Baker against Geneva Atkins and another to recover land. Judgment for plaintiff, and defendants appeal. Reversed.

W. J. Leslie, for appellants. W. H. Baker and Thompson & Spalding, for appellee.

DU RELLE, J. L. E. Atkins was a widower with five children at the time he married Lucy Baker. Subsequent to their marriage Lucy Baker Atkins purchased a tract of land for \$400, and died childless. L. E. Atkins then married appellant Geneva Atkins. Appellee, Baker, brought suit for the land, claiming it as the only brother and heir at law of Lucy Baker Atkins. Geneva Atkins defended, claiming a homestead in the property. The sole question is the construction of the deed. The deed is between David Mattingly and wife, of the first part, and Lucy Atkins, wife of L. E. Atkins, of the second part, and, after reciting the consideration, proceeds: "The parties of the first part have sold, and do hereby convey, unto the party of the second part, the following tract of land [describing it]; to have and to hold unto said Lucy Atkins forever, with covenant of general warranty. In testimony whereof, witness our signatures this 22d day of July, 1892. This conveyance, at the request of said Lucy Atkins, is made to her for and during her life, and at her death to go to her husband, L. E. Atkins, should he survive her; and, in the event said Lucy Atkins should leave a child or children, then this land shall descend to them and their father according to the laws of descent." (The signatures and the clerk's certificate follow.) For appellee it is claimed that the words of grant and the habendum clause convey what, under the statute (section 2342, Ky. St.), is an absolute fee, and that the condition imposing a limitation upon the estate conveyed to Lucy Atkins is clearly repugnant to both the granting clause and the habendum of the deed, and therefore void

under the common-law rule that "a fee cannot, at common law, be limited to a fee, as, if lands are limited to one and his heirs, and, if he dies without heirs, then to another, this last limitation is void." *Fearne*, Rem. 373. The case of *Lee v. Lee*, 7 B. Mon. 605, is relied on, which presents the exact case supposed in the quotation from *Fearne*, and was decided in accordance with that doctrine. *Bail v. Hancock's Admr.*, 82 Ky. 107, is also relied on. In that case the deed under consideration not only recited a previous promise to convey the property to the grantee, but gave her the absolute disposition of the property by deed or will, at her pleasure, and it was held to pass a fee. In *Ratcliffe v. Marrs*, 87 Ky. 27, 7 S. W. 395, 8 S. W. 876, the rule laid down in *Turman v. White's Heirs*, 14 B. Mon. 572, as to the application of the rule in *Shelley's Case* in this state, was disregarded, and a deed to William, "to have and to hold said tracts of land, with their emblements, to said William aforesaid, during his natural life, and after that to his heirs, forever," executed before the adoption of section 10, art. 1, c. 63, Gen. St., was held to pass a fee simple to William. The first rule of construction is to reconcile all parts of the document. *Spurrier's Heirs v. Parker*, 16 B. Mon. 274. A construction which creates a repugnancy must be rejected. *Adie v. Cornwell*, 8 T. B. Mon. 276. It is a well-recognized rule that that construction will be favored which avoids a repugnance in the terms of the instrument construed. The statute relied on provides: "Unless a different purpose appear by express words or necessary inference, every estate in land created by deed or will without words of inheritance shall be deemed a fee-simple, or such other estate as the grantor or testator had power to dispose of." Where must such different purpose appear? It must appear in the terms of the instrument under consideration. And so, in *Henderson v. Mack*, 82 Ky. 380, 381, we find a deed in which it is recited in the granting clause that the grantors "do hereby sell, grant, and convey to the party of the second part, his heirs and assigns, the following described property: * * * to have and to hold the same, with all the appurtenances thereon, to the second party, his heirs and assigns, forever, with covenant of general warranty, during his natural life, and after his death to go to and belong absolutely to Belle Mack, she paying the unpaid purchase money, as aforesaid." It was held, in an opinion by Judge Holt, that: "The proper end of all rules of construction is to effect the intention of the parties to the instrument; and the intention of the grantor in a deed is to govern, where it can be ascertained, equally as in the case of other instruments. In arriving at it the entire paper must be considered. Blackstone says that the construction must be made upon the entire deed, and not merely upon disjointed parts of it." If

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clauses are repugnant to each other, they must be reconciled if possible; and the intent, and not the words, is the principal thing to be regarded. The technical rules of construction are not to be resorted to when the meaning of the party is plain and obvious. *Noyes v. Nichols*, 28 Vt. 159. In *Jackson v. Myers*, 3 Johns. 383, 3 Am. Dec. 504, Kent, C. J., states the rule in these words: "The intent, when apparent, and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement. In the exposition of deeds the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect." Applying these rules of construction to the deed in question, we cannot escape the conclusion that it was intended by it to create but a life estate in James E. Young, with a remainder right in Belle Mack." We regard this case as conclusive of the case at bar. There is an addition in each of the cases to the habendum clause, and in both cases this addition comes after the covenant of general warranty. But in the *Henderson Case* it was held that the technical words importing a fee, and used both in the granting and habendum clauses, must yield to the manifest intent as expressed by the addition to the habendum clause. We are of opinion, therefore, that the deed conveyed a life estate to Lucy Atkins, with remainder to her husband in fee, subject to be divested by Lucy leaving a surviving child or children. From this it must follow that the widow is entitled to a homestead, subject to the right of the unmarried infant children of the husband to joint occupancy, under section 1707, Ky. St.

For the reasons given, the judgment is reversed, and cause remanded, with directions to overrule the demurrer to the answers and sustain the demurrer to the petition.

TERRY v. TERRY.¹

(Court of Appeals of Kentucky. March 7, 1902.)

FORCIBLE ENTRY AND DETAINER—TITLE PAPERS AS EVIDENCE—LANDLORD AND TENANT—ATTORNMENMENT OF TENANT TO STRANGER.

1. As the sole question in a proceeding of forcible entry was whether plaintiff was in the actual possession of the land at the time of the alleged forcible entry, defendant's title papers were not admissible in evidence for him, neither the right nor the extent of possession being involved.

2. Defendant was not entitled to prove that he had obtained possession of the land from the tenant of plaintiff's lessor, as the attornment of a tenant to a stranger is void unless it be with the consent of the landlord, or pursuant to a judgment of a court.

Appeal from circuit court, Breathitt county.

"Not to be officially reported."

Proceeding of forcible entry by Charles Terry against Jacob Terry. Judgment for plaintiff, and defendant appeals. Affirmed.

Marcum & Pollard, for appellant. J. J. O. Bach and W. W. Vaughan, for appellee.

BURNAM, J. In June, 1900, the appellee, Charles Terry, sued out a writ of forcible entry against the appellant, Jacob Terry, charging that he had forcibly entered into a field of which he was in the peaceable possession. The trial in the country resulted in a verdict of a jury finding the defendant guilty as charged in the warrant. He thereupon appealed to the circuit court. There a trial also resulted in a verdict and judgment for appellee, from which this appeal is prosecuted.

It appears from the bill of exceptions that Miles Terry, the father of appellee, cleared the field in controversy some 18 or 20 years before the institution of this proceeding, inclosed it with a fence, and held the possession of it until the spring of 1900, when he rented it out to his son, the appellee, Charles Terry, for a period of five years. The contract of renting was reduced to writing, but was not signed by the parties, but appellee was put in possession. In the year 1898, Miles Terry, with the consent of appellee, rented the field to one Robert Freeman, who cultivated it in oats. In the year 1899 it was used for a pasture, and in March, 1900, appellee put some hands in the field to cut briars. Afterwards the appellant, Jacob Terry, also put some of his hands at work in the same field, and notified appellee to get out. Upon the trial in the circuit court the appellant offered in evidence a patent from the state to one R. W. Rose, and a deed from Rose to Isaac Terry and from Isaac Terry to himself, which he said covered the land in dispute, and which the court refused to allow to be read. He also offered to prove that after obtaining the deed from his father, which covered the field in controversy, he served written notice on Robert Freeman, appellee's tenant, to surrender possession of the land to him, and that soon after he went to Freeman's house, and that Freeman gave him peaceable possession, and that he had been in possession ever since, claiming the land as his own. The court refused to permit this testimony to go to the jury. Appellant also asked for a peremptory instruction, which was refused. For these alleged errors a reversal is asked.

It seems clear that at the time of appellant's entry appellee was in the actual possession of the field, and we do not think that the court erred in not permitting appellant to read his title papers to the jury. This is sometimes permitted to show the extent of possession, but never the right of possession. See *Beauchamp v. Morris*, 7 Ky. 312, and *Carpenter v. Shepherd*, Id. 501. Nor do we think that the court erred in not permitting

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appellant to prove that he had obtained possession of the land from Freeman, the tenant of appellee's lessor, as it is well settled that the attornment of a tenant to a stranger is void, unless it be with the consent of the landlord, or pursuant to a judgment of a court. See *Trabue v. Ramage*, 80 Ky. 323. The sole question in the case was whether appellee was in the actual possession of the land at the time of the alleged forcible entry. As there is no controversy on this point, it follows that the judgment appealed from should be affirmed, and it is so ordered.

JOHNSON v. DUMEYER et al.¹

(Court of Appeals of Kentucky. March 7, 1902.)

CONSTRUCTION OF WILL—POWER TO SELL FOR REINVESTMENT—APPLICATION OF PURCHASE MONEY.

1. Where testator devised city lots to his daughter, with power to sell "if a sale is advantageous," but providing that "the proceeds of sale shall be invested in other real estate, and the property shall be held until absolute power is given to sell as provided in item 7 of my will," the seventh item providing that the lots during the term of 20 years shall not be sold or incumbered, the devisee had power to sell at any time for the purpose of reinvestment, and her decision that a sale is advantageous or advisable is final and conclusive.

2. Under Ky. St. § 4846, the purchaser of land sold for reinvestment under the provisions of a will need not look to the application of the purchase money, unless expressly so required by the devise.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Agreed case between Lena Dumeyer and husband, as plaintiffs, and A. L. Johnson, defendant, for the construction of a will, and for the performance of a contract. Judgment for plaintiffs, and defendant appeals. Affirmed.

Strother & Strother, for appellant.

GUFFY, C. J. This was an agreed case, filed in the Jefferson circuit court for the purpose of enforcing the specific performance of a contract, and as an incident thereto to obtain a construction of the will of John G. Seeger. It appears that Lena Dumeyer is the owner in her own right of certain real estate in Louisville, Ky., on which there is a mortgage amounting to \$1,300. It further appears that she sold certain real estate devised to her by the will aforesaid, and it was purchased for \$1,485; and the appellant Johnson, having bought the same, declined to execute the contract for the reason that he doubted the ability of said Dumeyer to convey a perfect title. The first item of the will in question reads as follows: "I give and bequeath and devise to my daughter, Lena Dumeyer, a lot of land

and improvements thereon situated in Louisville, Kentucky, having a front of 28 feet on the north side of Main street, between 16th and 17th streets, and extending the same width northwardly 195 feet to Crop street; to have and to hold the same as hereinafter stated as her sole and separate estate, with power to dispose of same by will or deed as if she were a feme sole." The second item devises to Christian Seeger a lot of land. Then comes the following expression in the will: "Power and authority is given to Lena and Christian to sell said lots described in items one and two if a sale is advantageous, but the proceeds of sale shall be invested in other real estate, and the property shall be held until absolute power is given to sell as provided in item 7 of my will." The seventh item reads as follows: "The real estate devised to my children shall be held by my said four children for and during the term of 20 years after my death, and for and during the term of 20 years the property described shall not be sold nor mortgaged nor incumbered, and any mortgage created during said 20 years on said property shall be null and void. After the expiration of said term of 20 years my said four children shall have an absolute title to the real estate devised or acquired by them by reinvestment with full power and authority to sell or dispose or incumber the same and pass a fee-simple title by will or deed, but the property or proceeds of any property devised to my daughters shall be held by them as their separate estate." It will be seen from the will that the testator made bequests to four of his children, but only the power and interest of the said Lena is involved in this suit. The court below adjudged that the plaintiffs, Lena Dumeyer and her husband, had ample right and power to convey to the appellant Johnson a clear, good, and indefeasible fee-simple title to the real estate described in the petition, and adjudged a specific performance of the contract aforesaid, and from that judgment Johnson prosecutes this appeal.

The opinion of the court below reads as follows: "By the second clause of the will express authority and power of sale is given to the plaintiff to sell for reinvestment in like property, subject to the condition or suggestion that the sale should be advantageous. That provision is evidently not intended as a restriction upon the right to sell, for it does not put the decision of that question with any other person; and, having given plaintiff the right to sell whenever it shall be advantageous to do so for the purpose of reinvestment, it is plain that the right to sell is vested absolutely in the plaintiff, and subject only to his judgment of its advisability. The reference to the sale being advantageous is a suggestion, rather than a condition. The will is entirely harmonious in its provisions. The second clause refers to the seventh clause for a determination of the trust, while the seventh clause in turn fixes the

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time of the trust at 20 years, not only for property originally devised, but also for such property as had in the meantime been acquired by reinvestments which had been authorized by the second clause. During the period of the trust—the 20 years—the property cannot be mortgaged, incumbered, or sold, except that a sale for reinvestment is expressly allowed by the second clause. By section 4846, Ky. St., it is expressly provided that the purchaser of land to be sold for any specific purpose, or generally by trustees in a devise like this one, shall not be bound to look to the application of the purchase money, unless so expressly required by the devise. There being no requirement of any kind in that respect by this will, it necessarily follows that the defendant's objection upon that ground is not well taken. I am clearly of the opinion that the contentions of the plaintiffs as to the construction of the will as set forth in the first five parts of this agreed case are correct, that they have full power to make the sale and conveyance to defendant, and that the defendant should be required to accept the conveyance in completion of the contract of sale."

After a careful consideration of the questions involved, we concur in the opinion of the learned chancellor, and therefore affirm the judgment appealed from.

GRAY'S ADMR et al. v. PASH et al.¹
(Court of Appeals of Kentucky. March 4, 1902.)

CONSTRUCTION OF WILL—CHANGE OF CONDITION AFTER EXECUTION OF WILL—EXTRINSIC EVIDENCE TO SHOW TESTATOR'S INTENTION.

Where a testator directed payment of \$1,000 to each of the children of P., who had married testator's niece, but whose wife was dead when the will was made, the children of P. born of a marriage contracted after the execution of the will are entitled to the benefit of its provisions, as the will speaks as of the time of testator's death; and evidence is not admissible to show the circumstances surrounding testator at the date of the will for the purpose of showing that he intended to limit his bounty to the children of P. by his niece.

Appeal from circuit court, Boyle county.
"Not to be officially reported."

Action by Henry T. Gray, administrator with the will annexed of Thomas H. Gray, and Henry T. Gray in his own right, against Nettie F. Pash, Kate Prewitt, and others, for a construction of the will of Thomas H. Gray and a settlement of his estate. Judgment construing will, and plaintiffs appeal. Affirmed.

R. P. Jacobs and C. R. McDowell, for appellants. Nat W. Halstead, for appellees.

WHITE, J. Thomas H. Gray died testate in Boyle county in 1897. His will was duly

probated in the county court, and this controversy is over the construction of that instrument. The will itself bears date of March 21, 1882, but there is an undated codicil thereto, which was written, as seems to be conceded, some time prior to 1888. By the will a life estate in all testator's property is given to his brother James M. Gray, and then disposition is made of the fee after the death of J. M. Gray. The latter clause is affected by the codicil. The codicil reads: "After my death, and after the death of my brother, James M. Gray, it is my will that my nephew, Henry Gray, is to have half of the farm he now lives on, containing about 152 acres of land; and that my niece Mrs. Kate Prewitt, wife of T. C. Prewitt, is to have my half of the farm joining Thomas C. Prewitt and Thomas Prewitt, and running up to the Danville and Perryville pike, and containing about 138 acres of land; and out of the remainder of my half interest in the joint estate shall be paid the children of Z. T. Pash one thousand dollars each as they become of age, and the remainder of my half in said estate that may be in the hands of my brother, James M. Gray, at the time of his death, is to be divided equally between my nephew, Henry Gray, and my niece Kate Prewitt; and Henry Gray is appointed trustee of the children of Z. T. Pash, until they become of age." The facts as they appear in this record are that Thomas H. Gray and his brother James M. Gray were bachelor brothers, who were partners in business, and had accumulated considerable property. Besides these two there were two other brothers, William and Henry, both of whom were dead in 1882. Henry Gray and Mrs. Kate Prewitt were the only children of William Gray, and the children of Z. T. Pash alive when the codicil was written were the issue of Bettie, daughter of Henry Gray, deceased, who had married Z. T. Pash and had died. Bettie Gray Pash had three children, and died in 1883, but one of these three died before testator, Thomas H. Gray. In 1896, Z. T. Pash married a second time, and by this marriage has had five children, so that at the death of the testator, Gray, he had seven children, only two of whom were in any way related to testator, Thomas H. Gray. The question presented in this case is as to the right of the five children of Z. T. Pash by his second wife to take under the will of Thomas H. Gray \$1,000 each, by which it is provided: "Out of the remainder of my one-half interest in the joint estate shall be paid to the children of Z. T. Pash one thousand dollars each," etc. The lower court adjudged that under the will each of the seven children of Z. T. Pash was entitled to receive \$1,000, and from that judgment this appeal is prosecuted.

It is the contention of counsel for appellants that the facts and circumstances and surroundings at the date of the will or cod-

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icll may be shown by parol testimony in order to give effect to the will and construe its meaning, as well as to identify the devisees and legatees therein. That, though the will on its face appears full and complete, both as to the property devised and the persons to whom given, the real intention of the testator may be shown to have been otherwise by showing that the conditions had materially changed between the date of the will and codicil and the date of testator's death. After having proven this change of conditions, appellants' counsel insists we may interpret or construe the will as speaking of the date it was written, rather than at testator's death. To this end proof was taken below to show that Z. T. Pash had married and had five children after the will was written, and that these five children were in no way related to testator, and were strangers in blood to his household. From this proof it is argued that testator would not have reasonably given each of these five children, in no way related to him, the same as he had given the others, who were his niece's children. The court below sustained exceptions to this proof, and this is excepted to as error. We are of opinion that this proof was incompetent for any purpose, and was properly rejected. But, for the sake of argument, if it be conceded to be admissible, it proves nothing that would change the language, clear and explicit as it is, of the will. It will be noticed that the will nowhere names Bettie Gray Pash, niece of testator. The devise is to the children of Z. T. Pash without stating that they are the children also of his niece, nor is the number stated. If the niece, Bettie, was dead when this codicil was written, and the devise had been intended to be limited to her children, it could easily have been done by names, or as children of Bettie, or simply given the number then living. On the other hand, it appears that testator lived more than 10 years after the second marriage of Z. T. Pash, and in the same neighborhood a part of the time, so it must be presumed testator knew that Pash had children other than those of his first wife, Bettie; yet the general words of the will are not changed. There is no ambiguity in the will in this particular. The children of Z. T. Pash are given \$1,000 each. There is no qualification or limitation expressed, or even suggested as possibly intended. The language is broad enough to cover, and does cover, all the children of Pash. If there was any question of identity of Z. T. Pash's children, that could be shown by proof; but such is not the case here. There is no question of identity. It is well settled that testimony as to the intention of the testator is inadmissible. *McCauley v. Buckner*, 87 Ky. 191, 8 S. W. 196; *Chenault's Guardian v. Chenault's Ex'rs*, 88 Ky. 83, 11 S. W. 424; *Mudd v. Mullican* (Ky.) 12 S. W. 263, 386; *McBrayer v. McBrayer's Ex'x*, 95 Ky. 475, 26

S. W. 183; *Tuttle v. Berryman*, 94 Ky. 553, 23 S. W. 345. If the testator's expressed intention as to what he intended doing is not admissible, surely the circumstances and surroundings could not be shown to alter or vary the very language of the will itself. The courts have power to construe wills when their meaning is doubtful, and proof may be heard to identify a devisee or legatee when that is in doubt; but the courts cannot make a will for a person, nor can it substitute its judgment for that of the testator as to the objects of his bounty. In the will under consideration the devise is to each of a class composed of the children of Z. T. Pash. The court is not authorized to divide the class, and say to one part, "You take, because your mother was a niece of the testator," and to another part, "You do not take anything under the will, because you are strangers in blood to the household of testator." There is no such division made or authorized, or even intimated, by the will itself; and when it is conceded—as must be, for the will to be valid for any purpose—that the testator knew his estate, and the objects of his bounty, and was capable of making a will, the case is settled in favor of appellees. If the testator, Thomas H. Gray, had not intended to give to the children of Z. T. Pash, whether they were also children of his wife Bettie Gray Pash or not, he could easily have so stated, either in the original codicil or by a second. The testator lived several years after Pash's second marriage, and nearly 14 years after the death of his niece Bettie Gray Pash. We are of the opinion that the construction placed on the will by the learned trial judge is the only one that comports with our law, and that to construe it otherwise would be to substitute the power of the court for the will and desire of the testator.

There appears no error in the judgment, and the same is affirmed.

YAGER v. KENTUCKY TITLE CO.¹

(Court of Appeals of Kentucky. March 7, 1902.)

GUARANTORS—RIGHT TO SUE AT ONCE UPON DEFAULT OF PRINCIPAL—FAILURE TO SUE PRINCIPAL WITH DILIGENCE.

The holder of a bond for the payment of money upon which an unconditional guaranty of the payment of the principal and interest was indorsed was entitled at once upon the default of the principal to look to the guarantor for payment of the debt, and therefore the guarantor was not released by want of diligence in suing the principal.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by the Kentucky Title Company against W. J. Yager on a contract of guar-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

anty. Judgment for plaintiff, and defendant appeals. Affirmed.

McDonald & McDonald, for appellant.
Pope Nicholas, for appellee.

BURNAM, J. On the 2d of September, 1897, the appellant, W. J. Yager, sold and conveyed to Lola M. Gauss certain real estate in Louisville in consideration of the execution by her of four bonds for \$500 each, due in one, two, three, and four years, respectively, which were made payable to the Kentucky Title Company or bearer, and which bore interest at the rate of 6 per cent. per annum, payable semiannually; and to secure the payment of each of the bonds a lien was retained in the deed upon the property. These bonds were transferred by Yager to the Kentucky Title Company, with this indorsement: "I hereby guaranty the payment of the principal and interest and of the within bond at maturity. Sept. 2, 1897. W. J. Yager." It was provided by the deed that, if Lola M. Gauss failed to pay any of the bonds when it became due, the holder of such overdue bond or coupon might declare all the bonds secured by the deed to be immediately due and payable. In January, 1899, the title company instituted this suit, in which they allege that none of the bonds or interest thereon had been paid since the 2d of March, 1898, and asked for a personal judgment against the payor, and also against W. J. Yager upon his indorsement, and for an enforcement of their lien. The appellant, Yager, answered that he was only a guarantor on the bonds, and that he had been released from all liability by the failure of the title company to institute suit for more than four months after the principal obligors had defaulted in payment, although he alleged he notified them that he would not consent to any indulgence upon the bonds. The trial court overruled a general demurrer to this answer, and the title company replied, denying the alleged negligence, or that Yager had ever notified them that they should institute suit against the principal obligors on the bond; and they also deny that, if suit had been instituted, the amount could have been made out of the principal obligors, or that the appellant was prejudiced by such failure. The chancellor held Yager liable upon his contract of guaranty because the proof failed to show that he was damaged by reason of the title company's failure to sue promptly, and, the proceeds of the property being insufficient to pay the lien debts, gave the title company a personal judgment against him for the deficit of \$673.93, with interest and cost; and from this judgment appellant appeals.

We do not deem it important to consider the proof introduced upon the trial of the case, as, in our opinion, the answer of appellant did not state facts sufficient to support a defense, and the chancellor erred in overruling the demurrer filed thereto. "A guar-

anty is either absolute or conditional. An absolute guaranty is an unconditional promise of payment or performance on default of the principal. To bind the guarantor, it is not necessary that there should be notice of acceptance of the guaranty and default of the principal, or that any steps should be taken to enforce the contract guarantied against the principal. The guaranty may proceed against the guarantor at once on default of the principal. The guarantor's liability is dependent upon the same rules of law by which the liability of one who has broken his contract is determined. A guaranty is conditional when there is some extraneous event beyond the mere default of the principal by which the guaranty becomes binding. Liability does not attach immediately upon nonpayment or nonperformance by the principal. In general it is necessary to fix the liability of the guarantor, that there should be notice of the guaranty and notice of the principal's default, and reasonable diligence in exhausting reasonable remedies against the principal. The most usual form of absolute guaranty is a promise to pay the debt at maturity if not paid by the principal debtor, and the guarantee may bring an action on default of payment at the date named against the guarantor." See Am. & Eng. Enc. Law 1141. Brandt, Sur. p. 119, § 85, says: "When the terms of a guaranty of payment fix the time within which the payment shall be made, if the payment is not made within the time prescribed, there is a breach of guaranty, and no steps need be taken against the principal, nor need his insolvency be shown, to charge the guarantor." See numerous cases cited in notes to support text. *Yeates v. Walker*, 1 Duv. 84. the payee of a note assigned it in the following words: "For value received, I assign this note to Owen W. Walker, and, if not paid, I bind myself to pay it." The assignee instituted a joint action against the payors and the assignor. Judgment was rendered by default against the assignor. Upon appeal he sought to reverse the judgment upon the ground that the petition failed to show that the appellee had sued the payors of the note, and had been unable to coerce the payment of the debt from them. The court held that, if the assignment was made before the maturity of the note, the assignor's liability accrued at its maturity. And in *Thompson v. Glover*, 78 Ky. 195, 39 Am. Rep. 220, this court said: "Where the whole transaction is of such a nature as to give the guarantor full information as to his liability, and the agreement to accept is contemporaneous with the guaranty, and was the consideration therefor, all the parties being privy to the whole transaction, no specific notice is necessary." The guaranty in this case was an absolute undertaking on the part of appellant, Yager, to pay the principal and interest of the bonds at the maturity thereof, and the title company had the right to look to the

appellant, as guarantor, for the payment of their debt, immediately upon the default of the principal. As this is the effect of the judgment appealed from, it is affirmed.

FALLON v. FARMERS' HOME MUT. AID ASS'N.¹

(Court of Appeals of Kentucky. March 5, 1902.)

INSURANCE—DAMAGE BY WINDSTORM—FAILURE TO ALLEGE NOTICE OF INJURY.

In an action upon a policy insuring against damage by windstorm plaintiff should have alleged that he had given defendant insurance company notice of the nature and extent of the injuries inflicted within a reasonable time thereafter, or he should have alleged some excuse for his failure to do so.

Appeal from circuit court, Fleming county.

"Not to be officially reported."

Action by Tobe Fallon against the Farmers' Home Mutual Aid Association upon a policy insuring against damage by windstorm. Judgment for defendant, and plaintiff appeals. Affirmed.

G. A. Cassidy and W. G. Dearing, for appellant. John P. McCartney, for appellee.

BURNAM, J. On the 20th day of August, 1896, the Farmers' Home Mutual Aid Association insured the tobacco barn of appellant, Tobe Fallon, against damage by fire, lightning, or windstorm of any description to the extent of \$300, which was to be paid within 60 days after notice of the damage to the property insured. On the 17th day of January, 1900, appellant instituted this suit in the Fleming circuit court, seeking to recover damages for injuries to his barn from windstorms. He alleges, in substance, that the barn was injured to some extent about three years before the institution of this suit by a violent windstorm; and that he notified the company of the character and extent of the injuries which it had received, and requested them to repair it, and which they promised but neglected to do; that he thereupon did so himself, expending for this purpose 50 cents; that the barn was located upon a high hill, and had, since the original injury, been repeatedly shaken and racked by windstorms until it had become unsafe for occupancy, and asked that the company be compelled to put it in good condition, or pay the amount of the insurance. The petition contained no specific allegations of the character of the damages, when they occurred, nor did he allege that he had given the defendant notice thereof, except as to the original injury which he had himself repaired. The defendant company filed a motion that the plaintiff be required to make his petition more specific. Thereupon he filed an amended petition, but failed to cure

the defects of his original petition. The defendant then demurred generally and specially to the petition as amended, which were sustained, and the petition dismissed, and the plaintiff has appealed.

Notice of the damage to the property insured is made a condition precedent by the terms of the policy, and it was essential that plaintiff should have alleged that he had given the defendant company notice of the nature and extent of the injuries inflicted upon the property insured within a reasonable time after the injury, or some excuse for his failure to do so. In the absence of such allegations, the special and general demurrers were both properly sustained.

Judgment affirmed.

GOATLEY et al. v. CROWE et al.¹

(Court of Appeals of Kentucky. March 6, 1902.)

CONSTRUCTION OF WILL—DEVISE SUBJECT TO TRUST—POWER TO CONVEY LAND WHILE TRUST REMAINS UNEXECUTED—RES ADJUDICATA.

1. A testator devised his entire estate to his wife and daughters and to R., his son, whom he directed to take care of the daughters on testator's farm "during their single life," and then provided that all of the property, after supporting the wife and daughters, should be owned by R. by his making to each of the daughters certain gifts provided they should marry. *Held*, that R. took the land in fee subject to the trust, but as long as any of the daughters were unmarried, and the trust thus remained unexecuted, R. had no power to sell the land.

2. R. having made an assignment for the benefit of creditors, and his assignee having brought suit to construe the will, a judgment rendered in that action to the effect that R. had no vendible interest in the land during the existence of the trust, and that the land therefore did not pass to the assignee under the deed of assignment, does not preclude the heirs of R. from claiming the land subject to the trust.

Appeal from circuit court, Washington county.

"Not to be officially reported."

Action by Julia A. Goatley and Zachariah Crowe against Lee Goatley and others for the construction of a will. Judgment construing will, and defendants appeal. Reversed.

W. E. Selecman and Hazelrigg & Chenault, for appellants. John W. Lewis, for appellees.

WHITE, J. Peter Goatley died in Washington county in 1859, testate. His will was probated, and contains among others this provision: "I give and bequeath to my wife, Sinal Goatley, and to my daughter Louisa Toon and her three children, and Cavilla M. Goatley, Emma Jane Goatley, Susan Goatley, Jane Maria Goatley, and July Ann Goatley, and to my son Robert P. Goatley,—all the above-named heirs are at present living with me,—all my land except the land I purchased

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

of John Withrow and wife, and also my slaves and their increase, and all my personal estate, excepting what will pay my just debts. I wish it distinctly understood that the above-named property, both real, personal, and mixed, is entirely under the control and management of my son Robert P. Goatley, who is to have the care of the other heirs above named during their single life; and I wish it also understood that they are to remain here, and have their support, while single. All the land, slaves, and personal estate above named, after supporting my wife and daughters above named during their single life, is to be held and owned by my son Robert P. Goatley by his giving to each of my daughters now single a horse, saddle, and bridle, and cow, and bed, and six sheep, provided they should marry. * * * I also wish it understood that my daughter Louisa Toon, above mentioned, is only to have a home here and maintenance for her children during her single life. If she should marry, Robert P. Goatley is not to give her anything after her marriage, but, if her children should remain with my son Robert P. Goatley until they are of age, then my son Robert is to school them, and give them a horse, saddle, and bridle." Robert P. Goatley was appointed executor without bond. Julia Ann Goatley has never married, but continued to live with her brother Robert P. Goatley up until his death, in 1889, and after that she continued to live on the place, and use the rents and issues thereof, till in 1899 some controversy came up over the title to the land, when she instituted this action to construe the will of her father, Peter Goatley. To her petition the heirs at law of Robert P. Goatley filed answer, making same a cross petition against the appellees, heirs at law of Peter Goatley, claiming the fee simple title to the land subject to the trust for the support of Julia Ann Goatley. To this cross petition appellees, heirs at law of Peter Goatley, filed answer, and denied that Robert P. Goatley, or appellants as his heirs at law, held or owned any interest in the land in fee, but that Robert P. Goatley was a trustee merely, and for the purpose of providing for a support for the daughters of Peter Goatley, as named in the will. In a separate paragraph it is pleaded that in an action brought by the assignee for the benefit of creditors of Robert P. Goatley the Washington circuit court was called on to construe the will so far as the rights and interest of Robert P. Goatley were concerned, the assignee claiming the interest and title of Robert P. Goatley by the deed of assignment; that to that action Robert P. Goatley was a party, and before the court; that judgment was rendered in that action, by which it was determined and decreed that under the will of Peter Goatley the lands were created a trust estate, and did not pass to the assignee under the deed of assignment of Robert P. Goatley. Appellees pleaded this

judgment as a bar to appellants' right to recover anything by descent from Robert P. Goatley. To this answer of appellees a reply was filed, which admitted the rendition of the judgment in the assignment suit, but denied that it was an adjudication contrary to a right of recovery by them in this action. The action was submitted on the pleadings and record of the assignment suit, and the court adjudged in favor of appellees on the question of *res adjudicata*. The rights of the original plaintiff, Julia Ann Goatley, are not in controversy here. The only question is as to the ownership of the fee title to the land, subject to her rights. To reverse the judgment denying appellants the fee title this appeal is prosecuted.

We are of the opinion that by the will of Peter Goatley the fee title to the land was devised to Robert P. Goatley subject to the trust imposed to support and furnish a home to the daughters of Peter Goatley while they remained single, and to give them specified property when they should marry. This trust imposed on Robert P. Goatley to support and furnish a home for his unmarried sisters was, in its nature, personal, and could not be delegated by him, and was continuing, as this record shows, during his life, as one of the daughters never married, but outlived her brother. Robert P. Goatley therefore had no vendible interest in the land during the existence of the trust imposed by the will. If Robert P. Goatley could have sold and conveyed away the fee title to the land, there would have been no way to compel him to support and provide a home for his unmarried sisters. If this land had passed to the assignee in insolvency, it must have been sold to pay debts of Goatley, and the personal trust would have been destroyed. The last clause of the item quoted above plainly shows that Peter Goatley intended that his single daughters should be provided for and should have a home on this land; for it says: "I also provide that if my son Robert P. Goatley should die before my daughters that are now single should marry, they are still to remain in possession of the property, and my son Mason J. Goatley is to manage and have the care of them and property while they remain single, provided he is living." We are of the opinion, and so hold, that Robert P. Goatley was devised the fee title to the land, but because of the nature of the trust imposed on him as well as on the land he could not sell and convey same so long as the trust was not fully executed, which seems not to be yet fully executed. We are also of the opinion that the judgment and decree of the Washington circuit court in the suit brought by the assignee of Robert P. Goatley, is not an adjudication and estoppel of the rights of appellants, heirs at law of Robert P. Goatley. That judgment and decree is final and binding on the parties and privies, but is not inconsistent with the claim of appellants in this case. That judgment

gave the correct interpretation to the will of Peter Goatley that the rights and interest of Robert P. Goatley in the land under the will was not then a vendible interest because of the trust imposed, and did not pass under the deed of assignment. The same construction we now give to the will and to his rights and title. Whenever the trust imposed is fully executed, or by the conditions imposed the land and personal obligation is freed, the fee will be in Robert P. Goatley, and the property may then be conveyed.

For the reasons indicated, we are of the opinion that the judgment appealed from is erroneous, and will be reversed, and cause remanded for judgment for appellants in accordance herewith, and for further proceedings not inconsistent with this opinion.

**FOREST HILL BUILDING & LOAN ASS'N
OF WEST COVINGTON v. McEVOY'S
EX'R et al.¹**

(Court of Appeals of Kentucky. March 6, 1902.)

JUDGMENT—SETTING ASIDE—EXPIRATION OF TERM—POWER OF COURT—RE-REFERENCE TO COMMISSIONER—APPELLATE JURISDICTION—IMMATERIAL RECORD—COSTS.

1. A court of continuous session had power to set aside an order of sale after the expiration of 60 days from the date it was entered, motion therefor having been made before the expiration of 60 days.

2. Where the chancellor deemed the master's report insufficient upon matters referred, a re-reference was proper.

3. Where a building and loan association sought by cross petition to enforce a mortgage lien which had been assumed by defendants, the association claiming that the maturity of the debt had been precipitated by the default of defendants in the payment of dues and interest, an appeal lies from a judgment adjudging that defendants were not in default, and permitting them to continue the payment of dues and interest, though the judgment recites that the submission to a commissioner, on which it was rendered, was only on the question whether or not defendants should pay interest on the mortgage, as the effect of the judgment is to refuse to enforce the lien, and therefore something more is involved than the amount of the interest, which alone would not be sufficient to give jurisdiction of an appeal.

4. Under Civ. Code Prac. § 737, appellant having brought up the entire record of the settlement of an estate embracing litigations having not the faintest relation to the litigation which ended in the judgment appealed from and reversed, the motion of appellees to require appellant to pay for the immaterial parts of the record must be sustained.

Appeal from circuit court, Kenton county.
"Not to be officially reported."

Action against the executor of Martha McEvoy and the Forest Hill Building & Loan Association of West Covington for a settlement of the estate of Martha McEvoy. Judgment refusing to enforce mortgage lien asserted by defendant building and loan association, and that corporation appeals. Reversed.

Furber & Jackson, for appellant. Byrne & Read, for appellees.

DU RELLE, J. Suit was brought by Glenn and wife against Martha McEvoy's executor for a settlement of Martha McEvoy's estate, and for a reference to the master to ascertain and report the debts, to which suit the appellant was made a party, and called upon to set up its claims. The administrator of Haley applied to be, and was, made a party, and alleged that Martha McEvoy owned in 1893 the east half of lot No. 40 in Wright subdivision, which she sold to one Seals, who executed to her two purchase money lien notes, one of which was unpaid, and had been assigned by Martha McEvoy to Haley, with a written guaranty for its payment; that the land had been subsequently sold to John and Thomas McEvoy, who assumed the payment of the lien note referred to, and also a subsequent mortgage to appellant association, which seems also to have held mortgages upon other lots which had been owned by the decedent. The appellant association set up its various mortgages, including the one on the eastern half of lot No. 40, claiming that under the terms of the mortgage, which contained a clause of precipitation of the principal upon failure for 90 days to pay the weekly installments, the maturity of the indebtedness had been precipitated by the failure to pay such installments for a period of 93 weeks. Appellant therefore prayed judgment for the total sum of \$519.58, and for a sale to satisfy its mortgage. The case was referred to the commissioner, and a report filed in favor of all the contentions of appellant. The report was confirmed, and subsequently an order of sale as to several lots, including the one in question, was made, without any provision as to what should be done with the proceeds. A motion was made within 60 days to set aside the order confirming the commissioner's report, and, after the expiration of the 60 days, sustained. The commissioner had meanwhile been ordered not to execute the order of sale as to the lot in question. The case was again referred to the master, and, seemingly by oversight, this order was subsequently repeated. The claim of Haley's administrator on the lien note seems to have been compromised and paid, and was dismissed, settled. The commissioner then reported that the building association book of the McEvoys was in arrears, but was so when the McEvoys assumed the Seals mortgage, and that the association gave them time to pay the mortgage in weekly installments of \$3, which were regularly paid until the cross petition was filed against them by the association. This last report was confirmed. The judgment appealed from recites: "The submission is for judgment only on the question of whether or not John and Thomas McEvoy should pay interest on the mortgage * * * from the time of the filing of the cross petition by said association

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

against them in this action." It adjudged that they were not in default at the time of the filing of the cross petition, and that after such default they offered to pay their dues and interest, which offer was not accepted by the association. The judgment then proceeds: "It is adjudged that John and Thomas McEvoy be allowed to continue paying their dues and interest, at the rate of \$2 dues and \$1 interest, as of the date of filing of the cross petition against them, * * * and that said association recover no interest for the period of time between the date of the filing of said cross petition and the time when said association accepts payment as herein ordered. The association should not be allowed interest for the time during which it refused to accept payments in the sums in which it had agreed and was obliged to accept them. If payments should not be offered by John and Thomas McEvoy as herein directed, interest will begin to run from date of the first regular meeting of said association at which said payments are not offered." The motion to set aside the order of sale was made within 60 days of the date of the order. The court had control of its order during the term of 60 days, and the motion to set aside suspended the order until acted upon.

We are not inclined to hold the re-reference to the commissioner erroneous. If the chancellor deems the master's report insufficient upon the matters referred, we do not think he should be limited by too strict a rule in seeking further information by a re-reference of the matter in doubt.

But the book of the association does not sustain the finding of the commissioner, nor that of the chancellor, who seems to have been misled thereby. It shows that between April 23, 1896, when the McEvoy's assumed the payment of the mortgage, to April, 1898, when the cross petition was filed, they were in default in their payments of dues considerably more than the 90 days required to precipitate the maturity of the debt. This being so, even if the waiver claimed to have been made of past defaults at the time the mortgage was assumed had been properly pleaded, which it was not, and assuming what is not the fact,—that the tender of payment of current dues at and after the date of filing of the cross petition was pleaded and proven,—they fell in default to the required extent after their assumption, and were still in default to the required extent at the time of the tender claimed to have been made. It necessarily follows, then, that a judgment refusing foreclosure must be erroneous.

But it is claimed that the judgment was upon a submission upon the question of interest only, and so recites. It makes no difference what the recital of the judgment is. It denied the relief sought, viz., the enforcement of the mortgage, by granting a relief to the defendant to the cross petition which

was absolutely incompatible with such enforcement. Tested by this, the motion to dismiss the appeal must fail. That motion is based upon the theory that interest to an amount less than \$100 is alone involved. As we have seen, the effect of the judgment was to deny the relief sought in the cross petition, and we have jurisdiction of a judgment which denies that relief. It is unnecessary, therefore, to consider the denial of interest on the entire mortgage because of the tender claimed to have been made of certain installments thereon.

There is also a motion—seemingly made in anticipation of reversal—to require the appellant to pay the cost of copies of immaterial parts of the record herein. By subsection 11, § 737, of the Civil Code of Practice, it is provided that "a party who requires a clerk to copy such papers [which do not constitute part of a record], or immaterial parts of a record, shall pay the cost resulting therefrom, to be adjudged by the court of appeals upon or without motion." The most casual glance at this record shows that it contains a mass of matter which is entirely immaterial to this appeal. This appeal relates solely to the controversy between the McEvoy estate, the McEvoy's, the Haley estate, and the appellant association, with regard to the claims upon the eastern half of lot No. 40. This was a side issue in the suit for a settlement of the McEvoy estate. But appellant has brought here the entire record of the settlement of the McEvoy estate, embracing litigations which have not the faintest relation to the litigation which ended in the judgment from which this appeal is taken. All papers, pleadings, reports, and orders which have anything to do with the eastern half of lot No. 40, the liens claimed thereon, or the liabilities secured by such liens, are properly in the record before us. Nothing else is. If counsel cannot agree as to what part of the record shall be taxed against appellant, the court will be compelled to make the specification.

The judgment is reversed, and cause remanded, for a judgment in accordance with this opinion.

INDUSTRIAL MUTUAL DEPOSIT CO. v. CENTRAL MUTUAL DEPOSIT CO.¹

(Court of Appeals of Kentucky. March 7, 1902.)

CORPORATIONS—PROTECTION IN USE OF CORPORATE NAME—TRADE-NAME CONSISTING OF GENERIC TERM.

A corporation incorporated as "Industrial Mutual Deposit Company" is not entitled to enjoin a corporation subsequently incorporated as the "Central Mutual Deposit Company" from using the words "Mutual Deposit Company" as a part of its name; those words being descriptive of the business of the corporation.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Fayette county.

"To be officially reported."

Action by the Industrial Mutual Deposit Company against the Central Mutual Deposit Company for an injunction. Judgment for defendant, and plaintiff appeals. Affirmed.

Hobbs & Farmer and Morton & Darnall, for appellant. Forman & Forman, for appellee.

HOBSON, J. Appellant, the Industrial Mutual Deposit Company, filed this suit in the Fayette circuit court to obtain an injunction protecting it in the use of its corporate name, and preventing injury to its business. The court sustained a demurrer to the petition, and dismissed the action. The petition set forth these facts: The plaintiff, the Industrial Mutual Deposit Company, was incorporated on May 7, 1900. The defendant, the Central Mutual Deposit Company, was incorporated in January, 1901. The articles of incorporation of both are similar. The business in which they are engaged, and the method of conducting it, are the same. The principal office of both is located in the city of Lexington, in the Merrick Lodge Building. Many of the promoters of the defendant before its organization were connected with the plaintiff. They were induced to organize the defendant company, to designate the Merrick Lodge Building as the chief office of the company, and to select for it the name "Central Mutual Deposit Company," which differs from that of the plaintiff only by the substitution of the word "Central" for the word "Industrial," with the purpose and intent of drawing away from plaintiff its customers and clientage, and of promoting the business of the defendant, to the injury of the plaintiff's business. By this means it has seriously damaged the plaintiff, and has drawn away from it many of its customers. The demurrer admits as true the allegations of the petition.

The general principle that a corporation's name is its property, and that equity will protect the corporation from a fraudulent use of another name so like it as to deceive the public and rob it of its business, is admitted. Thus, in *Elliott on Private Corporations* (section 48) it is said: "The rule most consistent with principle is that a corporation will be protected in the use of its name upon the same equitable principles which protect persons in the use of trading names and trade-marks." There is, however, one well-recognized exception to the rule, and this is that a trade-name consisting simply of a generic term will not be protected. Thus, in *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581, the plaintiff sold his coal under the trade-name of "Lackawanna." The defendant's coal also came from the Lackawanna valley, and he designated it as "Lackawanna coal." The court held that the name

of a district could not thus be appropriated exclusively, and after saying that such phrases as "Pennsylvania wheat," "Kentucky hemp," "Virginia tobacco" could not be protected, it added: "Nor can a generic name, or a name merely descriptive of an article of trade, or its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection." In the subsequent case of *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535, the court held that a corporation would not be protected in the name "Goodyear Rubber Company." It said: "Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one. The addition of the word 'company' only indicates that parties have formed an association or partnership to deal in such goods, either to produce or to sell them. * * * Names of such articles cannot be adopted as trade-marks, and be thereby appropriated to the exclusive right of any one; nor will the incorporation of a company in the name of an article of commerce, without other specification, create any exclusive right to the use of the name." To the same effect, see *Avery v. Meikle*, 81 Ky. 85. Under these principles, it would not be maintained that a corporation doing business under the name of the Industrial Mining Company could enjoin another corporation from doing business in the name of the Central Mining Company, or one doing business as the Industrial Lumber Company could enjoin another from doing business as the Central Lumber Company. The words which are identical in the names in controversy are "Mutual Deposit." But these words designate the business followed by the company, and are generic terms descriptive of that business as fully as the word "lumber" would be in the case supposed, or the word "mining," and just as the word "trust" is in the names of the numerous trust companies operating in the state. Both the corporations are doing a mutual deposit business, and, as the name is descriptive of the business, neither can appropriate it exclusively.

Judgment affirmed.

CAMPBELL v. FIDELITY & CASUALTY CO. OF NEW YORK.¹

(Court of Appeals of Kentucky. March 5, 1902.)

SECOND APPEAL—LAW OF CASE—ACCIDENT INSURANCE—INTOXICATION—MURDER OF INSURED—EVIDENCE.

1. Where the court on a former appeal directed the giving of specific instructions which distinctly recognized the burden of proof to be on defendant, that opinion was the law of the case, and conclusively determined that question.

2. Upon an issue as to whether the insured in an accident insurance policy was drunk at

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the time he was killed, the evidence of a witness that he knew deceased well, and that he was a man who could drink large quantities of whisky—as much as a half gallon within a very short time—without becoming drunk, was not admissible; and, even if it had been, its rejection would not have been prejudicial.

3. Evidence tending to show that the person who killed insured was seen lying in wait for him two or three weeks before the killing was inadmissible; there being no question of self-defense, or as to who was the aggressor in the difficulty.

Appeal from circuit court, Shelby county.

"Not to be officially reported."

Action by Jennie B. Campbell against the Fidelity & Casualty Company of New York on an accident insurance policy. Judgment for defendant, and plaintiff appeals. Affirmed.

Gilbert, Peak & Gilbert, for appellant. Willis & Willis, for appellee.

HOBSON, J. The facts in this case are fully stated in the opinion rendered on the former appeal. See *Campbell v. Casualty Co.*, 60 S. W. 492. On that appeal a judgment for the defendant was reversed on account of the instructions by the court to the jury, and at the conclusion of the opinion explicit directions as to the instructions on another trial were given. On the return of the case to the circuit court it was tried anew, and the jury were instructed as thus directed. They again returned a verdict for the defendant, and the plaintiff again appeals.

Complaint is made that the court erred in placing the burden of proof upon the defendant. The answer admitted the killing of the intestate, and undertook to show that the defendant was not liable, because of certain provisions of the policy exempting it from responsibility. On the former appeal this court, by the instructions directed to be given, distinctly recognized the burden of proof to be on the defendant; and, that opinion being the law of the case, the trial court properly so held. When the case was reversed and a new trial awarded by this court, it was tried de novo, and on the principles settled by this court.

The evidence offered by the witness Garrett A. Lee that he knew the deceased, Campbell, well, and that he was a man who could drink large quantities of whisky—as much as a half gallon within a very short time—without becoming drunk, was of little value. The facts as to his condition were before the jury, and the evidence, if admitted, could have thrown little light on the case, as the effect that whisky has on a man depends largely on his condition at the time. We do not see, under the facts of the case, that this evidence was admissible, or that its rejection could have been prejudicial.

There was no error in refusing the evidence offered by appellant as to her seeing Duncan near her house one night two or three weeks before her husband was killed,

standing in front of their house, near a tree, and as she and her husband approached he jumped behind the tree, and remained there until they passed. This threw no light on the homicide, and as this court on the former appeal eliminated from the case all question of self-defense, or who was the aggressor in the difficulty, the evidence could not have thrown any light on the issues before the jury.

Judgment affirmed.

GRIFFIN v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 5, 1902.)

INTOXICATING LIQUORS—LOCAL OPTION—SALE BY DISTILLER—EVASION OF LAW FOR—BIDDING SALE BY RETAIL.

Under Ky. St. § 2558,—part of the local option law, providing that "the provisions of this act shall not apply to any manufacturer or wholesale dealer who in good faith and in the usual course of trade sells by the wholesale in quantities of not less than five gallons, delivered at one time and not to be drunk on the premises,"—the court should have instructed the jury that, if defendant was a manufacturer or wholesale dealer, and in good faith and in the usual course of trade sold the whisky by the wholesale in quantities of not less than five gallons, delivered at one time, and that it was not drunk on the premises, they should find him not guilty, but that if the money, with his knowledge, was made up and the whisky was delivered by him with a view to its division at once between the contributors, including the prosecuting witness, and the transaction was not in good faith a selling by wholesale, but a device to evade the operation of the local option law, they should convict him.

Appeal from circuit court, Knox county.

"Not to be officially reported."

Grant Griffin was convicted of the offense of selling liquor in violation of the local option law, and he appeals. Reversed.

B. B. Golden, for appellant. R. J. Breckinridge, for the Commonwealth.

HOBSON, J. Appellant was indicted for selling to S. M. White spirituous liquors in violation of the local option law. The testimony for the commonwealth by the witness White was as follows: "I went to a small house near Gray's station, in Gray's voting precinct in Knox county, within twelve months before this indictment. There were several men on the outside and several on the inside of the house. The defendant, Grant Griffin, was in the house all the time, and there was a man going about through the crowd inside and outside of the house. I don't know who he was. He had a cigar box, and me and the others there present put in various sums of money until we got \$20 made up, and then this man took it, and paid it over to defendant, Griffin, and we got ten gallons of whisky, and we all divided it in the house, after we bought it, among ourselves. I got either a quart or a half gallon

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

out of the keg." The defendant, Griffin, testified as follows: "At the time that the witness White speaks of, I was operating a distillery near Gray's station, in Knox county, and I owned and controlled the house spoken of by the witness. I use that house for my private warehouse, and kept my whisky stored there in the original ten-gallon packages. I cannot state whether the witness got the whisky he states or not. I never sold whisky at any time in quantities less than ten gallons in the original package. I did not know how the money was procured that was paid to me. I did not direct anybody to make up \$20 for a keg of whisky, and did not know that it was being done. One man always paid me the money, and I delivered him the whisky in the original package. I don't know what they did with it after they bought it." On this evidence the court instructed the jury as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant, Grant Griffin, in this county, and before the finding of the indictment, either directly or indirectly sold to the witness intoxicating liquors, to wit, whisky or brandy, in less quantities than five gallons, you will find the defendant guilty as charged in the indictment, and fix his punishment at a fine of not less than one hundred nor more than two hundred dollars." "If you have a reasonable doubt of the defendant being proven guilty, you will find him not guilty."

Section 2358, Ky. St., which is part of the local option act, provides: "The provisions of this act shall not apply to any manufacturer or wholesale dealer who in good faith and in the usual course of trade sells by the wholesale in quantities of not less than five gallons, delivered at one time and not to be drunk on the premises." In *Mahan v. Com.*, 56 S. W. 529, and *Adair v. Com.*, 56 S. W. 530, it was held by this court, construing this statute, that five things must concur in order to constitute a wholesale transaction within the exception: (1) The sale must be by a manufacturer or wholesale dealer; (2) in good faith, and in the usual course of trade; (3) by the wholesale in quantities of not less than five gallons; (4) delivered at one time; and (5) not to be drunk on the premises; and that when a sale is made the vendor takes the responsibility of seeing that the liquor is not drunk on the premises. Sections 2570, 2571, Ky. St., further provide: "No trick, device, subterfuge or pretense shall be allowed to evade the operation or defeat the policy of the law against selling spirituous, vinous or malt liquors without license, or in violation or evasion of any local option law prevailing in any county, town, city, precinct or municipality of this commonwealth." Section 2570. "A conviction for the offense of selling spirituous, vinous or malt liquors without license so to do, or for selling same in any county, town, city, precinct or municipality of this

commonwealth where local option laws prevail, may be sustained against the person in possession of the premises on which said liquor is obtained, furnished or disposed of in violation or evasion of law, if the following facts appear: A house, room, inclosure or other place where spirituous, vinous or malt liquors are furnished or obtained in violation or evasion of law, or where some device is used to dispose of, furnish or obtain such liquor in violation or evasion of law." Section 2571. Under these provisions, the court should have further instructed the jury that, if the defendant was a manufacturer or wholesale dealer, and in good faith and in the usual course of trade sold the whisky by the wholesale in quantities of not less than five gallons, delivered at one time, and none of it was drunk on the premises, they should find him not guilty; but that, if the money, with his knowledge, was made up and the whisky was delivered by him with a view to the division of the whisky as soon as it was got between the contributors, including the witness White, and the transaction was not in good faith a selling by wholesale, but a device to evade the operation of the local option law, they should convict him.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

RICHMOND, N., I. & B. R. CO. v. RICHARDSON.¹

(Court of Appeals of Kentucky. March 5, 1902.)

CARRIERS OF LIVE STOCK—CONNECTING LINE—LIABILITY FOR LOSS—EXECUTION OF SHIPPING CONTRACT—FRAUD OR MISTAKE.

Where plaintiff had been accustomed for many years to ship live stock over the line of defendant railroad company under a form of contract making defendant liable only for loss occurring on its line, it must be presumed that, when plaintiff applied to defendant's agent for a car to ship his stock, he anticipated shipping it in the usual way; and though the contract, which was in the usual form, was not read to him or explained, it cannot be inferred that there was any fraud or mistake.

Appeal from circuit court, Estill county.

"Not to be officially reported."

Action by C. Richardson against the Richmond, Nicholasville, Irvine & Beattyville Railroad Company to recover damages for breach of contract to carry live stock safely. Judgment for plaintiff, and defendant appeals. Reversed.

Wallace & Harris, for appellant. Grant E. Lilly, for appellee.

HOBSON, J. On January 19, 1893, appellee shipped 95 hogs and 3 cows, loaded in a car at Irvine, Ky., consigned to Green & Embury, at Cincinnati, Ohio. The stock were loaded late in the afternoon, and were tak-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

en by appellant immediately to Richmond, Ky., and there delivered to the Louisville & Nashville Railroad Company, to be forwarded to their destination. By the usual course of business, the car should have reached Cincinnati that night; but for some reason it was not taken up by the connecting line, and did not reach Cincinnati until the 22d. It was then delivered, with four of the hogs missing, one dead, and the others in bad condition. The hogs were in good condition when turned over by appellant to the Louisville & Nashville Railroad Company. There was no delay or neglect on appellant's part. What was the real cause of the delay in the car between Richmond and Cincinnati is not shown by the proof. On the first trial of the case there was a verdict in favor of the plaintiff for \$240. On appeal to this court a new trial was ordered. The court, after stating fully the facts of the case, and quoting at length the written contract of shipment, said: "It seems to us that the contract of shipment of the hogs in question does not make the appellant liable for any failure or injury, except such as occurred on its line of road between Irvine and Richmond; and, inasmuch as there was no plea of fraud or mistake in the execution of the contract of shipment, the court below erred in allowing any parol proof as to the terms of the contract of shipment. No instruction should have been given to the jury authorizing them to find against the appellant for any delay or damage to the hogs after the delivery of the car containing the hogs to the Louisville & Nashville Railroad Company at Richmond." 43 S. W. 465. On the return of the case to the trial court the plaintiff amended his petition, charging fraud or mistake in the execution of the contract of shipment, and pleading that the contract made by him with the company was one of through shipment from Irvine to Cincinnati. Issue was joined on these allegations. The case was tried anew, and resulted in a verdict in favor of the plaintiff for \$200.

There is little contradiction in the evidence. The proof shows that the plaintiff applied to the agent of appellant at Irvine for a car, saying that he wished to ship the stock. The agent ordered the car. The plaintiff loaded his stock on it. By the time he got it loaded, the engine was waiting for it, and immediately started on with it. He then came to the station, and he and the agent signed the contract of shipment. The contract was not read to him or explained. He had been shipping stock for 20 years; had shipped, according to his own testimony, as many as 50 cars. The company used only this form of bill of lading. He had often shipped on it before, and knew that appellant's road only ran to Richmond. The price for the shipment of the stock under their contract was \$36. If not shipped under it, the price of shipping it was \$95. The plaintiff and the agent valued the hogs, and the

valuation they fixed was placed in the contract; also the rate, \$36. This evidence utterly fails to show there was any fraud or mistake in the execution of the contract. When the plaintiff applied to the agent for a car to ship his stock, he must be presumed to have anticipated shipping it in the usual way, and on the usual contract in use by the company, on which he had been shipping for years. There was nothing in the transaction to evince a different arrangement, and the defendant not being liable beyond its own line, by the express terms of the contract, and having turned over the stock without delay and in good condition to the Louisville & Nashville Railroad Company at Richmond, according to appellant's expectation, and in the usual course of business, the court should have instructed the jury, under the evidence, to find for the defendant.

Judgment reversed and cause remanded, with directions to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

SERGEANT et al. v. NORTH CUMBERLAND MFG. CO.¹

(Court of Appeals of Kentucky. March 6, 1902.)

BASTARDS—LEGITIMACY—BURDEN OF PROOF—DOWER—ADULTERY—STATUTE OF LIMITATIONS.

1. As a general rule, a child born in lawful wedlock, when its mother is living with her husband, and they have opportunity for coition, is conclusively presumed to be legitimate; and, while exceptions are allowed to this rule, the burden of proof in such a case is upon the one asserting illegitimacy, it being necessary for him to show that the husband could not possibly have been the father of the child.

2. Under Ky. St. § 2133, the adultery of the wife does not bar her claim to dower where she continues to live with the husband.

3. Where a portion of a number of heirs sold and conveyed their interests in the land inherited, the possession of the purchaser was not adverse to the other heirs or to the widow's claim to dower; and, in any event, they are not barred by any possession short of 15 years.

Appeal from circuit court, Harlan county. "To be officially reported."

Action by Milton Sergeant and others against the North Cumberland Manufacturing Company for partition of land and allotment of dower. Judgment for defendant, and plaintiffs appeal. Reversed.

B. M. Lee, for appellants.

O'REAR, J. Appellants, Milton and Millard Sergeant, are twin children of appellant Mary Sergeant. They were born in June or July, 1877. Ephraim Sergeant, Sr., owned a tract of 400 acres of land in Harlan county at his death in December, 1876. Eight of his children (but not including appellants)

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

in 1884 conveyed their interests in this land, which has, by subsequent conveyances, come down to appellee. Appellant Mary Sergeant was the widow of Ephraim Sergeant, Sr. Her two children, appellants Millard and Milton Sergeant, joined her in bringing this suit in 1898 for a partition of the land, claiming dower for the widow and an undivided one-tenth each for the two children. Appellee defended upon the alleged grounds that Mary Sergeant, by adultery, had forfeited her right to dower, and that the two boys named were not the children of the decedent, Ephraim Sergeant, Sr. An issue was joined upon the question of the legitimacy of the sons. The court, upon the pleadings, and without proof, dismissed appellants' petition. This was error. The answer charged that Ephraim Sergeant, Sr., at the time of his death, was 80 years of age; that for 6 months before his death he had been in very feeble health, and unable to turn himself in his bed; that during that time appellant Mary Sergeant was guilty of adultery with divers men; that at no time within 10 months before the birth of these two sons had the putative father been physically able to perform the sexual act, and that he did not do so. It was not charged that his wife was living apart from him, or that they had not been in cohabitation during that period up to his death. As a general rule, a child born in lawful wedlock, when its mother is living with her husband, and they have opportunity for coition, is conclusively presumed to be legitimate (Greenl. Ev. § 28; *Strode v. Magowan's Heirs*, 2 Bush, 626); this is so even though it may be shown also that the wife during the time was guilty of infidelity (*Cope v. Cope*, 1 Moody & R. 269, 276; *Morris v. Davies*, 3 Car. & P. 215; *Rex v. Luffe*, 8 East, 193). This presumption of the legitimacy of such offspring is founded not alone upon the coincidence of probabilities, but as well upon that policy of the law that forbids either husband or wife testifying to occurrences between them during marriage; also upon its supreme regard for those privileges of the married state that all men instinctively withhold from the public knowledge. If the question of legitimacy were open to such attack, to be sustained or defeated by a mere preponderance of evidence, based largely and most frequently upon circumstances alone, the right of inheritance, the integrity of blood, the pride of ancestry, and its just sense of honor, all would depend upon the most dubious of titles. From the very nature of the case, positive evidence in support of the legitimacy must be the most difficult to be adduced. The law does not allow its inquiries to invade the privacy of the conjugal couch for any such purpose. When husband and wife enter it, it must be held

that its privileges are not subject of investigation, to the end that its reasonable and legitimate fruits may be brought into question. Exceptions to the general rule stated are allowed. For example, where a white woman, married to a white man, gives birth to a negro child; or when the husband and wife have been constantly apart, living in separate localities, not being together for a longer time than the period of gestation (*Pittsford v. Chittenden*, 58 Vt. 51, 3 Atl. 323; *Rex v. Maldstone*, 12 East, 550); or where the circumstances shown are such that it would have been impossible for the husband to have been the father (*Patterson v. Gaines*, 6 How. 550, 12 L. Ed. 553),—the presumption of legitimacy is overcome. But in every instance where it is allowed to be shown that the child born of a woman during wedlock, or thereafter within 10 months, is not legitimate, the burden of the proof is upon the one asserting the illegitimacy. Greenl. Ev. § 81. Even the allegations of illegitimacy will not be deemed to have been sustained by a mere preponderance of the evidence. It must show that the husband of the mother could not possibly have been the father of her child. If *Goss v. Froman*, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102, seems to go beyond this rule, the soundness of the extent of that opinion may well be doubted.

2. The demurrer of Mary Sergeant to the answer should have been sustained. It was admitted that she was the widow of appellee's remote grantor; that he owned in fee simple and was seised of the land in dispute during their marriage. Adultery of the wife will not bar her dower. Section 2133, Ky. St., on this subject, provides that the spouse shall be barred of dower in the other's property if he or she "voluntarily leave the other and live in adultery, unless they afterward become reconciled and live together as husband and wife." *McQuinn v. McQuinn* (Ky.) 61 S. W. 358.

3. The plea of limitation was not good. Appellee, claiming title through the husband, may be said to hold not adversely to his title, but in amity with it. Until dower is allotted, it may be questioned whether the widow has a right of action therefor. At any rate, in this case the answer does not show that appellee and those under whom it claims have had the actual, adverse possession of the land for 15 years before the bringing of the suit, or that they have had the actual possession of it for any length of time. The first reconveyance was in 1884. This suit was brought in 1898; consequently the statute had not run in any event.

The judgment is reversed, and cause remanded for proceedings consistent with this opinion.

FRAZIER v. BRASHEARS.¹**LOZIER v. FRAZIER.**

(Court of Appeals of Kentucky. March 5, 1902.)

HOMESTEAD—WIFE NOT NECESSARY PARTY TO ACTION—CONCLUSIVENESS OF JUDGMENT.

Where the purchaser at execution sale of defendant's undivided half interest in a tract of land brought suit for a sale of the land and division of the proceeds, and the court, though defendant resisted the sale, claiming a homestead, ordered the property to be sold, and a bond for one-half the purchase money to be taken, payable to plaintiff, that judgment, not being appealed from or vacated, was a conclusive determination that defendant was not entitled to a homestead; and his wife, though not a party to that proceeding, could not there after relitigate the question.

Appeals from circuit court, Letcher county. "Not to be officially reported."

Action by J. H. Frazier against H. A. Lozier to enjoin the collection of a bond. Judgment setting aside execution sale, and allotting homestead to R. O. Brashears, who intervened, and J. H. Frazier and H. A. Lozier prosecute separate appeals. Reversed.

S. B. Dishman and D. D. Fields, for appellant Frazier. L. W. Fields, for appellant Lozier. R. O. Brashears, in pro. per.

PAYNTER, J. The appellant H. A. Lozier recovered a personal judgment against the appellee R. O. Brashears. An execution was issued on it, and levied upon the undivided interest of the appellee R. O. Brashears in a certain lot in Whitesburg, Ky., and it was sold under the execution, and at which sale the appellant J. H. Frazier became the purchaser. The other half of the property was owned by Mary E. Brashears. After Frazier bought the property, he instituted this action against R. O. Brashears and Mary E. Brashears, and asked that it be sold, for the alleged reason that it was indivisible. R. O. Brashears resisted the sale, claiming that Frazier did not take anything by his purchase, because he was entitled to have his interest assigned to him as a homestead. The case was prepared on this issue, and at the November term, 1893, a judgment was rendered ordering the sale of the property, and directing that a bond for one half of the purchase money should be taken, payable to the appellant Frazier, and a bond for the other half to Mary E. Brashears. This judgment was a denial of R. O. Brashears' right to a homestead in the one-half of the land purchased by Frazier, and an adjudication that Frazier acquired the interest in the lot purchased by him. From this judgment R. O. Brashears prosecuted an appeal to this court. Upon motion of appellee, it was dismissed. Pending the appeal to this court the appellant Frazier instituted an action against the appellant Lozier to restrain

the collection of the bond which he executed for the purchase money under the execution sale. Afterwards Jane Brashears, wife of R. O. Brashears, presented a petition, and asked to be made a party to the action. She averred in it that she was the wife of R. O. Brashears, had a family, and was entitled to a homestead. The court permitted the petition to be filed. Subsequently the court adjudged that the judgment of 1893 should be set aside, that R. O. Brashears was entitled to a homestead in the property, that the sale under the execution should be set aside, and that the bond executed by Frazier to Lozier be canceled.

The court had no power over the judgment which was rendered at the November term of 1893. It was a final judgment. Its effect could only be avoided by a reversal, or by a vacation of it in a proceeding instituted in proper time for that purpose. Instead of reversing it, this court dismissed the appeal which was prosecuted from it. No proceedings were instituted to vacate it. The court evidently was of the opinion that, as R. O. Brashears' wife was not a party to the proceeding at the time the judgment was rendered, she had the right to relitigate the homestead question. Her husband was living, and made claim in the action to the property as a homestead, which was denied. The law gives the homestead to the husband, because he has a family and is a bona fide housekeeper. The wife's right to the homestead accrues upon the death of the husband. She has no such interest in her husband's homestead, which enables her to maintain an action to have it adjudged to him, unless he has abandoned her or failed to assert his right thereto. *Daisy v. Houlihan* (Ky.) 43 S. W. 487; *Hemphill v. Haas*, 88 Ky. 492, 11 S. W. 510. Under the facts of this case, the court erred in permitting the petition of Mrs. Brashears to be filed, because she did not manifest any right to be made a party to the action. As the rights of the parties were concluded by the judgment of 1893, it follows that the court erred in adjudging the sale to Frazier invalid, and in cancelling the bond which he had executed to Lozier for the purchase money.

The judgment is reversed on the appeal of Frazier, and also on that of Lozier, for proceedings consistent with this opinion.

MURRAY v. DUFFY et al.¹

(Court of Appeals of Kentucky. Feb. 28, 1902.)

ASSIGNMENT OF NONNEGOTIABLE BOND—RIGHT OF OBLIGOR TO MAKE DEFENSE AGAINST ASSIGNEE.

The fact that a mortgage executed to a title company to secure nonnegotiable bonds payable to the company provided that "the money herein borrowed is to be used for the express purpose of paying for the improve-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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ments to be erected upon the land herein conveyed" did not give notice to the mortgagor that the bonds were to be sold for the purpose of raising the money, and she is therefore not estopped from pleading against an assignee of the bonds any defense which she had and might have used against the title company before notice of the assignment.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by William J. Duffy against Kate H. Murray and others to enforce a lien on land. Judgment enforcing lien of plaintiffs and of various creditors who asserted liens by cross petitions, and defendant Kate H. Murray appeals. Reversed.

Phelps & Thum, J. T. O'Neal, W. S. Pryor, and W. W. Thum, for appellant. Wilkins G. Anderson, for Duffy. C. B. Seymour, for appellees Polk & Mills. Barnett & Barnett and Shackelford Miller, for Louisville Banking Co. Oliver H. Stratton, for appellee Bowser.

DU RELLE, J. In March, 1896, the appellant was the owner of a lot of land on Second street, near A street, in Louisville, and desired to borrow money to erect a house on it. She executed and delivered to the German-American Title Company 12 bonds for various amounts, aggregating \$3,800, payable at various dates, from one to three years after date, to the title company or bearer, at the office of said company, with coupons attached, payable to bearer, and executed a mortgage upon the land mentioned to secure the payment of the bonds. The mortgage, in the usual form, contains a clause of precipitation for default in interest, an agreement as to insurance, and this provision: "The money herein borrowed is to be used for the express purpose of paying for the improvements to be erected upon the land herein conveyed." The money was left in the hands of the title company, and from time to time she gave orders on the title company in favor of the contractor who was building her house, which were duly paid, until about the middle of April, 1896, when the company ceased to honor her orders. Meanwhile the title company, about March 10, 1896, pledged one of the bonds as collateral security to the appellee the Louisville Banking Company, and sold and transferred the remainder of the bonds to the other appellees herein. In May, 1896, the title company made an assignment for the benefit of its creditors. At the date of the assignment amounts aggregating \$1,407.25 had been paid out to Mrs. Murray and on her orders, leaving \$1,892.75 unpaid. Suit was brought to enforce the mortgage lien to pay one of the bonds. The other bondholders were made parties and asserted their claims, and Mrs. Murray defended, claiming that the

unpaid amount, \$1,892.75, should be prorated as a credit upon the bonds. Both sides claimed an estoppel by virtue of the provision of the mortgage above quoted. Mrs. Murray claimed that it was notice to all purchasers of bonds that the money was to be retained by the title company, and paid out only as the work progressed. The bondholders claimed that it was notice to Mrs. Murray that the bonds were to be sold for the purpose of raising the money. Mrs. Murray's claim need not be considered.

The claim of the appellee bondholders does not seem to us to be sustained by the evidence, or by a fair construction of the quoted clause. The testimony of Mrs. Murray seems conclusive upon her claim that she knew nothing of any purpose to sell or negotiate the bonds, as well as of her ignorance of the advertisements of the title company, even if knowledge of such advertisements could work an estoppel as to instruments almost exactly similar to those which we have repeatedly held to be nonnegotiable upon their face. *Insurance Co. v. Hall* (Ky.) 50 S. W. 234; *Insurance Co. v. Hoffman* (Ky.) 50 S. W. 979; *Schnable v. Title Co.* (Ky.) 53 S. W. 1031; *Waggoner v. Title Co.* (Ky.) 56 S. W. 961; *Levy v. Rudolph* (Ky.) 56 S. W. 988. If Mrs. Murray did not in fact execute the bonds for the purpose of having them sold by the title company as her agent, —and there is no sufficient evidence that she did so, but, on the contrary, the weight of the testimony is directly the other way,—the whole case for the appellees depends upon the proper construction of the clause we have referred to. Fairly construed, that clause, even if it does not give notice that the money was to be paid out to Mrs. Murray only as the building progressed, certainly does not in any way indicate that the bonds were to be sold by the company before she received the money. The recital of the purpose for which the money was to be used was a contract that the security of the mortgage should be increased by the improvement of the mortgaged property. We are unable to see that it contracted for, or was notice of, anything else; and we find in the record nothing to prevent or estop the appellant from asserting her rights under the statute which provides that "all bonds, bills, or notes for money or property shall be assignable so as to vest the right of action in the assignee; but except in case of bills of exchange, not to impair the right of any defense, discount, or offset that the defendant has and might have used against the original obligee, or any intermediate assignor, before notice of the assignment." Ky. St. § 474.

For the reasons given, the judgment is reversed and the cause remanded, with directions to enter a judgment in accordance with this opinion.

HIGGINSON v. SCHANEBACK.¹

(Court of Appeals of Kentucky. March 5, 1902.)

BOUNDARY—ORAL AGREEMENT AS TO DIVISION LINE—AUTHORITY OF SURVEYOR TO MAKE AGREEMENT.

While an oral agreement as to a division line is not within the statute of frauds, neither a surveyor whom plaintiff directed to locate the line in controversy, nor her son, whom she told to assist him, was authorized to bind plaintiff by an agreement locating the line; nor is she estopped to dispute the line upon which they agreed with defendant by reason of the fact that she expressed satisfaction therewith, as she supposed at the time that the line had been located according to the calls of her deed.

Appeal from circuit court, Webster county.
"Not to be officially reported."

Action of ejectment by Margaret Higginson against John Schaneback. Judgment for defendant, and plaintiff appeals. Reversed.

Baker & Baker and Lockett & Lockett, for appellant. Bourland & Henson, for appellee.

PAYNTER, J. This is an action in ejectment. In 1858 Charles Anderson conveyed to Benjamin Higginson a certain boundary of land, then in Union county. After the execution of the deed the grantee and his wife entered upon the land described in the deed, and occupied it and claimed it to the extent of the boundary until the death of the grantee. Since that time the appellant, his widow, has occupied and claimed it. The appellee owns a tract of land adjoining that of the appellant. He claimed to a line defined by the deed of Anderson to Higginson. This case arises from a controversy as to the location of the Anderson line. The land in controversy is a narrow strip, 10 or 12 feet wide. We are of the opinion that the jury would have found for the appellant, except for an erroneous instruction which was prejudicial to the rights of the appellant. The court told the jury that, if it believed the appellee had extended his inclosure over the line described in the deed, it should find for the plaintiff, unless it believed from the evidence that a dispute arose between the parties as to the division line between them, and that, to settle it, they agreed that J. D. Palmer should survey and mark the line, and they would abide his action; that Palmer, in pursuance thereof, had marked the line, and the defendant has not moved over it, in which event it should find for the defendant. The court further told the jury that no agreement between defendant and plain-

tiff's son was to be considered unless he was authorized to, and did, act for her in making the agreement as to the division line. The facts with reference to the survey which Palmer made, and the alleged compromise, are as follows: The plaintiff sent for Palmer, who was a surveyor. He came, and she told him to take her deed and locate the line in controversy, and she also told her son to assist the surveyor in the matter. The defendant's land only binds part of the way on the Anderson line, the location of which is in controversy. Palmer went upon the land and did a little surveying, whereupon he told the defendant and the appellant's son that he could not locate the line unless they agreed upon a corner at a point where plaintiff's and defendant's land joins. Thereupon they took a stone and placed it at a point which if treated as the corner, and running from which, would leave some of plaintiff's land upon defendant's side of the line. The surveyor and the son reported to appellant that they had located the line, and that it came further over on her than it was supposed it would come. She, supposing that the line had been surveyed and located according to her deed, expressed her satisfaction that the matter had been settled. She did this to the surveyor and her son, and also to the defendant. She did not authorize her son to make an agreement with the defendant as to the division line in order to settle the dispute between them. At the time she expressed her satisfaction she was laboring under the impression that the line was located according to the calls of her deed. She never called upon Palmer to settle the controversy between the parties, but to survey the line according to her deed. There is no evidence at all that such an agreement was made, or that Palmer had surveyed with the understanding that the parties were to abide the result of his work. According to the testimony, he did not do sufficient surveying to enable him to tell the true location of the line. Under the modern doctrine of this court, an oral agreement as to a division line is not within the statute of frauds. *Jamison v. Petit*, 6 Bush, 669; *Ferguson v. Crick* (Ky.) 23 S. W. 668; *Grigsby v. Combs* (Ky.) 21 S. W. 37; *Thacker v. Crawford*, 5 Ky. Law Rep. 770. We do not think the instruction was erroneous because the parties could not be bound by an oral agreement as to a division line, but we are of the opinion that it was erroneous because there was no evidence on which to base it.

The judgment is reversed for proceedings consistent with this opinion.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

GAYHEART et al. v. SIBLEY et al.¹
(Court of Appeals of Kentucky. March 14, 1902.)

TITLE BY INHERITANCE—EVIDENCE OF HEIRSHIP AND OF ANCESTOR'S OWNERSHIP.

Plaintiffs asserting title to trees growing on land which they claim to have inherited from their father must allege and prove that their ancestor owned the land and the trees at the time of his death, and that they were his only children, or that they claim by conveyance from such of his children as are not joined as plaintiffs.

Appeal from circuit court, Knott county.
"Not to be officially reported."

Action by William Gayheart and others against H. W. Sibley and others for an injunction. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. M. Bailey, for appellants. J. J. C. Bach and John E. Patrick, for appellees.

O'REAR, J. Appellants asserted title to the trees in controversy growing on land which they say they inherited from their father, Jack Gayheart. They claim that appellees were wrongfully asserting title and exercising acts of ownership over the trees and were threatening to remove them. The circuit court dismissed appellants' petition. The proof in the record fails to show that appellants' father was the owner of the land upon which the timber grew, or that he ever had any character of title to it. It was incumbent upon appellants to allege and to prove that their ancestor from whom they claim to have inherited owned the land upon which the trees were growing and owned the trees at the time of his death, and that they were his children, and were his only children, or that they claim by conveyance from such of his children as are not joined. There was a total failure of proof in these respects; nor, indeed, was there an adequate allegation in the petition. It follows that the judgment of the circuit court must be affirmed.

HOMMEL v. LEWIS et al.¹

(Court of Appeals of Kentucky. March 18, 1902.)

DEDICATION OF STREET—RIGHT TO OPEN STREET—INSTRUCTIONS TO JURY—ESTOPPEL TO OBJECT—FAILURE TO REQUEST INSTRUCTION.

1. Where it was stipulated by the original dedication of a street that it was not to be opened until required by some owner or owners of property thereon, plaintiff and defendant having bought lots on opposite sides of the street, defendant, while he was entitled to have the street opened, had no right to tear plaintiff's fence away against his objection.

2. Appellant cannot complain of an instruction which is in substance the same as an instruction asked by him.

3. As no instruction was asked as to the right of plaintiff to nominal damages, though his land was not in fact injured, he cannot complain that no such instruction was given.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by George Hommel against Henry J. Lewis and another to recover damages for injury to property. Judgment for defendants, and plaintiff appeals. Affirmed.

Lieber & Lincoln, for appellant. Helm, Bruce & Helm, for appellees.

HOBSON, J. About the year 1878 the Falls City Real Estate & Building Association divided into small tracts, of from five to ten acres, a body of land it owned southwest of the city of Louisville, and laid out certain lanes and avenues on a plot. None of the lanes or avenues were opened for public use, except Greenwood and Garland avenues. A part of the land was sold to a man by the name of Buchannon, who failed to pay for it; and by a suit in the Louisville chancery court it was subjected to the payment of the unpaid purchase money, and bought by the plaintiff in the action. In this proceeding no mention was made of the avenues. Thereafter conveyances were made to various parties,—among them, appellant and appellees. At this time Falls City avenue was not open, but appellant's deed calls for the center line of this avenue, and runs with it. Appellee Lewis purchased two tracts on the opposite side of Falls City avenue. He opened the street, removing appellant's fence, which ran across it, at either end of his line, inclosing his land. Appellant then filed this suit for damages for the tearing away of his fences, and for damage to his land from the construction of the street, which he alleged turned water upon it which by nature flowed otherwise. The allegations of the petition were denied, and it was pleaded that the avenue was opened after notice to him, and with his consent and acquiescence. The jury found a verdict for the defendants, and the plaintiff appeals.

By the original dedication it was stipulated that this avenue, among others laid down in the plot, which was annexed to the deed, was "not to be opened until required by some owner or owners of property thereon," and that it should be the duty of all other owners of property binding on the street, the opening of which is thus required, to remove their fences. There was nothing in the subsequent proceedings or deeds to revoke this stipulation, and the defendant was entitled to open the street. *Wickliffe v. City of Lexington*, 11 B. Mon. 155; *Schneider v. Jacob*, 86 Ky. 101, 5 S. W. 350; *Railroad Co. v. Thompson*, 79 Ky. 55. Appellant himself testified that he knew he took his property subject to the right of the other lot owners to have this street opened, and the fact is that the value of the property for the purposes for which it was bought must have depended largely upon this right. Appellant insists, however, that ap-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

pellee had no right to take the law in his own hands, and tear his fence away against his objections. This seems to be conceded, and the testimony for the appellees is to the effect that appellant said he had no objection to the opening of the street, provided appellee paid the cost. The instruction given by the court on this subject is, in substance, the same as that asked by appellant himself, and it has often been held that the appellant cannot complain of an instruction which he asked. The same is true of the instruction as to the change of the flow of the water. No instruction was asked on the trial as to the right of the plaintiff to nominal damages, although his land was not in fact injured, and this objection is not, therefore, maintainable now. The jury saw the premises, and their verdict seems to be supported by the weight of the evidence.

Judgment affirmed.

LOGAN et al. v. PHENIX.¹

(Court of Appeals of Kentucky. March 13, 1902.)

ADVERSE POSSESSION—PAROL GIFT—CHAMPERTY.

1. Adverse possession of land for 15 years under a parol gift gives the donee a perfect title.

2. The deed under which plaintiffs claim is champertous, and therefore void, if executed when defendant was in the adverse possession of the land, though such possession had not continued for 15 years.

Appeal from circuit court, Owen county.
"Not to be officially reported."

Action by Joan Logan and another against Gabe Phenix to recover land. Judgment for defendant, and plaintiffs appeal. Affirmed.

James H. Settle, for appellants. W. A. Lee, for appellee.

HOBSON, J. The mother of appellee, Gabe Phenix, owned 23 acres of land in Owen county. In the spring of 1891 she gave him 4 acres of this land, and he settled on it, building a house and fencing the land, and has since held it as his own, giving it in for taxation, and holding it continuously in adverse possession. She made him no deed to the land, but said it was his, and recognized it as his. In October, 1898, when she was very old, she made a deed to appellants, which embraced the entire boundary of 23 acres; and after her death, in January, 1901, they brought this suit against him to recover the 4 acres of ground. He pleaded the above facts, and the case was heard before a jury. The court instructed the jury that they should find for the defendant if he had had the land continuously in adverse possession, occupying it and using it as his own adversely to the plaintiffs and those

they claimed under, for a period of 15 years or more before the institution of the suit, or if he was in such adverse possession at the time the deed under which they claimed was made. The jury returned a verdict for the defendant.

Although the defendant had no title to the land, shown by any deed or other writing, he acquired a possessory title under the statute by an adverse possession of 15 years; and, if the deed under which the plaintiffs claimed was made while he was in such possession, it was champertous, as to him, and void. The instructions of the court were warranted by the testimony, and the verdict of the jury is fully sustained by the evidence. Neither of the parties could read or write, and their ignorance of the proper legal form in which to put the transaction did not affect the rights of the defendant, if his possession was in fact adverse.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. PENROD'S ADMR.

(Court of Appeals of Kentucky. March 12, 1902.)

"Not to be officially reported."

Dissenting opinion. For majority opinion, see 66 S. W. 1018.

Gordon & Gordon, H. W. Hines, and B. D. Warfield, for appellant. C. J. Waddill, for appellee.

O'REAR, J. The facts in this case, as shown on the last trial, are substantially, if not identically, as they were on the previous trial when the case was before us here on appeal and decided. See 56 S. W. 1. The only material difference in the record now and then is that the pleadings were made to conform on the last trial to the proof as to the alleged failure of the trainmen to give the warning of the approach of the train. In the former opinion the court stated that the facts did not warrant a recovery. The principal facts upon which this statement may be rested are that the driver of the wagon, who was killed, knew that his team were unused to trains, and were wild, and that they were dangerous. He was warned especially as to these facts. However, on this occasion he left the team standing unhitched while unloading the wagon, and in such close proximity to the train, and within a few minutes of the time when he knew that a train was due, as to amount to the grossest negligence, and but for which it is inevitable that the accident resulting in his death would not have occurred. The facts being the same upon this trial as upon the former in this respect, the law, of course, not having since been changed, the verdict is not sustained, and should have been set aside. Therefore I dissent from the majority opinion.

DU RELLE, J., concurs.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

SMALLRIDGE v. HAZLETT et al.¹

(Court of Appeals of Kentucky. March 5, 1902.)

DOWER—LAND HELD BY EXECUTORY CONTRACT—SEISIN OF HUSBAND—ESTOPPEL OF PURCHASER.

1. Under Ky. St. § 2142, providing that, "if the husband held land by executory contract only, the wife shall not be endowed of the land, unless he owned such equitable right at his death," the wife is not entitled to dower in land which the husband held under title bond, but sold and conveyed to another before his death.

2. An occasional cutting of timber and tanbark by the husband upon an uninclosed tract of wild land, and the listing of the land for taxation in his name, is not sufficient evidence of seisin to vest in him the fee, so as to entitle the wife to dower.

3. A purchaser from the husband is not estopped by the husband's deed from explaining the nature of his seisin, and showing that it was not of such a character as entitled his wife to dower.

Appeal from circuit court, Boyd county.

"To be officially reported."

Action by Mary Smallridge against L. C. Hazlett and others to recover dower. Judgment for defendants, and plaintiff appeals. Affirmed.

J. J. Montagne and C. L. Williams, for appellant. Thos. R. Brown, for appellees.

BURNAM, J. The plaintiff brought this action to recover dower in four separate tracts of land in the possession of the appellees, which she alleges her husband had in his possession for 17 years before his death under a bond for title from the heirs of one Taylor, but which he sold and disposed of previous to his death. From the evidence in this case it appears that the tract of 204 acres of land in which the plaintiff sought dower is within the limits of the grant from the state of Virginia to one Taylor of 17,800 acres, issued in 1788, and that on the 5th day of January, 1859, M. T. Bolt, as agent for Richard Apperson, who held a power of attorney from the Taylor heirs, sold by executory contract the 204 acres to C. P. Smallridge, the deceased husband of plaintiff, and executed to him a bond for title, in which it was agreed that Apperson would convey or cause to be conveyed the tract of land by deed, upon the payment by Smallridge of \$244.80, the purchase money thereof. There is no evidence in the record that Apperson ever complied with the title bond of Bolt by the execution of the deed to Smallridge. It further appears that the land was never actually occupied, inclosed, or cultivated by Smallridge during his alleged ownership under the title bond from Bolt. But it does appear that he occa-

sionally cut trees and tanbark therefrom, and listed it for taxation in his own name until about the year 1877, when he sold and conveyed it by general warranty deed to the appellees, who took possession thereunder, and have so continued until the institution of this suit. The defendants resisted recovery upon the ground that the plaintiff, under this state of facts, was not entitled to dower. Upon final submission, the circuit judge dismissed plaintiff's petition, and she has appealed.

By the common law the wife was not entitled to dower in land to which her husband had an equitable title, merely, and which he sold and disposed of before his death. See *Hamilton v. Hughes*, 29 Ky. 581. And the Kentucky Statutes (section 2132) provide that: "After the death of the husband, the wife shall be endowed for her life of one-third of the real estate whereof he, or anyone for his use was seized of an estate in fee simple at any time during the coverture, unless her right to such dower shall have been barred, forfeited or relinquished." And section 2142 of the Kentucky Statutes provides: "If the husband held land by executory contract only, the wife shall not be endowed of the land, unless he owned such equitable right at his death." In our opinion, these sections of the Kentucky Statutes, which were also sections of the Revised Statutes, do not change the common-law rule in so far as it requires that there must have been actual seisin of an estate in fee simple of lands by the husband during coverture, to entitle the widow to dower. See *Fontaine v. Dunlap*, 82 Ky. 321; *Gully v. Ray*, 18 B. Mon. 107; *Dean's Heirs v. Mitchell's Heirs*, 27 Ky. 451. And an occasional cutting of timber, tanbark, etc., upon the uninclosed tract of wild land, is not sufficient evidence of seisin to vest the husband of an estate in fee simple.

But the appellant contends that, as the appellees acquired their right to and possession of the land from the deed of her deceased husband, they cannot, in a suit for dower, deny his seisin of the land so held by them. And this contention seems to be supported by the early case of *Dashiel v. Collier*, 27 Ky. 601. This case was decided before the enactment of section 2142 of the statutes. And in the case of *Gully v. Ray*, 18 B. Mon. 107, in a very careful and well-considered opinion, it was held: "The purchaser was not estopped by the husband's deed from explaining the nature of his seisin, and showing that it was not of such a character as entitled his wife to dower in the land." And this conclusion seems to us more in accordance with the spirit both of the common law and the subsequent statute.

Wherefore the judgment dismissing plaintiff's petition is affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

LEWIS' ADM'R v. TAYLOR COAL CO. OF KENTUCKY.¹

(Court of Appeals of Kentucky. March 5, 1902.)

DEATH—PAIN AND SUFFERING—MISJOINDER OF CAUSES OF ACTION—FAILURE OF MASTER TO FURNISH GUARD TO PROTECT SERVANT—DEATH RESULTING FROM BREACH OF CONTRACT—SURVIVOR OF CAUSE OF ACTION.

1. A cause of action for death cannot be properly joined with a cause of action for the pain and suffering of the decedent.

2. A misjoinder of two causes of action does not furnish ground of demurrer to the petition, the defendant's remedy being a motion to require plaintiff to elect.

3. The law imposes no obligation upon the master to furnish a guard to protect the servant from a mob of strikers.

4. Neither Const. § 241, nor Ky. St. § 6, giving a right of action for the death of a person resulting from an injury inflicted "by negligence or wrongful act," authorizes a recovery for the death of a servant resulting from the master's breach of contract to furnish a guard to protect him from an assault by others.

5. Under Ky. St. § 10, providing that no right of action for personal injury shall cease or die with the person injuring or injured, "except actions for assault," and certain other actions named, an action for the pain and suffering of a servant resulting from the master's breach of contract to furnish a guard to protect him from an assault does not survive the death of the servant.

Appeal from circuit court, Ohio county.

"To be officially reported."

Action by the administrator of H. W. Lewis against the Taylor Coal Company of Kentucky to recover damages for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Yost and Glenn & Ringo, for appellant. Sweeney, Ellis & Sweeney and F. M. Sackett, for appellee.

PAYNTER, J. The appellee is a corporation engaged in the business of mining and selling coal. The intestate, H. W. Lewis, was a coal miner. While in the employ of the appellee he received injuries from the effects of which he died. This action was brought to recover damages resulting from the injuries received. Omitting formal parts, the petition reads as follows: "(3) That in May, 1898, it had in its employment a large number of miners and mine laborers, all of whom were members of a secret organization called the 'Miners' Union,' and were on that account known and designated as 'union men,' in contradistinction to miners and mine laborers who were not members thereof, and who were designated 'nonunion men.' About this time these union miners became dissatisfied with the management of the defendant's mines, or with the amount of wages they were being by it paid for their services, and left its employment on a strike; refusing not only to work themselves, but to permit others to work at, in, or about these mines,

until their differences with the defendant corporation could be adjusted. So openly and to such an extent did they show their determination that no one should be employed to fill their places in or about the mines, that they publicly and boldly threatened to take the life of any man or men who should come there and attempt to do any character of work for the defendant. These threats, and the consequent danger to any nonunion men who should attempt to work there for the defendant, were well known to it, its superintendent and agents. Shortly after this strike was inaugurated, the defendant attempted to, and did, hire the services of a large number of nonunion men, and brought them to its said mines, in order with them to carry on its business; but these men were, with threats of violence and force, frightened from their labor and driven from the place. These facts were, as a matter of course, well known to and by the defendant and its agents, as at this time the locality of the mines was under the domination of the strikers, and men who attempted to work or labor for the defendant were intimidated and awed into a submission to their commands and behests. This soon left the mines in a bad and dangerous condition, as the rising of the waters therein, and their great need of being pumped out and drained, was rendering them valueless and unfit for use; and the defendant's officers and agents fully realized that the property would soon be ruined and become a dead loss to its owners unless hands could be procured who would do the work so badly and seriously needed there. (4) That an agent and officer of the defendant company fully authorized to act and make contracts for it then approached the plaintiff's intestate, the said H. W. Lewis, then a resident of the county of Jefferson, in this state, and without warning him of the trouble of the mines, of the strikes of the miners, of their threats against any one who would come there to work, of the consequent danger to him, which the defendant well knew, employed him to go to the mines and work for it, promising and agreeing to give him employment for the space of one year. Accepting this employment at the compensation then and there agreed upon, and wholly ignorant of any danger or dangers incident to the work, or on account of the strikers and their threats, his said intestate went to the mines and began work. After a few days, during which time he had been superintending a number of men who were draining the mine, he was warned by a committee of the strikers that they would not allow him to work for the defendant. These facts and the language and the threats of the said committee his intestate at once communicated to the defendant's superintendent and chief officer, then at the mines, and asked him what he must do. It was well known to the defendant, its officer and agents, that, if this

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work was stopped then, the mines would become flooded, dangerous and unfit for use, and be thus made utterly worthless; and thus knowing, and realizing the absolute necessity for the continuation of this work, the defendant corporation, by and through its said superintendent and chief officer, then and there promised, agreed, and undertook, in consideration of said Lewis' continuing the work under the circumstances as herein above alleged, that the said company would hire a sufficient guard or force of men to protect the said Lewis and all the men working under him from any danger or trouble from the strikers; and thereupon said Lewis, relying solely and wholly upon the defendant's promise to protect him, proceeded again to work, and finished his day's labor. The defendant, however, willfully, negligently, and wantonly failed and refused to perform its said undertaking, in this: that it did not hire a guard or any number of men to protect the said Lewis, nor did it, through any of its officers or agents, make any attempt to secure the services of a guard, or in any way to protect him from the dangers which it well knew environed him, and from which, in consideration of his work to save its property from ruin, it had solemnly agreed and undertook to hold him harmless. (5) He now alleges that after the said Lewis had finished his labor for the day, and had gone to his home, a number of the strikers, consisting of about — men, went to the house where he was staying, dragged him therefrom by force, and willfully, unlawfully, and without right or reason, beat him on the head with stones, clubs, and loaded sticks, by reason of which beating he was permanently disabled and injured, and was confined to his bed for — months, suffering all the time great bodily pain and mental anguish, and afterwards died by reason of the wounds then and there so by him received, and all of which these strikers were enabled and encouraged to do on account of the defendant's failure to furnish the guard and protect the said Lewis, which, well knowing the urgent and crying need therefor, it willfully, wantonly, and negligently failed and refused to do. (6) That his said intestate was so assaulted, beat, injured, and murdered by these rioters at the defendant's mines, on its property, and although it had due notice of the riot immediately on its breaking out, and although it had promised and agreed to protect the said Lewis, it failed to protect or to make any attempt to protect him, to his damage in the sum of fifteen thousand dollars, all of which occurred on the 31st day of May, 1898, and within twelve months next preceding the filing of this petition."

At common law, although the death of a person was caused by negligence or wrongful act, no cause of action survived. Under section 6, Ky. St., where death results from negligence or wrongful act, the cause of action

survives to the personal representative. The section reads as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful or the negligence is gross, punitive damages may be recovered and the action to recover such damages shall be prosecuted by the personal representative of the deceased." Section 241 of the constitution provides that there may be a recovery where death resulted from negligence or wrongful act. At common law the right of action for the injury to the person abated on the death of the party injured. Under Ky. St. § 10, the cause of action for personal injury, causing physical and mental suffering, does not abate on the death of the injured person, except actions for assault, slander, and criminal conversation, and so much of the action for criminal prosecution as is intended to recover for personal injury. These questions are reviewed by this court in *Railroad Co. v. McElwain*, 98 Ky. 700, 34 S. W. 236, 34 L. R. A. 788, 56 Am. St. Rep. 385. So, under the principles of the common law, if appellee had, through its agent, inflicted the injury which resulted in physical pain and mental suffering and death, neither cause of action would have survived. This court has held that the cause of action for damages resulting in death cannot be joined with the cause of action for physical pain and mental suffering; that a recovery for one bars an action for the other. *Hackett v. Railroad Co.*, 95 Ky. 236, 24 S. W. 871; *Railway Co. v. Barclay's Adm'r* (Ky.) 43 S. W. 177; *Railroad Co. v. McElwain*, 98 Ky. 700, 34 S. W. 236, 34 L. R. A. 788, 56 Am. St. Rep. 385; *Hansford's Adm'r v. Payne*, 11 Bush, 385; *Conner's Adm'r v. Paul*, 12 Bush, 145. No motion was made to compel the plaintiff to elect which cause of action he would prosecute. A demurrer was filed to the petition and sustained. As there was no motion to elect, the question as whether the petition states a cause of action is here for review.

The law imposes on carriers the highest degree of care in the transportation of their passengers. The law not only makes them liable for neglect in the operation of their road, if a railroad, but makes them liable for the neglect of any duty imposed on them resulting in the injury of a passenger. If those in charge of a train knowingly permit a person to remain upon it who from his conduct renders it probable that the passengers may be injured by him, and one is so injured, then the carrier is liable, because the law imposes the duty of exercising the highest degree of care in his transportation; and it would be gross negligence to endanger the life or limb of passengers by carrying a per-

son of the character described. So the duties of the carrier are such that it might be made responsible for the criminal conduct of some one who is entirely disconnected with its service. The law imposes the duty upon the master to furnish his servant with reasonably safe tools or machinery to use or operate, and reasonably safe premises upon which to work. A violation of this duty, when the servant is ignorant of the master's neglect, or, being aware of it, a reasonably prudent man would continue to work under like conditions, the master is responsible for the injury which he receives in consequence of such neglect. The master, whether he be a common carrier or engaged in another enterprise, does not undertake to protect the servant from the criminal acts of others. This is not a duty which the law imposes, or which arises from the relation of master and servant. The law does not make one liable civilly or criminally for the criminal act of another unless the position of the parties are such relatively that the act must be considered as having been, in contemplation of law, advised or procured to be done by another. Actionable negligence arises from a duty imposed by law to use ordinary care under the conditions in which a person upon whom a duty rests is placed. For a failure to perform that, a cause of action exists. The negligence may have resulted independent of a contract, or a contract may exist which does not contain a promise that the one is to use ordinary care to avoid injury to one who is to perform a service in the execution of the contract. In the latter case actionable negligence results from a condition, rather than a violation of the provisions of a contract.

With these general observations, we come to the consideration of sections 6 and 10 of the Kentucky Statutes. The word "negligence" is used in section 6 in its usual and ordinary sense. It was intended to make one liable for his own negligent act, or for that of another for whose act he is responsible. The words "wrongful act" are comprehensive enough to include negligent acts, but they were intended primarily to cover cases where the act was wanton or was intentionally committed, or where one may have counseled or procured another to do it, when, in contemplation of law, the act of counseling or advising makes the wrongful act his own. It is not charged that under the law of master and servant (nor could it have been correctly done) the appellee was bound to furnish a guard to protect the decedent from the hands of a mob. Therefore there was no breach of duty imposed by law which would make it guilty of negligence. It is not charged that the appellee inflicted

the injury upon decedent, or counseled, advised, or procured others to do it. Therefore it is not charged, nor could it have been, that the appellee was guilty of the wrongful act which resulted in the injury and death. By the way, it may be added that in *McClure v. Alexander* (Ky.) 24 S. W. 619, it was held that the section of the statute where the right of action is given the widow and minor children of a person killed by the careless, wanton, or malicious use of firearms, etc., is not repealed by section 241 of the constitution. Having reached the foregoing conclusion, it follows that an action for the death of the intestate will not lie under section 241 of the constitution, or section 6 of the Kentucky Statutes. If appellee had been liable at common law for the assault and battery committed upon the person of the intestate, the cause of action would not have survived to the personal representative, because the act complained of was an assault, and an action therefor does not survive to the personal representative; for section 10 of the Kentucky Statutes reads as follows: "No right of action for personal injury or injury to real or personal estate shall cease or die with the person injuring or injured, except actions for assault, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted, an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract." This court has held in *Anderson v. Arnold's Ex'r*, 79 Ky. 370, that an action for an assault and battery does not survive. Of course, the court did not mean to hold that, when death has resulted from an assault, any cause of action which was given under the statute for the death would not survive; neither do we want to be understood as holding a cause of action given for the death of a person, either by section 241 of the constitution, or any section of the statutes, is affected by section 10, although the death was the result of an assault. We simply hold that the cause of action for the assault and battery does not survive. The action is really one in contract. The contract averred cannot bring the case within the provisions of section 241 of the constitution and section 6 of the statute; nor can it have the effect of keeping alive a cause of action, if it existed, which section 10 of the statute declares does not survive. There is another reason, and may be more, why the contract cannot be enforced, but we deem it unnecessary to consider it.

The judgment is affirmed.

DAWKINS et al. v. HOUGH et al.¹

(Court of Appeals of Kentucky. March 5, 1902.)

VENUE OF ACTION—SURCHARGING SETTLEMENT OF GUARDIAN—CANCELLATION OF DEED AS INCIDENT.

Under Civ. Code Prac. § 67, providing that an action by a ward against his guardian for the settlement of his accounts must be brought in the county in which the guardian was qualified, an action to surcharge a settlement made by plaintiff's former guardian was properly brought in the county in which the guardian qualified; and the court, as an incident, had jurisdiction to cancel a deed executed by the guardian conveying land to the ward located in another county.

Appeal from circuit court, Hardin county.
"To be officially reported."

Action by Mary I. Hough and another against J. E. Dawkins and others to surcharge a settlement made by a guardian. Judgment for plaintiffs, and defendants appeal. Affirmed.

Bingham & Davis, for appellants. J. P. O'Meara, for appellees.

BURNAM, J. In June, 1896, the appellee Mary I. Hough instituted this suit in the Hardin circuit court to surcharge a settlement made by her former guardian, W. P. Reesor. She alleged, in substance, that the defendant Reesor qualified as her guardian in the Hardin county court (the county of their residence) in April, 1887; that, in addition to certain personal property, she owned an interest in a tract of land in Jefferson county, which was inherited from her maternal grandmother, Mary Coffman, who died before her mother; that the Jefferson Southern Pond Drainage Company, after the death of her grandmother, procured a deed to be made to them for 10 acres of land located in Jefferson county, to satisfy an alleged lien for \$64.84; that her guardian redeemed the land by the payment to the drainage company of \$71.50 on the 1st day of March, 1898, with money in his hands belonging to her, and had the drainage company make a deed to him personally, in fraud of her rights, and that he thereafter conveyed the land, in March, 1899, to one B. F. Dawkins, who devised it to his son J. E. Dawkins in trust; that both B. F. and J. E. Dawkins had full knowledge of all the facts, and knew that the land belonged to her. And she prayed that the deed be adjudged void, but that, if the land could not be restored to her, that Reesor, as guardian, should be charged with its value, and a reasonable rent therefor, in his settlement as guardian, in addition to the personal property which he had received. And in an amended petition J. E. Dawkins and those for whom he stood as trustee were made parties to the proceeding. They filed first a special demurrer and plea to the jurisdiction of the Hardin circuit court

upon the ground that he was a resident of Jefferson county, that the summons was served upon him in that county, and that the land sought to be recovered also lay in that county, and that for these reasons the Hardin circuit court had no jurisdiction to hear or determine the title or possession to the land sought to be recovered. Upon final submission the circuit judge held that the purchaser, Dawkins, knew that the plaintiff, Mrs. Hough, who was then an infant, unmarried, and residing with her guardian, who was also her father, owned an interest in the land with her father, and that the deed to him did not divest her of her interest therein, and directed that the deed should be set aside, and that she should have the possession of the land, with its reasonable rent from the date of the sale. From that judgment this appeal is prosecuted.

The appellants have omitted to have copied the proof heard in the lower court, and bring the case up upon the single question of the jurisdiction of the Hardin circuit court to render the judgment complained of, and rely for reversal upon section 62 of the Civil Code of Practice, which provides that "actions for the recovery of real property, or any interest therein, must be brought in the county in which some part thereof is situated." Section 67 of the Civil Code of Practice provides that "an action by the ward against his guardian for the settlement of his accounts * * * must be brought in the county in which the guardian was qualified." The gist of the action instituted by appellee was to surcharge the settlement made by her guardian, and the cancellation of the deed to appellant, or a decision upon its validity, was a necessary incident to the settlement. Her guardian had qualified in Hardin county, and the suit was therefore properly brought in Hardin county; and, as the Hardin circuit court had jurisdiction of the suit for a settlement of the accounts of the guardian, it had, as an incident, jurisdiction to take all necessary steps to afford complete relief, and to this end could inquire into the validity of the transfer of appellee's land by her guardian, although located in Jefferson county. In the case of Webb v. Wright, 65 Ky. 126, it was held that the court having jurisdiction of the persons and cause of action in a suit which was in effect for the settlement of a partnership, the proceeding, in rem, for the sale of land in another county, attached as an incidental remedy. And in Fishback v. Green, 87 Ky. 107, 7 S. W. 881, this court held that, in an action to settle an insolvent estate, the court had jurisdiction to decree the sale of land situated in another county than that in which the action was pending. And in Doty v. Association, 106 Ky. 720, 46 S. W. 219, 47 S. W. 433, it was held that the Fayette circuit court, having jurisdiction of the parties and the original controversy, had juris-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

diction to decree the sale of land in another county, as incidental to the original relief sought. And in *Dehaven v. Dehaven's Adm'r*, 104 Ky. 41, 46 S. W. 215, 47 S. W. 597, it was held that, in an action properly brought in Oldham county for the settlement and partition of a decedent's estate, the court had incidental jurisdiction to partition lands in Jefferson county, and to issue such writs as were necessary to put those entitled thereto in possession thereof. We are therefore of the opinion that as the suit was properly instituted in the Hardin circuit court, under section 67 of the Code, that court, as a necessary incident, had power to determine the controversy as to the real estate claimed by the ward in Jefferson county, and to decree a cancellation of the deed to appellant, and issue the necessary writs to put appellee in possession.

Judgment affirmed.

HOBSON, J., not sitting.

FT. JEFFERSON IMP. CO. et al. v. DUPOYSTER.¹

(Court of Appeals of Kentucky. Feb. 25, 1902.)

SUBROGATION—TENANTS IN COMMON—SALE OF PART OF LAND BY ONE CO-TENANT—RATIFICATION—PLEADING—RELIEF SOUGHT BY REPLY.

1. Where a father who owned land jointly with his children executed a mortgage thereon for his own debt, and thereafter the children, at the father's request, and to relieve their own interest, assumed the debt, executing their note therefor, they were entitled to be subrogated to the rights of the mortgagee; not being mere volunteers.

2. In an action to recover the unpaid purchase money of land, in which defendant corporation sought and was granted a rescission, defendant is not entitled to a lien for purchase money paid upon such parts of the land as have been sold under judgments in the action to satisfy pre-existing liens; it being bound by those judgments, having received upon its claim the surplus of the proceeds of the sales made thereunder, and it being inequitable, aside from that fact, to permit it to assert such a lien.

3. Where one of several tenants in common sold specific parcels of the land to different persons, and afterwards sold the entire land to another, his co-tenants will not be allowed to ratify the sales of the specific parcels, and thus allot them to the vendor in full of his interest, so as to deprive the purchaser of the whole tract of his lien upon the vendor's interest for purchase money paid, as the loss should be borne by all the purchasers.

4. While the court was not authorized to place land in the hands of a receiver where the interest of only one of several co-tenants was incumbered, yet as the other co-tenants were adjudged their part of the rents which came into the hands of the receiver, and, by consent order, agreed to pay their part of the expenses of the receiver, they will not be heard to complain of the original error.

5. In an action to enforce a lien on land, it was error to extend the lien over the interest

of one who was not made a defendant to the original petition, though plaintiff, by a reply to such person's answer to a cross petition to which she was made a defendant, asserted a lien on her interest in the land, as no rejoinder was filed, and no issue made upon that question.

Appeal from circuit court, Ballard county. "To be officially reported."

Action by Joe C. Dupoyster, in his own right and as administrator of Ben S. Dupoyster, against the Ft. Jefferson Improvement Company and others, to enforce a purchase-money lien on land. Judgment rescinding contract of sale and adjusting equities, and the Ft. Jefferson Improvement Company and others appeal. Reversed on appeal of Mrs. Rebecca S. Dupoyster, and affirmed on appeal of other appellants.

J. M. Nichols & Son and F. H. Sullivan, for appellants. John W. Ray, Geo. W. Reeves, and Bugg & Wickliffe, for appellee.

PAYNTER, J. This is the second appeal of the case to this court. The opinion delivered on the former appeal is found in 51 S. W. 810, 48 L. R. A. 537. The court decided: (1) That by the deed of Thomas Dupoyster, made in 1859, his son Ben S. Dupoyster took a life estate in the land conveyed, and that the children of J. C. Dupoyster, as they were born, took vested remainders. (2) That Ben Dupoyster, claiming under the deed of 1859, purchased adverse claims and was holding under this deed at the time it was sold to the appellants. (3) That in the Thomas Dupoyster deed his son Ben S. had the "discretion of allotting, of dividing, or of partitioning," as he saw proper, the lands among the children of Joe C., but not so as to create inequality or lessen the interest of any one of the children. (4) That Joe C. had born to him four children, two of whom are dead; that the interest of the dead children passed by the law of descent to their lawful heir or heirs. (5) That there should be a rescission of the sale by Joe C. and Ben S. to the appellant, and on whatever of the land Joe C. is the owner by inheritance from his dead children a lien should exist in favor of the appellant for the purchase money wrongfully received by him. Numerous questions are raised, but we will not here summarize them. From our consideration of the case the questions raised will be seen.

Before Joe C. and Ben S. made the deed to the appellant, they had executed what is known as the "Harkless Mortgage" on the land in controversy, but which mortgage did not recognize any one as being the owners of the land except the grantors. J. B. and his sister, Mrs. Edwards, are the surviving children of Joe C., and own one-half the land embraced in the Thomas Dupoyster deed, because of the vested remainders which they took. In this suit they asserted their right under the Thomas Dupoyster deed to

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the entire boundary, but it was decided that they took it together with the other children of Joe C., and, two having died, their father inherited part of their (deceased children's) interest in the land. It may be added here that Joe C. inherited three-eighths of the tract of land, and his wife, Rebecca, one-eighth. The grantors in the Harkless mortgage could not create any lien on any interest in the land, except their own. The rights of J. B. Dupoyster and Mrs. Edwards were not affected by that mortgage. Pending this suit, and before the judgment was rendered from which the former appeal was prosecuted, J. C. Dupoyster and those representing the Harkless mortgage and J. B. Dupoyster and his sister entered into an agreement by which, if persons last named were adjudged the land, then the judgment for the Harkless debt should go against the entire tract. It is averred in the pleadings, and not denied, that the appellant Ft. Jefferson Improvement Company took its judgment subject to that agreement, and approved it. Pursuant to that agreement a judgment was entered giving a lien on the entire tract of land for the Harkless debt. This was in the former judgment, from which no appeal was prosecuted, and that part of it has never been reversed, nor does any complaint seem to have been made on the former appeal as to that part of it. Subsequently J. B. Dupoyster and his sister, pursuant to the agreement which had been made, and the judgment of the court, executed their obligations for the Harkless debt, and also gave a mortgage to secure its payment, and have paid \$5,000 on it. It is insisted that J. B. Dupoyster and Mrs. Edwards are not entitled to be subrogated, because (1) they had not paid all the debt; (2) they were volunteers; (3) a surety is not entitled to subrogation as against a prior surety; (4) the lien of the original Harkless mortgage was released by extension granted on the mortgage debt by appellees.

First it may be said that the Harkless mortgage created a superior lien upon Joe C. Dupoyster's interest in the land to that of the appellant for the purchase money which it had paid, and which it was entitled to have refunded to it. J. B. Dupoyster and sister have paid all the debt, inasmuch as they executed their note in lieu of the one which existed. So far as the right to subrogation goes, it is equivalent to the payment of the money, because they made it their own debt. There was a novation. The rule which the appellant claims should exist in equity cannot have any application to the facts of this case. It is a universal rule of interpretation that one who voluntarily pays the debt of another, when he is under no obligation to pay, does not create a liability in his favor; nor can he be subrogated to the lien held by the creditor to secure its payment. It is equally as well settled, if one is bound for the debt of another, he has the right to discharge it, and when he

does so an implied liability arises in his favor against the debtor, and he will be subrogated to the rights of the creditor. By the consent and agreement of the parties, J. B. Dupoyster and his sister's interest in the land became bound for the Harkless debt, the same as the property of their father and mother, if the latter joined in the mortgage. It did not then become their debt, but it continued to be the debt of their father, and in order to relieve their interest in the land they were compelled to pay it. They were not volunteers in the matter. They consented that their land might become impressed with the liability, at the request of their father, and with the approval of the appellant. However, it was not necessary to have the latter's approval. It did not increase the burden on the interest of J. C. Dupoyster, nor did it lessen the chances of the appellant to make its debt out of his interest in the land. The effect of the transaction is that J. B. Dupoyster and his sister have paid off a lien debt for which the interest of J. C. Dupoyster was primarily liable, to protect their interest in the land, and did so at his request. This court, in *Ostermeyer v. Ostermeyer*, 39 S. W. 22, recognized the right of one thus paying the debt to release his own interest in property to be subrogated to the rights of the creditors, and also held that an implied liability would arise. The mere fact that those holding the Harkless debt were willing to accept the obligation of J. B. Dupoyster, etc., for the mortgage debt, and give him time for the payment of it, did not have the effect of preventing subrogation. The right of subrogation arises out and from the transaction. It accrued the instant those representing the Harkless mortgage accepted the new obligation.

The doctrine of subrogation is one of equity, to promote justice, and it may or may not arise from a contract. The right to it depends upon the facts and circumstances of each particular case, and to which must be applied the principles of justice. Where a person furnishes money to pay the debt of another, if it is equitable that he should be substituted for the creditor it will be done. One is not a volunteer in a transaction where he has paid the money at the request of the person whose liability he discharges. Neither can one be regarded as a volunteer who pays money to relieve his own property therefor, for which some one else is liable. *Pom. Eq. Jur. § 799*, says: "The rule is well settled that when a life tenant, or any other person having a partial interest only in the inheritance or in the land, pays off a charge, mortgage, or incumbrance on the entire premises, he is presumed to do so for his own benefit. The lien is not discharged unless he intentionally release it. He can always keep the incumbrance alive for his own protection and reimbursement. His intention to do so will be presumed, even though he has taken no assignment. In fact, his payment

constitutes him an equitable assignee." Same author (section 1211) says: "This equitable result follows, although no actual assignment, written or verbal, accompanied the payment, and the securities themselves were not delivered over to the person making payment, and even though a receipt was given, speaking of the mortgage debt as being fully paid, and sometimes even though the mortgage itself was actually discharged and satisfied of record. This equitable doctrine, which is a particular application of the broad principle of subrogation, is enforced whenever the person making the payment stands in such relations to the premises or to the other parties that his interests, recognized either by law or equity, can only be fully protected and maintained by regarding the transaction as an assignment to him, and the lien of the mortgage as being kept alive, either wholly or in part, for his security and benefit."

Counsel for appellant avers that a surety is not entitled to subrogation as against a prior surety. We are unable to understand what application that doctrine has to the facts of this case.

Under the contracts which Ben S. Dupoyster made, there was a lien upon what is known in this record as the Norton and Terrell tracts. Ben S. Dupoyster made to J. B. Dupoyster a deed embracing these tracts, in which it was provided that the grantee pay the lien debts on the land. This deed was made when the grantee was an infant. The court in this case directed these tracts to be sold to pay the debts against them. J. B. Dupoyster became the purchaser. The Norton tract brought about \$400 more than was necessary to pay the debt against it, and that excess was applied as a credit to appellee's judgment against J. C. Dupoyster, and against him as the personal representative of the estate of Ben S. Dupoyster. If the Terrell land was embraced in the Thomas Dupoyster deed of 1859, J. B. Dupoyster and his sister owned one-half of this land. Therefore J. B. Dupoyster was put in the position of buying a part of his own land to discharge a debt which his uncle made, and for which he could not bind the vested remainder-men. Perhaps the Norton land is outside of the boundary embraced in the Thomas Dupoyster deed. The appellant got the entire benefit of this sale, except the part which went to pay a pre-existing claim against it. Both tracts were sold under judgments in this action, and the appellant is bound by them. The sales were confirmed by a sale of part of the Terrell tract, and appellant's lien was made valid on the balance of the tract, and to that extent was benefited by the sale, besides being relieved of a prior incumbrance. Notwithstanding this, the appellant claims it had a lien on the Terrell and Norton tracts superior to the rights which J. B. Dupoyster acquired under his purchase. Its right to assert this claim is barred by the judgments

and proceedings in this case. If it were not, it would be inequitable to permit the appellant to assert its lien against these tracts.

It appears that after Thomas Dupoyster made the deed to Ben S. Dupoyster, etc., in 1859, and before the deed was made to the appellant, Ben S. Dupoyster and J. C. Dupoyster sold to several persons tracts out of the Thomas Dupoyster boundary, and in the deeds of the purchasers their respective parcels were defined by metes and bounds. On the return of this case, J. C. Dupoyster, J. B. Dupoyster, and Mrs. Edwards pleaded these facts; and the last two named expressed their willingness to ratify the sales which had been made to the several persons, and thereupon asked that J. C. Dupoyster be charged in the division of the remaining part of the tract with the parcels which he and Ben S. Dupoyster had sold to persons prior to their sale to the appellant. The practical effect of this would have been to have given to J. B. Dupoyster and Mrs. Edwards, out of the boundary sold the appellant, an amount equal in value to their one-half interest in the tract of land which their father and uncle had sold prior to the sale to appellant. To do this would compel the appellant to suffer the loss which should be borne by all the purchasers. Where one joint tenant conveys a specific portion of the joint lands, it is not void. The other joint tenant could have joined in the conveyance, and thus have vested the purchasers with title. Their power to have ratified the sales of the specific parcels is unquestioned. That is not the question. The question here is, when sales have been made by one joint tenant to specific boundaries, can the other joint tenant say what sales he will ratify, and do so to the prejudice of another purchaser of a specific boundary? The court below held that this could not be done. If Joe C. Dupoyster was alone to be affected by such ratification, then a different question would be presented, because it would be eminently just, if the other joint tenants would ratify the sales of specific parts of the joint property, to charge him in the division therewith. But here J. C. Dupoyster has sold it all. As a result of the sale to appellant, the part which he sold it is in lien for the money which he wrongfully obtained on the contract of sale. The appellant occupies the same position it would occupy had the sale been upheld. If the co-tenants, before the sale to appellant, had ratified a previous sale by a deed duly recorded, or otherwise, and the appellant had had actual notice of the latter mode of ratification, then a different question would be presented for our consideration. To sustain the claim of the co-tenants (J. B. Dupoyster and Mrs. Edwards) would be to allow the exercise of their will after all the sales, determine what part of the land should be assigned to J. C. Dupoyster, and who should suffer from such an assignment. They have no legal or equitable rights which enable them to deter-

mine how the rights of the others to this suit shall be adjudged.

It is urged that the court erred in putting the land in the hands of the receiver. This is done upon the idea that the interests owned by J. B. Dupoyster and Mrs. Edwards were not incumbered by the plaintiff's debt, and the fact that J. C. Dupoyster's interest was would not authorize the court to place the whole tract in the hands of a receiver. It seems to us that J. B. Dupoyster and his sister could have complained of the action of the court in placing the land in the hands of a receiver, but they seem to have been adjudged their parts of the rents which came into the hands of the receiver, and by consent order agreed to pay their part of the expenses of the receiver. Under such circumstances they should not be heard to complain of the original error. The court did not dispose of the other half of the rents. Therefore we do not decide whether or not they should be applied to the appellant's debt.

As there seems to have been a provision in the deed of Dupoyster to Ft. Jefferson Improvement Company that the Ft. Jefferson Company was to convey to the assignor of Mrs. Fannie Jackson three blocks in the town of Ft. Jefferson, we are of the opinion that the court properly decided that (she having died) her children were entitled to have conveyed to them one-half of the same, to be charged to J. C. Dupoyster in the division of the land.

Mrs. R. S. Dupoyster is the wife of J. C. Dupoyster. She joined in the deed to the Ft. Jefferson Company, and she was the owner by inheritance from her children begotten by J. C. Dupoyster of one-eighth of the land embraced in the deed of Thomas Dupoyster. The court adjudged that her one-eighth was subject to the payment of the amount due the appellant on the rescission of the contract. She was not made a party to this action before the first appeal in this case. She was made a defendant in the cross petition of J. B. Dupoyster and Mrs. Edwards, wherein they asked for the partition of the land. She filed an answer to that in which she expressed her willingness to the partition of the land, claiming one-eighth. The Ft. Jefferson Improvement Company never made her a defendant in the action, nor by any pleading to which she was made a defendant did it seek any relief against her. As we have said, she filed an answer to the cross petition of J. B. Dupoyster and Mrs. Edwards, and to this answer the appellant filed a reply in which it said it was entitled to have its lien on her interest for the payment of the judgment rendered in its favor against J. C. Dupoyster and the estate of Ben S. Dupoyster. No rejoinder was filed, and no issue was therefore made upon the question of the appellant's right to have its lien extended over her interest in the land. As there was no pleading filed by appellant seeking relief

against her, in which she was made a defendant, it failed to manifest any right to have her interest in the land sold to pay the judgment against her husband.

The case is affirmed on the appeal of the Ft. Jefferson Improvement Company, and on the appeal of J. C. Dupoyster and J. B. Dupoyster and Mrs. Edwards, and is affirmed on cross appeal of Jackson, but is reversed on the appeal of Mrs. Rebecca S. Dupoyster for proceedings consistent with this opinion.

CHESAPEAKE & O. RY. CO. v. SAULSBERRY.¹

(Court of Appeals of Kentucky. March 7, 1902.)

CARRIERS—EJECTION OF DRUNKEN PASSENGER—INJURY AFTER EJECTION—FAILURE TO CARE FOR PERSON INJURED.

1. A railroad company had the right, by its brakeman, to eject a drunken passenger who was boisterous and violent, and therefore incurred no liability therefor; no more force being used than was necessary.

2. Where a passenger, after being properly ejected, was injured by his own wrongful conduct in running beside the moving train with the intention to get on again, the company owed him no legal obligation to stop the train for the purpose of ascertaining whether he had been injured.

Appeal from circuit court, Carter county.
"To be officially reported."

Action by B. H. Saulsberry against the Chesapeake & Ohio Railway Company and others to recover damages for personal injuries. Judgment for plaintiff, and defendant company appeals. Reversed.

John T. Shelby, for appellant. G. W. Saulsberry, for appellee.

BURNAM, J. The plaintiff, a minor, by his next friend, alleged "that on the 14th day of October, 1898, the defendant company ran a passenger excursion train from Moorehead, Kentucky, to Huntington, West Virginia, and return, at one fare for a round-trip ticket, on account of the show given in Huntington by Buffalo Bill; that he boarded the train at Aden station with a number of other parties, among whom were the defendants Walter Littleton and Walter James; that upon the return of the train it reached Aden about 8:20 p. m., after dark, and that he was so intoxicated from the use of liquors from the time he left Huntington that he was insensible to danger and did not realize what he was doing, which fact was well known to the defendants; that when in this condition the train was stopped, and he was ejected therefrom, about a quarter of a mile west of Aden station, at a very rough place on the defendant's roadbed, by the defendants Littleton and James and a brakeman in the employ of the defendant company, who was in charge of the car.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

and put by the side of the train, in such close proximity to it that he fell under it, and when the train started the wheels of the car ran over and crushed his left arm necessitating its amputation, and that the defendant company knew of his injuries, but proceeded on its way, leaving him lying by the side of the track in a helpless and almost lifeless condition, exposed to the weather and passing trains; and that he continued in this condition for a period of two hours and twenty minutes, until he was picked up by a freight train of the defendant company and carried to his home, near the station." The defendant company says that, on the occasion mentioned in the petition, the plaintiff, who was a passenger on its train, was drunk, disorderly, and behaving very badly; that when the train reached Aden on its return trip, near which station the plaintiff lived, the defendants James and Littleton, who were his friends and companions, caused the plaintiff to leave the train and put him in charge of friends, but that when the train started from Aden the plaintiff broke loose from his friends, who were attempting to detain him, and boarded the train at its rear end, and in the hearing and presence of other passengers used profane and threatening language, and behaved in such a riotous manner that its codefendants, James and Littleton, again attempted to make him get off; that its brakeman, seeing their efforts, caused the train to be stopped a short distance from Aden station, and, at the request of James and Littleton, assisted them in removing the plaintiff from the train at its rear end, and in so doing used no more force than was necessary, and placed him upon the ground at the rear of the train, where he was in a perfectly safe position; that, when he was again prevented from boarding the train by Littleton and James at the rear end of the car, he ran along the side of the train after it had started, for the purpose of boarding the car at the other end, and whilst so doing, without their knowledge, stumbled and fell so that his arm projected over the railroad track, and was run over by the wheels of the car; that his injuries were entirely due to his own carelessness and negligence. It also denies that it had any knowledge of his injuries at the time. The plaintiff, who was 18 years of age, testified that he went with Walter Littleton to a saloon after getting to Huntington, where he spent the day drinking; that when they returned to the station at Huntington, in the afternoon, for the purpose of boarding the train, they met Walter James, and the three got on the train together; that he was so intoxicated that he had no recollection of anything that occurred after the train left Catlettsburg, until a few minutes before he was picked up by the freight train on the side of the road near Aden station. The uncontradicted tes-

timony shows that, from the time the train left Huntington until its arrival at Aden station, he was passing through the train, from one car to another, and from one place to another on the cars, indulging in loud and profane language and frequent altercations with the other passengers; that when the train reached Aden station, about 8 o'clock in the evening, his friends, James and Littleton, got him off the train, and that a lady friend caught hold of him and endeavored to prevent him from getting back on the train, but that as it moved off he broke loose from her and jumped on the platform of the rear car, and said in a loud voice that he wanted to find "the damn son of a bitch who had the hatchet"; that James and Littleton took hold of him and attempted to restrain him, and that whilst they were doing so the defendant's brakeman stopped the train, which had not gotten fully under way, and assisted them to again get him off some four or five hundred yards from the station; that plaintiff was placed on the ground by the side of the rear platform of the last car, in a perfectly safe place; and that, as the train started to move off, he ran along the side of the car for the purpose of boarding it at the other end, and when so doing stumbled and fell, his arm falling across the rail, and it was run over and crushed. A passenger who was looking out of the window saw him fall, and, when the brakeman came through the car, told him that the plaintiff had fallen under the train; and he testifies that the brakeman responded that he did not think so, as he saw him in a ditch at the side of the track when the train started. There is nothing to show that the place where the plaintiff was put off was dangerous. At the conclusion of the evidence, the defendant asked the court to direct the jury to return a verdict in its favor, which was refused, and the court said: "The uncontradicted testimony in this case is that this young man was drunk, boisterous, and violent; that he was put off the train at Aden, his home, from which point he started, and from which he bought his ticket, by his friends. The railroad company did not participate in that action at all. He succeeded in evading the vigilance of his friends, and got back on board. Whilst passing through the coach, looking for the individual that had the hatchet, James and Littleton took hold of him and pulled him into a seat. About that time the brakeman came along and said, 'I will put him off.' And he and the other defendants took hold of him and put him off the train, from the rear end of the rear coach, and he pursued the train, and in following it, and in attempting to board same, he fell to the west, whilst running in that direction, and the wheels ran over his arm and crushed it. Up to that time he was guilty of such contributory negligence as would deprive him of his rights

to recover, but when they ran over him, and the attention of the brakeman was called to that fact, he refused to stop the train. I think it was their duty to stop and take him up, and they were negligent in their refusal to do so, and he is entitled to recover for the suffering he endured by reason of his exposure after he was run over, for some two hours." The trial resulted in a verdict and judgment for \$8,500 in favor of the plaintiff, and to reverse that judgment this appeal is prosecuted.

Section 806 of the Kentucky Statutes provides that "if any person whilst riding on a passenger or other train shall, in the hearing or presence of other passengers and to their annoyance, use or utter obscene or profane language, or behave in a boisterous or riotous manner, it shall be the duty of the conductor in charge of any train upon which such person is to put him off the train, or to give notice of such violation to some peace officer at the first stopping place where any such officer may be." Whilst the plaintiff testifies that he was totally unconscious of what he was doing from the time the train left Catlettsburg until he was picked up upon the side of the track by a freight train, the other testimony does not bear out his statement in this respect. He was sober enough to continually pass through the train, to resist the efforts of his friends to put him off at his home station, and to get back on the train after it had started; and his conduct from the time he boarded that train at Huntington would have justified those in charge of the train in ejecting him therefrom, and the company would not have been liable for any injury which might result therefrom, provided no more force was used in doing it than was reasonably necessary; and this rule applies to an intoxicated person, although he may not be able to take care of himself. In *Railroad Co. v. Logan*, 88 Ky. 239, 10 S. W. 655, 3 L. R. A. 80, 21 Am. St. Rep. 332, this court said: "In every situation and relation, an intoxicated person, like others, should be held to the strict observance of the just and salutary rule which requires each one to so use and enjoy his own as not to injure others. It thus becomes lawful for a landlord to expel from his tavern to the street or highway, at any time, a person who, whether intoxicated or not, endangers the safety of, or molests and insults, his guests; and no one would question the right of a housekeeper to eject from his domicile a drunken man who maltreats or offends, by indecent conduct or language, his wife and children, provided no more force be used for the purpose in either case than was reasonably necessary. Such being a rule of conduct recognized as just and necessary, we do not see why it ought not to be applied, upon the same conditions, for the benefit and protection of passengers on a railroad train, nor why they should be given the right to maintain an action against

a railroad company for suffering them to be molested, put in fear, and insulted on a train by drunken men, while denying the company the right, except at its peril, to resort to the only feasible means in its power to prevent or stop the wrong being done. Common justice would seem to require either that passengers be left without redress against the company for wrong and injury done to them on trains by disorderly and vicious persons, or else that no liability attach or negligence be imputed to the company when the expulsion of the latter is rendered necessary for the safety and protection of the former." And in *Smith v. Railroad Co.*, 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72, the rule laid down in the *Logan Case* was approved, and the right and duty of the conductor as to a drunken passenger was reaffirmed, and the statute held to be applicable to a brakeman as well. The court said: "Now that, knowing it to be held universally that a conductor, using no unnecessary force, may remove from the car persons who are drunk, riotous, or unruly, it is an authority conceded to him, indeed, a duty required of him; and we would refuse to hear a railroad company's efforts to plead or prove that it gave no such authority to its conductors, or did not charge them with such duties; and such, we believe, should be the rule with respect to brakemen."

It seems clear from these authorities that plaintiff was properly ejected from the train, and we think there can be no doubt that his injuries were caused by his own wrongful conduct in running beside the moving train with the intention of attempting to get on board of it. The remaining question to be considered is, therefore, whether the railroad company, under the circumstances, was under legal obligations to stop its train for the purpose of determining whether plaintiff had been injured, and, if so, to have again taken charge of him. Our attention has not been directed to a case in which this precise question has been passed upon. In *Reed v. Railroad Co. (Ky.)* 47 S. W. 591, 44 L. R. A. 823, the plaintiff was a passenger upon one of the defendant's trains, standing outside of the car, upon the platform, and, in passing over a high trestle, fell a distance of 40 or 50 feet to the ground below, and was greatly injured. The defendant knew of the accident, but failed to go to his assistance, and the suit was to recover damages on the ground that the defendant was guilty of negligence in failing to stop the train and care for him. In that case it was held: "The obligation on the railroad to stop its train and rescue the plaintiff was wholly subordinate to its obligation to its other passengers; and, before the plaintiff could complain of the company's failure to assist him, he must allege facts showing that such assistance could have been rendered without endangering the safety of other passengers or property committed to its care." In that

case the plaintiff was a passenger on the defendant's train, whilst in this case this relation had ceased to exist. The plaintiff had been carried to his destination, and had been put off the train by his friends at the place where his ticket expired, and where his home was. The accident was due to the plaintiff's wrongful act in running along the side of the car in the night, and in attempting to get back upon the moving train. Under these circumstances, we are of the opinion that there was no legal obligation resting upon the appellant company to have stopped its train for the purpose of ascertaining whether the plaintiff had been injured. The hazard of the business in which it was engaged precluded it from playing the part of the Good Samaritan to one with whom it had no contractual relation, and to whom it was under no legal obligation.

For the reasons indicated, we are of the opinion that the trial court erred in overruling the motion for a peremptory instruction, and the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

McCABE'S ADM'X v. MAYSVILLE & B. S. R. CO. et al.¹

(Court of Appeals of Kentucky. March 5, 1902.)

REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT—JOINDER OF RESIDENT DEFENDANT—LEASE OF RAILROAD—AUTHORITY OF RAILROAD CORPORATION—NEGLIGENCE OF LESSEE—LIABILITY OF LESSOR.

1. A motion for the removal of a cause to the federal court must be overruled unless the petition for removal shows the existence of a controversy which is wholly between citizens of different states, and which can be fully determined as between them, that being the jurisdictional fact upon which the right of removal depends.

2. A removal cannot be had by a nonresident defendant where a resident defendant is properly sued jointly with him.

3. As statutes are not presumed to be intended to have effect beyond the jurisdiction of the state, Act Jan. 22, 1858 (2 Stant. Rev. St. p. 548), authorizing "railroad companies in this commonwealth" to contract "for the leasing of the road of one company to another, provided the roads so leased shall be so connected as to form a continuous line," applies only to domestic corporations, as the statute provides how the meeting of stockholders to approve such contracts shall be called, and it cannot be presumed that such a provision was intended to regulate the proceedings of corporations in other states.

4. A provision of the charter of a railroad company "that whenever any portion of said railroad shall be completed and in readiness for business, such portion thereof may be put in operation under authority of the board of directors on such terms for the use thereof as the board of directors may prescribe," not exceeding certain maximum rates, with a proviso that "they may make special contracts for special services on such terms and conditions as the parties thereto may agree upon," did not

authorize the corporation to lease its road, as such charters are to be strictly construed.

5. A provision in the charter of a railroad corporation empowering the corporation to "make contracts with individuals, corporations and other railroad companies for the building, completion and operating of said road or any part thereof," empowered the corporation to lease its road, but not so as to relieve it from liability for the negligence of the lessee in the operation of a train whereby a person on the track was struck and killed.

O'Rear and Du Relle, JJ., dissenting.

Appeal from circuit court, Mason county.

"To be officially reported."

Action by Peter McCabe's administratrix against the Maysville & Big Sandy Railroad Company and the Chesapeake & Ohio Railway Company, to recover damages for the death of plaintiff's intestate. Judgment removing cause to United States circuit court, and plaintiff appeals. Reversed.

A. E. Cole & Son, for appellant. W. H. Wadsworth, for appellees.

HOBSON, J. Appellant, Emma R. McCabe, as administratrix of Peter McCabe, deceased, filed this suit in the Mason circuit court against appellees, the Maysville & Big Sandy Railroad Company and the Chesapeake & Ohio Railway Company, to recover damages for the death of her intestate, who, she alleged, was killed in September, 1901, while walking along Third street in the city of Maysville, by an engine and train of the Chesapeake & Ohio Railway Company, by reason of the negligence of its agents in charge thereof, as well as the negligence of the Maysville & Big Sandy Railroad Company in permitting it to use the track, which was the property of the latter company. She alleged that after the building and completion of its road, and more than 12 months before the injuries to her intestate, the Maysville & Big Sandy Railroad Company leased and transferred its entire line of road to the Chesapeake & Ohio Railway Company, and that the latter has since that time been in the exclusive possession and control of it; that by the laws of Kentucky the lease and transfer were ultra vires and void; that in December, 1893, pursuant to section 211 of the constitution of Kentucky, and section 841, Ky. St., the Chesapeake & Ohio Railway Company became a corporation, citizen, and resident of this state by filing in the office of the secretary of state, and in the office of the railroad commission, copies of its articles of incorporation, and that thereupon a certificate of said incorporation was issued to it by the secretary of state. She further alleged that the railroad track was laid in Third street under an ordinance from the city authorities; that the railroad track took up the whole street, so as to render it unfit for travel by wagons or vehicles; that the city authorities were without power to authorize such a use of the street; and that the ordinance was void, and the operations of the trains on it was illegal. She prayed

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

judgment for \$25,000. The Chesapeake & Ohio Railway Company filed its petition to remove the case to the circuit court of the United States, alleging that it is a corporation created under the laws of the state of Virginia, and a citizen of that state, and of no other; that the Maysville & Big Sandy Railroad Company is not a proper party to the action, and was made a party to it for the sole purpose of preventing a removal of the case to the United States court; that no cause of action is shown in the petition against the Maysville & Big Sandy Railroad Company; that it had authority of law to make the lease referred to, and is insolvent. It is specially pleaded in the petition that, by virtue of the charter and amendments thereto of the Maysville & Big Sandy Railroad Company, and particularly of the act of February 17, 1866, entitled "An act authorizing the sale of the Maysville & Big Sandy Railroad, and providing for the organization of a new company under its charter to construct said road" (Acts 1865-66, p. 664), and of the general laws of the state of Kentucky, that company had full power and authority to make the lease referred to. On this petition the court, over the plaintiff's objection, ordered the case to be removed to the federal court, and the plaintiff prosecutes this appeal.

In *Powers v. Railroad Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, the United States supreme court said: "A petition for removal, when presented to the state court, becomes part of the record of that court, and must, doubtless, show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and, if it does, the circuit court of the United States cannot allow an amendment of the petition, but must remand the case." It was the duty, therefore, of the court below, when the petition for removal was presented, to determine whether the jurisdictional facts upon which the right of removal depended appeared in the petition, and, if they did not appear, to overrule the motion for the removal of the case. On appeal from that judgment the same duty devolves upon this court. Under the act of congress the jurisdictional facts to sustain removal are that "there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them." It has been held that in a suit against two defendants jointly liable, where one of them is a citizen of the state and the other a citizen of another state, if they are properly sued jointly, a removal cannot be had by the non-resident defendant. *Railway Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. The common-law distinctions between the different forms of action have been abolished

by our Code of Practice, and all persons who are liable for a wrong may now be sued jointly in this state in an action to recover for negligence. "A railroad company is given by the state certain franchises, and thereby assumes certain burdens. These it cannot transfer to another without legislative authority, so as to exempt itself from responsibility for the torts of its transferee. The Maysville & Big Sandy Railroad Company was therefore liable to appellant jointly with the Chesapeake & Ohio Railway Company, if the transfer was unauthorized, and, in this event, the suit against the two companies jointly might be properly maintained. To hold otherwise would be to require the plaintiff to prosecute two actions, although each of the defendants was alike liable to him. The question then to be determined is, did the petition for removal show that the controversy was wholly between the plaintiff and the Chesapeake & Ohio Railway Company, and that the Maysville & Big Sandy Railroad Company was not a proper party to the action? Section 203 of the state constitution is in these words: "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability if the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges." The franchises of a corporation are its property. The declaration that these in case of a lease or alienation shall not be relieved from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the use of the franchise, or any of its privileges, is, in substance, a declaration that the corporation shall not be relieved of such liability; for its existence is inseparable from all of its franchises. Under this section, therefore, no lease made by a corporation can exempt it from liability for the wrongs of its lessee. If the lease in question was made after the adoption of the constitution, it would not exempt the lessor from liability. The date of the lease is not shown in the record, but if it was made before the adoption of the constitution the result is the same. An act of the general assembly approved January 22, 1858, entitled "An act to authorize railroad companies to make certain contracts with each other," is relied on. But this act only refers to "railroad companies in this commonwealth," or domestic corporations. The act is in these words (see 2 Stant. Rev. St. p. 548): "That all railroad companies in this commonwealth shall have power and authority to make, with each other, contracts of the following character: 1. For the consolidation of either the management, profits, or stock of any two or more companies, the roads of which are or shall be so connected as to form a continuous road, either temporarily or permanently. 2. For the leasing of the road of one company to another, provided the roads so leased shall be so con-

nected as to form a continuous line. 3. For the completion in whole or in part, of the unfinished road of any company. 4. For giving a common name and style to any continuous road belonging to two or more companies: provided, however, that all such contracts shall be approved by a majority, in interest, of all the stockholders in each of the contracting companies, at some stated or called meeting of the same." Section 2: "That the called meetings of stockholders, provided for in the first section, shall be called by the president and directors of the company, and notice of the time and place thereof, and of the purposes of such meeting, shall be advertised in one or more newspapers of general circulation in the county where the principal office of such company is then kept, for at least two weeks before such meeting." In the construction of statutes it is a cardinal rule that they are not presumed to be intended to have effect beyond the jurisdiction of the state. The second section of the act can, therefore, have no reasonable application to foreign companies, for it cannot be presumed that the legislature intended to regulate the proceedings of the president, directors, or stockholders of such companies or advertisements to be given in other states. Taking this section in connection with the opening words of the first section, "All railroad companies in this commonwealth," we see no room for doubt that the legislature intended to confer these privileges only on domestic companies.

As to the power of the Maysville & Big Sandy Railroad Company to make the lease, we are also referred to the following provision in its charter (Act Nov. 25, 1851, § 8): "Sec. 8. That whenever any portion of said railroad shall be completed and in readiness for business, such portion thereof may be put in operation under authority of the board of directors on such terms for the use thereof as the board of directors may prescribe, not exceeding the maximum rates authorized by the fifteenth section of the act incorporating the Maysville & Lexington Railroad Company: provided, they may make special contracts for special services on such terms and conditions as the parties thereto may agree upon." Acts 1851-52, p. 390. We do not see that this section goes further than to authorize the operation of the road under authority of the board of directors. The rule is that charters of this sort are strictly construed. We are also referred to the following provision (Act Feb. 17, 1866, § 3; see Acts 1865-66, p. 664): "The purchaser or purchasers at any such sale after the same has been ratified and approved by said court shall in virtue thereof be invested with the title to said road and all its franchises and chartered privileges as fully and completely as if the same had been originally granted to them. They shall have power to reorganize the company under its charter; and for the purpose of its charter open books and receive

and collect subscriptions of stock to said company, make contracts with individuals, corporations and other railroad companies for the building, completion and operating of said road or any part thereof." When this statute was passed the road was not completed; the purpose of the provision was to enable the company to complete and operate the road. To this end it was empowered to "make contracts with individuals, corporations and other railroad companies for the building, completion and operating of said road or any part thereof." Thus power was granted it to make the contract with the Chesapeake & Ohio Railway Company above referred to; but no exemption was granted from any liabilities which attached to it, and such an exemption, as against the public, cannot be implied. While there is some conflict of authority, we think the great weight supports this conclusion. In *Harmon v. Railroad Co.*, 28 S. C. 404, 5 S. E. 835, 13 Am. St. Rep. 686, the court said: "The circuit judge seems to rest his conclusion upon the ground that, inasmuch as under the charter of the defendant company it has power to lease its road, it follows necessarily that when the road is leased the company is released from all its obligations to the public and to individuals, and these obligations then rest solely upon the lessee. We cannot accept this view. It rests upon the idea that, inasmuch as the defendant company incurs these obligations in exchange, as it were, for the chartered rights and privileges conferred by the legislature, when such rights and privileges are transferred to another by the consent of the legislature, the corresponding obligations are likewise transferred to such other person or corporation. This, at first view, seems plausible, and is the view adopted in some of the states. But it rests upon the unfounded assumption that the defendant company has transferred all of its chartered rights and privileges to the Richmond & Danville Railroad Company. We understand the testimony as tending to show, and the concession of counsel to be, simply, that the defendant company has leased its road to the Richmond & Danville Railroad Company, and not that it had transferred all its chartered rights and privileges to that company. On the contrary, this very case necessarily implies that the defendant still maintains its corporate organization and existence, and instead of running its road itself directly has bargained with another company to run it for a compensation, as we must suppose. The defendant company, therefore, in reality still enjoys the benefits of its charter, and cannot be permitted to escape its corresponding obligations." In *Driscoll v. Railroad Co.*, 65 Conn. 254, 32 Atl. 354, the court said: "A grant to a corporation of a right to lay out, construct, and operate a railroad is the grant to the corporation of the capacity to exercise a portion of the powers of sovereignty for the purpose

of making pecuniary profit to itself. This is its franchise. Such grants are never made except at the request of the corporation. In return, the corporation is held to have promised to pay just damages to any person injured by any want of care in using the right so granted. As the grant is of a public right, in which every one of the public is a sharer, so the promise is to each one of the public. A due regard for the public rights obviously requires that a corporation which has asked for and received such a grant shall not be absolved from its promises except by an act of the legislature to that effect so distinct and unequivocal as not to be open to mistake. Nothing should be left to inference." In *Braslin v. Railroad Co.*, 145 Mass. 68; 13 N. E. 65, the court said: "The sanction of the legislature was given to the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. * * * It was under a positive duty and obligation to the public, and the consent of the legislature to the making of the lease did not imply a discharge from the duty and obligation. * * * Where a corporation seeks to escape from the burden imposed upon it by the legislature, clear evidence of a legislative assent to such exoneration should be found." In *Logan v. Railroad Co.*, 116 N. C. 946, 21 S. E. 959, the court said: "After conferring upon a corporation the right of eminent domain, with many other special privileges which the legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the state cannot be held to have abdicated its right to protect the patrons of the road who are under its care by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs or defaults." These were all suits against the lessor where the lease was authorized by statute. See, to the same effect, *Balsley v. Railroad Co.*, 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784; *Singleton v. Southwestern R. R.*, 70 Ga. 464, 48 Am. Rep. 574; *Tillett v. Railroad Co.*, 118 N. C. 1031, 24 S. E. 111; *Railroad Co. v. Morris*, 68 Tex. 59, 3 S. W. 457; *Chollette v. Railroad Co.*, 26 Neb. 169, 41 N. W. 1106, 4 L. R. A. 135; *Parr v. Railroad Co.*, 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826; *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Stephens v. Railroad Co.*, 36 Iowa, 327; *Bower v. Railroad Co.*, 42 Iowa, 546; *Railroad Co. v. Lee*, 71 Tex. 553, 9 S. W. 604.

In some states a distinction is made between injuries resulting from the negligence of the lessee alone and those resulting from the failure of the lessor to discharge some duty imposed by law upon him, where the

lease is authorized by statute, and the lessor is only held liable for the latter. Thus the lessor is held responsible where cattle stray upon the track and are injured while the road is operated by the lessee by reason of the failure to fence the track as required by statute, or where a person is injured by reason of the improper construction of a station house too near the track, or an injury results from a failure to put in sufficient cattle guards, or there is a failure to transport persons or property as required by the charter of the lessor. *Heron v. Railway Co.*, 68 Minn. 542, 71 N. W. 706; *Lee v. Railroad Co.*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140; *Bean v. Railroad Co.*, 63 Me. 295; *Nugent v. Railroad Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; *Lakin v. Railroad Co.*, 13 Or. 436, 11 Pac. 68, 57 Am. St. Rep. 25. After citing a number of these cases in his note to *Lee v. Railroad Co.* (Cal.) 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 152, Freeman, commenting on them, says: "If it be true, as the decisions with substantial unanimity admit, that a lessor railway remains liable for the discharge of its duties to the public unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except perhaps where the plaintiff is suing upon an express contract made with him by the lessee corporation. Is it not as much a public duty on the part of a railway corporation to operate its trains without negligence as it is to receive all freight offered for transportation, or to carry all passengers who offer to pay the regular rates, or to keep its track and station houses in safe condition? In truth we do not know of any duties of a railway corporation which are of a private character. * * * There are cases in which the lessor had been held not responsible for injuries to the servants of the lessee by reason of the lessee's negligence. *Railroad Co. v. Washington*, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344; *Hukill v. Railroad Co.* (C. C.) 72 Fed. 745. These cases rest on the idea that the duty owed to the servant by his employer grows out of the contract of service, which is voluntarily entered into by the servant, and that he does not stand to it like the public. In addition to these there is a line of cases holding the lessor not responsible for any acts of the lessee, on the ground that the legislative authority to lease constitutes the lessee quoad hoc the owner of the property, and substitutes him for the lessor. *Miller v. Railroad Co.*, 125 N. Y. 118, 26 N. E. 35; *Caruthers v. Railroad Co.*, 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 737, and cases cited.

Upon principle and the weight of authority we are of opinion that the Maysville & Big Sandy Railroad Company is liable to appellant. The obligation to fence the track for the protection of stock, or to receive passengers or freight, or carry them safely, is no more a duty of the lessor imposed upon

it by its charter than its duty to avoid injury to the traveling public in the discharge of its functions, as in this case. By its acceptance of the franchises conferred by the state the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease its property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road, where the corporation still retains its existence and the enjoyment of its franchises in the rents. For such grants are strictly construed, and, as against the public, are never extended by construction. In the case before us there is only a grant to the lessor of power to contract for the operating of the road. The company enjoys all its franchises in the fruits of the contract. There is nothing in the provision to show that the legislature had in mind authorizing the company to divest itself of its franchises, or permitting it, while enjoying them or their fruits, to be acquit of responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit. In *Harper v. Railroad Co.*, 90 Ky. 359, 14 S. W. 346, the question was not elaborated, and it is apparent from the opinion that only the question of jurisdiction was really considered by the court; for it does not appear from the facts stated that the lease in that case was authorized by statute, or under what provision of law it was made.

It is unnecessary for us to pass upon section 211 of the constitution and section 841 of the Kentucky Statutes, and determine whether appellee can accept citizenship in this state, and so take all its advantages and at the same time plead that it is a nonresident of the state.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

O'REAR and DU RELLE, JJ., dissent.
BURNAM, J., not sitting.

SEAWEL et al. v. DIRST et al.

(Supreme Court of Arkansas. Feb. 8, 1902.)

INSANITY—MONOMANIA—EVIDENCE—DEEDS—ACKNOWLEDGMENT—IRREGULARITY.

1. Evidence, in an action to foreclose a trust deed, held insufficient to show that monomaniacal delusions of the grantor affected his capacity to transact business so as to invalidate the deed on the ground of insanity; it appearing that he was capable of comprehending and acting intelligently upon the business affairs out of which the conveyance grew, and understood the nature and consequences of his act.

2. Under Act March 11, 1891, providing that all conveyances, proof of execution of which is insufficient because the officer certifying such execution omitted any word in the certificate, or is otherwise informal, shall be as

valid and binding as though the certificate of acknowledgment and proof of execution was in due form, a deed of a homestead, in which the name of the grantor's wife appeared in the body of the deed as grantor, but the certificate showing the acknowledgment of which on the part of the wife did not show that she acknowledged the execution of the deed, but only that she acknowledged that she had signed and sealed a relinquishment of dower, was not void, though it did not appear that the defect in the acknowledgment resulted from a clerical oversight or omission of the officer taking the same; the act being applicable to all cases in which the acknowledgment is insufficient to give full legal effect to the conveyance.

Appeal from circuit court, Marion county, in chancery; Elbridge G. Mitchell, Judge.

Action by W. Q. Seawel and others against A. L. Dirst and another. From the judgment rendered all parties, except defendant Williams, appeal. Modified.

On the 1st day of July, 1896, A. L. Dirst and his wife, J. W. Dirst, executed a deed of trust conveying 160 acres of land in Marion county to J. C. Floyd as trustee to secure certain promissory notes executed on that day by A. L. Dirst to W. Q. Seawel and other parties named in the deed of trust, and to whom he was indebted for goods and supplies furnished to him. The notes not being paid at maturity, Seawel and the other parties brought suit in the circuit court to recover judgment on the notes and to foreclose the deed of trust. They alleged in the complaint that the land described in the deed of trust was the homestead of Dirst and his wife, and that in 1894, prior to the execution of their deed of trust, Dirst and his wife had executed a mortgage on the same land to Margaret S. Williams; that the wife of Dirst did not join in the execution of said mortgage, and that it was for that reason void; and they asked that it be set aside and declared void by the decree of the court, and that the trust deed to Floyd be foreclosed. A. L. Dirst and his wife, J. W. Dirst, appeared and answered that A. L. Dirst at the time he executed the notes and trust deed to Floyd was of unsound mind, and not competent to make said contract or to bind himself by the execution of said note and mortgage. A guardian ad litem also appeared for A. L. Dirst, and he also set up the defense that Dirst was insane at the time the note and mortgage was executed. Mrs. Margaret S. Williams appeared, and for answer denied that the mortgage executed by A. L. Dirst and wife to her was void, alleged that it was valid, and that the debt it was given to secure had not been paid, and asked for a decree foreclosing the same. On the hearing the court found that the mortgage of Margaret S. Williams was a valid and subsisting lien upon the land, and gave judgment in her favor for the sum of \$1,156.25, and ordered that, in the event such sum was not paid within 12 months, the land be sold for the payment of the judgment. The court further found that A. L. Dirst

was insane at the time he executed the deed of trust to Floyd and the notes to Seawel and others to secure which the trust deed was executed. The court, therefore, adjudged that the trust deed and notes were void, but found that the accounts for which the notes were executed were made and contracted before Dirst became insane, and the court gave judgment in favor of the plaintiffs for the amount of their respective accounts. From this judgment all parties except Margaret S. Williams appealed.

S. A. Woods and J. C. Floyd, for appellants. Horton & South and Pace & Pace, for appellee.

RIDDICK, J. (after stating the facts). This is an action brought by certain creditors of A. L. Dirst to foreclose a trust deed upon 160 acres of land, executed by Dirst and his wife to secure the payment of notes given by him to plaintiffs, and also to set aside and declare void a previous mortgage executed by Dirst and his wife to Margaret S. Williams upon the same land. Plaintiffs contend that, as the land mortgaged was the homestead of Dirst and his wife, the mortgage to Mrs. Williams was invalid, because the wife did not join in the execution and acknowledgment of the same as required by the statute. But the mortgage on its face appears to be the joint deed of A. L. Dirst and J. W. Dirst, his wife, the names of both of them appearing in the body of the deed as grantors. It is true that the certificate showing the acknowledgment of the deed on the part of the wife was defective, in that it did not show that she acknowledged the execution of the deed, but only that she acknowledged that she had signed and sealed a relinquishment of dower. This defect in the acknowledgment was, however, cured by the subsequent act of 1896. Plaintiffs say that this act was evidently intended to cure defects in the certificate of acknowledgment resulting from clerical oversight and omissions of the officer taking the same, and that it does not apply here for the reason that there is no proof to show such a defect or omission. But this same argument was made in the recent case of Williamson v. Lazarus, 86 Ark. 226, 49 S. W. 974, 74 Am. St. Rep. 91, and overruled, on the authority of the decision in Johnson v. Parker, 51 Ark. 419, 11 S. W. 681. In the latter case Chief Justice Cockrill, who delivered the opinion of the court, said that instances of obvious omissions of words from certificates of acknowledgments may have given rise to the act in question, but he said that the terms of the act "are comprehensive, and enunciate a general rule applicable to all cases in which the acknowledgment is insufficient to give full legal effect to the terms of the conveyance." These cases are conclusive of the question here, and show that the ruling of the circuit judge on this point was correct.

The next question, as to whether the trust deed executed by Dirst to Floyd to secure the debts due from him to the plaintiffs in this action was void by reason of the fact that he was insane at the time of its execution, is largely a question of fact, the legal questions involved being well settled. It is unnecessary to set out the testimony in the record bearing on this point in full. It shows clearly that Dirst, the grantor in the trust deed, was partially insane, both before and after it was executed. He was subject to insane delusions on certain subjects. The presence of this form of insanity in Dirst became first distinctly noticeable in the spring of 1896, some two or three months before the trust deed was executed. The following circumstances first attracted attention to his malady: Dirst was the owner of a shepherd dog, to which he seemed much attached, but about the time referred to, without any sufficient reason, he became possessed with the idea that the dog was mad, and killed it. The next day he killed a chicken cock belonging to him, and, upon being asked why he did so, replied that "It was mad, and had been chasing him around, and that he was not going to be killed by a ten cent rooster." A physician was called in, and found Dirst laboring under great mental excitement, and possessed with the delusion that his wife was insane. He said to the physician, "There is nothing the matter with me, but my wife is crazy." "I concluded," said the doctor, "that he was a monomaniac on the subject of his wife's insanity." Ten or twelve days later the physician saw him again, and found him still laboring under the same nervous derangement, but not to such an extent as before. Dirst at this time was engaged in the business of a nurseryman, and was also the proprietor of a country newspaper. Though at times afflicted in this way, he continued to look after his business affairs to a limited extent for over a year after the trust deed was executed. But the delusions continued. At times he believed that certain of his former neighbors who had died were not in fact dead, and asserted that they had been buried alive to fool him. He often asserted that events known to have occurred in the neighborhood were only myths. To one of his sons he said on one occasion that the Mountain Echo, the Baxter County Citizen, and the Harrison Times were only myths; that no such papers were published, but that a few sample copies had been sent out to fool the people. Haunted at times by these delusions, with signs and symptoms of insanity increasing and accumulating against him, it was nearly three years after the execution of the trust deed before Dirst was finally adjudged to be insane by the county court, and sent to the state asylum for the insane. The evidence, as we have before stated, makes it very plain that Dirst was afflicted with some form of

insanity; but we think it is equally plain that he was only partially insane, and that on some subjects he was rational. This is shown by the testimony of the witnesses introduced to prove his insanity. "On some subjects," said one of them, "he seemed sane, and on others he seemed wild. Railroads and minerals seemed to be his hobby. He seemed crazy on those subjects, but on fruit culture and some other subjects he seemed rational." Two of his sons who were of age deposed as witnesses for the defendants to acts of insanity on the part of Dirst, but both admitted, on cross-examination, that he was rational on some subjects. "It was owing to the subject of conversation," said one of them. "There were some subjects on which he was rational at all times." Even the testimony of his wife, one of the defendants, shows that he was only partially insane. "He seemed," she said, "rational on some subjects and irrational on others. As long as we talked on agricultural subjects or mineral outcrops he seemed rational, but when we talked on the subject of railroads or his neighbors he seemed irrational, and would indulge in wild and unreasonable statements." The fact that he was only partially insane, and that there were intervals when his mind was rational, is also shown by the fact that nearly a year after the deed of trust was executed he was still engaged in his nursery business, and in taking orders for the sale of his fruit trees. It is no doubt true that an insane man might, if allowed to do so, undertake to continue the business that he had followed previous to his insanity. The insane physician might endeavor to heal the sick, the insane minister might still try to preach, and so might the insane nurseryman endeavor to carry on his business when his mind was no longer able to comprehend it; but this is not a case of that kind. The testimony of every witness here is that on questions concerning fruit trees and the business of nurseryman Dirst was always sane. It was on other and different subjects that his mind was unbalanced.

Coming now, to his conduct on the day the trust deed was executed, the evidence shows that on that day two attorneys, J. C. Floyd and S. W. Woods, who between them represented these creditors, and had the claims for collection, called to see him about the payment thereof. They found Dirst and his young son in the field hoeing corn. He seemed to be in good health and perfectly rational. When they explained to him the object of their visit, Dirst expressed a desire to pay off the indebtedness, and said that he would do so in the future, but that he had no money at that time. Upon suggesting that he could secure the claims by giving a mortgage, Dirst explained to them that his place had been sold under execution, and he had not redeemed it. The attorneys then told him that, if he would secure the amount

of the execution sale along with the other debts, the lands could be released or redeemed from the execution sale. He replied that he was willing to do that if they would give him time to pay the debts, and upon their offering to give him 18 months' extension he said that the arrangement was satisfactory, and he would go to the house and consult his wife about the matter. They then went to the house, and after consulting with his wife it was agreed by them to execute the trust deed on the terms proposed. The attorneys took dinner with him at his house, and while waiting for dinner to be prepared Dirst helped one of them to feed their horses, and afterwards showed them his garden and some of his fruit trees, and talked with them of the qualities of the different fruits, and on other subjects of that kind, in a rational and sane manner. It was just after the nominations for president had been made by the two leading parties, and Dirst discussed with them the merits of the respective candidates and platforms. Being in favor of what was called the "gold standard," Dirst took that side of the question, and the witnesses say supported it by a very intelligent argument, and seemed in perfect control of himself and his mental faculties. The trust deed was prepared in accordance with the agreement of the parties and after dinner Dirst and his wife and the two attorneys went together to Dodd City, a neighboring village, and the deed was there acknowledged before a notary public. During all the time they were with Dirst these two witnesses say that they saw nothing to indicate mental derangement on his part. He appeared to be perfectly rational on all subjects, and they said that the idea that he was mentally unbalanced in any way never once occurred to them, as his conduct through the whole matter was that of an intelligent and rational man. These witnesses must, of course, be treated as to some extent interested, but their statements are not contradicted, but are supported by the testimony of the notary public before whom the deed was acknowledged, and by that of another witness, who saw Dirst on that occasion and heard him talk. It is even corroborated by the testimony of Mrs. Dirst, who, though she was permitted to testify for the defendants, did not contradict these witnesses as to the conduct of her husband on that day, and the only reason she gave for believing that he was insane at the time he executed the deed was that when he came to the house he told her that the attorneys wanted her to sign the trust deed, and said to her that she "had better do so," without consulting or explaining the matter to her, as he usually did. But sane men often act in that way, and this did not show that he was insane or ignorant of the nature and consequences of the deed he was about to make. Her testimony shows that at the time she

was asked to sign the deed by her husband she understood fully why the trust deed was desired, and the history and nature of the claims to be secured. It was therefore apparent that no explanation was needed. Her husband probably knew this, and for that reason made none.

The story of the conversation between herself and husband on the night following the execution of the deed, in which he told her not to cry; that Gray, the officer before whom the deed was acknowledged, "was neither a notary or justice of the peace and had no authority to take the acknowledgment, and it didn't amount to anything,"—cannot be considered, for it was a communication from a husband to a wife, and was clearly incompetent.

Granting that as Mrs. Dirst was a party to this suit, and had an interest in the land as a homestead, she could testify in her own behalf, yet still it was not competent for her to testify to communications made by her husband to her as evidence to avoid his deed. Sand. & H. Dig. § 2916. Disregarding such communications proved by her, we think the evidence shows that Dirst at the time he made the deed was sane, or, at least, not insane, on any subject connected therewith.

Counsel for plaintiffs say in their brief that the very fact that he was willing to incumber his homestead with such a lien is evidence of insanity on his part. But it is a common occurrence for persons in debt to mortgage their homesteads in order to secure their debts. A considerable percentage of the homesteads in this city are mortgaged; but, while this indicates that the owners thereof are in debt, it is no evidence of insanity on their part. Besides, it is shown in this case that Dirst, several years before he was affected with insanity, mortgaged this same homestead to Margaret Williams for a larger amount than that secured by this trust deed. This mortgage to Mrs. Williams has not been paid, and in the end it may absorb the homestead, and leave little or nothing for the satisfaction of the claims secured by the trust deed. The existence of this prior mortgage on his homestead may account for the willingness of Dirst to give the second one, especially when by giving it he obtained a year and a half extension on his debt. The attorneys who testified said that Dirst expressed a desire to pay the debt, but insisted upon a liberal extension of time in which to pay as the condition upon which he would execute the trust deed. They were compelled to give the extension in order to get the security, and this indicates that Dirst understood the nature and consequences of the contract he was making.

Now, as before stated, the law bearing on this question is not difficult to state. While

it may have formerly been the doctrine of the courts that an insane person could do no legal or binding act, that dogma has been long overthrown. The law now recognizes the fact, well established by the investigation and observation of medical experts, that there may be derangement of mind as to particular subjects, and yet capacity to comprehend and intelligently act on other subjects. It follows, therefore, that the proof which is designed to invalidate a man's deed or contract on the ground of insanity must show inability to exercise a reasonable judgment in regard to the matter involved in the conveyance. The fact that the grantor was a monomaniac, and possessed of insane delusions on some subjects not connected with the conveyance or the matters out of which it grew, is not sufficient to invalidate his deed. To have that effect, the insanity must be such as to disqualify him from intelligently comprehending and acting upon the business affairs out of which the conveyance grew, and to prevent him from understanding the nature and consequences of his act. Busw. Insan. § 270; *Burgess v. Pollock*, 53 Iowa, 273, 5 N. W. 179, 36 Am. Rep. 218; *Elwood v. O'Brien*, 105 Iowa, 239, 74 N. W. 740; *Concord v. Rumney*, 45 N. H. 428; *Aldrich v. Bailey*, 132 N. Y. 85, 30 N. E. 264; *Kingsbury v. Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Bish. Cont.* (Enlarged Ed.) 962, 964; 16 Am. & Eng. Enc. Law (2d Ed.) 624, and cases cited.

Now, applying these rules to the case in hand, we think the finding must be in favor of the plaintiffs. The burden was on the defendants to show that the trust deed was void. But, taking all the evidence together, we think it is reasonably clear that they did not make out a case sufficient to avoid the deed. On the contrary, we believe the decided weight of evidence shows that Dirst, in executing the trust deed, understood very well the nature and consequences of his act. If there had been any fraud or unfairness in the transaction, a different question would have been presented. But the debts secured by the trust deeds were valid and subsisting claims against Dirst. As he owed these debts, and was unable to pay them, it was only natural that he should wish, by securing them, to obtain time in which to pay them. His action in this regard displayed, not insanity, but honesty and good business intelligence.

On the whole case, we think the court erred in declaring the trust deed and notes void. The judgment in that respect is therefore reversed, with an order to enter a decree in favor of plaintiffs foreclosing the trust deed, but subject to the prior lien of Margaret Williams. The decree as to her mortgage is affirmed.

STATE ex rel. CROW, Atty. Gen., v. LUND.

(Supreme Court of Missouri. Feb. 19, 1902.)

QUO WARRANTO—OFFICER—TERM—HOLDING OVER.

1. Respondent was appointed city comptroller of Kansas City, April 17, 1899, under the charter, art. 4, § 14, providing that there shall be such an officer, who shall be appointed and hold the office for two years, unless sooner removed, provided that the term of the one first appointed under the charter shall be one year, and appointments thereafter shall be made at the beginning of the second year of the mayor's term. Const. art. 14, § 5, provides that, "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official term, and until their successors shall be duly elected or appointed and qualified." No successor of respondent had been appointed when the attorney general instituted proceedings of quo warranto more than two years after respondent's appointment. Held, that the provisions of the charter fixing the term at two years, with no provision for holding over, and fixing the time when appointments shall be made, are "contrary provisions," within the meaning of the constitution, and that respondent's right to the office ceased at the expiration of the two years, though no successor had been appointed.

2. Const. art. 14, § 5, providing that, in the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official term, and until their successors shall be duly elected or appointed and qualified, applies to the officers of a municipality.

3. The phrase "any contrary provision" refers to and includes a provision contained in the law creating an office, and is not restricted to other constitutional provisions.

4. Where the term of an appointive officer is fixed by law, and he is given no right to hold over until his successor is appointed, the facts that it has been the custom of his predecessors to so hold over, and that inconvenience would result from the office being vacant, are no defense to a proceeding by the state in the nature of quo warranto.

Robinson, J., dissenting.

In banc. Appeal from circuit court, Jackson county; E. P. Gates, Judge.

Quo warranto by the state of Missouri, on the relation of Edward C. Crow, attorney general, against Hans Lund. From a judgment for defendant, plaintiff appeals. Reversed.

F. M. Black, Atty. Gen., and Fyke, Yates, Fyke & Snyder, for appellant. Sanford B. Ladd, for respondent.

BURGESS, C. J. This proceeding was begun ex officio by the attorney general in the circuit court of Jackson county, Mo., to oust respondent, Hans Lund, from the office of city comptroller of Kansas City, Mo. There was judgment for respondent, from which plaintiff appeals. Respondent was, on the 17th day of April, 1899, by and with the advice and consent of the common council of Kansas City, Mo., appointed by its then mayor, James M. Jones, city comptroller for said city. The appointment was made un-

der section 14, art. 4, of the charter of the city, which is as follows: "There shall be a city clerk, city assessor, city counselor, city comptroller and city physician, who shall be appointed by the mayor, by and with the advice and consent of the upper house of the common council, and shall hold their office for the term of two years, unless sooner removed, and who shall perform such duties as may be prescribed by this charter or any ordinance of the city: provided, however, that the appointments first made under this charter after the general city election of 1890 shall be for one year only, so that the appointments made thereafter shall be made at the beginning of the second year of the mayor's term." No one has ever been appointed and confirmed as the successor of respondent, and his contention is that, having been appointed for a term of two years, he holds over until his successor is appointed and confirmed.

It was held in *People v. Tieman*, 8 Abb. Prac. 359, and in *People v. Tieman*, 30 Barb. 198, and later by the supreme court of the United States in the case of *Badger v. U. S.*, 93 U. S. 599, 23 L. Ed. 991, that by the common law, and, in most of the states, when the term of office to which one is elected or appointed expires, his power to perform his duties ceases; that this is the general rule. In this state, however, if the common-law rule be as stated in *Badger v. U. S.*, supra, it does not apply, with the exception as to judicial officers and members of the legislature, and, in the absence of words indicating that the officer is to hold over until his successor is elected or appointed and qualified, "It is sometimes a matter of doubt whether or not the incumbent can hold over."

* * * Sometimes, however, where words of holding-over import are omitted, it may remain doubtful whether such a right was intended to be conferred; in which case the prevalent rule of construction in this country appears to be that, if no restrictive words be used,—no terms expressly or impliedly prohibiting holding over,—then such continuance in official power and life is permissible and valid, until a successor be chosen, etc." *State v. Perkins*, 139 Mo. 106, 40 S. W. 950. The same rule is announced in *Dill. Mun. Corp.* (4th Ed.) §§ 219, 220; *Tlod. Mun. Corp.* § 81; *Mechem, Pub. Off.* § 397; and in *Throop, Pub. Off.* §§ 323, 325. In almost all of the states it is expressly declared, in constitutional or by statutory provision, that all officers shall hold over until their successors are elected, or appointed and qualified, and, even when there is no such provision, as a rule they do so; but where there is a constitutional or statutory restriction expressed or implied to the contrary that rule does not obtain, and the term of office fixed by law expires at the end of the term, and, although the officer may hold over after the expiration of his term, he is thereafter de facto an officer

(*State v. Smith*, 87 Mo. 158; *Robb v. Carter*, 65 Md. 321, 4 Atl. 282), and his acts cannot be called in question in a collateral proceeding. Of the adjudications relied upon by defendant, the following were proceedings in which the right of some officer to hold over was collaterally called in question: *Wier v. Bush*, 4 Litt. 430; *McCall v. Manufacturing Co.*, 6 Conn. 428; *Tuley v. State*, 1 Ind. 500; *Bath v. Reed*, 78 Me. 276, 4 Atl. 688; *People v. Oulton*, 28 Cal. 44; *City of Wheeling v. Black*, 25 W. Va. 266. *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663, is also relied upon by defendant, but in that case the organic law of that state, upon which the decision is bottomed, expressly provides that, "Whenever it is provided in this constitution or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be so construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified." So that it is perfectly apparent from that provision of the constitution that there was no escape from the conclusion reached by the court; that is, that all officers in that state hold over after the expiration of their terms until their successors are elected, or appointed, as the case may be, and are qualified. *People v. Blair*, 82 Ill. App. 570, is another case relied upon by defendant. That was a direct proceeding by quo warranto against the defendant Blair to test his right to hold and execute the office of city marshal of the city of Marengo, which it was averred he had usurped without right, and it was held that municipal officers appointed or elected for a fixed term hold over till the election or appointment and qualification of their successors, unless a contrary legislative intent is manifest, and, as no such contrary legislative intent appears in the general act for the incorporation of cities, that the incumbent, Dunwoody, held over until his successor was elected, or appointed and qualified. Now it is expressly provided by the section of the charter quoted that the "city clerk, assessor, counselor, comptroller, and city physician, shall hold their respective offices for the term of two years, unless sooner removed, * * * provided, the appointments first made under the charter after the general city election of 1890, shall be for one year only, so that the appointments made thereafter shall be made at the beginning of the second year of the mayor's term"; thus by restrictive words fixing the tenure of the office at two years, and at a definite and fixed time. But even if not so expressed, it is clearly implied from the language used, that the officers named shall hold their offices for two years only from the date of their appointments, and, "that which is implied in a stat-

ute is as much a part of it as what is expressed." *Suth. St. Const.* § 334.

By section 24 of the charter of Kansas City all officers of the city, including the mayor, are required to be elected at an election to be held for that purpose on the first Tuesday after the first Monday in April every two years, while the appointment of all officers first made under the charter after the general city election of 1890 was for one year only; and the appointments made thereafter were required to be made at the beginning of the second year of the mayor's term. Section 14, *supra*. The object of having the elective officers elected at one time, and the appointment of the appointive officers at another time, evidently was that the city administration might not be embarrassed in the conduct and management of its affairs by too many inexperienced officers. Besides, if the terms of the appointive officers do not expire at the expiration of two years from the time of their appointments, why is it that the charter does not provide that they shall hold over until their successors are appointed and qualified, as it does with respect to elective officers? It is too plain for argument that the object indicated was the intention of the framers of the charter; otherwise they would have made the same provision with respect to both classes of officers. It therefore seems obvious that the framers of the charter purposely omitted any provision that the appointive officers should continue to hold over until their successors should be appointed and qualified, and that they intended that those offices should be immediately filled by the mayor upon the expiration of their terms. In the case of *State v. Beardsley*, 13 Utah, 502, 45 Pac. 560, the law provided that elective officers of a city should hold their respective offices for two years, and until their successors were elected and qualified. It also provided that the appointive officers of the city should hold their respective offices for two years, unless sooner removed by the city council. The court said: "The first section declares that elective officers shall hold for two years, and until their successors are elected and qualified, while the latter section declares that appointive officers shall hold for two years, unless sooner removed. The defendant is an appointive officer, and his legal title to the office terminated on the 12th day of February last, unless appointive officers, as well as elective, also hold until their successors are elected and qualified. Does the language of the two sections with respect to the term express the same idea? They are found in the same act. The first declares in express terms that elective officers shall hold for two years, and until their successors are elected and qualified; the latter for two years, unless sooner removed. The language differs. The language of the first section in express terms extends the in-

cumbent's term until his successor is elected and qualified, while the language of the other in express terms extends the incumbent's term two years from its commencement. The legislators may have believed that the inconvenience, expense, and delay of filling an elective office would be greater than that of filling an appointive office. The first section continues in office an incumbent selected by the people, while the latter supersedes one appointive officer with another. We have been referred to a number of cases under constitutions or statutes providing that public officers should hold over until their successors should be elected and qualified. Others were mandamus cases, or cases involving collaterally acts of officers holding over,—*de facto* officers. This is a direct proceeding to try the title to an office, not the validity of the act of the officer. In a direct proceeding, the incumbent must show a legal title to the office as against the state. A colorable title will not do. In a collateral attack, it would be sufficient to prove that Beardsley was in office exercising its functions when the act was done; but in a direct procedure like this one, he must show a perfect title. If he fails in any particular, judgment must be given against him. *High, Extr. Rem.* (2d Ed.) § 712; *People v. Bartlett*, 6 Wend. 422." The charter of Kansas City having limited the time of appointive officers to two years from the date of their appointments, and defendant having been appointed on the 17th day of April, 1899, his term of office expired at the end of two years thereafter; and since the expiration of his term of office he has been simply an officer *de facto*, unless, by reason of section 5, art. 14, of the constitution of this state, he is continued in office until his successor shall be appointed and qualified. That section reads as follows: "In the absence of any contrary provision, all officers now or hereafter elected, or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified." Plaintiff contends that this provision of the constitution does not apply to municipalities, but we are unable to concur in this view, for the following reasons: First, it is broad and comprehensive enough in its terms to include all officers, whether they be state, county, township, or municipal; and, there is nothing in it which is indicative of anything to the contrary, or which leaves any doubt as to its true meaning. Second, if there existed a doubt as to whether or not it embraces municipalities, that doubt can but be dispelled, when that section is taken into consideration with the various provisions of the constitution which in some way have reference to municipalities. For instance: Section 18 of the bill of rights provides: "That no person elected or appointed to any office or employment of trust or profit under the laws of this state, or any ordinance of

any municipality in this state, shall hold such office without personally devoting his time to the performance of the duties to the same belonging." Section 19 provides: "That no person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or receiver, shall be eligible to any office of trust or profit in the state of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable." Section 12 of article 4 provides that: "No senator or representative shall, during the term for which he shall have been elected, be appointed to any office under this state, or any municipality thereof; and no member of congress or person holding any lucrative office under the United States, or this state, or any municipality thereof (militia officers, justices of the peace and notaries public excepted) shall be eligible to either house of the general assembly, or remain a member thereof, after having accepted any such office or seat in either house of congress." Section 48 of article 4 is: "The general assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the state, or any county or municipality of the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." Section 13 of article 9 provides: "The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court, of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of wilful and corrupt perjury." Section 18 of article 9 provides: "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time be a state officer and an officer of any county, city or other municipality; and no person shall at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia." Section 17 of article 10 provides: "The making of profit out of state, county, city, town or school district money, or using the same for any purpose not authorized by law by any

public officer, shall be deemed a felony, and shall be punished as provided by law." Section 24 of article 12 provides: "No railroad or other transportation company shall grant free passes or tickets, or passes or tickets at a discount, to members of the general assembly, or members of the board of equalization, or any state, or county, or municipal officers, and the acceptance of such pass or ticket, by a member of the general assembly, or any such officer, shall be a forfeiture of his office." Section 7 of article 14 provides: "The general assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers on conviction of wilful, corrupt or fraudulent violation or neglect of official duty." Section 8 of article 14 provides: "The compensation or fees of no state, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

These frequent references to municipalities are very persuasive, at least, that they were intended by the framers of the constitution to be embraced within section 5, article 14, supra; and we are of the opinion that they are. Therefore, unless the words "in the absence of any contrary provision," in that section, refer to and mean a contrary provision in the constitution, and not in the charter by which the office of city comptroller is created, its tenure fixed, and its duties prescribed, it must follow from what has been said that the term of office of the defendant expired at the termination of two years from the date of his appointment. To hold that these words mean "in the absence of any contrary provision by the constitution," would be to say that legislative bodies cannot pass any law by which the term of any particular office is to expire at a definite time, however important that may be, and the circumstances may demand. This would be giving it a forced and unnatural construction, and one not warranted by the language used. This position finds support in the fact that the charter provides that the appointments first made after the general city election of 1890 shall be for one year only, so that the appointments made thereafter shall be made at the beginning of the second year of the mayor's term. No one will contend that that provision of the charter is in conflict with the constitution, and if it is valid, and the term of office of those officers who were appointed under that provision expired at the expiration of one year from the time of their appointments, it must logically follow that those who were thereafter appointed for two years, in the absence of a provision in the charter that they are to hold until their successors are appointed and qualified, held for two years only from the time of their appointments; for if the word "only" is a word of exclusion, as was held in the Perkins Case,

It is clear that the words "for the term of two years," are restrictive in character and meaning, for the word "only" simply serves to emphasize those words, and does not add to their meaning. If the law had provided that the term of all appointive officers should be "for one year only," there can be no question but that their term would have expired at the end of the year, whether their successors had been appointed or not (State v. Perkins, supra, and authorities cited), and those words are not more restrictive than the words, "And shall hold their office for the term of two years, unless sooner removed," which simply means for two years, only,—nothing more, nothing less. Moreover, applying to the construction of this provision of the charter the maxim, "Expressio unius est exclusio alterius," it is apparent that the term of the appointive offices cannot be extended beyond the term fixed by the charter. The limit of the tenure of these offices is as clearly fixed by the charter at two years as though it read "only for two years," or "two years, and no longer." But if this position be correct there is no escape from the conclusion that it is so implied by the charter, which is just the same as if expressed. The fact that it may have been the custom in regard to these appointive offices for the incumbent to hold over until his successor be appointed and qualified is no defense to this proceeding by the state in the nature of a quo warranto through her representative, the attorney general, ex informatione, in which the burden is upon defendant to show title to the office (State v. McCann, 88 Mo. 386; State v. Meek, 129 Mo. 431, 31 S. W. 913; State v. Powles, 136 Mo. 376, 37 S. W. 1124; High, Extr. Leg. Rem. [2d Ed.] § 629), and the fact that he may hold it by custom does not confer upon him any legal title to it. Nor is the fact that the term of the comptroller's office expires at the end of two years from the time of appointment may lead to inconvenient results any defense thereto, for the same reason. As was said in the case of State v. Seay, 64 Mo. 89, 27 Am. Rep. 206, "Where, as in this case, there is a casus omissus, resulting from giving the language of the law the only construction of which it is fairly susceptible, the courts must leave it to the lawmaking power to make provisions to avoid such a consequence." But no such result need follow if defendant be ousted and the office declared vacant in this case, for no such vacancy need under any circumstances continue for more than five days, as under the charter the mayor cannot hold up a nomination for more than five days; and, if he does his duty in making the appointment, and the upper house do theirs in confirming it, as it must be presumed they will do, there can be no ground for apprehending disastrous results or serious consequences.

Our conclusion is that the term of defendant Lund as an officer in fact by the law expired at the expiration of the term of two

years from the time of his appointment. We therefore reverse the judgment of the court below and enter up judgment of ouster against the defendant.

All concur, except ROBINSON, J., who dissents, and will express his views in a separate opinion.

**SOUTHERN COMMERCIAL SAV. BANK
v. SLATTERY'S ADM'R et al.**

(Supreme Court of Missouri. Feb. 19, 1902.)

WITNESSES -- COMPETENCY -- TRANSACTION WITH DECEDENT--COLLATERAL SECURITY--DEED OF TRUST -- PRIORITIES BETWEEN CREDITORS--BANK DIRECTOR--TRANSACTION WITH BANK--NOTICE OF FRAUDULENT INTENT.

1. The cashier and stockholder of a bank, who was present as clerk when its discount committee negotiated a loan to a person since deceased, by which it acquired from him collateral in connection therewith, is not precluded from testifying to the transaction by Rev. St. 1899, § 4652, providing that, in actions where one of the original parties to the contract in issue is dead, the other party shall not be admitted to testify; a "party to the contract," as used therein, meaning the person who negotiated, rather than the one in whose name and interest it was made.

2. The president of a corporation, to secure an increase in a loan to him from a bank, delivered as collateral security notes of the corporation, and a deed of trust of its property, securing the same. The notes were made to an employé of the president, and indorsed, by the latter's direction, without recourse. The bank thereupon promised to increase his loan, and did so a few days later, by crediting the amount to him on its books. In the meantime the deed was given to him to record, and he was permitted to retain the recorder's receipt therefor, which he exhibited to the bank on the following day. Before the bank had given him credit on its books, however, the receipt which he was allowed to retain was used by him as collateral security to secure credit from a third party, who took the same in connection with a set of notes similar in all respects to those described in the deed, and which, after comparison therewith, he was induced to believe were in fact the ones described therein. The recorded deed was afterwards delivered to him in lieu of the recorder's receipt, by means of which the borrower had obtained possession of the deed. Neither creditor knew of his dealings with the other. Held, that the bank was entitled, notwithstanding, to the security of the deed, as against the creditor in possession thereof.

3. That a borrower was officially connected with a bank as director is insufficient to charge it with notice of his fraudulent purposes in negotiating a loan.

Sherwood, J., dissenting.

In banc. Appeal from St. Louis circuit court: Jas. E. Withrow, Judge.

Suit by the Southern Commercial Savings Bank against Dennis P. Slattery's administrator and others for an injunction and other relief. From a decree for plaintiff, defendants appeal. Affirmed.

The salient facts and features of this litigation are sufficiently presented in the following statement in the chronological order of their occurrence: On the 12th day of July, 1892, the Lange Financial Company, a cor-

poration, of which one William B. Lange was at the time president, executed to Ernest Renner 11 promissory notes,—one for \$20,000, due five years after date, and 10 for the sum of \$600 each, due one each six months during the five years, which latter obligations represented the interest to be earned upon the principal note. At the same time it executed a deed of trust to secure the payment of the notes, whereby it conveyed to Charles F. Vogel, as trustee, certain of its property at the southeast corner of Third and Market streets, in the city of St. Louis. Renner was an employé of William B. Lange, and, at the request and direction of the latter, indorsed the notes without recourse, and thereupon Lange took possession of them. At the time the notes and deed of trust above mentioned were executed the property was subject to two prior deeds of trust,—one for \$6,000, held by James M. Carpenter, and the other for \$10,000, which Lange had some time previously pledged to the plaintiff as security for a cash advancement to him of \$10,000. This latter deed of trust was then three days overdue, and that held by Carpenter was to mature seven days later. In these circumstances, Lange had, some time prior to July 12, 1892, suggested to the cashier of the plaintiff bank that it increase his loan to \$16,000, by paying off the Carpenter incumbrance, release the \$10,000 second deed of trust, and accept as security the \$20,000 deed of trust, over which the controversy in this case arises. He was informed that it would be necessary for him to meet the discount committee of the bank and discuss the proposal with them; and upon that meeting it was decided that "when his [Lange's] paper matured, or when it became necessary that he pay off this first deed of trust," the bank would advance the additional \$6,000, in accordance with his proposal, if all was found to be correct. On the 12th day of July, 1892, or the day previous, Lange requested that the discount committee be called together to meet him at 9 o'clock the following morning; stating to the cashier of the plaintiff that he "had perfected his deed of trust, and was prepared to close the loan that had been agreed upon." This committee was composed of Fred Hofmeister, John Beckert, Jr., and one Meegan, who died prior to the trial below; and, in accordance with Lange's request, Hofmeister and Meegan met him in the bank at the hour named; Street, the cashier, also being present. Lange stated that he had asked the committee to meet him in order to close the loan previously agreed upon; produced the deed of trust and the \$20,000 note, together with the 10 interest notes, and handed them to Meegan, who examined them and pronounced them regular and in proper form, and then handed them to Street, the cashier, who in turn put them into the safe, where they remained 20 days, and until they were transferred to a safe deposit box owned by plaintiff.

They have ever since been in its possession. The deed of trust did not follow the notes into the safe, but was given to Lange upon his statement that, as he was "going right up to the city, he would take it up and have it recorded." On the day following he returned and informed the discount committee that he had recorded the deed of trust, and exhibited the receipt of the recorder of deeds, upon a card such as is issued for instruments filed in his office, and stated that he would bring to the bank a certified copy of it, which he afterwards did. For some unexplained reason, Lange was permitted to retain the card. It was in evidence that the collateral note given by Lange to the plaintiff for the new loan of \$16,000, to secure which the \$20,000 deed of trust and notes were pledged, bore date the 16th day of July, 1892, and that its proceeds were formally credited to Lange's account upon plaintiff's books on July 19th following. It matured 90 days after date, and when due was canceled and replaced by a new collateral note for \$17,000, to which amount the loan was then increased; and the latter obligation was at its maturity replaced by another for \$18,000, representing an increase of an additional \$1,000. There were numerous other renewals until January 25, 1894, at which time the plaintiff's claim had been reduced to the original amount, and under that date Lange executed the collateral note upon which plaintiff still holds the notes and deed of trust now in question. Some time in July, 1892, but on what day it does not appear from the evidence, Lange met Dennis P. Slattery in the court house and solicited a loan from him, informing him that he "owed some money on a piece of property on which he had a deed of trust." Slattery replied that he had no money on hand, and Lange asked him to indorse for him for a few days; offering as security a set of notes of the same description as those mentioned in the deed of trust of July 12th on the property at Third and Market streets, together with the recorder's receipt for that conveyance, which he had taken from the bank to place on record, and certain insurance policies, and stating that Slattery might come into the recorder's office and "see that the papers were all right, as he had just recorded them." They went into the office of the recorder, and Lange exhibited the card to a clerk, who thereupon produced the deed of trust for their inspection. Slattery compared the notes with those described in the deed of trust and checked them off, and, having thus convinced himself, indorsed Lange's notes for \$4,000, and took the notes, insurance policies, and recorder's receipt as security. About 10 days later Lange returned with the notes bearing Slattery's indorsements canceled, and received back the deed of trust, notes, policies, and recorder's receipt. In September of the same year Slattery again indorsed for Lange to the amount of \$3,000,

and, as security, took the same recorder's receipt, notes, and policies of insurance, together with three additional policies, and held them until the note he had thus indorsed was returned to him canceled, when he gave the securities back to Lange. In January, 1893, Lange applied to Slattery for further indorsements; but the latter declined to again accommodate him in that manner, although he finally loaned him 100 shares of Missouri Pacific stock, receiving as security for return of the stock the same notes, policies, and recorder's receipt. These he retained until the 1st day of February following, when Lange brought back the stock, and they seem to have done no further duty as collaterals until the 1st of September, 1893. About that day Lange again solicited Slattery for a loan; this time asking for \$14,000, which was more than the latter had at hand. After some negotiation, Lange agreed to take \$10,000 and some of the Missouri Pacific stock; but Slattery declined to take the recorder's receipt for the deed of trust, or a certified copy of that instrument, demanding the original and a certificate of title. These were furnished him, and he turned over to Lange \$14,000 in cash, or its equivalent, for which he received a collateral note for that amount, due one year after date, describing the securities pledged, among which were the original deed of trust to Vogel, trustee, and the same notes which Lange had given him before, although it was stated in the collateral note that the first two of the ten interest notes were paid. This collateral note, and the securities so pledged with it, remained in Slattery's possession continuously from that time until the trial of the case. The notes held by plaintiff are on white paper, the blank spaces being filled in with pen and ink in Lange's writing while the blanks in those held by Slattery are filled up in type-writing; the principal note being on tinted paper, and the interest notes on white paper. On the 28th day of January, 1894, Lange died; and shortly afterwards plaintiff's agents took possession of the property conveyed by the deed of trust of July 12, 1892, and began to collect the rents. Then the fraudulent actions of Lange for the first time came to light, and it was discovered that, although there was but one deed of trust, both Slattery and the respondent held a set of notes in every respect identical with those mentioned in the deed of trust. Neither had ever known of Lange's dealings with the other, and each asserted that the notes held by the other were spurious and fraudulent. Slattery, having in his possession the original deed of trust through his loan to Lange of September 1, 1893, called upon Vogel, the trustee in that conveyance, to sell the property in execution of the trust, but he, having in the meantime become the administrator of Lange's estate, declined; and thereupon Slattery called upon Patrick Staed, the then acting sher-

iff of the city of St. Louis, to act in Vogel's place,—the deed of trust providing that, upon refusal of the original trustee to act, that officer should succeed to the trust,—and accordingly Staed advertised the property for sale under the deed of trust. These are the facts out of which the present case arises, as best we can gather them from a record of unnecessary length. The amended petition of plaintiff prayed an injunction restraining Slattery and Staed from making the sale advertised, and a decree declaring the notes held by Slattery to be spurious and counterfeit, and not the notes secured by the deed of trust of July 12, 1892, and general relief. Slattery's answer was in the nature of a cross bill, and set out the facts from his side of the case, and prayed that he be adjudged the lawful owner of the notes secured by the deed of trust in question, that the bank be perpetually enjoined from making any claim that the notes held by it were the genuine ones, and that it be required to account for the rents collected from the property. Staed's answer was a general denial, and Mathilde Lange, the remaining defendant, who was alleged in the petition to have acquired the equity of redemption in the property involved, admitted, upon information and belief, the facts set up in the petition. A temporary restraining order was granted, and the case sent to a referee to try all the issues. In due time he filed his report, finding for the plaintiff bank, to which Slattery filed 49 exceptions. These the trial court overruled, and confirmed the report, entering a decree for the bank, making the temporary injunction perpetual. After the trial, but before the referee filed his report, Slattery died, and the cause was revived in the name of his administrator, who, after unsuccessful motion for rehearing, prosecutes this appeal.

Noble & Shields, for appellants. W. M. Kinsey and Rassieur & Rassieur, for respondent.

PER CURIAM. 1. In the proceedings before the referee, the plaintiff called as witnesses, to prove the transactions by which it acquired the notes and deed of trust from Lange, Street, its cashier, who was also a stockholder, and Hofmeister, a director and member of its discount committee. Counsel for Slattery objected on the ground that these witnesses were incompetent to testify in regard to any transactions with Lange, who was then dead, but the referee overruled the objection. Before proceeding to discuss the real issue in the case, it is proper to dispose of this question, inasmuch as the plaintiff's case resting largely upon the testimony of these witnesses, a reversal must follow if both of them were incompetent. Their competency depends upon our statute (section 8918, Rev. St. 1889), which is section 4652 in the revision of 1899; and, in considering our judgment upon this point,

we need look no further than to that section, and the construction heretofore put upon it in our decisions. It has always been held to be an enabling, and not a disabling statute (Bates v. Forcht, 89 Mo. 121, 1 S. W. 120; Fink v. Hey, 42 Mo. App. 295), and to supersede the common-law rule to the extent of its terms. So if Street was a competent witness at common law, or if he is not included in the proviso of our statute, the ruling of the referee was right. It cannot be maintained that he was a party to the contract between Lange and the plaintiff by which the latter first acquired the deed of trust and notes, because he took no part in the transaction; the negotiations being carried on by the discount committee, of which he was not a member. He was present in the capacity of a clerk, not as a contracting agent. The committee alone had power to make such a contract for the bank, and the mere presence of Street when the contract was made does not alter the case. But counsel for defendants urge that Street, being also a stockholder, was an interested party, and so incompetent to testify. It is a sufficient answer to this to say that under our statute the interest of a witness alone does not exclude him, where the other party is dead. That happens only because he and the deceased are both parties to the contract or cause of action. In other words, the body of the statute removes the common-law disability arising out of interest, while the proviso confines the exclusion, in case of the death of one party, to a party to the contract or cause of action, so that a "party to the contract," as the term is used in the statute, is considered to mean the person who negotiated the contract, rather than the one in whose name and interest it was made. Banking House v. Rood, 132 Mo. 256, 33 S. W. 816. As Street did not negotiate or close the contract between Lange and the plaintiff, we hold that he was not rendered incompetent by Lange's death, and that the referee properly admitted his testimony. This conclusion renders it unnecessary to review the action of the referee in overruling the objection to the testimony of the witness Hofmeister. His testimony was merely corroborative of Street's, and that of the latter was not disputed, denied, or impeached, so that, even if we disregard the evidence given by Hofmeister, the facts upon which plaintiff relies would still be established, and the final result would be the same had the referee excluded his testimony entirely. As this is a proceeding on the equity side of the court, the action of the referee in overruling the objection to the testimony of Hofmeister, even if erroneous, which we do not decide, was not prejudicial to the defendants.

2. It is further contended that, aside from the testimony of Street and Hofmeister, the decree should have been for the defendants, upon the evidence, and we must therefore

review the whole case. *Lins v. Lenhardt*, 127 Mo. 271, 29 S. W. 1025. The referee found and held that the transaction of July 12 or 13, 1892, between Lange and plaintiff, by which the notes were delivered into its custody upon its agreement to increase the loan to \$16,000, was a negotiation of the paper for value, even though he was permitted to carry away the deed of trust under the circumstances shown in evidence, and the formal credits were not passed to his account upon plaintiff's books until some days later. The defendants challenge the correctness of that ruling, and insist that it is unwarranted both in law and in fact. Upon that question hangs the success of this appeal, for it cannot be disputed that Slattery did not come into possession of the set of notes held by him until some time later in the same day, or on the day following. When Lange solicited him for a loan, the deed of trust had been recorded. The ticket receipt was produced, and they went together to the office of the recorder, and examined the same deed which Lange had brought from the bank to record; and Slattery checked the notes with those described in it. There is no dispute that the deed which they examined there, and which at the trial was in Slattery's possession, is the same one which Lange carried away from the banking house of the plaintiff. When Lange met the discount committee, and turned over to them the new deed of trust and notes for \$20,000, and they agreed to increase his loan \$6,000, and approved and accepted the notes and deed of trust, the obligation of the plaintiff became fixed; and, for a failure to perform, it might have been held liable in damages. Certainly it was so after they accepted the substituted securities, and it is equally certain that this obligation assumed was both a burden to the plaintiff and a benefit to Lange. The mere fact that Lange did not receive credit on plaintiff's books for the new discount until some days later does not militate against this view; for there is nothing to show that he might not have enjoyed it sooner, had he so desired. The promise of plaintiff to increase the loan and its obligation to do so were a sufficient consideration. *Story*, Cont. (5th Ed.) 548; *Given v. Corse*, 20 Mo. App. 132; *Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1. And this is so, notwithstanding the fact that the formal execution of the promise was deferred until a later day. The liability to perform sprang up when the promise was made. As between Slattery and the plaintiff, the question whether there was a sufficient delivery by the grantor in the deed of trust to give it legal effect is wholly immaterial. Neither is in position to dispute it, and discussion of the question would not tend to shed any light on the issues in this case. Nor can it be said that Lange's acts after leaving the bank to record the deed of trust show a lack of intent on his

part to consider his agreement with the plaintiff uncompleted. The plain answer to that argument is that plaintiff cannot be affected by any intent on his part of which it had no knowledge, and we find nothing in the evidence concerning conversation or dealings with the discount committee which tends to disclose any purpose contrary to that stated by him,—to record the deed. Lange's official connection with the plaintiff as one of its directors is not of itself sufficient to charge the plaintiff with notice of his fraudulent purposes, if, indeed, he had at that time such a purpose. *Johnston v. Shortridge*, 93 Mo. 227, 6 S. W. 64; *Benton v. Bank*, 122 Mo. 339, 26 S. W. 975.

It is next objected that the plaintiff, by its negligence in permitting Lange to carry away the deed, and in failing to get back the recorder's receipt for it, put it in his power to defraud Slattery, and so ought to bear the loss which must fall upon one of two innocent parties. We are cited to a number of cases in which that doctrine, about which there is no dispute, was announced and applied, but in none of them do we find facts entirely like those of the instant case. Thus, in *Gaffey v. O'Relley*, 88 Mo. 419, 57 Am. Rep. 424, it was held that one who has title to land, and, knowing it, stands by and allows and encourages another to contract for its purchase from a third party in possession under color of title, will be estopped to set up his title against the party so purchasing; but it is obvious that in that case the decision was based upon the knowledge on the part of the owner of the conduct of him who committed the fraud, and in this case it is not even pretended that the plaintiff had any knowledge of the subsequent conduct of Lange. And in *Simson v. Bank*, 43 Hun, 158, the deed intrusted to Bliss was a deed in fee, conveying the property to him. In other words, the case was one in which a grantor intrusted a deed to the grantee before the consideration was paid, and thus clothed him with the indicia of ownership. In *Preston v. Witherspoon*, 109 Ind. 457, 9 N. E. 585, 58 Am. Rep. 417, one party deposited wheat for storage with another, and allowed him to mingle it with his own, knowing that he was publicly selling and shipping from the mass; and it was properly held that the true owner, having conferred apparent ownership and authority to sell, was estopped, as against an innocent purchaser; but here, again, the decision turned upon element of knowledge, which is wholly lacking in the case at bar; and so it is with the other authorities cited on this point by defendants. None of them are in point. A much different case would be presented had the plaintiff intrusted the notes to Lange, instead of the deed of trust, but the deed did not of itself clothe him with the indicia of ownership of the debt it secured. It was the mere incident to the

debt evidenced by the notes (*Hagerman v. Sutton*, 91 Mo. 531, 4 S. W. 73; *Carpenter v. Longan*, 83 U. S. 275, 21 L. Ed. 313); and, when once recorded, its manual possession was not sufficient to raise the presumption of ownership, and the plaintiff was not within the rule of the cases cited, unless it might ordinarily have anticipated what in fact occurred. The recorder's receipt had no different effect, and although it may be true, as stated by some of the defendants' witnesses, that it is the custom among those engaged in the real estate loan business to use the receipt card in place of the deed of trust while the latter instrument is being recorded, the plaintiff, being in the banking business, is not chargeable with knowledge of that custom (*Lawson, Usages & Cust.* 45; *Brown v. Strimple*, 21 Mo. App. 338); and actual knowledge of it was not brought home to it, or its officers who were acting for it. Without notes corresponding to those described in the deed of trust, Lange could not have secured the loan from Slattery. Indeed, it would be idle to pretend the contrary. But it was not due to any fault or neglect of the bank or its officers that Lange was able to produce such notes, nor do we observe anything in the record indicating that they might have prevented it. The vice of defendants' argument lies in the fact that it assumes that the loan was made by Slattery on Lange's possession of the recorder's receipt, while in truth the notes were the real inducement and security. We agree with the referee that the plaintiff was not guilty of any such neglect as would deprive it of its right to the security of the deed of trust as against Slattery.

The next contention of defendants is that where there are two sets of notes, conforming to those described in the deed of trust, the possession of one set, together with the deed, by a purchaser for value, is conclusive against the validity of the other; but we are not cited to any authority so holding. Counsel support their position on this point by the argument that a ruling to the contrary would be detrimental to the business interests of the state, and would open the way to the perpetration of similar frauds. The argument, however, could more properly be considered by the legislature than by the courts. A very much similar state of facts appeared in *Kernohan v. Manss*, 53 Ohio St. 118, 41 N. E. 258, 29 L. R. A. 317, where one Gill, the custodian of a mortgage securing a note in his own favor, and others in favor of other persons, counterfeited the note owned by himself, and sold the counterfeit and the mortgage to Kernohan. Afterwards he sold the genuine note, without the mortgage, to Manss. Upon the issue between the two purchasers it was held that the latter was entitled to the security of the mortgage,—a result quite opposite to that which defendants contend must follow the possession of one set of duplicate notes to-

gether with the mortgage. So, too, in *Morris v. Bacon*, 123 Mass. 58, cited by the referee, it was held the possession of the mortgage and a note similar to that described in the mortgage did not entitle the holder to the benefit of the security as against the pledgee of an identical note previously negotiated for value under the representation that it was secured by the mortgage. At best, the rule urged by the defendants' counsel could only be one of evidence, and could amount only to a presumption in the absence of positive evidence.

A full consideration of the case leads us to the conclusion that the plaintiff is entitled to the security of the deed of trust of July 12, 1892; and, the decree below being for the right party, we affirm it.

BURGESS, C. J., and BRACE, MARSHALL, VALLIANT, and GANTT, JJ., concurring. SHERWOOD, J., dissenting. ROBINSON, J., agrees the judgment should be affirmed, but not for the reasons stated in the opinion.

PAUCK v. ST. LOUIS DRESSED BEEF & PROVISION CO.

(Supreme Court of Missouri. Feb. 19, 1902.)
INJURY TO THE SERVANT—DEFECTIVE APPLIANCES—NOTICE TO MASTER—EVIDENCE—DAMAGES.

1. Evidence is admissible, in an action by a servant against a master for injuries alleged to have been caused by defective appliance, as to the condition of the appliance three weeks before the accident.

2. Both bones of plaintiff's left leg were fractured about two inches above the ankle joint, and he had not been able to work more than a week at a time from the time of the accident until the trial, which occurred seven years later. The leg broke out about a year after the accident, and a small piece of bone came out, and the leg continued to swell up and ulcerate, and pained him after working. It was one inch larger than the other leg, and the joint, on moving, produced crepitation. Plaintiff was a laboring man, about 40 years old, and in robust health at the time of the accident. Held sufficient to sustain a verdict for \$5,000.

Sherwood, J., dissenting.

In banc. Appeal from circuit court, Jefferson county; Frank R. Dearing, Judge.

Action by Bernard Pauck against the St. Louis Dressed Beef & Provision Company for injuries received while in the employ of defendant. From a judgment in favor of the plaintiff for \$5,000, and from an order denying a new trial, the defendant appeals. Affirmed.

Given Campbell, for appellant. Taylor & Taylor and Johnson, Houts, Marlatt & Hawes, for respondent.

BURGESS, C. J. This is the second appeal in this case. When the case was here before, the judgment was reversed, and the cause remanded for further trial. 159 Mo. 467, 61 S. W. 806. After the case was sent

back to the court below, the venue was changed to the circuit court of Jefferson county, where, upon a trial had to the court and a jury on the 15th day of May, 1901, plaintiff recovered a verdict and judgment in the sum of \$5,000, from which, after unavailing motion to set the verdict aside and for a new trial, defendant brings the case to this court by appeal for review.

The pleadings are substantially the same as when the case was here before, although after the reversal of the judgment and before the trial defendant filed an amended answer.

The facts, in so far as the plaintiff's case is concerned, were about the same upon the last trial as upon the first. Defendant contends, however, that plaintiff failed to prove the case made by his petition, and that the court should have given the instruction asked by it in the nature of a demurrer to the evidence after it had been introduced. The contention is that there was no evidence to justify the finding of the jury that the particular switch where the accident occurred was out of order at the time of the accident, or that the accident was caused by any condition of the switches or tracks. The case of *Byrne v. Eastmans Co.*, 27 App. Div. 270, 50 N. Y. Supp. 457, is relied upon by defendant as sustaining this contention; and, while the facts in that case and the case in hand are similar in many respects, in that case there were two men in charge of the switches, whose duty it was to make the connection between the track on the floor and the track in the elevator, and to see that the track was complete when the elevator came in place. The accident was attributable to a broken wheel to which a hook was attached, upon which the beef was suspended that fell upon the plaintiff. The hook and wheel were adjusted by plaintiff's fellow servants, and it was held that "the fact that the hook and wheel were used when they should not have been was entirely due to the negligence of the employé who selected this particular wheel for use upon this particular occasion in question, and that negligence was the negligence of a fellow servant of the plaintiff, for which the defendant was not liable. The burden of proof is upon the plaintiff to show that the accident was caused by a neglect of a duty that the defendant owed to the plaintiff, and the evidence clearly established that the accident was caused by the negligence of a fellow servant of the plaintiff, for which the defendant was not liable." It will thus be seen that the defendant in that case was held not to be liable for the injury upon the ground that it was caused by the negligence of a fellow servant, while in the case in hand there is no pretense that the injury was caused otherwise than by loose and defective machinery or appliances.

As to whether or not the particular switch where the accident happened was out of order at the time or not, and that plaintiff was

guilty of contributory negligence, were, under all the facts, questions for the consideration of the jury.

In the former opinion we ruled that, under the evidence as it then was, defendant did not assume the risk incident to the use of the machinery used by him, and whether or not he was guilty of such contributory negligence, in remaining in defendant's employ after knowing of its condition, as would bar his recovery, was, under the circumstance, a question of fact to be submitted to the jury, and there was nothing disclosed upon the trial which would justify us in receding from that ruling or to change our views with respect thereto.

A point is made on the action of the court in admitting the testimony of one Goetting, a witness for plaintiff, as to the condition of the switches three weeks before the accident, which defendant asserts was prejudicial, and introduced into the case an issue not made by the pleadings. But we are unable to concur in this view. The evidence was clearly admissible for the purpose of showing that defendant had notice of the condition of the rail before the accident. It was not necessary that the witness should be able to testify to the condition of the switch on the very day of the accident, but within a reasonable time before the accident was competent. It would, of course, have been proper for defendant to show that the defect had been removed before the accident happened. *Swadley v. Railway Co.*, 118 Mo. 208, 24 S. W. 140.

We are unable to appreciate the criticisms on the instructions, which seem to us to be substantially correct, and presented the case fairly to the jury.

It is claimed that the testimony as to the extent and nature of plaintiff's injuries did not warrant the amount of damages for which the verdict was rendered. The injury occurred on the 22d day of June, 1894, at which time plaintiff was about 40 years of age, and in robust health, never having been sick but once in many years, when he was ill from chills and fever for a short time. The trial was in May, 1901, about 7 years after the injury. Plaintiff's occupation was that of a day laborer. Both bones of his left leg were fractured about two inches above the ankle joint, and from that time up to the time of the trial he had not been able to work more than a week at a time. The leg broke out about a year after the accident, and a small piece of bone came out. The leg continued to swell up and ulcerate, and, after working, pained him severely. It was one inch larger than the other, and the ankle joint, on moving, produced a harsh sound, called "crepitation." Injury permanent. The verdict was approved by the trial court, and should not be interfered with unless manifestly the result of passion or prejudice; and as there is no way, in so far as we are advised, by which it can be shown that a

jury, in making an excessive verdict, were controlled by improper influences, it can only be inferred when such verdict is so out of line with reason and justice as to shock the conscience, and to satisfy the unbiased mind that it is not the result of an impartial, unprejudiced, deliberative body. "To justify such an inference, the facts and circumstances in proof ought not to justify any other contention" (Hollenbeck v. Railway Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887), and we do not think they do so in this case.

Finding no reversible error in the record, we affirm the judgment. All concur, except SHIERWOOD, J., who dissents.

MINNIER v. SEDALIA, W. & S. W. RY. CO.
(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

RAILROADS—MASTER AND SERVANT—DEATH BY WRONGFUL ACT—USE OF STANDARD-GAUGE CAR ON NARROW-GAUGE TRUCKS—ASSUMPTION OF RISK—INSTRUCTIONS.

1. In an action by the personal representatives of a locomotive engineer alleged to have been killed through negligent defects in the condition and construction of his train and the track, an instruction that deceased's knowledge would not work an assumption of risk unless the defects were so obviously dangerous as to threaten immediate injury, and that an assumption of risk could not be predicated if deceased, notwithstanding his knowledge of the defects, supposed, with reason, that he could safely operate the train by the use of care and caution, was erroneous, because not fully stating the law as to the assumption of risk, and being calculated to mislead the jury into believing that the deceased only assumed the risk if the danger was so obvious as to threaten immediate injury.

2. In an action by the personal representatives of a locomotive engineer alleged to have been killed by defects in his train, including, among others, the use of a wide-gauge car mounted on narrow-gauge trucks, defendant requested an instruction that deceased assumed the risk if he knew that such cars had prior to that date been adopted as a part of the company's car equipment, and had been in repeated and ordinary use. The instruction was modified by adding that no recovery could be had on account of the use of the car if the jury believed that the danger was so obvious as to threaten immediate danger to the employees while in the exercise of ordinary prudence and caution. *Held*, that the modification was erroneous, because, in effect, charging that a servant only assumes such risks as threaten immediate danger, and disregarding the general rule that the servant assumes the risks ordinarily incident to the employment.

3. There being no evidence that such a car was an unsafe appliance, the instruction was further vicious as being without foundation in the evidence.

4. A complaint in an action for negligently causing the death of a locomotive engineer alleged negligence in the use of a standard-gauge car mounted on narrow-gauge trucks, and in the overloading of such car. All the persons who had knowledge of the facts testified that the car was not overloaded, the only testimony to the contrary being that this car swayed more than the narrow-gauge cars composing the rest of the train. There was evidence that the car in question and other similar ones had been used on defendant's road for some time, and that similar cars had been

used on certain other narrow-gauge railroads, and there was no showing that there were other narrow-gauge railroads in existence than those mentioned in the testimony. *Held* to show that the use of the car did not constitute negligence.

Appeal from circuit court, Benton county; W. W. Graves, Judge.

Action by Martha M. Minnier against the Sedalia, Warsaw & Southwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. *Reversed*.

M. L. Clardy, Wm. S. Shirk, James Humphrey, and H. P. Lay, for appellant. Sangree & Lamm and Montgomery & Montgomery, for respondent.

MARSHALL, J. The plaintiff recovered a judgment for \$5,000 damages for the death of her husband on the 2d of November, 1897, caused by an accident on the defendant's road at a point about three miles north of Warsaw. Her husband was the engineer of the train. The defendant appeals.

The negligence charged in the petition is: "First, that the roadbed, track, ties, bridges, and trestles were out of repair, and were not in a reasonably safe and sound condition; second, that the defendant failed to furnish a sufficient number of competent brakemen to handle the train, and that one of those employed was incompetent, unskilled, and inexperienced; and, third, that the defendant's road is a narrow-gauge road, three feet wide, and that the defendant negligently put a broad-gauge car, mounted upon narrow-gauge trucks, in the train, heavily loaded, so that the same was top-heavy, and that said car would not adjust itself to the tracks and curve, and that in consequence of all such alleged negligent acts the broad-gauge car, so mounted, left the track and became derailed, and that by reason of the insufficiency and incompetency of the brakeman the train could not be stopped until it was on a trestle or bridge, with the result that the top-heavy broad-gauge car broke through and toppled over, pulling the said locomotive with it," and killing the engineer, the plaintiff's said husband. The answer is a general denial, except as to the ownership of the road, and the fact that the plaintiff's husband was the engineer, and a special plea of assumption of risks, among which was the risk that caused the accident. The reply is a general denial.

The defendant owns a narrow-gauge railroad running from Sedalia to Warsaw, and the deceased had been employed as an engineer on the road for quite a long time before the accident. The train in question consisted of the engine, six freight cars loaded with merchandise, a baggage car, and a passenger car. The broad-gauge car, mounted on the narrow-gauge trucks, was placed next to the engine, which the evidence shows was the usual and proper place to put it, and was loaded to within six or eight inches of the

top with shingles. The accident occurred at a bridge or trestle about three miles north of Warsaw. There is a slight curve in the road just north of the trestle, and a down grade. The broad-gauge car was sound, well constructed, and had been in use on the road about a month or six weeks before the accident. When the train approached the trestle it was moving slowly, with steam shut off, and under good control. The trestle or bridge was about three hundred feet long. About one hundred and ten or fifteen feet north of the bridge or trestle the forward trucks of the broad-gauge car jumped off the track. The rear trucks remained on the track. This caused the cars behind it to also leave the track. The train ran on, the forward trucks of the broad-gauge car and the trucks of the other cars running or bumping on the cross-ties, until all the train except the passenger car was on the bridge or trestle. Then the engineer succeeded in bringing the train to a full stop. When this was done one of the narrow-gauge cars about the middle of the train toppled over and fell off the bridge, and this caused the cars behind and before it to also turn over alternately,—that is, first one behind it, and then one in front of it,—until the broad-gauge car was finally affected, and it then turned over and fell off the bridge, and dragged the engine over with it. The cars fell to the bottom of the ravine, which was some 30 or 40 feet deep, measured from the top of the bridge. Every one jumped off and escaped injury except the engineer. He went down with the engine and was killed. The broad-gauge car was numbered 1,001. The evidence as to the condition of the track and the trestle is so conflicting as to leave no doubt that the witnesses on one side or the other committed rank perjury in describing it.

Counsel for plaintiff have submitted the following epitome of what their witnesses swore to:

"For instance, as to the condition of the track: First. The evidence clearly shows that at a point three or four feet, at least very close, to the place where the trucks of the car No. 1,001 jumped the rail, there was a low joint, and a body of ties so decayed and unsound as to be wholly incapable of supporting the rail; that at this point the wheels of the truck under the car 1,001 mounted the rail, and ran along for three or four feet upon the ball of the rail, and then fell down upon the ties. From this point up to the commencement of the trestle, which was 110 feet, the ties were put in about 25 inches from center to center, and this would make 48 ties between these two points; and some witnesses who counted the ties put the number at 48. Other witnesses stated the number of ties between these points was 45. The great bulk of the ties between these points were shown by our witnesses to be rotten, decayed, and doty. Some of said

ties, while on the surface appearing all right, were a mere shell and rotten on the inside, and the witnesses estimated the number of such rotten ties in said 110 feet from 15 to 29. For instance, Mr. Gregg, one of our witnesses, puts the number at 15. Mr. Allen puts the number at 20. Other of our witnesses put the number of rotten ties from 15 to 20, while of defendant's witnesses, Mr. Harvey puts the number at 29, and other of defendant's witnesses put the number at from four to five. The wheels of the trucks crowded the ties together, cutting, smashing, and breaking many of them. On the day of the wreck, as soon as the news of it reached Warsaw, a great number of people came out to see it. Some of these interested themselves in ascertaining the cause of the wreck, and in examining the condition of the track. They found this low joint and rotten ties as stated. Some of the ties that were left in the track were so rotten that with fingers and toes these people pulled out a great number of spikes. One witness pulled out ten with his fingers. Others pulled out a number with their toes. These spikes so pulled out were remaining in the ties in place as originally driven, but by reason of the rotten condition of the ties they would not hold in the ties, and could be removed as aforesaid. Even after the track had been rebuilt so trains could use it, other witnesses visited the point, and one witness pulled seventeen spikes out of the old ties remaining in place, in the manner narrated above, and other witnesses saw this done. In short, a great number of witnesses were examined as to the condition of this track north of the trestle, and their testimony is uniformly to the effect above, and showed the track to be in a deplorable condition. By other witnesses it was shown that the track north of the trestle was out of line; the rails were warped and twisted by the derailment; and the evidence tended to show that when the car 1,001 jumped the rail this derailed other cars of the train, and that these other cars fell over the trestle when the train had come to a standstill.

"Then, again, take the condition of the trestle: Second. The trestle was apparently in about as bad condition as the track. The piling which supported the trestle had been put in in 1890, and many of them were rotten close to the ground. All of them were more or less rotten and insecure. The sway braces were broken from their fastenings, and were shown to be rotten and doty. The spikes which held them in their place only entered the piling about two inches, and much of the other part of the piling was rotten. The guard rail on top was unsound and rotten in many places. The ties in the trestle were sawed ties, laid about eight inches apart, and, had they been sound, would have supported the train, and, in spite of the derailment, would have prevented it pitching over the trestle; but as

the cars went over it the ties broke in two, on account of their rotten condition. Mr. Wm. F. Steele, who was an employé of the defendant, stated that there were a hundred rotten ties on the trestle between the place where the locomotive left the trestle and the north end of the trestle. The uniform testimony of a great host of the plaintiff's witnesses was to the same effect as to the rotten and unsafe condition of the trestle. At the point in the trestle at which the first car, when the train had stopped, fell to the ground, there were shown to be a collection of rotten ties in the trestle, which broke when the derailed trucks ran upon them, and, after swaying backwards and forwards a little, went over the side, carrying with it the balance of the train and the locomotive."

On the other hand, counsel for the defendant have submitted the following analysis and summary of the testimony in respect to the track and the bridge:

"The accident in which said John Minnier lost his life was occasioned by the wheels under the forward truck of car 1,001 leaving the rails at a point approaching a high trestle. The wheels, bumping over the ties on the trestle, caused the car to sway from side to side, and to carry it over the side of the trestle, and to pull over with it the engine and other cars standing on the trestle. See testimony of Conductor Bass. See also testimony of W. L. Price. In an attempt to account for the wheels of the forward truck of car 1,001 leaving the rails, the plaintiff offered considerable testimony as to the condition of the cross-ties under the rails at or near to the place where the derailment occurred. But decayed ties in the track do not account for the derailment. The only part of the train derailed was the forward truck of the car 1,001. There were in the train, besides the engine, six freight cars, a baggage car, and coach. The engine and the seven other cars ran over the rails and onto the trestle, and remained on the rails until pulled off by the car next to the engine. Even the wheels under the rear truck of the car 1,001 remained upon the rails after the wheels of the forward truck were running over the ties on the track and on the bridge; and this rear truck, with several other pair, remained on the rails even after the car bodies had been pulled off the bridge. See testimony of Mr. Inge. The same witness, who was the general superintendent of the road, states that the morning after the wreck he made a thorough examination of the track at the place of derailment and some distance beyond. This was before any repairs had been made to the track after the wreck. He made an examination from the north end of the trestle about a quarter of a mile, principally along the place of derailment, inspecting the rails, ties, joints, and everything in connection with it. Examined the fish plates, and

found them in proper place; and bolts, nuts, and nut locks, and found them in perfect condition. The rails were not disturbed in any way where the derailment occurred. Before any work was done a train was run over it. He further states on same page that he measured the gauge and elevation of the track. He did not measure the curve. 'That is only a slight curve, and I have forgotten the degree of it, according to the three-foot standard; and the track all along there was in perfect gauge. The elevation of the outer rail was from one and a half to two inches as the curve was running into a tangent.' Patrick Curran, section foreman, also on the morning after the wreck made a like examination. He found the joints in secure condition, and the rails in proper gauge and line. He states that a train passed over the track north of the trestle where the derailment occurred, without any repairs. This witness was put in charge of the repairs to the track north of the trestle after the wreck, and he describes what repairs were made. His statement, in substance, is that 'I put in, I think, five or six new ties, and that is all the work I did on it.' He did not change the elevation of the rails; nor disturb the earth at all, except where new ties were put in. The new ties were put in close to the trestle. Five or six ties partly broken by wheels passing over them,—not enough to prevent the train from passing over them with perfect safety. The broken ties did not disturb the rails at all. James Watts, section foreman of the section of the road where the accident occurred, was at the scene of the wreck within an hour after it occurred, and made an examination to see what was the cause of the accident. His testimony is substantially the same as that of Patrick Curran. He further states that the condition of the track near the trestle where the accident occurred was good and well maintained before the accident; that it was under his care, and he went over it every day. To the same effect as to condition of the track and rails is the testimony of Paul Beemer. This witness made the examination of the track at the place of the accident the same day it occurred. Also the testimony of Robert Beatty, who was on the ground within two or three hours after the accident and examined the track. The rails had not been disturbed in any way, that he saw. Between the point of derailment and the trestle he saw one rotten tie, and several broken off by the wheels running over them. Joel Chaney walked over and looked at the track the next morning after the accident. He states that he saw no worn rails, nor any loose rails, nor any out of line. W. H. Ryan examined the track at the same place the same day, and shortly after the accident. Speaking of the place where the derailment occurred, he said that the rails were not disturbed or moved. The rails were not worn

or battered. Between the place of derailment and the end of the bridge he saw not over half a dozen partially decayed ties. He further states that he afterwards used the guard rails taken from the south side of the bridge, and some of the broken cross-ties from the bridge; that, with the exception of about two feet of guard rail, the timber was sound. W. W. De Jarnett, a witness, testified, in substance, that he was at the scene of the wreck about an hour after it occurred. His testimony corroborates the foregoing. Ira Gill, a witness for the plaintiff, testified that he noticed one rail in the track spread out half an inch. He is the only witness that pretends to have seen a rail spread, though many others examined the track. He didn't measure the gauge. He judged with the eye. If it had spread enough to let the wheels of one truck off, it is difficult to see why the rest of the train following the derailed truck did not also leave the rails. J. W. Bagby, a witness for plaintiff, examined the place of the accident the same day, and, he says, with some care; and he states, 'I think the rails were in their natural shape. * * *' He didn't see any indication of displacement of the rails. Another witness for plaintiff (Wingate) testified that a rail was turned over in the track. This witness and the witness Gill were evidently exercising their imagination in an effort to divine the cause of the derailment of the forward truck of car No. 1,001. This last theory has to account for the rest of the train remaining on the rails while in motion, and it is not creditable to the ingenuity of the witness. Fred and Ike Trinder, brothers of the plaintiff, testified that they visited the place of the accident two days after it occurred, and after repairs had been made to the track, and the operation of regular trains had been resumed between Sedalia and Warsaw. These witnesses testify to having found a joint three or four feet from the point where the wheels of the truck mounted the rail and went over the ties, under which there was a rotten tie, affording no support to the rail; that the joint was held together by fish plates, through which there was but one bolt to hold the fish plate. On cross-examination the last-named witness testified: 'Q. How wide was the space where you saw the joint,—3, 4, or 5 feet north of the point of derailment of the car, where the joint had no support from the ties? A. I should say from fifty to sixty inches.' The witness Watts testifies that he measured the distance from the north end of the trestle to the point where the wheels left the rails, which was 115 feet; also the distance from the latter point to the next joint north, which was twelve feet. See, to the same effect, testimony of Patrick Curran. In addition, Mr. Rohwer, a civil engineer, testifies that the effect on the engine passing over such a joint as that described by the Trinders would be to cause

it to swing over. 'That would be the natural consequence of bending the rail. If the rail bent, it would swing the engine over.' It would have been exceedingly singular, if such a gap existed in the track, it would have eluded the search of so many others who made examinations, and those who repaired the track before the Trinders came there, and that the engines and trains should still continue to pass over it safely, and, so far as it appears, without the engineers or other employes on the trains being sensible of its existence. It was shown by the testimony of Superintendent Inge that he was in the habit of going over the road three times a week, and sometimes every day. Part of the time he rode on the engine and on the rear end of the coach, and, from experience, could easily tell if there was a loose joint. He went over the track the day before the accident from Sedalia to Warsaw and back. He states that no such loose joint as that described by the Trinders existed there; that, if it had, it would have been impossible for him not to have seen it."

In respect to the charge of overloading the broad-gauge car, the plaintiff introduced several witnesses who testified that the car swayed more than the narrow-gauge car; but none of them attempted to say that the car was overloaded, or to qualify themselves to give an opinion on that question. On the other hand, the defendant introduced testimony showing that the car was not overloaded. The plaintiff admits that the charge that there were not enough brakemen on the train is not sustained by the proof, but still insists that the evidence showed that one of the brakemen was incompetent. The defendant contends that the evidence fails to show this. Touching the charge that the defendant was negligent in pulling the broad-gauge car, mounted on narrow-gauge trucks, in the train, or in using it on a narrow-gauge road, the plaintiff introduced no evidence whatever. On the other hand, the defendant showed by the testimony of Herman J. Smith, its foreman of car repairs in its shops in St. Louis, who built this car, that such a car, on such a road, was standard built and safe. The defendant also showed by conductors, superintendents, engineers, master mechanics, and superintendents on the Burlington & Western and Burlington & Northwestern Railroads, in Iowa, and on the Denver & Rio Grande Railroad, in Colorado, which are narrow-gauge railroads, that it is the uniform practice on those roads to transfer broad-gauge cars to narrow-gauge trucks, and to run them over those narrow-gauge roads, and that experience has proved that it can be safely done, even when such cars are loaded with from 30,000 to 60,000 pounds, and are run at a speed of from 18 to 25 miles an hour. The plaintiff contends, however, that the experience and practice on these two narrow-gauge roads does not establish a custom on all the narrow-gauge roads in the

United States (no other narrow-gauge roads are shown by the record in this case to be in operation in the United States), and that the plaintiff is only bound by a custom which has become uniform among all narrow-gauge roads, and, moreover, that the deceased is not shown to have known of any such custom, nor even that the defendant had introduced the car as a part of its rolling stock, nor yet that the deceased knew that this car constituted a part of the train he was engineer of. This car was 8 feet 5 inches wide, 27 feet 6 inches long, and about 7 feet high. A standard-gauge (or broad-gauge) car is 34 to 45 feet long, 9 feet wide, and about 11 feet high. The record does not disclose the exact size of a narrow-gauge car. The instructions given and refused will be considered hereinafter.

It is the duty of the master to furnish to the servant a reasonably safe place and reasonably safe machinery and appliances in which and with which to do the master's work. *Tabler v. Railroad Co.*, 93 Mo. 79, 5 S. W. 810; *Grattis v. Railroad Co.*, 153 Mo. 403, 55 S. W. 108, 48 L. R. A. 390, 77 Am. St. Rep. 721. "It is not the duty of the master to furnish any particular kind of tools, implements, or appliances. His duty in this respect is to use ordinary care and diligence in selecting and furnishing safe and suitable tools and implements. No inference of negligence can arise from evidence which shows that the implement was such as is ordinarily used for like purposes by persons engaged in the same kind of business." This terse statement of the rule was announced by Black, J., in *Bohn v. Railway Co.*, 106 Mo., loc. cit. 433, 17 S. W. 581. This court, in banc, speaking through Sherwood, J., in *Steinhauser v. Spraul*, 127 Mo., loc. cit. 562, 28 S. W. 625, 30 S. W. 102, 27 L. R. A. 441, said: "It is well-settled law that an employer is not bound to furnish his employes the safest known appliances, tools, or machinery, the latest approved patterns of tools and improvements therein, etc.; nor does he render himself liable by failing to discard tools or appliances which are not such, and to supply their places with those which are more safe. 2 *Thomp. Neg.* p. 983; *Blanton v. Doid*, 109 Mo. 64, 18 S. W. 1149." The servant, in entering the service of the master, assumes the risks that ordinarily and usually are incident to the business being conducted by the master, and his wages include compensation for injuries received from such risks. In *Bradley v. Railway Co.*, 138 Mo., loc. cit. 302, 39 S. W. 765, this court, per Macfarlane, J., said: "It is equally well settled that a master can conduct his business in his own way, and the servant, knowing the hazards of his employment as the business is conducted, impliedly waives the right to compensation for injuries resulting from causes incident thereto, though a different method of conducting the business would have been less dangerous." To the same ef-

fect is *Jackson v. Railway Co.*, 104 Mo. 449, 16 S. W. 413. It is also the law, not only in this state, but almost universally, that if the master fails in his duty to his servant to furnish safe appliances, and if the servant knows, or by the exercise of ordinary care could know, that the appliances furnished are not altogether or reasonably safe, the servant is not obliged to refuse to use the appliances, or quit the service of the master, if he reasonably believes that by the exercise of proper care and caution he can safely use the appliances notwithstanding they are not so reasonably safe; and if he does use them, and exercises such care and caution, and is injured, the servant does not waive his right to compensation for injuries received in consequence, nor is he guilty of contributory negligence. But if the appliance is obviously so dangerous that it cannot be safely used, even with care or caution, or, as it is sometimes said, if the danger of using it is patent, or such as to threaten immediate injury, then the servant is guilty of contributory negligence if he uses it, and the master is not liable, notwithstanding his prior failure of duty. *Huhn v. Railway Co.*, 92 Mo. 447, 4 S. W. 937; *Soeder v. Railway Co.*, 100 Mo., loc. cit. 681, 13 S. W. 714, 18 Am. St. Rep. 724; *Holloran v. Foundry Co.*, 133 Mo., loc. cit. 476, 35 S. W. 260.

These settled principles of law are again announced as a predicate for the determination of the principal contention of the defendant on this appeal,—that the second instruction given for the plaintiff is erroneous, and also that the court erred in modifying the thirteenth instruction asked by the defendant. Those instructions are as follows:

"Second [given for plaintiff]. The court instructs the jury that although you may believe from the evidence that the said John Minnier knew of the alleged defects and insufficiencies in the ties, roadbed, track, and trestle, and of the alleged condition, size, and weight of said car No. 1,001, and of the alleged manner in which it was loaded, and of the alleged incompetency and unskillfulness of one of said brakemen, all as fully referred to and mentioned in the foregoing instruction, yet such knowledge and information on the part of said Minnier does not prevent or bar the right of the plaintiff to recover in this case, unless you further find that the alleged defects and insufficiencies were so obviously dangerous as to threaten immediate injury to the employes and operators on said train at the time and place and under the conditions existing at the time of the accident; and if you find said defects and insufficiencies did exist, as explained to you in the other instruction, and were the direct cause of the accident, and were known, or by the exercise of ordinary care could have been known, to the defendant, and the said John Minnier, notwithstanding his knowledge thereof, supposed, and had good reason to suppose, that he could safely operate said

train by the use of care and caution, and that he did use all the care and caution incident to the condition in which he was placed at the time, your verdict and finding must be for the plaintiff."

"Thirteenth [asked by defendant, and modified by the court by adding the words in italics]. If John Minnier knew, or by the exercise of ordinary care might have known, that standard-gauge car bodies, one or more, were in, and constituted a part of, the train which he operated as engineer on the 2d day of November, 1897, over the defendant's railroad, and that such cars on narrow-gauge trucks had been prior to that date adopted by the defendant's company as a part of its car equipment, and had been in repeated and ordinary use on defendant's said railroad for thirty days or more prior to said date, and the said John Minnier remained in the services of the defendant, he accepted and took upon himself whatever risk pertained to the operation of that class of cars, and if the jury should believe from the evidence that the accident was caused by such a car becoming derailed by reason of such cars being less safe to operate over narrow-gauge roads than ordinary narrow-gauge cars, the plaintiff cannot recover, *on account of the use of said car, if the jury believe that the danger, if any, arising from the use of said car, was so obvious as to threaten immediate injury to the employés and operators of said train, in the exercise of ordinary prudence and caution at the time and place and under the conditions existing at the time of the accident.*"

It will be observed that the instruction given for the plaintiff treats of defects and insufficiencies in the ties, roadbed, track, and trestle, as well as of the alleged condition, size, and weight of the car No. 1,001, and of the alleged manner in which it was loaded, and also of the alleged incompetency and unskillfulness of one of the brakemen, combining in this respect the several acts of negligence charged in the petition, while the instruction asked by the defendant refers only to the liability or excusability of the defendant for its use of the broad-gauge car mounted on the narrow-gauge trucks. The plaintiff's instruction says nothing directly about the assumption by the decedent of the risks ordinarily incident to the employment, but leaves that feature of the case to be implied from the declaration of law that the knowledge of these defects by the deceased does not bar the plaintiff's recovery, unless the defects were so obviously dangerous as to threaten immediate injury. Whereas the instruction as asked by the defendant impliedly instructs the jury that the defendant had a right to introduce the broad-gauge car as a part of its appliances, even if it was more dangerous than the narrow-gauge cars previously in use; and if the deceased knew it was so introduced, and remained in the de-

fendant's service, the instruction directly told the jury he assumed the increased risks incident to such use. The modification of this instruction by the court tells the jury that the deceased did not assume such increased risk unless the danger arising from the use of such car was so obvious as to threaten immediate injury, even though the car was handled with prudence and caution. The vice of the plaintiff's instruction is that it did not fully state the law as to the assumption of risks, and was calculated to mislead the jury into believing that the deceased only assumed the risk if the danger was so obvious as to threaten immediate injury. And the modification of the defendant's instruction would have strengthened the impression of the jury that this was the true meaning of the plaintiff's instruction, because that modification told the jury that the deceased did not assume the risk unless it was so obvious as to threaten immediate injury, even though the car was used with ordinary prudence and caution. This was manifestly the theory of the law upon which the trial court proceeded, and that theory is not the law. In the first place, there is absolutely no evidence in this case that a broad-gauge car mounted upon narrow-gauge trucks is an unsafe appliance for a railroad to use. On the contrary, all the evidence in the case is that such a car is not only safe, but that it is used on all the other narrow-gauge roads that the evidence discloses are in existence. So that there is no foundation whatever to support the charge that such use of such car was negligence, and as there was no evidence of any such negligence, but the evidence is just the contrary, there was nothing to base such an instruction upon, so far as the use of the car is concerned. In addition, there is nothing in the case which justified the instruction as to obvious danger threatening immediate injury, so far as the car was concerned; and therefore so much of the plaintiff's instruction No. 2 (and the same is true as to plaintiff's instruction No. 1) as refers to such obvious danger is erroneous, and the whole of the modification of the defendant's instruction is without any fact in the case to rest upon. Moreover, the effect of the modification of the defendant's instruction is to tell the jury that a servant only assumes such risks as are so obviously dangerous as to threaten immediate injury. This is not the whole law on the subject, and, stated in this way, it is not the law at all. For it overlooks the rule that the servant assumes the risks ordinarily and usually incident to the employment. It calls attention to the exception to this rule, but does not state the rule; and, stated as these instructions put it, it makes the exception to the rule the rule itself. Both of these instructions, as given, were erroneous.

There is likewise no evidence that this car was overloaded. All the direct testimony of all the persons who had any knowledge of

the facts, or who qualified themselves to speak on the subject, is that the car was not overloaded; and the only testimony to the contrary is that this car swayed more than the narrow-gauge cars, and from this it is argued that the overloading caused the swaying. This, however, is only argument or deduction, and is not a statement of a fact by any person possessing knowledge of the fact, or competent to draw a deduction.

Counsel have pointed out no testimony supporting the charge that one of the brakemen was incompetent, unskilled, or inexperienced, and therefore that element may be eliminated from the consideration of this case.

The only case like the case at bar that the great industry and marked ability of counsel has discovered is *Titus v. Railroad Co.*, 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944. The negligence charged in that case was placing the body of a broad-gauge car upon the narrow-gauge trucks, used on the narrow-gauge railroad of the defendant, and that said car was so heavily loaded as to be top-heavy (allegations similar to this case), and the further act of negligence in using on said car an unsafe appliance for fastening the body of the car to the trucks (an element not present in this case). The trial developed the fact that "while on its way to Bradford, on the day given, the train was passing around a curve, at the rate of seven to ten miles an hour, when car 41,086 [the broad-gauge car on the narrow-gauge trucks] was observed to sway from side to side and afterwards to run as if off the rails," and then the car turned over, and the plaintiff's son, a brakeman on the train, was killed. The supreme court of that state held that there was no negligence shown, and reversed the judgment recovered in the trial court by the plaintiff, without remanding the cause. In the course of the opinion, Mr. Justice Mitchell said: "We have examined all the testimony carefully, and fail to find any evidence of defendant's negligence. The negligence declared upon is the placing of a broad-gauge car upon a narrow-gauge truck, and the use of 'an unsafe and not the best appliance, to wit, the flat center plate,' or, as expressed by the learned judge in his charge, in using on the narrow-gauge road the standard car bodies, and particularly the New York, Pennsylvania & Ohio car body described by the witnesses. But the whole evidence, of plaintiff's witnesses as well as of defendant's, shows that the shifting of broad-gauge or standard car bodies onto narrow-gauge trucks for transportation is a regular part of the business of narrow-gauge railroads, and the plaintiff's evidence makes no attempt to show that the way in which it was done here was either dangerous or unusual. Haleman says the majority of the bearings fit, and those that do not have hard-wood blocks put under them, and the blocks are fastened with telegraph wire; and he was not positive but that some were

bolted on. The particular car complained of was blocked and wired. Cazely and Richmond say it was the custom to haul these broad-gauge cars on the narrow-gauge trucks, though most of the broad-gauge were Erie cars, of a somewhat different construction; and Morris says the car in question was put on a Hays truck, fitted for carrying standard-gauge cars on a narrow-gauge road, and that this particular kind of Nypano car was so hauled quite often. These are plaintiff's own witnesses, and none of them say the practice was dangerous. The nearest approach to such testimony is by Morris, who says he 'had his doubts.' But even if the practice had been shown to be dangerous, that would not show it to be negligent. Some employments are essentially hazardous, as said by our Brother Green, in *Railway Co. v. Husson*, 161 Pa. 1, 47 Am. Rep. 690, of coupling railway cars; and it by no means follows that an employer is liable 'because a particular accident might have been prevented by some special device or precaution not in common use.' All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style, implement, or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."

The use of this car, under the facts as disclosed by this record, cannot be said to constitute negligence. This leaves only the averments and proofs as to the condition of the track, etc. The testimony is as conflicting as it is possible for witnesses to make it. This court would not disturb the finding of the jury under such conditions if the jury had been properly instructed. If the testimony of the plaintiff's witnesses is true, it is incomprehensible how any train could ever have passed safely over this road. Yet

trains, including this broad-gauge car, had passed over it in safety many times during the 30 days immediately preceding the accident. If the spreading of the rail half an inch caused the front trucks of this car to leave the tracks, or if it was caused by a low or loose joint, it is hard to understand why the rear trucks of this car did not also leave the track, and also why the engine did not leave the track. If there were as many rotten cross-ties as the plaintiff's evidence shows between the point this car left the track, 110 or 115 feet north of the trestle, and the point on the trestle where the car stopped, it is hard to understand why this car did not sooner turn over, for it was the last freight car to turn over, and ran about 300 feet with the forward trucks on the cross-ties, and did not turn over until it was dragged over by the narrow-gauge cars in its rear. On the other hand, if the testimony of the defendant's witnesses as to the condition of the track, etc., is true, then it is hard to comprehend why this car left the track at all. These, however, are problems the law leaves to the jury to solve, and it is not the practice of this court to interfere with the verdict under such conditions.

For the error in giving the plaintiff's second (and first) instruction, and in modifying the defendant's thirteenth instruction, hereinbefore pointed out, the judgment of the circuit court is reversed, and the cause remanded for further trial in conformity herewith. All concur.

In banc. Petition for a writ of prohibition by E. R. Cuendet against W. W. Henderson, probate judge, and Albert J. Aiple. Motion to quash the temporary writ issued pursuant thereto overruled, and the preliminary rule made absolute.

Grover & Grover, for plaintiff. Rassieur & Buder, for defendants.

ROBINSON, J. This is an original proceeding instituted in this court to obtain a writ of prohibition directed to the probate court of the city of St. Louis, prohibiting, during the pendency of plaintiff's appeal, its carrying out or taking any steps whatever to enforce a certain order or decree revoking plaintiff's letters of administration on the estate of E. J. Cuendet. The material facts out of which this controversy arises, as set forth in plaintiff's petition for the writ, are these: The plaintiff is the sole heir and residuary legatee under the will of Eugene J. Cuendet, deceased. In 1894 letters testamentary were duly issued to Thomas Witt, the executor named in the will, who then qualified and entered upon the discharge of his duties as executor. On December 5, 1899, Witt resigned his executorship. The plaintiff being then of age, and entitled under the statute to administer, was by the probate court of the city of St. Louis appointed administrator of the estate with the will annexed, and duly qualified as such administrator by executing and filing a bond in the sum of \$340,000, with solvent sureties approved by the court, and thereupon entered upon the discharge of his duties as administrator, and took possession of all property and assets belonging to the estate. On June 15, 1900, William C. Richardson, public administrator of the city of St. Louis in charge of the estate of Urairie Cuendet (plaintiff's mother), presented a petition to the probate court disclosing the fact that the estate of Urairie Cuendet had a claim against the estate of Eugene J. Cuendet, and asking that the letters of administration theretofore granted to plaintiff be revoked. On September 14th following, the probate court revoked plaintiff's letters, and appointed Albert Aiple administrator in his stead. Plaintiff then filed a motion to have set aside the order revoking his letters, and during the pendency of this motion Aiple was permitted to qualify as such administrator. On September 20th the court overruled plaintiff's motion to set aside order of revocation, and plaintiff thereupon filed his affidavits for appeal to the circuit court, one as heir and distributee, and the other in his capacity as administrator of the estate of Eugene J. Cuendet. At the same time the court fixed the amount of the appeal bond to be given by plaintiff in his individual capacity at \$30,000, and fixed the amount of his bond as administrator at \$250,000, which said bonds were duly executed by the plaintiff with solvent sureties, and approved by the court; and on

CUENDET v. HENDERSON, Judge, et al. (Supreme Court of Missouri. Feb. 19, 1902.)

LETTERS OF ADMINISTRATION—REVOCATION—APPEAL—EFFECT AS SUPERSEDEAS—PROHIBITION OF FURTHER PROCEEDINGS.

1. Rev. St. 1899, § 278, confers the right of appeal, among other cases, from an order revoking letters of administration. Section 281 requires the appellant to give an approved bond to prosecute the appeal, and pay all debts, damages, and costs that may be adjudged against him. Section 283 provides that on the filing of an affidavit and bond, and the latter's approval, an appeal shall be granted, but shall not operate as a supersedeas on any other matter relating to the administration of the estate, except that from which the appeal is specially taken. Section 284 provides for the transmission thereupon of a certified transcript of the record and proceeding with the original papers relating to the cause. Section 285, provides that on the filing of such transcript and papers the circuit court shall be possessed of the cause, and shall proceed to hear the same anew, etc. *Held*, that an appeal taken in compliance therewith, from a revocation of letters of administration operated as a supersedeas, so as to entitle appellant to retain the assets of the estate during its pendency, and the probate court was thereby deprived of any further authority in regard thereto during such time.

2. Where, notwithstanding an appeal from an order revoking letters of administration, which operated as a supersedeas, the probate court asserts the right to enforce its order, the supreme court may prevent it from doing so by writ of prohibition.

the same day the court entered orders granting appeals to the circuit court to Eugene R. Cuendet, and to Eugene R. Cuendet administrator, and the clerk of the probate court duly transmitted to the circuit clerk a certified transcript of the record and proceedings relating to said application for the revocation of letters of administration, together with the original papers pertaining thereto. Notwithstanding said appeals, and the approval of said appeal bonds therein, and while said appeals were pending in the court, Aiple, claiming to be administrator de bonis non of the estate of E. J. Cuendet, applied to the probate court for an order compelling the plaintiff to make final settlement with said Aiple of his administration of said estate, and asking the court to ascertain the amount of money and property of the estate in plaintiff's possession, and for a judgment in favor of Aiple and against plaintiff, compelling the latter to turn over and deliver to Aiple all the property and assets of said estate in his possession, and for an execution against plaintiff and the sureties of his official bond enforcing such judgment. Upon the filing of said motion the court recognized said Aiple as administrator of the estate of E. J. Cuendet, and ordered a summons to be issued for plaintiff as a basis for issuing execution against him in pursuance of the order revoking his letters. The petition for the writ then concludes as follows: "Your petitioner now alleges that by the orders allowing appeals from the said decree vacating and revoking petitioners' said letters of administration, and by the filing of said appeal bonds, approved and accepted by the said Hon. W. W. Henderson, judge of the probate court, the said judgment and decree vacating and revoking said letters of administration is suspended, and has become inoperative during the pendency of said appeal; and petitioner is still the lawful administrator of the said estate, and as such is vested with title to, and is entitled to the custody, control, and management of, all the property and assets thereof. The said probate court of the city of St. Louis is without jurisdiction, authority, or warrant of law to proceed further under the said order and decree appealed from; and was and is without authority, jurisdiction, or power to appoint and qualify said Aiple as administrator of the estate of E. J. Cuendet, or to recognize him as such administrator; and without power and authority to compel your petitioner, as administrator aforesaid, to make, at this time, final settlement of his administration of said estate; and without jurisdiction, power, and authority to compel your petitioner to turn over and deliver to said Albert J. Aiple, or to any one else who may be appointed by said probate court administrator of the estate of E. J. Cuendet, any and all of the property and assets of the said estate of E. J. Cuendet in the hands of your petitioner as such administrator; and the said

Albert J. Aiple is without any legal right, power, or authority to discharge the duties and functions of administrator of said estate, or to be vested with title or to have the custody of the property and assets thereof, and is not so vested with title; nor has said Aiple any right, authority, or legal standing to demand that your petitioner, Eugene R. Cuendet, should make, with him, said Aiple, final settlement or an accounting of petitioner's administration of the said estate of E. J. Cuendet, nor has said Aiple any right or authority or legal standing to demand of your petitioner the delivery to him, said Aiple, of all the personal property, and delivery to him of all the assets of said estate. All of the said acts, orders, decrees, and proceedings of the said Hon. W. W. Henderson, judge of the said probate court of the city of St. Louis, state of Missouri, done, entered, and taken since the filing of said appeal bond, and since the order granting said appeal, are usurpations of judicial power, and in excess of the authority of the said probate court of the city of St. Louis, and under the constitution and laws of the state of Missouri, it is made the care of this honorable court that the said probate court of the city of St. Louis, as well as all other inferior courts, keep within the bounds and limits of their several jurisdictions prescribed to them by the laws of the state. The said property and assets of the estate of E. J. Cuendet now vested in your petitioner under the law, and now in the custody and control of your petitioner, and which said probate court and said defendant Aiple seek to divest out of your petitioner, are of the value of at least thirty thousand dollars (\$30,000), and a portion of said property and assets now vested in, and in possession of, your petitioner is personal property of the pecuniary value of at least fifteen thousand dollars (\$15,000). Wherefore your petitioners, imploring the aid of this honorable court, pray to be relieved, and that they may have the state's writ of prohibition directed to said Hon. W. W. Henderson, judge of the said probate court of the city of St. Louis, state of Missouri, and to said Albert J. Aiple, to prohibit said Henderson, during the pendency of petitioners' said appeals in said circuit court, and in any other court of competent jurisdiction in which said appeals may be pending, from proceeding further to carry out or enforce the said order and decree revoking said letters of administration on the estate of E. J. Cuendet; and prohibiting him from, by order or decree, in any manner recognizing Albert J. Aiple as administrator de bonis non with the will annexed of the estate of E. J. Cuendet, and prohibiting him from interfering with or disturbing said Eugene R. Cuendet as administrator with the will annexed of the estate of E. J. Cuendet. In the administration, custody, and control and management of the property and assets of the estate of E. J. Cuendet, except to re-

quire him to preserve and account for the same in due course of administration; and prohibiting him from making, entering, or enforcing against petitioner any order or decree divesting, or pretending to divest, out of said Eugene R. Cuendet title in, and possession of, the personal property and assets of the estate of E. J. Cuendet, and directing, requiring, and compelling said Eugene J. Cuendet to turn over and deliver to said Albert J. Aiple any and all of the assets and property of the estate of E. J. Cuendet now vested in said Cuendet, administrator, or now in his possession, control, and management; and prohibiting him from making, entering, or enforcing against said Eugene R. Cuendet an order or decree directing, requiring, and compelling him at this time to make final settlement with said Aiple in said court of his administration of the said estate of E. J. Cuendet; and prohibiting him from making, entering, or enforcing against said Eugene R. Cuendet any order or decree having for its purpose the ousting him from his office as administrator with the will annexed of the estate of E. J. Cuendet, and ousting him from the custody, control, and management of the said property and assets of the said estate; and prohibiting said Albert J. Aiple from exercising, during the pendency of the said appeals, any authority as and discharging any of the duties of administrator de bonis non with the will annexed of the estate of E. J. Cuendet, and prohibiting said Aiple from demanding of petitioner a transfer and delivery to him of the property and assets of said estate of E. J. Cuendet, and prohibiting said Aiple from representing, or assuming or pretending to represent, as administrator, said estate of E. J. Cuendet in any proceeding in said probate court of the city of St. Louis or in any other court of justice." Upon the foregoing application a provisional rule, directed to W. W. Henderson, as judge of the probate court of the city of St. Louis, and Albert Aiple, as administrator de bonis non with the will annexed of the estate of E. J. Cuendet by appointment of said court, was issued prohibiting them, during the pendency of the appeal of E. R. Cuendet from the order of the probate court revoking his letters of administration of said estate, from proceeding further to carry out or enforcing the order of revocation. The defendant moved to quash the temporary writ, assigning as ground therefor that the petition does not state facts sufficient to entitle plaintiff to the relief sought.

The plaintiff's right of appeal from the order of the probate court revoking his letters of administration being conceded, and no question being made that prohibition may properly go to prevent the execution of process that has been duly stayed according to law, the only question for determination is whether such appeal operates as a supersedeas so as to entitle plaintiff during the pendency thereof to retain the assets of the es-

tate. For the proper solution of this question resort alone to the statute is necessary. By section 278 of the Revised Statutes of 1899 of the administration act, after conferring the right of appeal in 15 different classes of cases, among which being an order revoking letters of administration, it is further provided in said act as follows:

"Sec. 281. Every such appellant shall file in the court the bond of himself or some other person, in a sum and with security approved by the court, conditioned that he will prosecute the appeal and pay all debts, damages and costs that may be adjudged against him. * * *

Section 283 provides: "Upon the filing of an affidavit and bond and the approval of the latter, the appeal shall be granted, but shall not operate as a supersedeas in any other matter relating to the administration of the estate, except that from which the appeal is specially taken. * * *

By section 284 it is provided that: "When such appeal is taken the clerk shall transmit to the clerk of the circuit court a certified transcript of the record and proceeding, relating to the case, together with the original papers in his office relating thereto."

Section 285 provides: "Upon the filing of such transcript and paper in the office of the clerk of the circuit court, that court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the probate court."

These statutes seem all conclusive and self-explanatory. They clearly indicate that the legislature contemplated by their enactment that the right of appeal from an order of revocation of letters by the probate court should be conditioned on the giving of the appeal bond prescribed by section 281; and it is also equally as apparent that the legislature intended a compliance with the requirements of the statute by the party aggrieved should operate to vacate the order or judgment appealed from, and to transfer the whole matter of controversy to the circuit court. The legislature having made the right of appeal in cases of this character conditioned on the giving of the bond provided by section 281, supra, not only made the giving of the bond essential to the right of appeal, but also, by section 283, provided that the execution and approval of the bond shall give to the appeal the character of a supersedeas. If an appeal taken does not operate to prevent one in whose favor a judgment is rendered, or an order made, from at once receiving the full benefit thereof, in what way can he be said to be injured by the appeal, and why should the appellant be required to give an appeal bond to indemnify the appellee against injury which can never happen?

From a careful reading of the foregoing statutes, the conclusion seems to us inevitable that upon compliance with these require-

ments on part of the appellant in that matter (the petitioner herein), and the granting of an appeal by the probate court, the matter from which the appeal was taken is removed from such court to the circuit court, and that the probate court is without further authority, pending such appeal, to take any further action in regard thereto. The judgment of the probate court, being vacated, becomes thenceforth inoperative, and if the probate court, notwithstanding the appeal, proceeds to enforce its decree, by ordering the property of the administrator appealing into the hands of the newly-appointed administrator, it is the plain duty of this court, when applied to, by its writ of prohibition, to order suspended all further proceedings relating to the matter appealed from in the probate court until the final determination of the appeal in the circuit court is heard. If section 283, *supra*, does not mean that upon the filing of an affidavit for an appeal, together with an appeal bond, and the approval of the latter by the probate court, from any adverse ruling by that court in any of the 15 cases enumerated in section 278 of the statute, *supra*, the appeal is to act as a supersedeas in the matter appealed from, then we can find in the language of the section no meaning whatever. The order appealed from involved plaintiff's removal from office as administrator of the estate of E. J. Cuendet, deceased, and the immediate transfer of the property and effects thereof to his successor. Unappealed from, the order of revocation by the probate court worked a divestiture of plaintiff's legal title to the entire assets of the estate in his hands, and vested the same in the respondent Aiple. In a contest between these same parties, in their individual instead of official capacities, for the custody of this property, there would be no doubt of plaintiff's right of appeal from the judgment of any court involving his title thereto, and, to make such an appeal effective, have stayed the further execution of said judgment or order, pending such appeal, by the giving of a supersedeas bond, or an appeal bond that would act as a supersedeas. In view of the statutory provisions above mentioned, authorizing appeals from the order and judgments of the probate court, we think that the approval of the appeal bond by the court in this case, offered by the plaintiff, operated as a stay of all proceedings to enforce the order of revocation until the final hearing of the case on appeal, and that as an incident thereto it likewise entitled plaintiff to retain the property belonging to the estate until that time. As we have seen, the statute allowing the right of appeal in the class of cases specified not only makes the giving of an appeal bond essential to the right of appeal, but also provides that such appeal shall supersede the judgment or order from which it is taken. This court in the case of *State v. Hirzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961, held that the right to an appeal carried along

with it the right to make the appeal effective, even where the statute authorizing the appeal does not require an appeal bond, and where nothing is said about an appeal operating as a supersedeas.

The question in that case arose out of the overruling of a motion to vacate an order made by the judge of the circuit court of St. Louis county appointing a receiver to take charge of a certain railroad and its property pending the determination of a suit in that court against it. From the order overruling the motion to vacate the appointment of the receiver, an appeal was prosecuted to this court, under the authority of the provisions of an act of 1895 (now section 806, Rev. St. 1899). After the filing of the affidavit for appeal, the amount of the appeal bond was fixed by the court at \$1,000, which, being provided by defendants, was duly approved by the court and filed with the papers in the case. In the meantime the receiver had been put into the possession of the property by means of a writ of assistance, and refused to return same to defendant, notwithstanding the perfection of their appeal and the giving of the appeal bond. In a proceeding by prohibition against the judge of the circuit court making the order in that case, and the receiver having in charge the property under the court's writ of assistance, it was held that after the appeal had been duly taken from the order overruling the motion to vacate the appointment of the receiver, and the appeal bond having been duly approved and filed, all power to further execute or carry in force the order of appointment was stayed; and, further, that it operated to release all process that may have been taken out, prior to the filing of the appeal bond, having in view the carrying out or enforcement of the order of appointment. It is here also to be noted that the act of 1895 (now section 806, Rev. St. 1899), authorizing appeals from interlocutory orders removing from office the executive officers of corporations, and divesting them of the possession of the corporations' property, and vesting same in the hands of a receiver, neither requires nor directs that an appeal bond be given, and does not provide that the appeal allowed should act as a supersedeas, as in the administration statute in question, but the court's holding in that case was made upon the broad proposition that the right of an appeal conferred thereunder carried with it the right to make effective the appeal.

As said above, under the administration statute, which we are called upon to consider at this time, it is expressly provided, not only that an appeal may be taken from all orders of the probate court revoking letters testamentary or of administration, but that the appeal bond shall be given in every case in which appeals are allowable before an order allowing the appeal can be entered; and, further, that the appeal granted shall

operate as a supersedeas in the matter relating to the administration of the estate from which the appeal is taken. The language of the statute authorizing a supersedeas could not well have been more definite; but had it been less specific in fact, had the provision of section 283, *supra*, never been enacted by the legislature, the reason for the existence of such a rule is so manifest, from the other requirements of the statute, that the courts, in recognition of them, would find a supersedeas a necessary incident, and so declare its existence, as in the case of *State v. Hirzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; *State v. Klein*, 137 Mo. 673, 39 S. W. 272. The case of *Mullanphy v. St. Louis County Court*, 6 Mo. 563, cited and relied upon by defendants, in which it is held that an appeal from an order revoking letters of administration does not operate as a supersedeas, and the case of *Harney v. Scott*, 28 Mo. 333, in which, without comment, the *Mullanphy* Case is followed, are not proper interpretations of the statute as it then read, and should not be followed as authority in the case now before us.

While it is true, as respondent suggests, that the statute of 1835, under which the above cases were determined, was different from the statute under which the present case is to be considered, in this: that at the time those cases were determined there was no trial *de novo* on appeal from the probate to the circuit court, as now, but then the circuit court simply reviewed the error of the probate courts on exception taken.—the law as to an appeal acting as a supersedeas was substantially then as it is now, and the reason for the ruling in those cases is not to be accounted for upon the grounds of the difference in effect of an appeal bond in a case to be tried *de novo* in the appellate court and where, as in an appeal to this court, the trial is upon exceptions taken to the action of the lower court. By section 5, art. 8, c. 3, Rev. St. 1835, it is provided: "After such affidavit and bond have been filed, the appeal shall be granted, but shall not be a supersedeas in any matter relating to the administration of the estate, except that from which the appeal is specially taken." In disposing of the *Mullanphy* Case the court made the wording of the appeal bond taken act as a limitation upon the express language of the statute to the contrary, and in that we think it erred. To hold that the supersedeas, as provided in section 283, *supra*, extended only to those cases where the appellant has been adjudged to pay a debt (as declared in the *Mullanphy* Case), would be not only the substitution of judicial dictum for legislative enactment, but would result in confusion in the management of an estate most embarrassing. But whatever may have been the state of former judicial opinions on the subject, it is perfectly clear that the present statute, giving the right of appeal from an order of the probate court revoking letters

of administration, acts as a supersedeas when the statutory bond has been given, and that where the probate court, notwithstanding such appeal, asserts the right to enforce its orders pending its final determination, this court, by the writ of prohibition, may prevent its assertion. It follows, therefore, that the motion to quash filed by respondent should be overruled, and the preliminary rule in prohibition made absolute; and it is so ordered.

All concur.

BECKER et al. v. STROEHER et al.
(Supreme Court of Missouri, Division No. 2,
Feb. 4, 1902.)

PARTITION—PARTIES—JUDGMENT—CONCLUSIVENESS—RES ADJUDICATA—DEED—SUFFICIENCY—DECLARATION OF TRUST—RECORD NOTICE—EJECTMENT—PARTIES DEFENDANT—JOINDER OF ACTION.

1. A beneficiary or trustee in a deed of trust executed after the commencement of a partition suit by a party thereto is not a necessary party to the suit.

2. Under Rev. St. 1889, § 7160, providing that a judgment in partition shall be conclusive on all parties thereto and on all persons claiming under them, a judgment in partition is conclusive as to persons claiming under a mortgage executed by a party to a partition suit after the commencement of the suit, but before the rendition of the judgment therein.

3. An instrument declaring a trust, but containing no operative words of conveyance, or words showing an intention of the grantor to pass the legal title, is insufficient to create a legal estate in the grantee.

4. A recorded deed of land embraced in a trust deed which contained no words of conveyance, and was inoperative to convey title, by a beneficiary in the trust deed, will not impart constructive notice of the interest of the grantee, to a subsequent purchaser of the legal title, as the deed is not in the chain of title.

5. Persons holding separate and distinct portions of a tract of land cannot be joined as parties defendant in ejectment to recover the entire tract.

6. Plaintiff in ejectment cannot recover unless he shows a legal title to all or a portion of the land in controversy.

Appeal from St. Louis circuit court; R. Hirzel, Judge.

Suit by C. J. Becker and others against Louis Stroehrer and others. From a judgment in favor of the defendants, the plaintiffs appeal. Affirmed.

The petition contained two counts,—one in equity to divest the title of the property in controversy out of Louis Stroehrer, as trustee, and vest the same in plaintiffs and certain other beneficiaries named in the petition as co-tenants with plaintiffs; and the other count was in ejectment. The answers of the defendants the Mississippi Valley Trust Company, administrator of August Brueggmann, and Pearl A. Brueggmann, a minor, by the Mississippi Valley Trust Company, her duly appointed curator, Louis Gloeckner, and Louis James, were general denials. The answers of defendants Louis Kittlaus, Ferdinand Meyer, Elias K. Moss, Joseph A. Duf-

ty, trustee of John O'Connell, John O'Connell, Anna O'Connell, Anna Huber, and Alexander Huber, her husband, are substantially the same, and deny all allegations of the petition, except that they admit that the title to the property described in the petition was conveyed, as alleged, to Louis Strocher, in trust for Ponath, Meyer, and Brueggmann, but aver that Ponath and Brueggmann were partners, and that the land was conveyed to Strocher in trust for them as partners, and allege that the same was paid for out of the funds belonging to the partnership; that Edward H. Ponath became and is the surviving partner, and as such took out letters of administration, and inventoried the interest in said real estate as partnership assets; that the partnership estate was insolvent; that on the 20th of August, 1896, proceedings were instituted by Ferdinand Meyer and Patrick O'Connell in the circuit court of the county of St. Louis for the partition of the real estate described in the petition; that said partition was against Edward H. Ponath, as administrator of Ponath & Brueggmann and against Edward H. Ponath individually; that said partition suit progressed to final judgment, and that part of the land was set off to Louis Gloeckner, as assignee of Edward H. Ponath, and to Edward H. Ponath, subject to the rights of the partnership creditors; that in said partition suit \$320.51 costs were adjudged against Edward H. Ponath, and Edward H. Ponath as administrator of Ponath & Brueggmann, and Louis Gloeckner, assignee; that execution was levied upon all of the right and title of Edward H. Ponath, and Edward H. Ponath as administrator, and Louis Gloeckner as assignee, and that the same was sold on April 18, 1898, part to Louis Kittlaus, and part to Elias K. Moss; that on September 1, 1896, the legal title to the real estate described in plaintiffs' petition was in Strocher, and up to said time he had executed no declaration of trust in favor of Ponath & Brueggmann, or either of them, and that on or about said last-mentioned date there was filed for record an instrument purporting to be executed by Edward H. Ponath, by which he pretended to convey an undivided one-third interest in the property described in plaintiffs' petition to Cyrus Hall, in trust to secure Antole Rulf the payment of certain notes; that a sale was advertised under the power in said deed of trust about October 25, 1897, and that plaintiffs became the alleged owners of said undivided one-third interest; that, if such conveyance was actually executed by the said Edward H. Ponath, the same was executed in fact without any consideration, and was executed in fraud of plaintiff in said proceeding for partition; and, further, that the interest of said Ponath and his privies in the real estate described in the petition is subject to the rights of the creditors of the insolvent partnership of Ponath & Brueggmann. The answer of Louis Kittlaus seeks

affirmative relief to the end that, "if this court find that plaintiffs have an interest in the real estate in their petition described, this court may decree such interest to be immaterial and trivial, and not entitling plaintiffs to recognition by this court for the relief prayed in their petition," and for general relief. The answer of Ferdinand Meyer, by way of cross action, described the property allotted to him in the partition suit, and alleges that he entered into the possession of the same, and from the time of said allotment in said partition suit has been in possession thereof, and that the plaintiffs claim some right, title, or estate in said real estate adverse to the title and interest of this defendant; and he prays that the court ascertain and define his said title to said real estate, and for other and further relief. The answer of Joseph A. Duffy, trustee, et al., also prays the court to ascertain the estate, title, and interest of plaintiffs, and define the same, and determine the rights of the defendants, and adjudge by its decree the estate of all parties, and the several interests therein. The reply to the new matter contained in the several answers, after a general denial, sets up the fact that the plaintiffs had no notice of the interest of Edward H. Ponath being partnership property, if the same was or is property of the partnership formerly composed of Ponath and Brueggmann. The count in equity seems to have been abandoned, as there was no finding or judgment upon it by the trial court, nor in any point made upon it in this court. The issues on the count in ejectment were submitted to the court,—a jury being waived,—who refused all declarations of law asked by the respective parties, found for defendants, and rendered final judgment in their favor. The case is before us on plaintiffs' appeal.

R. M. Nichols, for appellants. Geo. W. Lubke, Jr., F. A. C. MacManus, R. H. Stevens, Lange & Senn, and Kehr & Tittman, for respondents.

BURGESS, J. (after stating the facts). The facts as disclosed by the record are substantially as follows: On the 28th of June, 1892, the legal title to the land in question was vested in the defendant Louis Strocher by deed of record; he having acquired said title by sheriff's deed in a partition suit, the granting part of which is in the following words: "Do assign, transfer, convey, and set over unto the said Louis Strocher, his heirs and assigns," etc. On the 29th day of October, 1895, Louis Strocher executed an instrument of writing, recorded January 31, 1899, which contains the following provision: "And whereas, the considerations in the said conveyance [meaning the sheriff's deed in partition above referred to], or any part thereof, was not paid by me, and the real estate hereinafter described was purchased by me at said sale, and said conveyance was made to

me for the sole use and benefit of Edward H. Ponath, August Brueggmann, and Ferdinand Meyer, each of whom was entitled to a one-third interest therein; and whereas, the said Ferdinand Meyer, for a sufficient consideration, afterwards conveyed, in writing, an undivided one-sixth interest in said property (being one-half of his aforesaid one-third interest therein) to John Heusner, of the city of St. Louis; and whereas, the said John Heusner afterwards, for a valuable consideration, conveyed to Patrick O'Connell, of No. 2917 Spring avenue, in the city of St. Louis, state of Missouri, the said undivided one-sixth interest and part of said real estate acquired by him from said Ferdinand Meyer as aforesaid, and the said Patrick O'Connell is now the owner of the said undivided one-sixth of an interest in said real estate; and whereas, it is deemed proper, by way of further assurance to the said Patrick O'Connell, that the said Stroehrer, Meyer, and Heusner should, by an instrument by them executed, solemnly declare and state the foregoing facts. * * * Know all men by these presents that we, the said Louis Stroehrer, of the city of St. Louis and state of Missouri, and the said Ferdinand Meyer, of the city of St. Louis and state aforesaid, and the said John Heusner, of the city of St. Louis and state of Missouri, for and in consideration of the facts aforesaid, and of the sum of five dollars to us in hand paid by the said Patrick O'Connell, the receipt of which is hereby acknowledged, do by these presents grant, convey, quitclaim, and release unto the said Patrick O'Connell an undivided one-sixth of the lots, lands, and real estate hereinbefore in this deed described." On the 20th of August, 1896, there was filed in the circuit court of St. Louis county a partition suit wherein Patrick O'Connell and Ferdinand Meyer were plaintiffs, and Edward H. Ponath, Edward H. Ponath, administrator of the partnership estate of Ponath & Brueggmann, Mississippi Valley Trust Company, administrator of the estate of August W. Brueggmann, deceased, Adolphine Brueggmann, Pearl A. Brueggmann, and Louis Stroehrer, were made defendants, which petition was in the ordinary form, seeking the partition of real estate. To the introduction of this, plaintiffs objected on the ground that they were not parties to said suit, and on the further ground that the deed of trust under which they claim was delivered to them before the suit became a *lis pendens*,—it becoming a *lis pendens* on April 2, 1896,—which objection was overruled, and exception duly saved. Summons was issued on this petition to the sheriff of the city of St. Louis on the 27th day of August, 1896, commanding him to summon Edward H. Ponath, and Edward H. Ponath administrator of the partnership estate of Ponath & Brueggmann, the Mississippi Valley Trust Company, administrator of August W. Brueggmann, Adolphine Brueggmann, Pearl A. Brueggmann, and Louis Stroehrer. During

the pendency of that suit, Louis Gloeckner, claiming to have bought Ponath's interest in the premises at an execution sale, was made a party to the suit upon his application; and, in the report of the commissioners and the final decree, Ponath's interest was assigned to him. As neither he nor Ponath paid their proportion of the costs, the two parcels assigned to the Ponath interest were sold under the execution in the case, and bought, respectively, by the respondents Kittlaus and Moss. On the 28th day of August, 1896, Edward H. Ponath conveyed all of his right, title, and interest, described as an undivided one-third in the property described in the petition, to Cyrus Hall, as trustee, to secure to Antole Ruif three notes, dated, "St. Louis county, Missouri, August 28, 1896," payable to the order of Antole Ruif, at the office of Choumeau & Dosenbach,—one for the sum of \$5,000, due one year after date, one for \$150, due six months after date, and one for \$150, due twelve months after date,—all of which were indorsed by Antole Ruif. Said deed of trust was recorded in the office of the recorder of St. Louis county on the 1st day of September, 1896, at 9 o'clock a. m., in Book 87, at page 483. After these notes and deed of trust were executed, and before the deed of trust was acknowledged, they were by Edward H. Ponath placed in an envelope and turned over to one Christ Bockelbrink; and on this envelope there was an indorsement made that they were to be held by Bockelbrink for the use of plaintiffs Becker and Gerber,—Becker having an interest to the extent of \$1,500, and Gerber to the extent of \$3,500. On the 28th or 29th of August, 1896, plaintiffs were notified by Edward H. Ponath that he had made the deed of trust in accordance with his previous promise, and that the same had been deposited with Bockelbrink for their use. Plaintiffs in this case were not made parties to the partition suit, and, while the record does not show that any answers were filed, an interlocutory decree was entered in said cause on February 25, 1897, appointing commissioners, who subsequently, and in due course, made a partition of the real estate in question, allotting $16\frac{59}{1000}$ acres to Patrick O'Connell, $13\frac{822}{1000}$ acres to Ferdinand Meyer, $7\frac{481}{1000}$ acres to Adolphine Brueggmann, and $2\frac{82}{1000}$ acres to Louis Gloeckner, who, on April 10, 1897, sought to be made a party to said partition suit on the ground that he had purchased the interest of Edward H. Ponath, and was made a party. To the admission in evidence of the decree and the report of the commissioners, and the accompanying plat, and the confirmation thereof, plaintiffs objected on the ground that they were not parties to the said partition proceeding, and for the further reason that at the date of the receipt of the deed of trust no notice of said suit had been given to their grantor, which objection the court overruled, to which ruling the plaintiff at the time duly

excepted. In said partition suit there was an award of costs against Edward H. Ponath, Edward H. Ponath administrator of the partnership estate of Ponath & Brueggmann, and his assignee, Louis Gloeckner, in the sum of \$329.51. Execution was issued against said Edward H. Ponath, and Edward H. Ponath administrator of the partnership estate of Ponath & Brueggmann, for said sum; and pursuant to the mandate of said execution the sheriff of the county of St. Louis levied upon and seized all of the right, title, and interest of Edward H. Ponath, and Edward H. Ponath administrator of the partnership estate of Ponath & Brueggmann, in the property hereinbefore referred to as set out to him and his assignee, and sold the same to Elias K. Moss and Louis Kittlaus, defendants herein, on the 18th of April, 1898. To the introduction and admission of the execution, and the advertisement of sale thereunder, and the deeds made pursuant thereto, plaintiffs objected on the ground that they were not parties to said partition suit, and that the same did not become a lis pendens until plaintiffs had received said deed of trust, and on the further ground that the said execution, and the sale thereunder, purported to be a conveyance of the interest of the administrator, as such, in the partnership estate, and for that reason the same was void. On Monday, the 5th day of October, 1897, between the hours of 10 o'clock a. m. and 3 o'clock p. m., the said trustee (Cyrus Hall) in said deed of trust, dated August 28, 1896, and recorded in Book 87, at page 483, of the recorder's office of St. Louis county, on the 1st of September, 1896, by virtue of the power in him vested, sold all the right, title, and interest of Edward H. Ponath in and to an undivided one-third of the property described in the petition, and at said sale said plaintiffs C. J. Becker and Edward Gerber were the highest and best bidders therefor, and pursuant thereof the said trustee made, executed, and delivered to them a deed of said property, which was duly recorded in the recorder's office of St. Louis county on the 25th day of October, 1897.

It seems that C. J. Becker did not know of the partition suit until after November, 1896. The testimony of plaintiff Becker as to conversations with defendant Ferdinand Meyer with reference to the partition suit being filed is as follows: "Q. Do you remember having a conversation with Ferdinand Meyer with reference to this property—some property—prior to the 1st of September, or about the 1st of September? A. He may have spoken to me about the North and South road property. Q. Didn't he tell you he had instituted a suit for partition about that time? A. No, sir; I had not seen Mr. Meyer for a month prior to— Probably a month and a half before that. Q. What conversation did you have with him about the 1st of September? A. I don't think I ever

spoke to him about the 1st of September. Q. Do you remember that? A. I am positive. Q. Didn't he tell you he was suing Ponath about that property? A. No, sir; positively he did not, until this day." Ferdinand Meyer testified as follows: "Mr. Becker and I on several occasions went away from the office by ourselves, and we on several occasions drifted into the troubles that we got in, at least, I mentioned what caused me to come there so often; and I noticed he, also, had grievances he could not get straightened out; and I told him exactly my mission, what I was there for, and why, and what I calculated to do if things were not squared up; and on about the 20th of August, 1896, I remember going with,—especially with Mr. Becker,—and we walked together as far as a Broadway café, up on Fifth and Chestnut-Pine and Broadway, and we went in there and had a glass of beer or a glass of wine. I don't know which. I then told him I had entered suit for partition. Q. Of what? A. Partition of the land on the North and South road. Q. How long was that after the suit had been brought? A. It was about a day or two; not any longer. Q. What did he say to that? A. He made no remark." On his cross-examination the following occurred: "Q. Did you make any note of the time you had this conversation with Becker? A. No. Q. Did you set it down in any book or memorandum? A. No, sir. * * * Q. Did he say that Ponath agreed to give him security? A. No, sir. Q. Mr. Meyer, what makes you know so positively that this conversation with Mr. Becker was on the 20th day of August? A. I didn't say it was on the 20th of August. I said it was the day following that we filed suit, and I think the suit was filed on the 20th. Q. And it was the day following? A. Yes, sir. Q. And that is the way you happen to remember that? A. Yes. Q. When you told Mr. Becker that you had brought the partition suit, had you gone into the details of your transactions with Mr. Becker? A. No, sir. Q. Acquainted Mr. Becker with all the details of your transaction? A. No, sir. Q. Simply told him that you had brought the partition suit? A. Yes, sir; for this land on the North and South road. Q. Did you describe it to him? A. He apparently knew it. * * * Q. Now, you are sure that you told Mr. Becker that you had brought suit the first or second day after you had done so? A. Yes, sir. Q. And yet you made no data or memorandum to that effect? A. I did not. Q. And have never thought of it until this time,—until this suit was filed? A. I thought of it ever since. Q. You have been refreshing your memory on it ever since? A. I considered over it a great many times."

Plaintiffs offered the following declarations of law: "The court declares the law to be that if it finds from the evidence that on or about the 28th day of June, 1892, the de-

defendant Louis Strocher became seised and possessed of a two-thirds interest in trust of the property described in the petition, for the use and benefit of the partnership composed of E. H. Ponath and Aug. Brueggmann, known as Ponath & Brueggmann, and that said trust was manifested and proved by a writing signed by said Louis Strocher; and further finds that on or prior to the 1st day of September, 1896, E. H. Ponath made, executed, and delivered to plaintiffs herein, or some one for them, a conveyance in trust to Cyrus Hall of all his right, title, and interest in and to an undivided one-third interest in the property described in the petition, for the purpose of securing to plaintiffs, or some one for them, the payment of his certain promissory notes of even date with said deed of trust,—one for \$5,000, and two semiannual interest notes,—which plaintiffs had received for value, and that said deed of trust was recorded in the recorder's office of the county of St. Louis on September 1, 1896; and further finds and believes from the evidence that at the date of receiving said notes and deed of trust the plaintiffs herein had no notice that the said interest in said property described in the petition was partnership property, or that the same would be required to answer in the payment of partnership obligations; and further finds and believes from the evidence that on or about, to wit, the 25th day of October, 1897, the said Cyrus Hall, trustee under said deed of trust, acting under the power given him in said deed of trust, after due notice of such sale by advertisement in accordance with the provisions thereof, sold to the plaintiffs all of the right, title, and interest belonging to said Ponath in and to the property described in plaintiff's petition; and further believes and finds from the evidence that the service of summons in said partition suit of Patrick O'Connell et al. v. E. H. Ponath et al. (No. 5,600) was not made upon E. H. Ponath until the 2d day of September, 1896,—then the verdict and finding must be for the plaintiffs. The court declares the law to be that if it finds from the evidence in this case that on or about the 28th day of June, 1892, the defendant Louis Strocher became seised and possessed, in trust, of the property described in the petition, for the use and benefit of E. H. Ponath, Aug. Brueggmann, and Ferdinand Meyer, as tenants in common, for each an undivided one-third interest therein, and that said trust was manifested and approved by a writing signed by said Louis Strocher; and further finds that on or prior to the 1st day of September, 1896, said E. H. Ponath made, executed, and delivered to plaintiffs herein, or some one for them, a conveyance in trust to Cyrus Hall of all of his right, title, and interest in and to the undivided one-third of the property described in the petition, for the purpose of securing to plaintiffs herein the payment of his certain promissory notes, of even

date with said deed of trust, for \$5,000, and semiannual interest notes, which plaintiff held for value on that date, and that said deed of trust was duly recorded in the recorder's office of St. Louis county on, to wit, September 1, 1896; and further finds and believes from the evidence that thereafter, and on or about the 25th day of October, 1897, the said Cyrus Hall, acting under the power given to him in said deed of trust, after due notice of such sale by advertisement in accordance with the provisions of said deed of trust, sold to the plaintiffs all of the right, title, and interest belonging to said Ponath in and to the property described in plaintiffs' petition; and further believes and finds from the evidence that service of summons in the partition suit of Patrick O'Connell et al. v. E. H. Ponath et al. (No. 5,600) was not made upon E. H. Ponath until the 2d day of September, 1896,—then the verdict must be for the plaintiffs in this case." Which declarations the court refused, to which refusal the plaintiffs, by their counsel, then and there duly excepted at the time.

It is well settled in this state that the beneficiary and trustee in a deed of trust executed upon land, the subject of partition, prior to the institution of a suit for that purpose, are proper parties to such suit (*Reinhardt v. Wendecck*, 40 Mo. 577; *Dameron v. Jameson*, 71 Mo. 97; *Yates v. Johnson*, 87 Mo. 213; *Harblison v. Sandford*, 90 Mo. 477, 3 S. W. 20; *Estes v. Nell*, 108 Mo. 173, 18 S. W. 1006; *Hiles v. Rule*, 121 Mo. 249, 25 S. W. 959; *Lilly v. Menke*, 126 Mo. 190, 28 S. W. 643, 904), but no such rule prevails with respect to a beneficiary or trustee in a mortgage or deed of trust executed after a partition suit has been instituted. The suit in partition in question in this case was begun on the 27th day of August, 1896, when the petition was filed, and process issued thereon (section 2013, Rev. St. 1880; *Brick Co. v. Barker*, 50 Mo. App. 60; *Watkins v. Railway Co.*, 58 Mo. App. 659); and in so far as the defendant Ponath, therein named, and all who claim under him, including the plaintiffs in that suit, are concerned, the judgment therein rendered is binding upon them, and all persons claiming under them (section 7160, Rev. St. 1880; *Hart v. Steedman*, 98 Mo. 452, 11 S. W. 993; *Holladay v. Langford*, 87 Mo. 577). The mortgage under which plaintiffs claim was executed and recorded on the 1st day of September, 1896, at which time the partition suit was pending, and to which Ponath, their grantor, was a party; and, if plaintiffs had desired to become parties to said suit, it was their privilege, under the statute, to have themselves so made, and, having failed to do so, they are in no position to complain. This was the course pursued by Louis Gloeckner, who claimed to have bought Ponath's interest in the property at sheriff's sale under execution. The statute provides

that a sale in partition "shall be a bar against all persons interested in such premises who shall have been parties to the proceeding and against all persons claiming from such parties, or either of them" (Rev. St. 1889, § 7169); and as plaintiffs claim under Ponath, who was a party to the partition suit, they are conclusively bound by the judgment therein. *Holladay v. Langford*, 87 Mo. 577; *Hart v. Steedman*, 98 Mo. 452, 11 S. W. 993. As plaintiffs failed to set up their rights in the partition suit, they are now precluded from asserting or setting up any interest or claim adverse to the interests of any and all persons claiming under the judgment in that suit.

With respect to the quitclaim deed of Meyer's interest from Strocher et al. to O'Connell, it is claimed by defendants that the recitals therein contained did not of themselves operate to divest the legal title to any of the remaining property out of Strocher, and to vest the legal title to any portion thereof in Ponath, so as to place him in the chain of title, and enable him to execute a legal conveyance, the record of which imparted constructive notice to the plaintiffs in the partition suit; that, while the recitals therein were "sufficient proof in writing of the trust," that proposition only makes the recitals evidence in a proceeding to prove and enforce the trust against the trustee and those having notice of the equities, and does not make the recitals, of themselves, to operate to divest the legal title out of Strocher and vest it in Ponath; that the legal title to the undivided interest not quitclaimed to O'Connell was not conveyed by, or diverted out of, Strocher, and vested in Ponath. There are no operative words of conveyance in the declaration of trust to pass the legal title to any interest in the property to Ponath, which were absolutely necessary to pass legal title; for there must be words used showing an intention to grant an estate, in order to pass title (*McKinney v. Settles*, 31 Mo. 541; *Lane v. Ewing*, Id. 86, 77 Am. Dec. 632), in the absence of which no legal title will pass; and, being not within the chain of title, it was insufficient to impart notice to a purchaser. No deed of conveyance or instrument of writing of any kind not within the line of the chain of title will impart notice to a purchaser. *Tydings v. Pitcher*, 82 Mo. 379. A purchaser is not to be charged with constructive notice of a deed simply because it is upon record, but, in order that he may be charged with such notice, it must be within the line of the chain of title.

There was no evidence that the plaintiffs in the partition suit had actual notice of the deed of trust by Ponath before the service of the summons on him in that suit. The judgment in that suit, which became final on the confirmation of the report of the commissioners, fixed the rights of the parties thereto, and is binding upon them, and

all persons claiming by, through, or under them.

The possession of the defendants of the property in question is not joint, but it is held in separate and distinct lots by the respective defendants. They were therefore improperly joined as defendants in this action.

Plaintiffs could only have recovered upon showing a legal title to all or some part of the land sued for, and, having failed to do so, the judgment must be affirmed. It is so ordered. All concur.

BURNHAM et al. v. BOYD et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

FRAUDULENT CONVEYANCES—SETTING ASIDE —PLEADING—EVIDENCE—SUFFICIENCY.

1. In a suit to set aside a conveyance as fraudulent, allegations that the deed was made to hinder and delay creditors, and was fraudulent, without specifications, are insufficient, and present no triable issue.

2. A father of a member of a firm executing a deed of trust to a bank, attacked as fraudulent, was indorser of the firm's paper to the bank. Previous to the trust deed, the firm conveyed the lands in the trust deed to such father to secure him for his indorsements, and he withheld the deed from record. The bank was informed that he was secured by deeds to the land. Before the execution of the trust deed the father reconveyed the lands to the firm, to enable it to secure the bank. On the day the trust deed was executed the firm made a chattel mortgage for the benefit of creditors, including the bank, and preferring it for the payment of a note not covered by the trust deed. The security given the bank was not out of proportion to the debt due the bank, and until a few days of the execution of the trust deed the bank believed the firm in good standing. After the execution of the trust deeds the bank gave the firm a written promise to extend the notes for two years on condition that the interest be promptly paid, but such memorandum was founded on no consideration. When the bank became uneasy about the debt, the cashier went to the firm, and, after examination of the firm's property, reached an agreement with the firm on Sunday, and the trust deeds were executed Monday morning, and were recorded at about 4 o'clock, when the cashier arrived at the county seat. Held insufficient to establish fraud warranting the setting aside of such trust deed as in fraud of creditors.

Appeal from circuit court, Greene county:
Jas. T. Neville, Judge.

Bill by James K. Burnham and others against T. J. Boyd and others. There was a decree for defendants, and plaintiffs appeal. Affirmed.

Ellis, Cook & Ellis and Karnes, New, Hall & Krauthoff, for appellants. Benj. C. Massey, for respondents.

VALLIANT, J. This is a suit in equity to set aside three deeds of trust given by defendant Boyd to secure certain indebtedness to defendant the Central National Bank of Springfield. The deeds convey to a trustee,

for this purpose, certain lands in Howell and Oregon counties. The plaintiffs are creditors of the firm of which Boyd is a member, and had, before filing this suit, brought suits against the firm on the debts due them respectively, and had sued out writs of attachment and attached the lands covered by these deeds of trust. The petition charges that the deeds were executed for the purpose of hindering and delaying the creditors of Boyd, and the bank knew it, and that since the execution of the deeds the bank has allowed them to be used to cover up the property of Boyd, and hinder his creditors, and has allowed him to use them to coerce his creditors into making unfair and unconscionable settlements. The only averment in the petition as of a fact to sustain the charge of fraud is that the pretended indebtedness which the deeds purport to have been executed to secure is fictitious and fraudulent. The answer denied all the allegations of fraud and fictitious indebtedness. The trial in the circuit court resulted in a finding and judgment for the defendants, and the plaintiffs appeal.

There was really no evidence to sustain the averment that the debt to the bank, or any part of it, was fictitious, and therefore the bill should have been dismissed for that reason. The allegations in the petition to the effect that the deeds were made by Boyd to hinder and delay his creditors, and that the bank allowed him to cover up his property by them, and coerce his creditors into unfair settlements, are mere charges without specifications, and present, in a suit of this kind, no triable issue. In a suit in equity to set aside a deed on the ground of fraud it is not sufficient to say in the petition that the deed was fraudulent, or that it was for the purpose of hindering and delaying creditors, or that it was suffered to be used for that purpose. To say that a deed is fraudulent, or that it was executed or used for a fraudulent purpose, is merely to characterize it, and, unless such characterization is accompanied with a statement of the facts that are supposed to constitute the fraud, it amounts to nothing in pleading. The evidence took a wider range than the pleadings in this case authorized, and it is upon points brought out in the evidence only that the assignment of errors is founded. It appeared in evidence that one J. J. Sitton, who was the father of one of the members of the firm of Boyd & Co., was indorser for the firm on a large part of the firm's paper held by the bank, and that a year or more before the deeds of trust in question were executed Boyd had conveyed these lands to Sitton to secure him for his indorsements. Sitton withheld his deed from record, and the evidence showed that he did so pursuant to an understanding with Boyd & Co. that the deed would not be recorded unless the financial conditions of the firm made it necessary

for Sitton's security. Counsel for appellants think the evidence shows that the bank was informed of this secret agreement to keep the deed off the record. The evidence on this point, to which the counsel refer in their statement, is in the testimony of the two Sittons, father and son. The father's testimony was: "Q. When did you first talk with the bank, or any representative of the defendant, about your being liable on those notes? A. Not until a few days before the assignment. Q. The first talk you had with them? A. Yes, sir. No, sir; I had a talk with them once before that,—in August prior. Q. In August, 1897? A. Yes, sir; I think I did. Q. Did you talk over the whole matter with them at that time? A. Yes, sir. Q. Did you tell them you were secured? A. Yes, sir." The son testified: "Q. You did not disclose to the wholesale houses at any time that your real estate had been deeded to your father, did you? A. No, sir. Q. You never told a single creditor of that fact? A. No. Q. You did not tell the bank even, did you? A. Yes. Q. Do you testify that you told the bank that,—Mr. McDaniel here? A. Yes, sir. Q. When did you tell him? A. I told him that at the time. Q. The time he signed the paper,—your father signed the paper? A. Yes, sir. Q. At the time he deeded it over? A. Yes, sir. Q. Your father and you had an agreement to keep it off the record? A. Yes, sir. Q. And did you tell Mr. McDaniel about that? A. I don't know about that." We do not think that in support of a charge of fraud anything more can be made out of that evidence than that the bank was informed that Sitton was secured by a deed to the land. But, even if the bank did know that the deed was being kept off the record, it was a matter in which it had no concern, and over which it had no control. Just before the execution of the deeds of trust in question Sitton reconveyed the lands to Boyd for the purpose of enabling him to thus secure the bank. On the same day these deeds of trust were executed, Boyd & Co. made a chattel deed of trust covering their entire stock of goods for the benefit of a large number of creditors, including this bank, and preferring the bank, providing first for the payment of a note due the bank, not covered by the other deeds of trust. Prior to that time Boyd & Co. had given the bank certain stocks as collateral for their notes it held. So that the bank was preferred above all other creditors upon all the available assets of the firm. But the security given was not out of proportion to the amount of the debt due the bank. Up to within a few days of the execution of the deeds of trust in suit the bank people believed the firm to be in good condition. The members of the firm so represented its condition, and stated that their commercial rating was \$120,000. The amount owing the bank at this time was about \$35,400, of

which about \$24,400 was covered by the deeds of trust in suit, the land being worth about \$20,000, and previously incumbered for about \$5,000. The stock of goods sold under the chattel mortgage for somewhat over \$4,000, which reduced the bank's debt that much. The collaterals previously given to the bank were not out of proportion to the debt of the bank not covered by the deeds of trust. It was also shown in evidence that shortly after the execution of the deeds of trust in suit the bank gave Boyd & Co. a written promise to extend the notes covered by the deeds of trust from time to time for two years on condition that the interest should be promptly paid; that the farms be kept up in good condition,—not suffered to run down,—and the taxes promptly paid. If that fact is what the plaintiffs had in mind when they charged in general terms in their petition that the deeds of trust were made to delay the creditors of Boyd & Co., and that the bank has since permitted the deeds to be used for that purpose, they should have stated the fact in their petition, so that issue could have been joined on it. But no such issue was tendered. The evidence, however, does not show that the deeds of trust were executed upon any such condition. It shows that the subject of extensions was mentioned, and, although no such agreement was made at the time, yet Boyd & Co. trusted that the bank would give them time, and the bank expected to do so. The memorandum given by the bank afterwards evidenced a mere voluntary indulgence, which did not affect the security, and was supported by no consideration, the conditions expressed being only a performance of obligations already existing. It was no legal obstacle in the way of any other creditor who might have chosen to pay the bank's debt and be subrogated to its rights under the deeds of trust. *Harburg v. Kumpf*, 151 Mo. 13, 52 S. W. 19.

The unusual hour at which the deeds were executed and the haste with which they were filed for record are mentioned as indications of fraud. It seems that after the bank became uneasy about its debt the cashier went to Thayer, which is the town where Boyd & Co. were doing business, to look into their affairs, and got the debt secured. Several days were consumed in examinations of property and discussing the situation. The terms were reached on Sunday, but the parties waited until 1 o'clock Monday morning to execute the deeds, and, as soon as they were delivered, McDaniel, the cashier, started for Alton, the county seat of Oregon county, with the deed to the land in that county, and upon arriving there aroused the clerk at 4 o'clock in the morning, and filed the deed for record at that hour, and immediately started to return to Thayer. The Howell county deed was filed at 8 o'clock the same morning. Unaccompanied by any other fact indicating fraud, we can see no ele-

ment of fraud in that conduct. Under the pleadings and evidence the circuit court could have reached no other conclusion than it did.

The judgment is affirmed. All concur.

NAGEL et al. v. LINDELL RY. CO. et al.
(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

STREET RAILROADS—CONSTRUCTION OF ROAD—ORDINANCE—FRAUD IN PASSAGE—RIGHTS OF ABUTTING PROPERTY OWNER—DAMAGE—INJUNCTION—PETITION—SUFFICIENCY—ALLEGATION OF FRAUD.

1. A petition in a suit against three street railroad companies to enjoin them from laying their tracks in a street, which alleges that the ordinance authorizing the construction of the road was obtained by fraud of the defendants, their agents, servants, and attorneys, in bribing aldermen, councilmen, and members of the municipal assembly by paying or promising to pay money, stocks, bonds, or privileges to such officers, is uncertain and insufficient in failing to specifically state the acts constituting the fraud.

2. A demurrer to the petition does not admit the truth of such allegation, as the allegation does not state a traversable fact, and a demurrer only admits facts which are well pleaded.

3. An allegation, in a petition to restrain a street railway company from laying double tracks in a street, that it is a narrow street, and that such tracks will greatly impair its usefulness in not leaving room between the tracks and curb for wagons to pass, is a mere conclusion, and insufficient to show a use of the street which will practically destroy it as a highway, and authorize an injunction to restrain the railroad's construction.

4. Rev. St. 1890, § 1825, requiring street railroad corporations, before taking or damaging any property in the construction of their railroads, to determine and pay the damages caused to the owners of real or personal property, does not give a right to damages not existing before the passage of the act, and a property owner is only entitled to damages which are peculiar to his property, and not common to all abutting owners.

5. The act of a street railroad company in tearing up the street preparatory to building its road, and piling ties and rails in the street, being a necessary incident to the construction of the road, is not such a damage to an abutting property owner as will authorize an injunction to restrain the construction of the road.

Appeal from St. Louis circuit court; Wm. Zachritz, Judge.

Injunction by Frank A. Nagel and others against the Lindell Railway Company and others. From a judgment in favor of the defendants, plaintiff Barr appeals. Affirmed.

This is a suit in equity, aiming to enjoin the defendants from constructing a street railway in Hamilton avenue in St. Louis. The circuit court sustained a demurrer to the petition, and, the plaintiffs declining to plead further, the court rendered judgment for defendants, from which one of the plaintiffs appeal. The petition states substantially that the plaintiffs severally own lots in the city fronting Hamilton avenue, which is one of the public streets of the city, and that defendants, who are three street rail-

way corporations and their officers, are about to construct a double-track railway through Hamilton avenue under authority of a certain ordinance of the municipal assembly approved October 28, 1898, being No. 19,429, and which is set out by literal copy in the petition. Without here copying the ordinance, which is very long, it is sufficient for the purposes of this case to say that it confers the authority to do what the petition states the defendants are about to do, provided the ordinance is valid, and provided the defendants have not omitted to perform some duty they owe to the plaintiffs preliminary to entering upon the work. The petition charges that the ordinance is illegal and void because it was "fraudulently and corruptly passed by the municipal assembly of said city by reason of said defendants, their agents, servants, and attorneys, corruptly bribing and paying the city aldermen, councilmen, and members of the municipal assembly large sums of money, or promising to pay the aldermen, councilmen, and members of the municipal assembly of the said city of St. Louis stocks, bonds, privileges, and large sums of money, to vote for said pretended franchise and ordinance." The petition states that, acting under that ordinance, the defendants; or one of them, has "unlawfully and forcibly entered, or is about to unlawfully and forcibly enter, in and upon said Hamilton avenue, adjacent to and in front of the said real-estate property of plaintiffs, above described, for the purposes of constructing and operating a street railway in and upon the said Hamilton avenue, and have hauled and deposited rails and ties, or are about to deposit rails and ties, upon the surface, and have dug up or are about to dig up the surface and tear up and remove the paving from said Hamilton avenue, and are now or about to engage in making excavation in said Hamilton avenue, and have or are about or threaten to occupy and obstruct said avenue with horses, men, timbers, street car tracks, street cars, electric wires, and poles, and other obstructions so as to temporarily prevent and permanently impair the use of said Hamilton avenue as a public thoroughfare, thereby preventing these plaintiffs from going to and from their respective real-estate property over and along said Hamilton avenue, and thereby greatly depreciating the value and damaging their respective real-estate property and their personal property, to the great and irreparable injury to plaintiffs' said property; that where said Hamilton avenue adjoins plaintiffs' property it is also a narrow street, and to build a double street car track thereon will greatly impair its usefulness, there not being room between the curbing and street car tracks for buggies and wagons to pass." Petitioners aver that it was the duty of the defendants before damaging plaintiffs' property to ascertain the amount of the damage, and pay it; but that they have not done so, nor

agreed with plaintiffs in relation to the damage, and no proceedings have been instituted to assess the compensation to be paid plaintiffs for the injury threatened. The prayer of the petition is that the ordinance be declared null and void, and defendants be perpetually enjoined from constructing and operating the street railroad so projected through Hamilton avenue.

Sterling P. Bond, for appellant. Boyle, Priest & Lehmann and Geo. W. Easley, for respondents.

VALLIANT, J. (after stating the facts).

1. A mere charge of fraud, without specification of the act or acts which constitute the alleged fraud, amounts to nothing in pleading, and would be stricken out on motion. We have said this so often that it would seem useless to cite authorities to support it. *Bank v. Rohrer*, 138 Mo. 369, 39 S. W. 1047; *Goodson v. Goodson*, 140 Mo. 208, 41 S. W. 787; *Burnham v. Boyd*, 66 S. W. 1088; *Wood v. Carpenter* (not yet officially reported) 66 S. W. 172; 9 *Enc. Pl. & Prac.* p. 683. The petition charges that the municipal assembly was corrupted by bribery, but it does not state who was the briber, nor who the bribed. There are three corporations involved, two of which, according to the petition, acquired their interests after the franchise had been granted. Whether it is intended to include them in the charge is not clear. "Their agents, servants, and attorneys" designates a large and unknown class. "The aldermen, councilmen, and members of the municipal assembly" covers a large number of officials in general, but points to no one in particular. Paying or promising to pay "stocks, bonds, privileges, and large sums of money to vote for said pretended franchise and ordinance" is as vague and uncertain as language could make the charge. There is no statement as of a fact which could be traversed; there is no issue tendered. A demurrer admits only facts well pleaded. It does not admit a mere characterization, which is all there is of the charge of fraud in this petition.

2. In *Lockwood v. Railroad Co.*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547, this court decided that the city of St. Louis could not grant to a railroad company a license to so use a street as to practically destroy it as a highway for the general public. Whilst recognizing the authority in the city to permit a railroad company to occupy the street along with the public, it was decided that such permission could not be given to occupy it to the exclusion of the public; and, the facts in that case showing that the use threatened by the railroad would practically exclude the public from the street, an injunction was granted at the suit of an abutting property owner. The same doctrine was announced in *Schulenberg & Boeckeler Lumber Co. v. St. Louis, K. &*

N. W. R. Co., 129 Mo. 455, 31 S. W. 796, and *Sherlock v. Railway Co.*, 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551. The plaintiffs seek to bring their case within the law as declared in those cases, but their petition fails to show a similar condition. In the first of those cases it was shown that the street was only 24 feet wide from curb to curb, and in that space, in front of the plaintiff's property, the defendant had laid double tracks for its steam railroad. In the second the street was occupied by four tracks of two steam railroads, and the defendant was about to occupy the sidewalk with other tracks in front of the plaintiff's property. In the third case there was a steam railroad about to be laid along an alley 16 feet wide. In the case at bar we have a street railroad to be laid along the surface, which in itself is not inconsistent with the use of the street at the same time by the general public. The width of Hamilton avenue is not stated in the petition. The statement is, "It is also a narrow street, and to build a double street car track thereon will greatly impair its usefulness, there not being room between the curbing and the street car tracks for buggies and wagons to pass." That is the statement of a mere conclusion, and we are unable to judge of its correctness as an opinion without knowing the width of the street or the distance between the track and the curb. Section 1825, Rev. St. 1889, which was in force when this controversy arose, is in reference to building street railroads under license from the city, and contains this clause: "Before taking or damaging any property in the construction of a railroad under such franchise, said corporation shall cause to be ascertained and determined the damages that will be done by the building and operation of such railroad, to the real and personal property situated on the route fixed by the ordinance defining such franchise, and shall pay to the owner or owners of the real and personal property so affected, or into court for them, the amount of their respective damages." It is contended on the part of appellants that this statute gives them a right to recover damages where none existed before. That view of the effect of this statute was urged with great force by learned counsel in *Ruckert v. Railroad Co.* (Mo.) 63 S. W. 814, but, after a careful consideration of the subject, this court came to the conclusion that that was not the correct meaning of the statute, and we are satisfied with the decision in that case. The opinion by Gantt, J., shows that, in conformity with the uniform rulings of this court both before and after the adoption of the present constitution, the damages to be ascertained and paid as contemplated in that statute were those peculiar to the plaintiff,—"different in kind, and not merely in degree, from those suffered by other members of the community." It was also shown in that opinion that it has long been the law of

this state that "the laying of a railroad track pursuant to authority granted by the city or the established grade of a street did not subject the street to a servitude different from that which was contemplated in the original dedication, and the damage to an abutting owner resulting from such use of the street was *damnum absque injuria*." That is the doctrine in this state to-day, subject to the qualifications pointed out in *Lockwood v. Railroad Co.*, *Schulenberg & Boeckeler Lumber Co. v. St. Louis, K. & N. W. R. Co.*, and *Sherlock v. Railway Co.*, supra. The plaintiffs, in their petition, do not show that they have suffered or will suffer any damage peculiar to themselves. They do say that the defendants, preparatory to constructing the railroad, are depositing rails and ties, and are tearing up the street and obstructing its use, etc., and "thereby preventing these plaintiffs from going to and from their respective real-estate property over and along said Hamilton avenue," etc. But those statements relate to the inconvenience resulting in the necessary work of construction, and are such as result in every street reconstruction. The damage resulting from the condition does not entitle the plaintiffs to an injunction of the kind sought in this suit.

The demurrer to the petition was properly sustained, and the judgment is affirmed. All concur.

TINDALL et al. v. TINDALL et al.
(Supreme Court of Missouri, Division No. 1.
Feb. 19, 1902.)

**DEEDS—CONSTRUCTION—ESTATE CONVEYED—
VESTED REMAINDER.**

The granting clause of a deed to grantor's daughter was expressed to be to her "for and during her natural life, and then to the issue of her body, forever," and the land was not "to be in any manner subject to the disposition" of her husband. In case she died "without leaving issue living at her death," it was to descend to her heirs at law, and not to her husband or his heirs. The habendum was, "Unto her, the said L., and to her sole use and benefit for and during her natural life, and to the issue of her body forever after." Held, that her children took thereby a vested remainder in fee simple in the land conveyed.

Appeal from circuit court, Howard county; Jno. A. Hockaday, Judge.

Partition by Jefferson W. Tindall and others against N. C. Tindall and others. From the judgment, plaintiffs appeal. Affirmed.

R. C. Clark and W. M. Williams, for appellants. Thos. Shackelford, C. B. Crawley, and A. W. Walker, for respondents.

BRACE, P. J. This is an appeal from a judgment of the Howard county circuit court in partition, upon an agreed case. All parties claim under a deed executed by Jere Kingsbury on the 19th of August, 1844, which is as follows: "This indenture, made and entered into on this nineteenth day of August

in the year of our Lord one thousand eight hundred and forty-four, between Jere Kingsbury, of the county of Howard and state of Missouri, of the one part, and his daughter, Lusina Tindall, wife of Cordy Tindall, of the same place, of the other part, witnesseth, that the said Jere Kingsbury, for and in consideration of the natural love and affection which he bears for his said daughter, Lusina Tindall, and for the further consideration of one dollar to him in hand paid by her, the said Lusina, at and before the sealing of these presents, the receipt whereof is hereby acknowledged, has this day given, granted, bargained, and sold, and does by these presents give, grant, bargain and sell unto her, the said Lusina, for and during her natural life, and then to the issue of her body, forever, the following described tracts or parcels of land, but not to be in any manner subject to the disposition of her said husband, to wit: The southwest quarter of the east half of the northwest quarter of section twenty-nine, township fifty, in range sixteen, in Howard county, in the state of Missouri, valued at \$2,000.00; and in case she, the said Lusina Tindall, shall depart this life without leaving issue living at her death, then the said tracts or parcels of land to descend to her heirs at law, and not to the said Cordy Tindall or his heirs. To have and to hold the above-described tracts or parcels of land, together with all their appurtenances thereunto belonging or in any wise appertaining, unto her, the said Lusina, and to her sole use and benefit, for and during her natural life, and to the issue of her body forever after. And the said Jere Kingsbury doth further, for himself, his heirs, executors, or administrators, further covenant to and with the said Lusina, and the issue of her body, forever, to warrant and defend the title to the above-described tracts or parcels of land free from the claim or claims of all and every person or persons, claiming by, through, from, or under them, the said Jere Kingsbury, or any other person or persons, bodies corporate or political, whatsoever." At the time of the execution of the deed the said Lusina Tindall had no children. Subsequently she had five, viz., Henry C. Tindall, Sr., M. K. Tindall, M. F. Tindall, N. C. Tindall, and Lucy Tindall. In August, 1855, Lucy Tindall died, and in May, 1883, M. K. Tindall died, both without issue. In 1894 Henry C. Tindall, Sr., died, leaving six children, viz., Mary L., Jefferson W., Josephine, Jackson C., Leona, and Henry C. Tindall, Jr.; and in August, 1898, the said Lusina Tindall died. On the 4th of March, 1893, the said Henry C. Tindall, Sr., conveyed "an undivided third interest" in said real estate in trust for the benefit of the said N. C. Tindall, which deed of trust was duly foreclosed on the 7th of November, 1898, and N. C. Tindall became the purchaser thereof, and received a deed therefor, by which he acquired the interest thus conveyed by the

said Henry C. Tindall, Sr.; and afterwards, on the 1st of December, 1898, by quitclaim deed, he acquired all the interest of the said Josephine and Jackson C. Tindall in said real estate. The said Jefferson W., Mary Lula, Leona, and Henry C. Tindall, Jr., four of the children of the said Henry C. Tindall, Sr., deceased, are the plaintiffs in this case; and the said N. C. Tindall, M. F. Tindall, and the other two children of the said Henry C. Tindall, Sr., deceased, viz., Josephine and Jackson C. Tindall, are the defendants. The court found that the plaintiffs and the said defendants, Josephine and Jackson C. Tindall, have no interest in said real estate, and that N. C. Tindall is entitled to two-thirds, and M. F. Tindall to one-third, thereof, and decreed partition accordingly, from which decree plaintiffs appeal.

The construction of the deed of Jere Kingsbury presents the only question for determination on this appeal. The modern doctrine is that in deeds, as well as in wills, the intention of the maker, as manifested in the instrument itself, is to be effectuated, unless in contravention of some positive rule of law. *Waddell v. Waddell*, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575; *Long v. Timms*, 107 Mo. 512, 17 S. W. 898; *Carr v. Lackland*, 112 Mo. 442, 20 S. W. 624. The general purpose manifested on the face of the deed is to give the land to his daughter and her children, should she have any, and to exclude her husband and his heirs from ever having any interest therein. To accomplish this purpose, the grant is "to the said Lusina for and during her natural life, and then to the issue of her body, forever," "but not to be in any manner subject to the disposition of her said husband"; "and in case she, the said Lusina Tindall, shall depart this life without leaving issue living at her death, then said tracts or parcels of land to descend to her heirs at law, and not to the said Cordy Tindall or his heirs." *Habendum*: "Unto her, the said Lusina, and to her sole use and benefit, for and during her natural life, and to the issue of her body forever after." Practically, this is a conveyance to Lusina of a separate estate in fee simple in the event she has no issue, and of an estate for life only if she have issue; remainder in fee to such issue. The said Lusina having no children at the time the deed was made, the remainder to her issue was then contingent. In due course thereafter children were born to her. The contingency contemplated in the deed happened, and the remainder theretofore contingent became a vested remainder. "Whatever may be the distinction between vested and contingent remainders, so long as they remain such, the moment the contingency happens on which a remainder depends it becomes a vested one, with the qualities and incidents of such a remainder. Thus, upon the grant of an estate to A., with remainder to his children, he having none at the time, the remainder will, of course, be a contingent

one; but, the moment he has a child born, the remainder becomes vested as fully as if it had originally been limited to a living child." 2 Washb. Real Prop. (5th Ed.) p. 603, § 2d. The law favors vested estates, and the rule is that estates shall be held to vest at the earliest possible period, unless a contrary intention is clearly manifested in the grant. *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 809; *Amos v. Amos*, 117 Ind. 19, 19 N. E. 539. "An estate is vested when there is an immediate right of present enjoyment, or a present, fixed right of future enjoyment. * * * The law favors vested estates, and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested. A grant to A. for life, remainder to B. and the heirs of his body, is a vested remainder; and yet it is uncertain whether B. may not die without heirs of his body before the death of A., and so the remainder never take effect in possession. Every remainder-man may die, and without issue, before the death of the tenant for life. It is the present capacity of taking effect in possession if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder." 4 Kent, Comm. (14th Ed.) p. *203. See, also, *Jones v. Waters*, 17 Mo. 587; *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395; *Byrne v. France*, 131 Mo. 639, 83 S. W. 173.

Applying these principles to the deed in question, the remainder in fee thereby created vested, when a child was born to the said Lusina, such child was "issue of her body," to whom the grantor directed the land to go "forever," i. e., in fee simple. Such child had a present capacity to take whenever the life estate might thereafter be determined, and did take as soon as born, unless a contrary intention clearly appears on the face of the deed. The use of the word "then" in the granting clause manifests no such intention, such words in such connection make no contingency. They relate to the time of the enjoyment of the estate, and not to the time of the vesting of the interest. *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395; *Doe v. Considine*, 6 Wall. 475, 18 L. Ed. 869, and cases in note. This construction is further re-enforced in this deed by the habendum clause, which was to the said Lusina "for and during her natural life, and to the issue of her body forever after." The only doubt as to this construction is raised by the clause providing for the descent of the fee to her heirs at law in case Lusina died without issue living at her death. Taking the whole deed together, we do not think that the grantor by this clause intended

to make the death of Lusina the contingency upon which the remainder should vest, but thereby attempted to provide for the contingency of the remainder never vesting. The mind of the grantor in this clause was not occupied with the extent of the estate just granted, but with a contingency which he thought might arise from his grant not taking effect as he had made it. This clause was evidently begotten by the grantor's anxiety to exclude the husband and his heirs from ever having any interest in the premises, and was not intended as a limitation on the remainder granted to the issue of the daughter. Any doubt raised by its phraseology ought to be resolved in favor of a vested estate. *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395; *Bredell v. Collier*, 40 Mo. 287. Hence we conclude that the remainder in fee simple created by the deed vested in the first child born to Lusina after the deed was made, as constituting the class therein named, which class opened up and admitted each of her other children born thereafter. *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065, 99 Am. St. Rep. 625; *Waddell v. Waddell*, 20 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575. And it follows that the said Henry C. Tindall, Sr., at the time of the execution of the deed of trust aforesaid, had a vested remainder in fee simple in said real estate, which passed by said deed, and became vested in the said N. C. Tindall, and the said N. C. Tindall, and not the children of the said Henry C. Tindall, Sr., is entitled to the share of the said Henry C. Tindall, Sr., in the said real estate. The plaintiffs, four children of said Henry C. Tindall, Sr., each claimed an undivided one-sixth of his said share in said real estate; and, in addition to the facts, it was further agreed as follows: "It is agreed to submit to the court this case on the above agreed statement of facts, for the court to determine whether the said N. C. Tindall is entitled to the shares claimed by plaintiffs, or whether plaintiffs are entitled to the same, and the decision of the court shall settle the final rights of the parties, and judgment be rendered accordingly, if the court shall find that N. C. Tindall is entitled to the shares claimed by plaintiffs; but, if the court finds that plaintiffs are the owners of the same, then a decree of partition may be had on the basis of M. F. Tindall one-third, N. C. Tindall one-third and two-sixths of one-third, and to each of the plaintiffs one-sixth of one-third."

The court having correctly found, as we have seen, that N. C. Tindall, and not the plaintiffs, is entitled to the interest in the real estate claimed by them, and decreed partition accordingly, its judgment should be affirmed, and it is accordingly so ordered. All concur.

RAILROAD COMMISSION OF TEXAS v. WELD et al.

(Supreme Court of Texas. March 10, 1902.)

RAILROAD COMMISSION — REGULATION OF FREIGHT RATES—ACTION TO ANNUL DECISION—JUDGMENT—FINALITY FOR PURPOSE OF APPEAL.

Rev. St. art. 4564, permits the enforcement of rates, charges, etc., prescribed by the railroad commission, until finally found to be unjust in a direct action brought for that purpose under the two following articles, where-in the only issue to be determined is the reasonableness and justice of the decision of the commission as to any rate, classification, regulation, etc. *Held*, that a judgment in an action brought thereunder by a person dissatisfied with a decision of the commission, which only found that a certain regulation of freight rates by it, and its refusal to establish a different rate, was unjust and unreasonable, but which did not accord relief otherwise to plaintiff, was a final judgment, from which an appeal could be taken.

Error to court of civil appeals of Third supreme judicial district.

Action by Weld & Neville and others against the railroad commission of Texas. From a judgment for plaintiffs, defendant appealed to the court of civil appeals. The appeal was dismissed (86 S. W. 122), and defendant appeals. Reversed.

C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for plaintiff in error. Gregory & Batts and Hutcheson, Campbell & Hutcheson, for defendants in error.

BROWN, J. Under articles 4565 and 4566 of the Revised Statutes, Weld & Neville, and others not necessary to name, instituted this suit in the district court of the Twenty-sixth district, Travis county, against the railroad commission of Texas, to have certain rates fixed by the commission, and certain orders, rules, and regulations adopted by it in reference to the shipment of cotton declared to be unreasonable and unjust as to the petitioners. A very brief statement of the case will be sufficient for the decision of the question presented by this writ of error.

The plaintiffs' petition is elaborate in its allegations, of which we give the following summary: It is alleged that the railroad commission established and promulgated a rate and certain rules and regulations for the transportation of cotton upon railroads within this state, which rules and regulations were particularly set out by the petitioners, and, among others, it was alleged that upon cotton compressed to a density of 22 pounds to the solid foot the said regulations provided for a reduction in the rate of charges allowed to railroad companies for transportation, and provided for compression of cotton before shipment, with specific provisions governing the compressing of it. It is alleged that the regulations were made with reference to the system of compressing and handling cotton which was then and had

been long in vogue in the state of Texas, of which method specific details are given, and its disadvantages alleged. Plaintiffs alleged that they are interested in one of several improved and economical methods of handling cotton which had been put into successful operation in the state of Texas, in which they used the Lowry press, which the petition describes particularly, showing its supposed advantages in preparing the cotton for shipment in many respects. It is alleged that the annual crop of cotton in Texas is about 3,000,000 bales, and the petition sets out with particularity the difficulties, expenses, and delays which prevailed in the transportation of cotton prepared under the old methods, and attempts to show the advantages of the Lowry system over that formerly in use. It is charged that the rates of freight allowed to the railroad companies for the transportation of cotton when the density of the bale is 40 pounds or more to the solid foot, and the rules and regulations governing the same, are unreasonable and unjust as to plaintiffs, who applied to the railroad commission to reduce the rate on cotton compressed at the gin to a density of 40 or more pounds to the solid foot, which the commission refused to do, and it is alleged that the order by which they refused to comply with the request is unjust and unreasonable as to the petitioners. The petition prays for relief upon the several points alleged, and asks that the commission be required to establish reasonable rates. It is unnecessary to set out the answer of the defendant, which consisted of general demurrer, special exceptions, general denial, and special answers. The case was submitted to the judge without a jury, and upon hearing the testimony the following judgment was entered, omitting that portion which states the ruling of the court upon questions of law raised by the demurrers and exceptions: "And on the 13th day of June, 1901, the court, having fully considered the matters of law, as well as of fact, is of the opinion that the law and the facts are with the plaintiffs. It is therefore adjudged by the court that the present classifications and freight rates established by defendant applicable to transportation of cotton, whereby the same rate of freight is required to be charged and paid for transportation on the various railroads in this state on cotton in round bales, eighteen inches in diameter, thirty-six inches in length, and weighing two hundred and forty pounds or over per bale, and having a density of forty pounds or over to the cubic foot, and of cotton in bales of the ordinary form, compressed to a density of twenty-two and one-half pounds to the cubic foot, are, as to the plaintiffs Dorance, Cairns & Co., a partnership composed of J. M. Dorance and A. C. Cairns; Hasler & Boyd, a partnership composed of S. O. Hasler and W. W. Boyd; D. M. Howard; T. G. Cole; Weld & Neville, a

partnership composed of Stephen M. Weld, Chas. W. Ide, George W. Neville, Alfred R. Weld, Edward M. Weld, and James F. McGowan; Hillsboro Gin Company; Peoria Gin Company; Clemma Gin Company; and Wharton Gin & Milling Company,—unjust and unreasonable. It is further adjudged by the court that the refusal, on December 17, 1900, by defendant, to establish a different and lower rate of freight on cotton in such round bales, of the dimensions and density aforesaid, for transportation of the same on the various railroads in this state, than the rate established and required to be paid for such transportation on cotton in bales of ordinary form, compressed to a density of twenty-two and one-half pounds to the cubic foot, is and was, as to plaintiffs, unjust and unreasonable. It is further adjudged by the court that none of the reasons assigned by defendant in its refusal of December 17, 1900, to establish a different and lower freight rate on cotton in round bales and of the dimensions and density aforesaid than on cotton in bales of the ordinary form, compressed to a density of twenty-two and one-half pounds to the cubic foot, could properly be taken into consideration by defendant in determining the question of a proper classification of and proper freight rate on such round bales. It is further considered and ordered by the court that the plaintiffs, Durance, Cairns & Company, Hasler & Boyd, D. M. Howard, T. G. Cole, Weld & Neville, Peoria Gin Company, Clemma Gin Company, Hillsboro Gin Company, and Wharton Gin & Milling Company, do have and recover of and from the railroad commission of Texas all the costs of this suit." From this judgment the railroad commission appealed to the court of civil appeals for the Third district, which appeal was dismissed because the judgment entered by the district court was not a final judgment from which an appeal would lie. 66 S. W. 122.

The law which created the railroad commission of Texas is based upon article 10, § 2, of the constitution of Texas, which reads as follows: "Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways and railroad companies common carriers. The legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties, and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable." The law was passed and its enforcement was intrusted to the railroad commission, with powers expressed by the following article of the Revised Statutes:

"Art. 4562. The power and authority is

hereby vested in the railroad commission of Texas, and it is hereby made its duty to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as by this chapter prescribed through proper courts having jurisdiction. (1) The said commission shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this state into such general and special classes or subdivisions as may be found necessary and expedient. (2) The commission shall have power, and it shall be its duty, to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this chapter for the transportation of each of said classes and subdivisions."

To support the rates, charges, orders, rules, regulations, and classifications which the railroad commission should make under the authority conferred, the law provided as follows:

"Art. 4564. In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said commission before the institution of such action shall be held conclusive and deemed and accepted to be reasonable, fair and just, and in all such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by articles 4565 and 4566 of this chapter."

This article denied to railroad companies and other persons interested the right to question the validity and justice of the rates, etc., that the commission should make in any suits between individuals and the railroads, because such course would have involved every action in the complications of making rates and would practically have denied redress. In order to secure a proper revision and correction by judicial proceeding of any wrong that might be done to shippers or railroads, the legislature enacted articles 4565 and 4566, as follows:

"Art 4565. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification or order, or to either or all of them; in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be

tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: provided, that if the court be in session at the time such right of action accrued, the suit may be filed during such term and stand ready for trial after ten days' notice.

"Art. 4566. In all trials under the foregoing article, the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

These articles provide an expeditious method for determining the reasonableness and justice of any rate, order, rule, or regulation which the commission might make, and at the same time permit the enforcement of the rates, etc., until the judgment of a court declaring them to be unjust and unreasonable has been rendered.

This action was brought under articles 4565 and 4566, above quoted, and the court was therefore confined to the provisions of those articles in entering its judgment and granting relief. The only issue which was presented in this suit was, are the rates, rules, and orders put in question by the pleading, as applied to the character of shipments alleged in the pleadings, unjust and unreasonable? The jurisdiction of the court is limited to the determination of that issue.

There can be no difference of opinion as to the legal proposition that a judgment which terminates the action in which it is rendered, and completely disposes of the case as to all the parties, so far as the court has power to do so, is a final judgment. 1 Freem. Judgm. § 34; 1 Black, Judgm. § 21; Gulf, C. & S. F. Ry. Co. v. Ft. Worth & N. O. Ry. Co., 68 Tex. 108, 2 S. W. 199, 3 S. W. 564; Belt v. Davis, 1 Cal. 139; Merle v. Andrews, 4 Tex. 200; McFarland v. Hall's Heirs, 17 Tex. 690.

The subject-matter of litigation in this case was fully disposed of by the judgment of the court when it was found that the rates and rulings complained of were, as to the plaintiffs in that case, unjust and unreasonable. Whatever may be the legal effect of the judgment, the court was not required to enforce it in this suit. If the court had the authority to enforce the judgment, it refused to do so, and that would make it final.

In the case of Belt v. Davis, before cited, a suit was brought to set aside a judgment entered in a former suit, and upon a hearing the court simply entered the order setting the judgment aside and granting a new trial. The objection was made that this was not a final judgment, upon which the

court said: "The whole scope and object of the suit, therefore, is to vacate the judgment, and procure a new trial, and whether this should or should not be done is the point upon which the issue of the parties is made up. That issue has been finally and definitively determined by the district court, and there is consequently no further judgment to be rendered in the suit. This particular cause is completely at an end, and, whether the judgment be affirmed or reversed, nothing more remains for the district court to do in this suit but to issue execution against the unsuccessful party for the costs." This case announces very clearly the true doctrine upon this question. Under our practice, that would not be a final judgment, because another trial would occur in the same suit. But the case illustrates the rule that the judgment need not dispose of or determine the rights of the parties in the subject of litigation.

The case of McFarland v. Hall's Heirs, cited above,—a suit for partition of land,—is well in point. The trial court ascertained the rights of the parties in the subject-matter, but did not declare the legal consequences by divesting and vesting title. It was contended that the judgment was not final, but this court held the judgment to be final, and entertained the appeal. The court said: "The principal question upon this appeal is whether the decree of the 12th of October, 1854, was final and conclusive of the matters therein adjudicated. It certainly determined all the issues of fact raised by the pleadings. It distinctly ascertained and adjudicated the rights of the parties, and settled definitively their respective interests in the subject-matter of the suit. It put an end to all matter in litigation in the case. After it was rendered, nothing remained but to carry it into effect or execute the judgment of the court. This would seem to bring it within the legal definition of a final judgment."

We are of opinion that the judgment of the district court is a final judgment, and fully disposes of the rights of the parties in this suit, and that the court of civil appeals erred in dismissing the appeal from the said judgment. It is therefore ordered that the judgment of the court of civil appeals, dismissing the said appeal, be, and the same is hereby, reversed, and this cause is remanded to the said court of civil appeals of the Third supreme judicial district for further proceedings herein.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 26, 1902.)

BREACH OF THE PEACE—LANGUAGE PROVOKING DIFFICULTY.

Evidence that defendant called witness a God damn liar was sufficient to justify a con-

viction of breach of the peace in using language calculated to bring on a difficulty.

Appeal from Foard county court; Geo. Burke, Judge.

Will Johnson was convicted of breach of the peace, and appeals. Affirmed.

F. P. McGhee, for appellant. Robert Cole, Co. Atty., and Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of a breach of the peace, and his punishment assessed at a fine of \$5. The trouble in which defendant is charged with using language calculated to bring on a difficulty was in regard to the failure of Moyer to settle for a meal at the hotel, and it occurred at a livery stable. Moyer remarked to Whittenberg, inside the stable, that defendant had lied in regard to the matter. Whittenberg challenged him to make the statement in the presence of defendant. They walked outside the stable, where defendant was, and Moyer denied the statement of defendant, whereupon defendant called him a "God damn liar," and Moyer struck at him with a rake. Defendant retreated. This is practically the state's case. Defendant denies having used the imputed language, and states that Moyer called him a "damn liar." This brought about a square issue of fact. If defendant used the language imputed to him, as testified by Moyer, the jury were justified in their verdict. They seem to have so believed, and found appellant guilty.

The judgment is affirmed.

DODSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 26, 1902.)

COMPLAINT AND INFORMATION—SUFFICIENCY—INDISTINCT WRITING.

Where a complaint was against George D., the information was not insufficient because the letter "D" was not completely made, owing to failure of the ink to trace a portion of it.

Appeal from Parker county court; D. M. Alexander, Special Judge.

George Dodson was convicted of an aggravated assault, and appeals. Affirmed.

Martin & Martin, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$25 and 30 days' confinement in the county jail. Motion in arrest of judgment was made upon the ground that defendant's name in the information is not written "George Dodson," as it was in the complaint; that the letter intended for "D" at the beginning of the name "Dodson" was not a "D"; and for our inspection the original complaint has been forwarded, and is before us. It occurs to us that this is without merit. While the "D"

is not completely made, this seems to have been a failure of the ink to trace a portion of the "D," as an inspection of the original information indicates. We think the information is sufficiently certain as to the name "Dodson." This being the only question, we find no error in the record, and the judgment is affirmed.

GARZA et al. v. STATE.

(Court of Criminal Appeals of Texas. Feb. 26, 1902.)

CRIMINAL LAW—DEPOSITIONS OF STATE'S WITNESSES—GENERAL VERDICT AGAINST SEVERAL DEFENDANTS—SUFFICIENCY—CONDUCT OF DISTRICT ATTORNEY—BILL OF EXCEPTIONS—EVIDENCE.

1. The state in a criminal prosecution is not authorized to introduce in evidence the deposition of a witness.

2. A verdict finding several defendants guilty as charged in an indictment, and assessing their punishment in the penitentiary, is a separate verdict as to each, authorizing a judgment of imprisonment against each.

3. The court on appeal will not consider the propriety of the remarks of the district attorney, where such remarks are not verified by bill of exceptions, but simply stated as a ground in the motion for a new trial.

4. Where the evidence established that all the cattle in a certain pasture were the property of a particular person, proof that other persons took the calves of the cows in such pasture, and threatened the witnesses to such taking, makes out a case of theft.

Appeal from district court, Nueces county; Stanley Welch, Judge.

Alejos Garza and others were convicted of cattle theft, and appeal. Affirmed.

R. B. Creager, for appellants. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellants, Alejos Garza, Manuel Dominguez, and Mauricio Garcia, were convicted of cattle theft. The indictment alleged the possession in E. B. Raymond, who was holding the same for the owner Mrs. H. M. King, and negatives the consent of both. Mrs. King was sick at the time of the trial, and had been for some time. She was therefore unable to attend the court, and did not testify. The evidence further shows that Raymond had had the actual care, control, and management of the property for years; that the particular ranch of which he had control was located in Cameron county. Mrs. King resided in Nueces county, at the city of Corpus Christi, and was about 70 years of age. Counsel for appellant argued to the jury that, in the absence of Mrs. King, the state should have taken her deposition. In order to prove her want of consent to the taking. In this connection the court charged the jury, "You are instructed the depositions of a witness in a criminal case cannot be taken by the state through its prosecuting officers," and to this appellant interposed objection. In view of the argument and under the circumstances, we believe the court was correct in giving the instruction. The state

cannot take the deposition of a witness in a criminal prosecution. *Cline v. State*, 36 Tex. Cr. R. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850.

The verdict of the jury found defendants guilty, and assessed their punishment at three years' confinement in the penitentiary. The court entered judgment on this verdict of three years against each of the defendants, and so pronounced the sentence. Exception was reserved to this on the theory that it was a joint verdict, and not a separate verdict, as to each. Some of the older cases so hold, but this has not been the rule since the case of *Mootry v. State*, 35 Tex. Cr. R. 457, 33 S. W. 877, 34 S. W. 126; *Polk v. Same*, 35 Tex. Cr. R. 495, 34 S. W. 633; and especially see *Davidson v. Same*, 40 Tex. Cr. R. 285, 49 S. W. 372, 50 S. W. 365.

The fifth ground of the motion for new trial complains of the remarks of the district attorney. This is simply made a ground of the motion, and is not reserved by bill of exceptions. Nor is it in any way verified, except by this statement in the motion. The same may be said with reference to what is stated in the fourth ground of the motion for new trial in regard to the complaint there made that the district attorney in his closing address read parts of the evidence in another case, and in connection therewith the opinion of another court, for the purpose, as stated by said district attorney, of showing the jury that they could disregard the evidence of 12 witnesses who testified for said defendant on said trial. This was not verified by bill of exceptions, and is simply stated as a ground of the motion.

It is further contended that the evidence is not sufficient to support the conviction. The jury gave credence to the evidence of the witnesses for the state. They testified to a state of facts which places it beyond any question that the animals taken were the property of Mrs. King, and under the control of Raymond. They saw defendant take six animals. They were the calves of the cows with Mrs. King's brand upon them. There were no other cattle in the pasture except Mrs. King's. That defendants threatened the lives of one or more of these witnesses indicates they divulged what they had seen and exacted this promise not to inform against them. This evidence, without going into detail, makes very clear an unquestioned case of theft.

The judgment is affirmed.

GOOD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 26, 1902.)

CRIMINAL LAW—MISCONDUCT OF COUNSEL—IMPROPER ARGUMENT—HARMLESS ERROR—APPEAL—VERDICT—JURORS—IMPROPER CONDUCT.

1. The defendant in a criminal case presented a bill of exceptions reciting a state-

ment by the prosecuting attorney to the jury calling attention to defendant's failure to testify. The court, in explaining the bill, stated that the judge was busy writing a charge, and did not hear the statement, and that the prosecuting attorney denied making such remark. A juror, the defendant, and two attorneys for the latter filed affidavits that the prosecuting attorney made the statement. The state presented affidavits by all the jurors stating that they did not know whether the prosecuting attorney made such remark, and that they were not influenced thereby if it was made, and the affidavit of a bystander, stating that the prosecuting attorney did not make such remark. The prosecuting attorney did not file an affidavit. *Held*, that the showing by the state was not sufficient to overcome defendant's showing of improper argument by the prosecuting attorney.

2. Error by the prosecuting attorney, in a prosecution for aggravated assault, in commenting to the jury on defendant's failure to testify, is not rendered harmless by the action of the court in rebuking the attorney and instructing the jury to disregard the improper statements.

3. A verdict fixing a fine and imprisonment, which is determined, pursuant to an agreement, by the jurors adding the amount of fine and term of imprisonment thought proper by each together, and dividing the sum by the number of jurors, is improper, though the jury is not bound by such agreement, and the verdict is changed, after such computation, in a few trifling respects.

Appeal from Tarrant county court; M. B. Harris, Judge.

C. W. Good was convicted of an aggravated assault, and he appeals. Reversed.

Cummings & Baskin, for appellant. Robt. A. John, Asst. Atty. Gen. for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$500, and 16 months' confinement in the county jail; hence this appeal.

By appellant's first bill of exceptions, he presents an exception to the action of state's counsel in his closing argument relative to appellant's failure to testify. We find the bill in this shape. Appellant presented a bill to the judge to the effect that W. R. McLaury, one of the counsel for the state, in addressing the jury, used the following language: "We have proven a clear case of assault against this defendant, and they have not contradicted it by any evidence; that they have even failed to put this defendant on the stand to contradict the same." Appellant excepted to this, and the court instructed the jury that they should not consider any remark made by said W. R. McLaury at the time. The court, in explaining this bill, says: "During the argument of the case by W. R. McLaury as prosecutor, Mr. Cummings, attorney for defendant, made an objection to a statement that he (Cummings) claimed to the court that W. R. McLaury made to the jury in his argument; said Cummings insisting that the remarks set forth in the bill were the remarks of said McLaury made to the jury; said McLaury denying at the time that he made any su-

remarks. The court being busy at the time that it is alleged the remarks were made, writing a charge, the court did not hear or understand just what was said by McLaury, and therefore could not say, of his own knowledge, whether the alleged remarks were made by said McLaury or not. But the court, at the time the objection by said Cummings was made, stated to McLaury that, if he did make remarks as claimed by defendant's attorney, the same was improper, and he should refrain from so doing, and instructed the jury verbally that if such remarks had been made, as claimed by defendant's attorney, that the jury should give it no consideration so as to in any manner prejudice defendant's case." In connection with this bill, one of the jurors who tried the case, to wit, J. J. Dwight, and C. W. Good (appellant), and both of his attorneys, Baskin and Cummings, presented affidavits stating that the language in the bill was used by McLaury. Traversing this affidavit, the state presented the affidavits of each of the jurors trying the case, including the said Dwight, stating that they did not know whether they heard McLaury, in his argument, use the language suggested by appellant, but, if he did so, that the same was not considered by them, and had no influence with them in making up their verdict. The state also introduced the affidavit of one A. J. Smith, who stated that he was present during the trial, and heard what McLaury said, and he did not use the language attributed to him by appellant, but merely said they had not adduced a word or scintilla of evidence to disprove his guilt, as proven by the state. The absence of any affidavit or statement by McLaury himself as to the language imputed to him by appellant is a noticeable fact. His silence on the subject is suggestive. When the matter was first presented to the court, he should then have ascertained whether or not the language imputed to the state's counsel in his argument had been used. The judge merely says under this head that he did not hear what was said, as he was busy writing; that Cummings claimed the expression had been used, and McLaury denied at the time that he made any such remark. This matter could have been very easily settled then and there, and should have been. As presented here, we do not believe the position taken by appellant is sufficiently met by counter affidavits; and it was not competent for the court to declare that the language was not used, nor do we understand the court to so declare in the bill of exceptions. He merely says he did not hear it. As has been held repeatedly, this reference to the appellant's failure to testify is inhibited by the statute, and is cause for reversal; and it has been held that an instruction by the court to disregard it will not cure the error. *Wilkins v. State*, 33 Tex. Cr. R. 320, 26 S. W. 409.

The assessment of the punishment by the jury, as shown by this record, was also irregular. They agreed to divide the amount as fixed by each juror, both as to the pecuniary fine and the term of imprisonment, by 6, in order to ascertain the punishment they would assess. True, they were not bound by this, strictly speaking; but the figures found were evidently used as a basis to ascertain the result. The pecuniary amount found by them as a result of the division was \$533.33, which they subsequently reduced to \$500. The imprisonment was 16 months and 5 days, and they agreed on 16 months, eliminating the 5 days. This might not be cause for reversal, as the jurors were not bound by the result; still it is irregular, and should not be permitted.

The judgment is reversed, and the cause remanded.

Ex parte OGDEN.

(Court of Criminal Appeals of Texas. March 5, 1902.)

**MUNICIPAL CORPORATIONS—ORDINANCES—
CONFLICTING WITH STATE LAWS.**

A municipal ordinance prohibiting pool selling on horse races, and providing for a punishment against any saloon keeper permitting pool selling on his premises, is void, being in conflict with a state law licensing the selling of pools on horse races.

Habeas corpus proceedings by E. C. Ogden to obtain his discharge for violation of a municipal ordinance. Relator discharged.

Watts, Chester & Ellison, for applicant. Smith, Crawford & Sonfield and Robt. A. John, Asst. Atty. Gen., for respondent.

DAVIDSON, P. J. This is an original application for the writ of habeas corpus. Briefly stated, the record shows that relator was charged by complaint with violating a city ordinance of the city of Beaumont; the offense stated being that he permitted the operation of a turf exchange, or selling pools on horse races, in his place of business. The ordinance under which the case arose provided, in the first section, the punishment against parties who pursued the occupation of turf exchange or selling pools on horse races. The second section denounced a punishment against any saloon keeper, owner, lessee, proprietor, manager, or person in charge of any saloon, or any owner, tenant, or lessee of any house where spirituous, vinous, or malt liquors are kept or sold, who shall permit any turf exchange, place for selling race pools, or place for exhibiting, reporting, publishing, or announcing such horses, or the progress and results of races, or place for staking money or other thing of value on the purported results of any horse race, etc. The first section of this ordinance was held invalid in the recent case of *Ex parte Powell* (decided at the present term) 66 S. W. 298, because the charter of the city

of Beaumont did not authorize such ordinance. The legislature has licensed turf exchanges or the selling of pools on horse races. It therefore cannot delegate authority to a municipal corporation to create or pass ordinances violative of that law, either by repealing or suspending it. *State v. Arrington*, 13 Tex. App. 613; *Flood v. State*, 19 Tex. App. 584; *Bohmy v. State*, 21 Tex. App. 597, 2 S. W. 886; *Ex parte Sundstrom*, 25 Tex. App. 153, 8 S. W. 207; *Ex parte Coombs*, 38 Tex. Cr. R. 648, 44 S. W. 854; Const. Bill of Rights, art. 1, § 28. The second section of the ordinance is dependent upon the first, and, the first being invalid, there is no foundation for the second. The inhibition against the owners, lessees, etc., of saloons is based upon the theory that it is a violation of a valid city ordinance prohibiting turf exchanges; that is, it is a criminal offense against the city ordinance to be engaged in turf exchange or selling pools on horse races. The second section of the ordinance, as created by the city council, would be equally violative of our statute. This ordinance simply makes it a violation of law to carry on a turf exchange or sell pools on horse races in the places mentioned. It being a legitimate business,—one legalized by the state,—the city could not, even in this indirect manner, inhibit it. It will be noted that the ordinance in question was not one of regulation, but is one of inhibition. The relator is discharged.

HENDERSON, J. I agree to the reversal of the case, because the charter does not authorize the inhibition of pool selling on horse races, and no power is given in the charter to regulate the place of such sale by location.

RAMIREZ v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1902.)

LARCENY—CONVICTION—APPEAL—REVERSAL—ERROR—PREJUDICIAL—INSTRUCTIONS.

1. Under Code Cr. Proc. art. 723, as amended March 12, 1897, providing that the judgment in any criminal action should not be reversed for error appearing in the record, unless such error was calculated to injure the rights of the defendant, a charge that the punishment for cattle theft, for which defendant was on trial, was "not less than two nor more than five years in the penitentiary," when by the statute it was not less than two nor more than four years, is not ground for reversal, where the minimum penalty was imposed.

2. A charge, as to circumstantial evidence, that the jury must believe accused committed the offense, is not erroneous because of omitting the words "and no other person."

3. Where the jury were repeatedly instructed as to the necessity of belief beyond a reasonable doubt, and the presumption of innocence, that an instruction given did not refer to such a doubt is no ground for objection.

Appeal from district court, Zapata county; A. L. McLane, Judge.

Abraham Ramirez was convicted of cattle theft, and appeals. Affirmed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of cattle theft, and his punishment assessed at confinement in the penitentiary for a term of two years.

The court charged the punishment "to be not less than two nor more than five years in the penitentiary," whereas the punishment, by law, is not less than two nor more than four years. Exception was reserved to this portion of the charge. The court states in signing the bill: "I am of opinion the error complained of did not injure appellant's rights, and the new trial prayed for should not be granted, under the law as it now is, under article 723, as amended March 12, 1897." Appellant received the minimum punishment,—two years in the penitentiary. Under the decisions of this court construing article 723, Code Cr. Proc., this error was not calculated to injure appellant's rights.

The charge on circumstantial evidence is criticised as being erroneous, in that it failed to instruct the jury that defendant, "and no other person," etc. The court charged the jury in that connection that they must believe accused committed the offense. Appellant contended that the omission of the expression "and no other person" is fatal to the charge. In this there was no error. This question has been previously decided adversely to appellant's contention.

The following excerpt from the charge is criticised: "Therefore, if you believe the four cattle in question were stolen from the range, and that recently afterward defendant had them in his possession, then, to warrant his conviction as the thief, you must be satisfied from the evidence that Abraham Ramirez is the person who took the cattle from their range, so that if you believe he bought them from Saturnino Garza and Labrado Garza, or from either, then he will not be guilty of theft, even if you believe that he knew they were stolen by persons from whom he bought them." The objection to this charge is that it required defendant to prove by a preponderance of evidence that he bought the cattle, and thus eliminated reasonable doubt from this phase of the case. The charge, taken as a whole, is not subject to this criticism; nor do we believe this particular portion of the charge is deficient in the matter criticised. It is true, "reasonable doubt" is not mentioned in the excerpt; but the court, after submitting the charge to the jury, to the effect that before they could convict they must believe beyond a reasonable doubt he fraudulently took from the possession of the alleged owner the cattle described in the indictment, without his consent, etc, but otherwise that they should acquit him, further gave the reasonable doubt in this language, "If you do not so believe beyond

reasonable doubt, you will acquit the defendant," and subsequently again gave the presumption of innocence and reasonable doubt.

The contentions of appellant, as presented by the record, do not show such error as requires a reversal of the case. The judgment is affirmed.

WALLACE v. STATE.

(Court of Criminal Appeals of Texas. March 5, 1902.)

CATTLE THEFT—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—WEIGHT OF EVIDENCE.

1. An instruction in a criminal case that the whole of admissions made by defendant, which are introduced by the state, are to be taken together, and the state is bound by them unless they are shown to be false, and that such admissions are to be taken into consideration as evidence in connection with all the other facts and evidence, is a charge on the weight of the evidence, and erroneous.

2. An instruction in a prosecution for cattle theft that a certain brand was only admitted in evidence as proving ownership of the cow claimed to be the mother of the stolen calf, and that the brands on the calf placed on the calf by the owner after its recovery can only be considered, in connection with all the other evidence, for the purpose of identifying the calf, is a charge on the weight of the evidence, and erroneous.

3. Evidence of a brand on a cow claimed to be the mother of a stolen calf is not admissible in a prosecution for the theft of the calf.

4. Evidence of the state that a calf was branded with the owner's brand after its recovery from defendant, charged to have stolen it, is inadmissible in a prosecution for the theft.

5. Where there is no direct evidence of the taking, in a prosecution for cattle theft, but possession is relied on as proof thereof, an instruction as to circumstantial evidence should be given.

Appeal from district court, Edwards county; I. L. Martin, Judge.

Sidney Wallace was convicted of cattle theft, and he appeals. Reversed.

Burney & Garrett, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of cattle, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant excepts to the following portion of the court's charge: "You are instructed that, when the admissions of a party are introduced in evidence by the state, then the whole of the admissions is to be taken together, and the state is bound by them, unless they are shown by the evidence to be untrue. Such admissions are to be taken into consideration by the jury as evidence, in connection with all the other facts and circumstances of the case." This charge was upon the weight of the evidence, and should not have been given.

He also complains of the fifth paragraph of the court's charge, as follows: "The jury are instructed that the certificate of the record of the mark and brand of the § and

J on jaw, in the name of M. E. Gardner, was admitted in evidence for the purpose of proving ownership, together with all the other facts and circumstances, if any, of cow claimed to be the mother of the alleged stolen calf, and the jury can only consider it for that purpose; and, the evidence showing that alleged stolen calf was only branded with said brands after the alleged theft of the same, the use of said brands on said calf at that time can only be considered by the jury in this case to serve the purpose, together with all the other evidence and circumstances, of identifying (if it does do so) the alleged stolen animal." This charge should not have been given as written. While it is true, under the statute, a properly recorded brand may be introduced for the purpose of showing ownership, the charge here given shows that the brand was not placed upon the animal alleged to have been stolen until after the alleged theft. We are not discussing the brand on the cow. The brand could not be introduced for any purpose. The charge is upon the weight of the evidence. Furthermore, we do not think it was admissible testimony to permit witnesses to testify that they subsequently branded the yearling after taking it from appellant. If the prosecuting witness knew and could identify this as the animal of Gardner, clearly testimony to this effect could be introduced; but that he subsequently branded the yearling, after receiving it from appellant, could not be admitted in evidence. If this animal was stolen, it was unmarked and unbranded, and clearly the fact that it was subsequently marked and branded could not be introduced as a criminative fact against appellant.

Appellant excepted to the failure of the court to charge on the law of circumstantial evidence. We find, by a close scrutiny of the evidence, that there is no positive testimony of any eyewitness to the original taking. Possession alone is relied upon to prove inferentially the original fraudulent taking. This being true, the court should have charged on the law of circumstantial evidence. For a full discussion of this question, see *York v. State* (Tex. Cr. App.) 61 S. W. 128; *Gentry v. State* (Tex. Cr. App.) 56 S. W. 69; *Hanks v. State*, Id. 922; *Arimendis v. State* (Tex. Cr. App.) 54 S. W. 600; *Taylor v. State*, 27 Tex. App. 465, 11 S. W. 462; *Crowell v. State*, 24 Tex. App. 404, 6 S. W. 318.

For the errors discussed, the judgment is reversed and the cause remanded.

BORDERS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1902.)

GAMING—INFORMATION—PRIVATE RESIDENCE—CITY LIMITS.

1. Under Pen. Code, art. 198, imposing a fine on any person who shall be engaged in

any species of gaming for money within the limits of any city on Sunday, the gaming with dice thereafter prohibited by article 388, as soon as so prohibited, became subject to the penalty imposed by article 198.

2. Under Pen. Code, art. 388, prohibiting gaming with dice, but providing that no person shall be indicted under such section for playing any such game at a private residence, an information which fails to negative the fact that the gaming was at a private residence is bad.

3. Under Pen. Code, art. 198, prohibiting gaming for money within the limits of any city on Sunday, a person cannot be convicted for gaming at a residence outside the corporate limits of a city though the residence was on platted ground adjacent to the city.

Appeal from Ellis county court: J. E. Lancaster, Judge.

John Borders was convicted of gaming in the city of Waxahachie on Sunday, and appeals. Reversed.

A. A. Kemble and Y. D. Kemble, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of gaming in the city of Waxahachie on Sunday, and his punishment assessed at a fine of \$20; hence this appeal.

The information is as follows: "That John Borders, on Sunday, the 2d day of December, 1900, and before the making and filing of this information, with force and arms, in the county of Ellis, state of Texas, and within the limits of the city of Waxahachie, did unlawfully engage, together with Jim Senters, in a species of gaming,—that is, did then and there play together with said Jim Senters at a game with dice for money; and the said John Borders on the 2d day of December, A. D. 1900, in the county and state aforesaid, and not at a private residence, did unlawfully bet at a game then and there played with dice, called 'craps.'" The court appears to have considered this as embracing two distinct counts of phases of gaming, and so submitted them to the jury. The jury returned a verdict finding appellant guilty under the first count, which is gaming in the city of Waxahachie on Sunday, under article 198, Pen. Code.

Appellant contends that shooting craps was not an offense up to 1871, when the above article was passed with reference to gaming on Sunday, and that playing craps did not become an offense until article 388, Pen. Code, was passed, some 10 years after the passage of article 198, and that therefore the games specified in the last-named article were not embraced in the former. There is nothing in this contention. Article 198 is general in its terms, and embraces any species of gaming for money; and, as fast as any game for money became prohibited by law, article 198 attached thereto.

Appellant also contends that, under article 388, playing at a game with dice or dominoes at a private residence is not an offense, and the first count in the information, falling

to negative the fact that said game of craps played with dice was at a private residence (being the count under which appellant was convicted), is bad. We agree with this contention. Article 388 does not make it an offense to play at a game of craps with dice at a private residence, and the proviso negating that the game was played at a private residence should have been set out in said count. See *Colchell v. State*, 23 Tex. App. 584, 5 S. W. 139.

It is further insisted by appellant that the record shows that the game of craps with dice was played at the private residence of one Lockett, and that this was outside of the corporate limits of the city of Waxahachie. We have examined the record, and the facts show that this is true. However, it is contended that, notwithstanding the locus in quo of the playing was outside the corporate limits of the city of Waxahachie, yet said place had been platted into lots and blocks, and there were a number of contiguous houses in that section, and that, for the purposes of the statute with reference to Sunday gaming, it was a part of the city of Waxahachie. Article 198, Pen. Code, inhibits Sunday gaming "within the limits of any city or town." We are here dealing only with the term "city." 6 Am. & Eng. Enc. Law, p. 32, defines a "city" as an incorporated town. And see, also, *Bouv. Law Dict.*; *Mitchell v. Franklin Co.*, 25 Ohio St. 154. It appears from the record, as intimated above, that Waxahachie has a special charter, granted by the legislature, with defined limits; that is, the charter, as originally granted, contained certain limits, and these have been extended in the new charter, but the extension does not embrace the locus of said gaming. We understand that title 18, *Sayles' Rev. Civ. St.*, relates to cities and towns and their incorporation; and it would appear from various articles therein contained that such city or town, whether incorporated under the general law or a city having a charter granted by the legislature, must have certain defined limits. We hold that the charter granted the city of Waxahachie fixed the limits of said city, and, although there may be a collection of houses outside or proximate to the corporate limits, this is not an integral part of said city, and cannot become so until it is brought within the municipality by some mode provided by law. If, because there may be a thickly populated section outside of, but adjacent to, the city limits, this would not constitute it a part of the city. If we were to so hold, it would be impossible to determine how far we could go, or how thickly the section had to be populated before it became a town or city. In our view, when the legislature used the term "city limits" in the Sunday gaming statute, they meant the corporate limits of such city. We accordingly hold that the proof failed to show a playing within the city limits of Waxahachie on Sunday.

For the defect in the count of the info

tion heretofore pointed out, the judgment is reversed and the prosecution ordered dismissed.

CLICK v. STATE.¹

(Court of Criminal Appeals of Texas. Feb. 12, 1902.)

CRIMINAL LAW—EVIDENCE—OBJECTIONS—ADMISSIBILITY—COMPETENCY OF WITNESSES.

1. An objection to all the testimony of a witness on the ground that it is hearsay, without pointing out any particular part of it, and showing that such part did not consist of statements made in defendant's hearing, is too general, where some of the testimony is not subject to the objection.

2. Under the statute requiring that a witness must have sufficient intelligence to understand the obligation of an oath, a girl eight years old, understanding that it was wrong to tell a lie, and that she would be punished for it, and that it was right to tell the truth, and stating that she would tell the facts as she saw them, though she did not know the nature of an oath, nor appreciate the formality of taking one, was properly allowed to testify; the matter being in the sound discretion of the court.

3. On a trial for crime, defendant could not prove that he sent money to certain persons out of the state, so that they might attend court as witnesses; there having been no effort to take the depositions of such persons, nor an application for a continuance on account of their absence.

4. The state may prove that defendant in a criminal prosecution had been charged with theft, as affecting his credibility.

Appeal from Cooke county court; B. F. Mitchell, Judge.

Tom Click was convicted of petty theft, and appeals. Affirmed.

J. T. Adams, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of petty theft, and his punishment assessed at a fine of \$10, and 10 days' confinement in the county jail; hence this appeal.

Appellant, by bill of exceptions, sets out the testimony of the prosecuting witness in full, and objects to all of the same on the ground that it was incompetent and hearsay. It is possible that some of the testimony may be hearsay, but no particular testimony is pointed out by the bill which is claimed to be hearsay. Evidently this objection will not hold good against the testimony as a whole. The exception is too general to present the admissibility of said testimony for review. Even if appellant had pointed out by his bill certain expressions of the witness which might be regarded as hearsay, still it is not shown that the same were made in the absence or out of the hearing of the defendant. The expressions may have been in his presence, and may have been a part of the *res gestæ* of the transaction. What we have said in regard to this bill holds good with reference to bill

of exceptions No. 2, which is an objection to the testimony of Mrs. Nellie Baker.

Bill No. 3 is to the competency of the witness Myrtle Baker, and is substantially as follows: When the witness Myrtle Baker was placed on the stand, in order to test her competency she was questioned, and answered as follows: "I am eight years old. I know it is wrong to tell a lie. If I should tell a story, they would put me in jail, and I would go to the bad place." In answer to defendant's counsel, she stated: "I don't know why I held up my hand when my father and mother did. I don't know what the man said to us while I held up my hand. I don't know what an oath is. My parents have talked to me, and told me to tell the truth. I have been to school one term. Am in the first reader. I do not know myself what would become of me if I should tell a story. All I know is what they told me. I can read a little. Was eight years old last September." To further questions by the county attorney she replied: "I know it is right to tell the truth, and wrong to tell what is not true. If I should testify on the stand, I would tell the truth, and tell the facts as I saw them. I have attended church, and gone to school one term." On this statement, her competency was objected to by appellant. The court overruled the same, holding the witness competent. The rule on this subject is that the competency of the witness is in the discretion of the trial court, and, unless this discretion appears to have been abused, the judgment will not be reversed on that account. *Colter v. State*, 37 Tex. Cr. R. 290, 39 S. W. 576, and authorities cited. Under our statute, the test as to the capacity or competency of a witness is twofold. The witness must have sufficient intelligence to relate the transactions with respect to which he is interrogated, and must have sufficient intelligence to understand the obligations of an oath. It has been held in some cases that though a witness did not know that, for perjury, he would be punished by imprisonment in the penitentiary, this did not show he did not understand the obligations of an oath. *Murphy v. State*, 36 Tex. Cr. R. 24, 35 S. W. 174; *Oxsheer v. Same*, 38 Tex. Cr. R. 499, 43 S. W. 335. However, in both of these cases the witness appears to have understood the moral obligations of an oath; that is, if he should tell a lie, he would be punished in the hereafter. In a number of cases in other states, witnesses of tender years—from seven to nine—have been held competent as witnesses where they manifested sufficient intelligence to understand the danger and wickedness of false swearing; that is, if they are capable of distinguishing between good and evil, and possess sufficient knowledge of the nature and consequences of an oath. See the authorities cited in note to *State v. Michael (W. Va.)* 16 S. E. 803, 19 L. R. A. 605. In *Holst v. State*, 23 Tex.

¹ Rehearing denied March 12, 1902.

App. 1, 3 S. W. 757, 59 Am. Rep. 770, relied on by appellant, the witness, a child six years of age, was held incompetent on the ground that she did not understand the obligation of an oath. In that case, being interrogated, she said: "I don't know how old I am. I have never been to school. I know my A, B, C's. I do know where I live." When asked if she knew what would be done with her if she were to tell a story in the court house, she answered in the negative. When asked if she knew where she would go, were she to tell a story, and be a bad girl, and die, she answered she did not know. The judge then told her if she were to tell a story, while in the court house, it would be very bad and wrong, and she might be sent to the penitentiary, and, if she were to die after telling a story, she might go to the bad man. She also stated, "I didn't know what was done when I held up my hand." She was not questioned further. Under the evidence in that case, we think the court was correct in holding, as it did, that the witness was incompetent on the ground that she did not understand the obligations of the oath she took. In this case the answers of the witness show she was of more intelligence, and that she better understood the nature of an oath. She testified as to her age,—that she was eight years old last September; that she knew it was right to tell the truth, and wrong to tell a lie; that she had gone to school one term, and could read the first reader; that she had also attended church. She further showed that she was conscious she would be punished temporarily if she told a lie. She stated they would put her in jail, and also that she would go to the bad place. The only similarity existing between the status of the two witnesses was with reference to the mode of taking the oath. Both witnesses answered that they did not know what was transpiring when they held up their hands. Now, it may be true that a witness might not understand the formality, or not be paying attention when the oath was administered, but yet understand and comprehend the obligations of an oath. We do not understand the objection to be made here that the witness had not been sworn, or not formally sworn, but simply that such witness did not understand the obligations of an oath. We think, as shown above, there is a marked difference between the understanding of the witness in Holst's Case and the witness here; and, as presented in the bill, we do not believe the court abused its discretion in holding the witness competent.

We do not think the court committed an error in holding that appellant could not prove that he had sent money to the territory for Mitchell and his wife, in order that they might attend court at his trial. No application for continuance was made on ac-

count of the absence of these witnesses, and no effort was made to take their depositions. What he did with reference to sending money to them to attend court was self-serving, and not material.

It was competent for the prosecuting attorney to prove that appellant had been charged with theft, as going to his credit.

We understand that the testimony as to appellant carrying a pistol and disturbing the peace was eliminated, so there is no error in this bill.

We have examined the charge of the court, and it covers every material issue in the case; and the requested charges, if applicable, were not rendered necessary.

The evidence supports the verdict of the jury, and the judgment is affirmed.

REDDING v. STATE.

(Court of Criminal Appeals of Texas. Feb. 26, 1902.)

EMBEZZLEMENT—INFORMATION—EVIDENCE—SUFFICIENCY.

Where an information for embezzlement alleged that defendant's conversion of funds intrusted to him for delivery to one Cliff S. was without the consent of Cliff S., but the statement of facts on appeal contained no reference to Cliff S., merely showing that "Dr. S." testified, the conviction will be reversed for want of evidence to sustain the allegation.

Appeal from Rockwall county court; E. D. Foree, Judge.

Pat Redding was convicted of embezzlement, and appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of embezzlement, and his punishment assessed at a fine of \$25 and five days' confinement in the county jail.

The complaint and information charge appellant with the embezzlement of "five dollars in currency of the United States," which had been intrusted to him by J. A. Bolin, to be delivered to Cliff Sorrells by appellant, and that the conversion was without the consent of either Bolin or Cliff Sorrells. The allegation in the information that the money was converted without the consent of Cliff Sorrells is utterly without evidence to support it. If the name of Cliff Sorrells occurs in the entire statement of facts, we have overlooked it. Dr. Sorrells testified, but there is nothing indicating that Dr. Sorrells was the Cliff Sorrells mentioned in the information. Having alleged the want of the consent of Cliff Sorrells in order to obtain the conviction, there must be evidence to sustain that allegation.

The judgment is reversed, and the cause remanded.

YEARY v. STATE¹

(Court of Criminal Appeals of Texas. Jan. 29, 1902.)

AGGRAVATED ASSAULT—INDICTMENT—SUFFICIENCY—EVIDENCE—ADMISSIBILITY—SUFFICIENCY—EVIDENCE OF CONSPIRATOR'S ACT—OBJECTIONS—SENTENCE—APPEAL—QUESTIONS CONSIDERED.

1. An indictment charging an assault and the infliction of great bodily injury, or an aggravated assault, with intent to commit such injury, by beating and bruising the prosecuting witness with the fists, is not bad, in failing to state how such injuries were inflicted or attempted to be inflicted with the fists.

2. An indictment for an assault and the infliction of great bodily injury, charging an assault "thereby inflicting serious bodily injury," is not bad, in using the word "inflicting," instead of charging that defendant "inflicted" such injuries.

3. The prosecuting witness, who had recently made a temperance speech, was attacked while on a train by appellant and five other persons who were offended by the speech, and had conspired to give the witness a beating; and defendant and another severely beat the prosecuting witness with their fists, while the other conspirators held the witness and encouraged the assault. Held sufficient to show an aggravated assault, with intent to inflict serious bodily injuries, though serious injury was not inflicted.

4. A bill of exceptions in a criminal case which merely charges that certain evidence is immaterial and irrelevant is insufficient to authorize a consideration of the evidence on appeal.

5. The admission of evidence, in a prosecution for an aggravated assault, of a public speech made by the prosecuting witness before he was assaulted, which is claimed to have been the motive of the crime, will not be held erroneous on appeal, in the absence of a showing that defendant did not hear the speech, and that it was not communicated to him.

6. Where several persons enter into a conspiracy to assault another for making a prohibition speech, evidence is admissible, in a prosecution against one or more for the assault, of the actions of one or more of the conspirators before the assault, and of their being together and going to the place where the assault occurred, and that certain of the conspirators worked for the others, and that a portion of them were engaged or had been engaged in the liquor business.

7. Evidence is admissible of statements made by one of the conspirators before the assault that he did not think that the person assaulted had any right to come there and make that kind of a speech, and that he had better stay at home and clean up his own town, as tending to show a motive for the conspiracy.

8. The inadmissibility, in a prosecution for assault, of evidence of a fight between other persons, is not raised by an objection that such evidence is hearsay or irrelevant, but only by the objection that it is evidence of another transaction.

9. The statute authorizing a jail sentence of not less than 1 month for aggravated assault does not mean a calendar month, the statute in relation to computing time in civil cases not being applicable thereto; and therefore a sentence for 30 days is proper, though a certain month contains less days, and others more.

Appeal from Collin county court; J. H. Faulkner, Judge.

Charles Yeary was convicted of an aggravated assault, and he appeals. Affirmed.

Garnett, Smith & Merritt, for appellant. Abernathy & Beverly and Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$300 and 30 days' confinement in the county jail; hence this appeal.

Appellant made a motion to quash the indictment, which contains three counts. He urgently insists that the court should have quashed the second count because, as he claims, the count failed to charge by what means the serious bodily injury was inflicted. He insists the allegation that he committed the injury by beating and bruising said Dial with his fists is not enough; that it should have gone further, and have shown how the serious bodily injuries were inflicted with the fists. It does not occur to us that this contention is sound. He also objects to the use of the participle "inflicting" instead of the verb "inflict." We do not think this vitiates the count. It alleges, "thereby inflicting upon the said R. C. Dial serious bodily injury." But in the view we take of this case, this count can be rejected, and all the proof admissible under it was equally admissible under the first count; and, in our opinion, the conviction must rest under the first count. That is, we do not believe the evidence shows that serious bodily injury was inflicted on the person of R. C. Dial, which the second count charges. "Serious bodily injury" has been defined to be "an injury such as gives rise to apprehension; an injury which is attended with danger." *George v. State*, 21 Tex. App. 315. 17 S. W. 351. In *Bruce v. State* (Tex. Cr. App.) 51 S. W. 954, it is said: "The injury must be grave, in contradistinction to trivial. Evidently the injury inflicted, in order to be serious, must give rise to some apprehension of danger to life or limb or to health." See further on this question *Scott v. State* (Tex. Cr. App.) 62 S. W. 419; *Miles v. State*, 23 Tex. App. 410, 5 S. W. 230; *Melton v. State*, 30 Tex. App. 273, 17 S. W. 257; *Hunt v. State*, 6 Tex. App. 663. As stated before, the conviction must be applied to the first count of the indictment, which charges that appellant, etc., "did then and there unlawfully, with premeditated design, and by the use of means calculated to inflict great bodily injury, make an aggravated assault and battery upon R. C. Dial, by then and there wounding and beating, bruising and striking the said Dial with his fists," etc. We understand it to be contended as to this count that it is defective because it fails to show how he used his fists; it being urged that this should be averred, in order that it be shown how the fists became the means calculated to inflict great bodily injury. However, we think this is not a matter of allegation, but of proof. *Kaley v. State*, 12 Tex. App. 245. In that case we do not understand

¹ Rehearing denied March 5, 1902.

that the information charged how the fists were used (that is, that the battery was committed at the head of the stairs, and the attempt was made to knock the man down-stairs); but the indictment was general, alleging the assault to have been made with premeditated design, and by the use of his fists in a manner calculated to inflict great bodily injury.

While we are on this branch of the case we might as well allude to the proof, which, in our opinion, maintains this count. The proof on the part of the state tended to show a conspiracy between appellant and five other persons to give the prosecutor, Dial, a severe beating on account of a prohibition speech he had made the night before at Farmersville, in Collin county. In pursuance of this design they boarded the train at Farmersville, and in a short time thereafter, while prosecutor was sitting quietly in his seat, without any altercation or words, they pounced upon him, and, while one of the parties held prosecutor down in the seat of the car, defendant and McKluney (another one of the party) beat him severely with their hands and fists. The six parties apparently acted together while the beating was going on; some of the party crying out, "Give him hell." Another said, "Hold the door," evidently to prevent an intrusion. One said, "Pull his whiskers out," while another told the parties beating him to gouge his eyes out. We think there was ample testimony to show a premeditated design to do the beating, and that prosecutor was beaten severely, though not to the extent that would characterize the punishment he received as serious bodily injury. Yet we do not understand that the state had to make proof of serious bodily injury in order to maintain the charge that the means used were calculated to inflict serious bodily injury. In our view, the circumstances of this case show that six stalwart men banded themselves together with the premeditated design to give prosecutor a severe beating with their hands and fists, and, under the circumstances, the means used were such as were calculated to inflict great bodily injury on prosecutor. The fact that the beating fell short of inflicting serious bodily injury does not show that the means they used were not calculated to inflict such injury.

Appellant reserved two bills of exception to the action of the court in admitting certain testimony. The first bill relates to the admission of the testimony of the witness W. S. Astin to the effect that the night before the assault on the prosecuting witness, Dial, he (witness) was present at the city hall in the town of Farmersville, and heard the said Dial make a speech in reference to the enforcement of local option; portions of the speech being set out, which, in mild terms, arraigned the people for not enforcing local option in that precinct, and told them how it could be enforced. Witness stated

there were 125 people present at the speaking, several ladies being present; and, of the defendants, he saw Jay Horn, Jeff Hinds, and Gus Hooks; that Hooks and Hinds had been in the saloon business before prohibition went into effect; that he could see no difference in the appearance of Hinds' place of business since the law went into effect than before; that he did not know what business they are now in; that Horn now runs a tenpins alley, etc. This testimony was objected to on the ground that it was immaterial, irrelevant, and hearsay as to defendant, and because the only object was to prejudice the jury against defendant; that it did not shed any light on any issue in the case, because it was not shown that defendant was present or heard said speech. These objections were overruled by the court, and the witness testified as above stated. It has been held that objections "that the testimony is immaterial and irrelevant" are insufficient. *Hamblin v. State* (Tex. Cr. App.) 50 S. W. 1019. It is further objected that it is not shown that defendant was present or heard said speech, and that the testimony was hearsay. It has been held that the bill of exceptions should state all the environments; that is, all the facts connected with the admission of testimony. The mere objection by appellant that the defendant was not present is not tantamount to a certificate by the judge that he was not present. If the bill had stated as a fact that appellant was not present, and had further stated it was not shown that prosecutor, Dial, had made a prohibition speech the night before, which was communicated to appellant, then the bill would be good. In *Barkman v. State* (Tex. Cr. App.) 52 S. W. 72, which in respect to the testimony is very similar to this, it was held that the statement in the bill that appellant was not present was not sufficient to exclude the idea that the testimony was properly admitted; that he might have known the fact without being present; and that the bill should have excluded the idea that he might have known the testimony. The writer of this opinion dissented from the view taken by a majority of the court with reference to that bill, but the court viewed the question differently, and such is now the law. Under the authority of that case, the bill fails to show that the court committed an error in admitting the testimony, although it be conceded the bill shows appellant was not present when the speech was made, though this came merely in the form of an objection. If we recur to the statement of facts, this appellant was fully apprised of the speech made by Dial the night before, and he and Dial are shown to have had an altercation the next morning.

The other bill of exceptions is to the testimony of the state's witness Dud Rike, who testified, over appellant's objection, substantially: That he was in Farmersville the day Dial was assaulted, and saw Anderson at the

post office about 11 a. m. That he saw Yeary on the day after he had the fight with Hancock, and afterwards saw him going to the train by himself. That he saw Horn and Hooks together in front of the post office about 12 o'clock, just as the train going to Greenville was coming up to the Santa Fé crossing. Hooks said to Horn, "Come and go to Greenville with me." Horn said, "I haven't got any business over there." Hooks said, "I will pay your way if you will go." Hooks and Horn then started towards the train. Witness heard Hinds say in the morning of the day that Dial was assaulted that he had kept Yeary off of Hancock for two or three days. Anderson worked for Hooks at his cold-drink house at that time; and McKinney worked there also, and ran a livery stable; and Yeary works for Hooks. Hinds runs a prescription store in Farmersville. About 10 o'clock in the morning witness heard Yeary and Dial quarrelling, and saw Hinds standing some distance from where they were quarrelling, and heard him say he did not think Dial had any right to come there and make that kind of speech; that he had better stay at home and clean up his own town. Hinds then told witness to see the marshal, as he was afraid there would be trouble. This was while Yeary and Dial were quarrelling, about an hour before the train arrived going to Greenville. Local option is in force in Farmersville. Appellant objected to this testimony on the ground that it was immaterial, irrelevant, and hearsay. As stated with reference to the former bill, none of these objections are good, except that the testimony was hearsay. If it appeared in the statement, in connection with the bill, that this was all the testimony showing the conditions under which the evidence was admitted, then it might appear that some of the testimony was hearsay. However, we have no doubt as to the admissibility of most of this testimony, under a proper bill, and showing proper objections. If the parties had entered into a conspiracy to give prosecutor, Dial, a beating on account of his prohibition speech at Farmersville, it was competent to show what each of them did, that they were together, and how they went to take the train. It was also competent to show the community interest of the parties; that Anderson worked for Hooks, and so did McKinney and Yeary; that Hinds ran a prescription store in Farmersville; and also that Yeary and Dial had a quarrel that morning; and what Hinds said with reference to Dial's coming to Farmersville and making the speech would be competent, as the act or declaration of one of the conspirators, showing the animus or motive for the conspiracy. Of course, the testimony with regard to Yeary's fight with Hancock, on proper objection, it does not occur to us, would have been admissible. The objection should have been that the fight between Yeary and Hancock was *res inter alios acta*,

and had no bearing or relevancy on any issue in this case. But this objection was not made.

Appellant reserved a number of special instructions, but we think the court's charge fully covered every phase of the case as presented by the evidence, and the charges asked, so far as applicable, were not rendered necessary.

Appellant also objected to the verdict of the jury on the ground that it imposed a punishment of imprisonment in the county jail for 30 days, whereas he contends that the law fixed the punishment of imprisonment for aggravated assault at a term not less than 1 month, and that this means a calendar month, which might be, according to the time of his conviction, 30 days or 31 days, or in one instance only 28 days; and he invokes in this connection a statute with reference to computation of time in civil cases. We do not think said statute is applicable to criminal cases, which requires uniformity or equality in punishment. If the contention of appellant were sound, then one defendant, for the same offense, might be imprisoned for one term, and another defendant for a different term, according to the day and month of his conviction. We do not think the statute fixing a month as the minimum punishment ever intended such a result. For a fuller discussion and the authorities on this subject, see *McKinney v. State* (just decided) 66 S. W. 769.

The judgment is affirmed.

McLANE v. MAURER et al.

(Court of Civil Appeals of Texas. March 12, 1902.)

On second motion for rehearing. Overruled.

For former opinion, see 66 S. W. 693.

FLY, J. If the theory of appellant should prevail, appellees might have sold the whole of the land, except the 200 acres on which the improvements are situated; and appellant could, by refusing to sell that, prevent appellees from receiving any compensation, except 5 per cent. on the sums realized from the sale of the other land. We do not think the contract can be legitimately so construed. It may be that the 200 acres should be included in the estimate, as it was in our original opinion; but it is clear that, if they are so included, the value of the improvements should not be deducted. They were not included in the estimate of the value of the land, and, on a fair estimate, should not be deducted. If the 200 acres were included, the damages would be \$429.25 in excess of what our judgment gives to appellees.

Since writing our former opinions, our attention has been directed to the case of *Wells v. Association*, 39 C. C. A. 476, 99 Fed. 222, 53 L. R. A. 1-112, which is copious-

ly annotated, and the law bearing on cases of this character is fully discussed. On pages 76-78, 53 L. R. A., are found notes peculiarly bearing on contracts for sale of real estate, and which sustain the decision of this court.

The motion is overruled.

SCOTTISH UNION & NATIONAL INS. CO.
v. TOMKIES et al.

(Court of Civil Appeals of Texas. Feb. 14, 1902.)

DEFAULT JUDGMENT—SETTING ASIDE—NEGLECT OF COUNSEL—EXCUSE—AFFIDAVIT OF MERITS.

A judgment on an ex parte hearing was taken in an action on an insurance policy. A motion for new trial showed that defendant's counsel who had answered were nonresidents, and, after consulting the members of the bar, and judging from the crowded condition of the docket, concluded the cause would not be reached for the first few weeks of the term. On appearance day, May 7th, the cause was set by plaintiff's counsel for May 10th; and on the following day, in the absence of defendant's counsel, who had no notice of such setting, judgment was rendered. The affidavit of merits averred that the policy provided that if any portion of the building fell, except as result of fire, all insurance was to cease, and that the building did fall as the result of a storm; and accompanying photographs showed that such affidavit was probably true. Defendant offered to submit to such conditions as might be imposed, and to try the cause during the pending term. *Held*, that as the motion presented some excuse for not making defense, and the affidavit showed a meritorious defense, it was error to refuse to set aside the judgment.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by Tomkies & Co. against the Scottish Union & National Insurance Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

O. T. Holt and Crane & Greer, for appellant. S. B. Moody, for appellees.

GARRETT, C. J. The appellees brought this suit in the district court of Harris county, for the Fifty-Fifth judicial district, against the appellant, to recover upon two fire insurance policies. The petition was filed April 25, 1901, to the May term of the court. The appearance day was May 7, 1901. On May 4, 1901, the appellant answered by filing a general demurrer and general denial. On May 11, 1901, the case was tried in the absence of counsel for the appellant, and judgment was rendered for the appellees. One of the policies covered a building used for a gristmill and gin, and the other covered personal property contained therein. On May 23, 1901, the appellant filed a motion for a new trial, in which it sought to clear itself of negligence in failing to present its defense to the policies sued on, and to show that it had a meritorious defense. The following facts were shown

by the motion: Messrs. Crane & Greer, a firm of lawyers at Dallas, Tex., had been employed by the appellant to defend the suit, and had filed the answer. Dallas is 260 miles from Houston. The docket of the court was large, and appellant's attorneys, basing their opinion upon information derived from members of the bar at Houston, advised the appellant that it would be practically impossible to procure a trial of the case during the first few weeks of the term; it being an appearance case on the nonjury docket. Nonjury cases were assigned to the first and eighth weeks of the term, the intervening six weeks being allowed for jury cases. The attorneys based their opinion that the case would not be reached during the first few weeks of the term upon information obtained from the members of the bar at Houston, and from personal knowledge in being counsel in a number of cases pending in one of the district courts of Harris county. On May 20, 1901, M. M. Crane, one of appellant's attorneys, communicated with the clerk of the court by telephone, and inquired what the status of the case was, and when trial might be had. The clerk told him that he believed it had been put on the jury docket, but promised to write more particularly; and on the following day, May 21st, the attorneys received a letter from him in which they were informed that a judgment had been rendered against them. M. M. Crane immediately went to Houston and prepared the motion for a new trial. The motion further showed that the case was not reached in due order, by calling cases consecutively on the docket as they appeared, and that if it had been thus called it would not have been reached on the day the judgment was taken, but that on appearance day, at the request of appellees' counsel, it was set down for trial on May 10, 1901; that appellant was not consulted as to the setting of the case, and did not consent thereto, either by itself or through its attorneys, and had no notice that judgment had been rendered against it until 10 days after it had been rendered. As a defense to the appellees' cause of action, the appellant set up that the policies sued on contained the provision: "If the building, or any part thereof, fall, except as the result of fire, all insurance on such building or its contents shall immediately cease," and that a part of the building mentioned in the policies did on or about September 8, 1900, fall, as the result of a storm, and not as the result of a fire, wherefore by its own terms the policy had been avoided, and there was no valid contract upon which judgment could lawfully be entered on May 10, 1901. The appellant submitted an amended original answer in connection with its motion, setting up the defense stated, and, as a condition to the granting of the motion, offered and agreed that the case might be set down for a trial

at that term of the court for such time as might be convenient to the court, and to immediately prepare for trial. The motion was supported by affidavits. Appellees filed counter affidavits to the effect that the case was called and tried in its regular order, and that no part of the building had fallen. It appeared that the case was called in its regular order on the appearance docket, and that, when it was reached, counsel for appellees arose and asked the attorneys present if any of them represented the defendant or its attorneys, but no one replied. Appellees' attorney then requested the court to set said cause for trial at the conclusion of the call of the docket; and at the conclusion of the call of the docket, and after all of the other cases upon the docket had been called and disposed of, the case was again called, and the court, by an order entered, set said cause for trial for Friday, the 10th of May, 1901. Said cause was called for trial in the afternoon of Friday, May 10, 1901, after all the cases in said court having precedence on the docket had been tried, postponed, or set for a later date; and, when said cause was called, evidence was heard by the court, and a trial had upon the merits, resulting in a judgment in favor of appellees. Appellant's attorneys, whose names were signed to its answer, were strangers to appellees' counsel, nor did he know where they resided; and he had never received any communication from them, nor any inquiry or request concerning said cause, until 12 days after the rendition of the judgment therein, at which time one of appellant's attorneys called upon him, and a conversation was had concerning the judgment which had been rendered. Appellant, by its agents, Weems & Bering, resided in Houston, Harris county, Tex., and had an office and agents at said place.

Counsel for the appellant could very reasonably have concluded that the case would not be reached for trial for some weeks, but being nonresident attorneys, and not in daily attendance on the court, diligence would have required them to make some arrangement by which they would be advised of the particular status of the case on the docket, and of the time it would be called for trial. Yet taking into consideration the actual, crowded condition of the docket, and their information and knowledge as to the prospect of the trial of contested cases to the appearance term, it cannot be said that they were without excuse for their failure to present the defense relied on by the appellant. The condition of the docket and the course of the business of the court were such as to cause them to believe that the case would not be called for trial during the first few weeks of the term, and their excuse for failing to give earlier attention to the case was a reasonable one. It is clear that it was not the intention of the appellant to allow judgment to go against it by default. An

answer had been filed, which, although not presenting the defense relied on, was sufficient to make the case a contested appearance case upon the nonjury docket; and while, at the request of appellees' counsel, it was set down for trial by an order of the court, yet it was set down for a day earlier than the attorneys for appellant were reasonably warranted to expect that it would be set down. So the showing of appellant for a new trial presents some excuse for not making its defense, and in allowing judgment to go against it on an *ex parte* trial. It also offered to submit to conditions to be imposed by the court, and to try the case at that term at such time as might be designated by the court, and tendered an answer, which it offered to file. This was done in ample time for a trial to be had at the appearance term. Upon such showing, where it is also made to appear that the party has a meritorious defense, the courts have always been liberal in granting a new trial; and, although such motions are usually addressed to the sound discretion of the court, the appellate courts have often reversed the judgment of the trial court denying them. *Dowell v. Winters*, 20 Tex. 796; *Palace Car Co. v. Dargan*, 1 White & W. Civ. Cas. Ct. App. § 442; *Sedberry v. Jones*, 42 Tex. 10; *Janes v. Langham*, 33 Tex. 607; *Thomas v. Womack*, 13 Tex. 585; *Broas v. Mersereau*, 18 Wend. 653; *Davenport v. Ferris*, 6 Johns. 181; *Tallmadge v. Stockholm*, 14 Johns. 343; *Anderson v. Scotland (C. C.)* 17 Fed. 667; *Frazier v. Williams*, 18 Ind. 416; *Hinman v. Paper Co.*, 53 Wis. 169, 10 N. W. 160; *Bank v. Harwick*, 74 Iowa, 227, 37 N. W. 171; *Ordway v. Suchard*, 31 Iowa, 481; *Dodge v. Ridenour*, 62 Cal. 263. The general rule established by these authorities is that the application should be granted if made during the term, early enough to secure a trial at that term if the defendant swears to a defense on the merits. Such was the rule in New York when the case of *Dowell v. Winters*, supra, was decided by our supreme court. In *Dowell v. Winters* the supreme court said: "The application addressed itself to the sound discretion of the court, to be determined by considerations of convenience and equity. And under the practice of other courts the application, it seems, would have prevailed, upon such terms, however, as to costs, as the court deemed equitable. *Davenport v. Ferris*, 6 Johns. 181; *Tallmadge v. Stockholm*, 14 Johns. 343. The practice of other courts, however, is not obligatory; but the practice in our own courts ought to be referable to some general principle, to produce uniformity; and this renders it proper that we should revise the judgment, although upon a question resting in some degree in the discretion of the court. It is obvious that such applications ought not to prevail where the effect would be to delay the trial, unless upon a good excuse for the default, and the presents-

tion of a meritorious defense, nor in any case where it would be to let in an unconscientious or merely technical defense. In a late case at Austin we held that the court rightly refused to set aside a default where it would be to let in the defense of the statute of limitations. *Foster v. Martin*, 20 Tex. 118. But where the trial has not been delayed, and there is an affidavit of merits, we think the default should be set aside and the answer received, upon some showing by way of excuse for the failure to plead in time. The excuse proffered in this case was certainly very slight, but it appears that the counsel acted under a mistake of law. Both counsel and client appear finally to have done their very best to make amends. They present what seems to be a strong case of merits, and there is reason to apprehend that, if not allowed to make defense, irreparable injury may be the consequence. For, having no such excuse for having made his defense to the action as a court of equity would deem sufficient, the defendant may not have been entitled to an injunction to stay the execution upon the judgment until he shall have recovered on the cross bill against the defendant in another suit. It does not appear that the trial would have been delayed. The plaintiff would not have been injured or hindered by reason of the default. On the whole, we conclude that the court ought, under the circumstances, to have set aside the judgment by default upon the payment of costs, and that the court erred in refusing it. The judgment is therefore reversed, and the cause remanded for further proceedings." It thus appears that the supreme court undertook as early as 1858 to establish a uniform practice in the courts of this state, referable to some general principle, which is that such applications should be determined by considerations of convenience and equity,—convenience if a trial can be held during the term, and equity if a meritorious defense is shown, accompanied by some excuse for not presenting it; and, the rule for such determination is stated to be that where the trial has not been delayed, and there is an affidavit of merits, the default should be set aside and the answer received, upon some showing by way of excuse for failure to plead in time. The rule thus announced has not been modified by any of the subsequent cases. There may be expressions in some of the cases that would seem to do so, but an analysis of the facts will show that the application was made after the term, or that there were some other distinguishing circumstances. The defense relied on to defeat a recovery upon the policy, if true, is meritorious, and not technical, especially when it is considered that by statute in this state the full amount of the insurance named in the policy upon the building is collectible in case of destruction by fire, without regard to its actual value. There is an affidavit, in support of the motion, that the build-

ing did, in part, fall as the result of a storm, and not as the result of a fire. Photographs accompanying the record show that this may have been true. There are counter affidavits denying that any part of the building had fallen, but the effect of all is that there is a question for the jury to determine,—whether or not any integral or material part of the building fell. *Railroad Co. v. Burke*, 55 Tex. 338, 40 Am. Rep. 808. The case of *Insurance Co. v. Crunk* (Tenn. Sup.) 23 S. W. 140, called to our attention by counsel for the appellees, holds that the falling of a minute portion of the material in the building would not avoid the policy, where no integral part of the entire building fell. But whether or not such integral part fell is a question for the jury, and the affidavits before the court and the accompanying photographs showed that there would be sufficient evidence to require the submission of such an issue. We are therefore of the opinion that there was an affidavit of merits.

The judgment of the court below will be reversed, and the cause remanded. Reversed and remanded.

ST. LOUIS S. W. RY. CO. v. JACOBSON.¹
(Court of Civil Appeals of Texas. Feb. 15, 1902.)

RAILROADS — INJURY TO SERVANT — OPERATION OF TRAIN — DUTY OF ENGINEER — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — DISCOVERED PERIL — INSTRUCTIONS — APPEAL — HARMLESS ERROR.

1. Where a servant of a railroad company, rightfully on its tracks, is seen by its employes in charge of an approaching train, it becomes their duty, even before discovering that the servant is in peril, to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances to avoid injury to the servant.

2. A charge requiring the employes in charge of a train to use ordinary care to avoid striking an employe rightfully on its tracks cannot be construed as requiring the employes in charge of the train to use ordinary care to stop the train from the time the servant is first seen on the track.

3. The rule that the discovery of the peril of a person guilty of contributory negligence imposes a duty on the person having charge of the dangerous instrumentality to avoid the injury if possible, being a modification of the rule that contributory negligence precludes a recovery, may be embraced in a charge of contributory negligence.

4. The rule that a person having charge of a dangerous instrumentality must avoid an injury to another if possible on the discovery of the danger to the latter, even if the person in danger is guilty of contributory negligence, applies, and the person responsible for the proper use of the instrumentality is liable for an injury resulting from a lack of such duty, though the contributory negligence of the person injured in failing to save himself continues up to the moment of the injury.

5. An instruction in an action against a railroad company for the death of a servant while rightfully on its tracks, authorizing a recovery if the employes of defendant negligently permitted the train to run upon deceased suddenly, by which he was placed in a position

¹ Rehearing denied, and writ of error denied supreme court.

peril, and was so frightened that he could not act with judgment, and for that reason failed to get out of the way of the train, is not open to the objection that it authorizes a recovery, even though deceased might have saved himself by the exercise of ordinary care.

6. The instruction is not erroneous, as not being presented by the pleadings, if the question of contributory negligence is in issue.

7. A judgment will not be reversed for error in refusing to suppress a deposition, when it does not appear that the deposition was introduced on the trial.

8. Where judgment is rendered against a defendant, and execution awarded in plaintiff's favor for the entire judgment, the defendant cannot object to an adjudication that plaintiff's attorney is entitled to an interest in the recovery as an attorney's fee.

Appeal from district court, Smith county; J. G. Russell, Judge.

Action by Mrs. L. B. Jacobson against the St. Louis Southwestern Railway Company. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

E. B. Perkins and Marsh, Mcllwaine & Fitzgerald, for appellant. Johnson & Edwards, for appellee.

GILL, J. This suit was brought by Mrs. Jacobson, the appellee, for herself and as next friend of the minors, Maggie and Josie Jacobson, against the appellant, to recover damages for the death of Joseph Jacobson, which was alleged to have been caused by the negligence of appellant. Deceased was the husband of appellee, and the father of the minors. Appellant pleaded in defense general denial and contributory negligence. A trial by jury resulted in a verdict and judgment for \$3,000 in favor of appellee, and \$1,500 for each of the minors. From this judgment the railway company has appealed.

Deceased, who bore to the appellee and the minors the relationship alleged, was a pumper in appellant's service, and it was his duty to keep the water tank at Trinidad, on appellant's line, supplied with water for the use of its locomotives, and to watch its trestles and bridges over Trinity river, Cedar creek, and certain sloughs near the latter stream. To enable him to perform his duty of inspecting the bridges and trestles under his care, he was furnished by the company with a railway velocipede. This latter was a three-wheeled vehicle, propelled by the hands and feet, operating upon levers and pedals designed for the purpose. At the time of the accident the weather was clear and dry, and deceased was under written instructions from his master to go over the bridges and trestles after the passage of each train, and to look out for fires, loose bolts, etc. Deceased, with his family, lived at the Trinidad water tank. The tank is between Trinity river on the west and Cedar creek on the east, the latter being more than a mile east of the tank. On the day of the accident deceased went on his velocipede to Malakoff, a station on appellant's line several

miles east of the last bridge under his care in that direction. The purpose of his visit to Malakoff was to purchase supplies for use at his home. While he was at Malakoff (which was a telegraph station) an extra freight train passed going west, the regular freight train being considerable behind time. This extra was flying signals which indicated that another was soon to follow, but there is no proof that deceased saw the signals. On the other hand, the evidence that he was in a store making purchases at the time this train passed, and not in a position to see it, renders it improbable that he knew it was an extra, or that another was soon to follow. A few minutes after the passing of this train he loaded two sacks of bran and some other smaller purchases on the velocipede, and started in the direction of his home, following at no great distance the extra train. Not long after he left the regular freight train arrived at Malakoff, going in the same direction, making a brief stop at that point. This train overtook deceased about 2½ miles from Malakoff, while he was going over one of the bridges which it was his duty to inspect after each train, collided with his velocipede, and so injured him that he died a few hours afterwards. From a point where a train going west would come in sight of the first of the series of bridges in question there is a heavy descending grade to within about 100 feet of the bridge on which the collision occurred. Thence west the grade is practically level. The train was running at a speed of about 20 miles an hour when it came in view of deceased, and, according to the testimony of the engineer, the deceased was actually seen entering on the bridge when the train reached that point, which is designated by the witnesses as the mouth of the cut. The engineer states that when he first saw deceased he thought he was a man with a sack on his back. Then almost instantly he thought it a cow on the bridge, whereupon he whistled for brakes, applied the emergency air brakes, and did all he could to stop the train, as he did not wish to incur the danger of running into a cow on the bridge. Then he saw it was a man on the bridge on a velocipede, and continued his efforts to stop or check the speed to avoid injuring him, but was unable to do so. That he continued to sound the whistle from the time he saw deceased, but failed to attract his attention until the engine was within one telegraph pole of him, when deceased turned and looked back and signaled him to stop. The fireman stated that he saw the deceased just after the engineer first sounded the whistle, and at once saw it was a man on a velocipede. He corroborated the engineer as to the sounding of the whistle and effort to stop. In contradiction of this, there was testimony to the effect that no whistle was sounded until the train reached the bridge on which deceased was, and some to the effect that the whistle was not sounded

until after the collision. To contradict the evidence of an effort to stop the train, there was testimony to the effect that the speed of the train was not checked until the collision occurred. That from the point where the engineer claims to have first seen deceased and begun his efforts to stop the train to the point where the train was ultimately stopped was a distance of over 3,000 feet. That from the point of view to the point of collision was 2,040 feet, and there was testimony to the effect that, equipped as it was with 10 cars having air brakes in good order, and only 17 cars in the train, the others having hand brakes, it could have been stopped before it reached the point of collision. It was shown that the bridge on which the accident occurred was less than six feet from the ground, and deceased could have descended therefrom without injury, had he discovered the approach of the train in time.

The grounds relied on at the trial as a basis of recovery were: First, that Jacobson was rightfully on the track in the discharge of his duty, and that appellant's servants in charge of the train failed to use ordinary care to avoid injuring him; second, that the operatives saw him, and knew of his peril, in time to avoid the injury, and thereafter failed to use the means at their command to stop the train or lessen its speed, and thus prevent the collision.

These issues, and the defense of contributory negligence, were submitted to the jury, and the judgment is assailed mainly because of alleged errors in the court's charge and the refusal of requested charges.

The following paragraph of the court's charge is assailed as erroneous: "If you find from a preponderance of the evidence that the deceased, Joseph Jacobson, upon the occasion in question, was upon a railroad velocipede upon the track of the defendant company, in the discharge of his duty as a bridge watcher of the defendant, for the purpose of inspecting the defendant's bridges, and if you further so find that the employees of the defendant in charge of its train saw him upon the track, then it became the duty of the said employees to exercise ordinary care,—that is, that degree of care which an ordinarily careful and prudent person would exercise, under the same or similar circumstances, to make use of the appliances and equipments of the train at their command, to avoid running upon and striking said Jacobson with said train,—and this duty arose and was continuous upon the part of said employees from the time the said employees saw said Jacobson upon the track; and if the jury find, from the preponderance of the evidence, that the said employees failed to exercise such ordinary care, and that as a direct and proximate result of such failure to exercise such care that the said train ran upon and killed said Jacobson, then you should find for the plaintiffs."

It is contended under this assignment that it was error to impose the duty of care upon the train operatives until the peril of deceased was actually discovered. We understand the law to be that as to persons rightfully on the track, where the operatives of the train may expect them to be, the operatives owe the general duty of lookout, and must exercise ordinary care to discover them, as well as to avoid injury after the peril is discovered. A violation of this duty would not render the company liable if the person thereby injured was guilty of contributory negligence in failing to exercise reasonable care for his own safety, but the law imposes the duty nevertheless, and the company in such case is not acquitted of blame, but recovery is denied because the injured party is also in fault. To illustrate: Suppose deceased, in the lawful discharge of his duty of inspection after the passage of each train, had been upon the bridge in question, and had by some means become disabled so that he could not leave it. Suppose the operatives of the train could, by the exercise of a reasonably careful lookout, have discovered him in time to avoid injuring him. Can it be doubted that in such a case the company would be liable? *Railway Co. v. Watkins*, 88 Tex. 24, 29 S. W. 232; *Railroad Co. v. Symplins*, 54 Tex. 615, 38 Am. Rep. 632; *Railroad Co. v. Hewitt*, 67 Tex. 479, 3 S. W. 705, 60 Am. Rep. 32. Here, according to one phase of the testimony, the deceased was rightfully on the bridge, and at a point where the operatives of the train had reason to expect him to be. It was the duty of the court to charge the law applicable to this state of facts if found by the jury to exist.

Under the portion of the charge complained of, this duty was imposed, and no more. If the engineer, when he first saw deceased, did not realize his peril, but proceeded upon the assumption that he would leave the point of danger, he discharged the measure of ordinary care, if a person of ordinary prudence would have done no more, considering the fact that deceased was on a bridge. The measure of care imposed might have been fulfilled by sounding a whistle or otherwise attracting his attention by some means at hand. In calling attention to the particular respect in which the engineer should have exercised care, the paragraph may be erroneous if considered alone; but taken in connection with special charges given at the request of appellant, and in connection with the charge on contributory negligence, we do not think it was misleading.

It will be noticed that the charge complained of does not require the engineer to use every means at hand consistent with the safety of the train to stop it or check its speed, but that the general duty to use ordinary care, owed to those rightfully on the track, was not relaxed by the mere fact that the engineer actually discovered deceased, but this duty continued unimpaired. The

more imperative duty which arose in case the engineer discovered his peril in time to avoid the injury was defined in another part of the charge. It is contended, however, that the part of the charge complained of is obnoxious to the rule announced in *Railway Co. v. Garcia*, 75 Tex. 583, 13 S. W. 223. The charge discussed in that case was with reference to the duty arising upon discovered peril. It was not held to be error in the abstract, but misleading, by reason of the peculiar nature of the facts.

The contention that the court by the charge complained of required the engineer to use ordinary care to stop the train from the time he saw deceased is not a just criticism of the charge. As has been seen, the law imposed the duty to use ordinary care to avoid injuring deceased if he was rightfully on the track, and it seems to us the charge was within the law. Indeed, it might be held with some show of reason that the undisputed facts show the evident peril of deceased from the time the engineer admits having seen him; for it is undisputed that the man was in the act of going upon the bridge in plain view of a rapidly approaching train. Under such circumstances, it may well be doubted if the engineer would be authorized to proceed upon the theory that deceased knew of the approach of the train, and intended to get off in time. The bridge was of such length he could not hope to cross it in time to escape injury, and, incumbered as he was, he could not have cleared the track without throwing his vehicle and its burden to the ground, and following it himself with haste. Such a course, willingly followed, would be so unreasonable and unusual it may well be said that by going upon a bridge under circumstances which rendered it impossible for him to escape without pursuing such a course he made it perfectly plain that he was unconscious of the approach of the train.

The charge of the court on contributory negligence is assailed upon two grounds: First, because it charges the law of discovered peril as a part of the law of contributory negligence; and, second, because, in the event it should appear that the operatives of the train discovered the peril of deceased in time to have avoided the injury, a recovery was permitted, even though deceased saw the train in time to escape, and negligently failed to do so. This latter point was also presented by special charges, which were refused.

Regarding the first objection, we are of opinion the court did not err in the respect complained of. The law of discovered peril, or the duty arising therefrom, when the peril is due to the negligence of the party injured, is in a sense a part of the law of contributory negligence,—a modification of the rule forbidding a recovery by reason thereof. Under one phase of this case, contributory negligence of deceased did not necessarily defeat

a recovery, and the court in that connection properly called to the attention of the jury the law which under a certain state of facts would permit a recovery notwithstanding the fault of deceased.

Under the second objection, appellant contends that while it is true if the negligence of a person places him in a position of peril, and the company's servants in charge of an approaching train discover his peril in time to avoid injury, and fail to do so, the company is liable, notwithstanding the fault of the person injured, yet this is true only in a modified sense; that is to say, when the negligence of the injured person is not continuous and existent at the time of the injury. And it is not true if the person injured also discovers his peril in time to avoid it, but continues his negligent course after discovery of peril, and does nothing to save himself.

The idea of appellant's counsel seems to be that if the recklessness of the person in peril, but able to save himself by the exercise of ordinary care, is equal to the recklessness of the train operatives who might avert the injury by a resort to the means at hand, but do not, there can be no liability. The doctrine of liability upon the discovered peril of one in fault is based upon grounds of public policy which forbid the killing or maiming of another, even with his consent or acquiescence, and this high duty to avoid such consequences would devolve on the operatives of a train, whatever the fault of the person in peril. It seems to us the very reasons which underlie the doctrine constitute a complete answer to appellant's contention. In such a case the question of negligence on the part of the operatives is in a sense eliminated. The duty to resort to every means at hand, consistent with the safety of the train, to avoid the injury, is absolute, and the failure to do so partakes of the nature of a wanton wrong, against which no act on the part of the person injured will be a defense. The rule has been adopted without qualification in this state. The courts have not sought to justify it on the questionable and technical ground that the defendant's failure to resort to every means at hand to prevent the disaster is a new and intervening cause. It is based rather on the broad ground of public policy, which forbids the interposition of such a defense by a wrongdoer who knowingly fails to prevent the destruction of a human life when he can. *McDonald v. Railway Co.*, 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803, and authorities cited; *Railway Co. v. Staggs*, 90 Tex. 461, 39 S. W. 295; *Railway Co. v. Bredow*, 90 Tex. 27, 36 S. W. 410.

The cases of *Railroad Co. v. Ricketts* (Tex. Civ. App.) 54 S. W. 1090, and *Smith v. Railroad Co.* (N. C.) 19 S. E. 863, 25 L. R. A. 297, relied on by appellant, are not in point. In discussing and disapproving the doctrine of comparative negligence, it is said in the

authorities cited that, in every case where liability is predicated upon negligence, the doctrine of contributory negligence is a complete defense. The rule announced is unquestionably sound, but, in our opinion, admits of the distinction which we have drawn.

The court charged the jury that if the employees of defendant negligently permitted the train to run upon deceased suddenly, and that deceased was rightfully on the track, and in the exercise of proper care, and that by the negligence of defendant he was thereby put in a position of peril, and was frightened and terrorized so that he could not act with caution or judgment, and that by reason of such terror he failed to get out of the way of the approaching train, plaintiffs would, nevertheless, be entitled to recover. The charge is conceded to be abstractly correct, but is assailed as erroneous for the reason that it, in effect, instructs the jury that a recovery can be had notwithstanding the deceased might have saved himself by the exercise of ordinary care, and that such an issue was not made by the pleadings. That the first objection is not tenable is apparent. The second is alike untenable, because the issue of contributory negligence necessarily involves the point presented by the charge assailed.

By the first and second assignments of error appellant complains of the action of the court in overruling a motion to suppress the depositions of certain witnesses predicated upon the ground that the interrogatories were leading. This motion was presented and overruled at a term of the court preceding the one at which the cause was tried, and exception was duly reserved by bill taken at the time. The record, however, does not disclose that the answers complained of were used upon trial. If they were in fact offered no objection was then urged, and we have no means of determining whether they were used upon the trial, and therefore cannot say whether the rights of appellant were in any way prejudiced by the action of the court upon the motion. If they were not used, it is plain the overruling of the motion, if error, would have been harmless.

Generally, the mere fact that error was committed upon the trial will not serve to reverse a judgment on appeal. Whether it might have wrought harm to the party complaining is nearly always a question for the appellate court. We hold, therefore, that it was not enough merely to preserve by bill the action of the court in overruling the motion. The appellant must go further, and show, in some proper and definite way, that the error was carried into the trial of the cause. This view is not only the logic and common sense of the question, but is sustained by authority. *Telegraph Co. v. Hinkle* (Tex. Civ. App.) 22 S. W. 1004; *Jackson v. State* (Tex. App.) 12 S. W. 701; *Ivey v. Bondies* (Tex. Civ. App.) 44 S. W. 917.

Appellant also complains because the trial

court adjudged to the attorneys representing appellee and the minors the amount of their contingent fee, and directed that it be paid to them out of the judgment. This, if error, in no way affects appellant. The judgment was in favor of plaintiffs, and awarded execution against defendant in their behalf for the entire recovery. We are therefore of opinion the error, if any, is not one of which appellant can be heard to complain.

We think the evidence sufficient to support the verdict, and, no reversible error being disclosed by the record, the judgment is affirmed. Affirmed.

GULF, C. & S. F. RY. CO. v. CLAY.¹

(Court of Civil Appeals of Texas. Feb. 11, 1902.)

RAILROADS—RIGHT OF WAY FENCE—FAILURE TO LEAVE OPENINGS—DROWNING OF STOCK—EVIDENCE—CONTRIBUTORY NEGLIGENCE—SIGNIFICATION OF "CATTLE"—OPEN CROSSINGS—PUBLIC POLICY.

1. In an action to recover for cattle drowned because defendant railway company had constructed a fence along its track bordering plaintiff's range, leaving no openings, and preventing the animals from escaping from the rising water, there was evidence that, before the construction of defendant's fence, plaintiff's cattle had been in the habit of going up into the hills across the track at night, and that, when the waters rose, numbers of animals had been seen to swim up to the fence, and, finding no opening, return. *Held* to support a finding that plaintiff's stock were drowned by the failure to leave any opening in its fence.

2. It appearing that the stock would have been drowned in an ordinary overflow, the fact that the flood was unprecedented did not affect the question of defendant's negligence.

3. The verdict was not unsupported by the evidence because there was no testimony that the horses and mules were in the habit of going into the hills, since the word "cattle," used by the witnesses in describing such habit, might be fairly construed to include all the animals in the pasture.

4. A statement by plaintiff's foreman on cross-examination that he supposed he might have cut the fence, and got the cattle out in that way, was insufficient to show contributory negligence, in the absence of any showing as to why he did not cut the fence, the condition of the water when he arrived, or that he had any implement with which he could have cut the fence.

5. Plaintiff was not guilty of negligence in using the pasture after knowledge of the construction of the fence without openings.

6. Under the deed to the right of way from plaintiff to defendant, requiring defendant to construct "all necessary road crossings," evidence that an open crossing was necessary for the proper use of plaintiff's premises was admissible.

7. A contract providing that a private crossing over a railroad shall be left open is not against public policy.

8. There has been no statutory modification of the common-law rule entitling the owner of land over which a railway is constructed to a way of necessity over the railroad, and the railroad company is liable for damages resulting from its failure to provide such a way.

¹ Rehearing denied, and writ of error denied supreme court.

Appeal from district court, Burleson county; Ed R. Sinks, Judge.

Action by A. M. Clay against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry, for appellant. Campbell & Pennington, for appellee.

PLEASANTS, J. Appellee brought this suit to recover of appellant the value of certain cattle, horses, and mules owned by appellee, and alleged to have been drowned by the negligence of appellant in failing to leave an open crossing over its railroad, which runs through appellee's pasture; said animals being thus prevented from escaping from high water caused by the overflow of Yegua creek, which runs through said pasture. The cause was submitted to a jury in the court below upon special issues, and the jury found: First, that the fencing by appellant of its right of way through appellee's pasture, without leaving any open crossing, caused the loss of appellee's stock, and that the value of the stock so drowned was \$1,755; second, that plaintiff could not, by the exercise of ordinary care, have prevented the drowning of any of said stock; third, that none of said stock would have been drowned if there had been any open crossing over appellant's railroad; fourth, that it was necessary, for the proper use of the premises by appellee, for the appellant to have constructed an open crossing, with cattle guards, over its railway on said premises. Upon these findings by the jury the court below rendered judgment in favor of appellee for \$1,755, from which judgment appellant prosecutes this appeal.

Appellant assails the findings of the jury as being contrary to the evidence in the following particulars: First. Because the undisputed evidence shows the overflow in which appellee's animals were lost was of an extraordinary and unprecedented character, occasioned by an unprecedented rainfall; and the rise in the Brazos river and in the Yegua creek was so sudden and rapid that some, if not all, of appellee's stock would have been drowned, regardless of whether said right of way had been fenced or open. Second. Because the evidence fails to show that none of said stock would have been drowned if appellant had left an open crossing over said right of way, and fails to show that the failure of appellant to construct such crossing was the proximate cause of the drowning of each head of stock lost by appellee. Third. Because there is no evidence to show that the horses and mules in said pasture were in the habit of going into the hills across the right of way of defendant, or that the failure of defendant to leave an opening in the fence along its right of way through said pasture was the proximate cause of said horses and mules being drowned. Fourth. Because the evidence

shows that the appellee and his agent in charge of said pasture were guilty of contributory negligence, which was the proximate cause of the loss of said stock.

The evidence in the record bearing upon the issues of fact thus presented by appellant, succinctly stated, is as follows: Plaintiff owns a pasture of about 2,000 acres, situated in Burleson and Washington counties. Fifteen hundred acres of this pasture is in Burleson county, and lies between the Brazos river and Yegua creek. This creek is the boundary line between said counties, and 500 acres of the pasture is on the Washington county side of the creek. All of the 1,500 acres in Burleson county, except about 150 acres, is very low land, and subject to overflow in any ordinary rise of the Yegua creek. The 150 acres mentioned above is in the post-oak hills, above high-water mark, and never overflows. The railroad of appellant runs along the foot of the hills, entirely through said pasture, for a distance of about 2½ miles. In April, 1899, appellant built a fence along its right of way through said pasture, and left no openings through the fence or across the right of way. This fence cut off the hills and all of the high land in said pasture from the low land, and prevented the stock in said pasture from going to the high land for protection from overflows. Prior to the fencing of said right of way the cattle in said pasture would come out of the low land at night, and go up in the hills to sleep, and to get away from the flies and mosquitoes, and would also go to the hills during high water. When appellant was building this fence appellee requested that open crossings be left in same, and explained to appellant's agent the necessity of having such crossing made, in order to prevent the drowning of appellee's stock. The request for the crossing or openings in the fence were made by appellee several times, but no crossings or openings of any kind were made by appellant. After the right of way was fenced, the cattle would come out of the bottom at night and sleep along the fence, as near to the hills as possible. Appellee in 1882 conveyed to appellant the right of way across his land in Burleson county. This conveyance contains the following stipulation: "It is expressly understood and agreed that said company shall construct all necessary cattle guards and road crossings on the line of railway over my land." About the 1st of July, 1899, there was an unprecedented overflow in the Brazos river and Yegua creek, caused by the heaviest rainfall ever known in that section of the state. The water from this overflow covered all of appellee's pasture, except the post-oak hills on the north side of appellant's railroad, and was four or five feet deep over appellant's railroad track, and the fences along the right of way were submerged. All of the stock in said pasture on the Burleson county side of the Yegua were

drowned, except a few head which plaintiff's agent in charge of the stock succeeded in getting out by breaking down the fence along the right of way. Sixty-two head of plaintiff's cattle, valued at \$1,005, and 25 head of his horses and mules, valued at \$750, were drowned in this pasture during said overflow. Several witnesses testified that they saw bunches of plaintiff's cattle and horses swim up to and along appellant's right of way fence, and, failing to find any opening, swim back toward the creek and disappear. The 62 head of cattle and 25 head of horses and mules lost by appellee in this pasture ranged on the Burleson side of the Yegua, and were on that side of the creek at the time of the overflow. The rise of the water was sudden and rapid, and Mr. Kiefer, who was appellee's agent in charge of the stock in said pasture, testifies that from the time the water commenced to rise he could not have gone in and gotten the stock out, before the water was all over the pasture; that he tried to save the cattle, and did save a few of them, by breaking down appellant's fence; and that it was impossible to get the stock out, because there were no openings in appellant's fence. He further testified on cross-examination that he supposed he could have cut the fence, but that he did not try to do it, and that, if he had had help enough, he might have knocked the staples out and mashed the wire down. Appellee was sick at the time of the overflow, and unable to do anything towards saving his stock. There are no knolls or high places in the bottom lands in appellee's pasture, but there is a slight depression between the railroad and the Yegua; and, when the creek overflows, the water runs into this depression before it covers all the land between it and the creek. This depression or "slough," as some of the witnesses call it, is not more than a foot deep. It is not shown at what hour the pasture was overflowed,—whether in the day or night,—but it remained under water for several days. In any ordinary overflow the water covered all of the pasture between the railroad and creek, and was deep enough to drown any stock that might be confined in the pasture. After the overflow the carcasses of about 60 head of stock were found in the pasture; some of the carcasses being found along the right of way fence.

We think the evidence is sufficient to sustain the finding of the jury that all of the stock of appellee drowned in said pasture were drowned because of the negligent failure of appellant to construct the necessary open crossings over its railroad. This is not shown by direct evidence, and, in the very nature of things, could not be so shown; but, from all the facts and circumstances established by the evidence, the jury were warranted in concluding that, but for the negligence of appellant in failing to leave openings in its fence, all of appellee's stock would have been saved. The instinct of

animals impels them to flee from danger, and the habit of horses and cattle to go from the low places to the higher to escape from rising water is a matter of common knowledge. In addition to these known facts, there is positive testimony in the record to the effect that the stock in this pasture, before appellant built the fence along its right of way, were in the habit of going up into the hills to sleep at night, and also went there whenever there was an overflow of the bottom lands. When this overflow came, numbers of plaintiff's animals were seen to swim to and along this fence in an effort to reach the hills. The fence was $2\frac{1}{4}$ miles long, and the evidence does not show how much of this distance was within the observation of the witnesses who testify to seeing stock swim up to the fence and try to get through; and the conclusion reached by the jury that all of the stock reached the fence, and would have gotten to the hills and been saved had appellant left the necessary openings in said fence, is not unreasonable or improbable. Appellant refused to leave an open crossing over the railroad after being warned of the probable consequences of its failure to do so. Having cut off the stock in said pasture from their only way of escape from the flood, appellant should not escape the natural and probable consequence of its negligence merely because it is possible that some of said stock would have been lost if it had been guilty of such negligence. The building of the fence by appellant without the necessary openings was an efficient and probable cause of the loss of all of the stock in said pasture; and the jury having found, upon all the facts in evidence, that such negligence on the part of appellant was the proximate cause of the loss of all of said stock, we cannot disturb that finding. The fact that the overflow in which this stock was drowned was unprecedented in its suddenness, and in the height to which the water rose, in no way affects the question of appellant's negligence, because the evidence shows that the stock in this pasture would have been drowned in any ordinary overflow after appellant constructed its fence without making the necessary openings in the same. This disposes of the first two of appellant's objections to the verdict.

The character of the overflow is material only on the question of contributory negligence on the part of plaintiff and his agent. We are of opinion the evidence does not raise the issue of contributory negligence. The undisputed evidence is that the plaintiff was sick in bed at the time of the overflow, and was unable to do anything towards saving his stock. His agent, Kiefer, testifies that he did everything in his power to save the stock, and did save some of them, by pulling or breaking down a portion of appellant's fence, and that the water rose so rapidly that it was impossible to get cattle out before the pasture was subm.

ed. The burden was upon the appellant to show contributory negligence on the part of appellee or his agent, and the only suggestion of such negligence found in the evidence is the statement of the witness Kiefer, on cross-examination, that he supposed he might have cut the fence, and got the cattle out in that way. This was not followed up by appellant, and the witness was not asked why he did not cut the fence. It is not shown that Kiefer had any implement or tool with which to cut the wire; nor is it shown when he arrived on the scene, or the condition of the water in the pasture at the time he got there. The evidence does show that the fence was submerged, and if this was the condition when Kiefer reached the pasture, and he had no tool with which to cut the fence, then, certainly, the conclusion that he was not guilty of contributory negligence in not cutting or attempting to cut the fence is one about which reasonable minds cannot differ. We think the verdict of the jury upon this issue is sustained by the uncontradicted evidence in the case.

Appellant's fourth objection to the verdict, on the ground that same is contrary to the evidence, in that there is no evidence showing that the horses and mules drowned in said pasture were in the habit of going into the hills across appellant's right of way, or that the fence was the proximate cause of said horses and mules being drowned, is, we think, without merit. It is true, the witnesses only use the word "cattle" in speaking of the habit of the animals in the pasture of going to the hills to sleep and to escape high water, but we think it a fair inference from all the testimony that the witnesses used the word "cattle" in this connection in its broadest sense, and intended by its use to include all of the animals in the pasture. But be this as it may, as before said, we think the habit of horses and mules in this regard is a matter of such common knowledge that it could have been properly considered by the jury without the introduction of any evidence on the subject.

It was not error for the court to refuse to allow the appellant to prove by the appellee that he knew the condition of his pasture and its liability to overflow, and that appellant had left no openings in its right of way fence, at the time he put his stock in said pasture, and was aware of the danger to his stock for a long time prior to the overflow. Appellant contends that this testimony was admissible for the purpose of showing contributory negligence on the part of appellee in placing his stock in said pasture, and in allowing them to remain there, knowing the danger to which they were exposed. The proposition under this assignment is, in substance, that appellee should have abandoned the use of his pasture after appellant constructed its fence, and sued appellant for the deprecia-

tion in the value of his land caused by the negligent construction of said fence. This exact question has been decided by our supreme court adversely to the appellant's contention. The owner of property is entitled to use it in any lawful manner he may desire for any purpose for which it is adapted, and he cannot be deprived of such use merely because damage may, under certain contingencies made possible by the wrongful act of another, thereby result. In the case of *Clark v. Dyer*, 81 Tex. 344, 16 S. W. 1063, our supreme court say: "The law does not require that the owner shall preserve and guard his premises from the effects of injuries caused by the wrongful act of another, before he is justified in the use thereof. A different rule would virtually deprive the owner of the beneficial rights that flow from and are incident to the enjoyment of his estate; for an attempted use would always be defeated by results that would flow from the wrongful acts of the promoter of the injury, he being permitted to say, 'You cannot hold me for the results of my wrong, because you should have anticipated injury would flow therefrom, and you should have guarded against it.' The law will not allow the promoter of the wrong to so deprive the owner of the use of his premises, or require him to use it at his peril." In the case cited the question under consideration was the right of the owner of the premises to recover for the value of crops destroyed by an overflow, the damage caused by the said overflow being due to the negligent construction of an embankment by the defendant. The embankment was constructed long prior to the planting of the crop, and the plaintiff knew at the time he planted said crop the damage that would accrue to same by reason of the negligent construction of said embankment, in event of an overflow. We think this decision is conclusive of the question raised by this assignment.

Appellant's seventh assignment complains of the refusal of the trial court to submit to the jury the question of contributory negligence on the part of appellee's agent, Kiefer, in failing to cut appellant's fence after he found that the pasture had overflowed, and appellee's stock were in danger. As before stated, we do not think the evidence on this point raises the issue of contributory negligence, and for this reason the charge was properly refused.

Appellant, in its remaining assignments, urges that the court erred in allowing appellee to prove that an open crossing over appellant's railroad was necessary for the proper use of his premises, and in submitting such issue to the jury. The contentions under these assignments are: First, that, under the stipulation contained in the deed from appellee for the right of way, he was not entitled to an open crossing; second, that, if the stipulation be a contract for an

open crossing, it is void, as against public policy; third, that in the absence of a contract the appellee would not, under the law, be entitled to an open crossing. The language in the deed, as before stated, is, "Said company shall construct all necessary cattle guards and road crossings on the line of said railway over my land." It is unnecessary for us to determine whether this language, by express terms, contemplates an open crossing. It does expressly contract for all necessary crossings, and it would seem that, under the contract, plaintiff would be entitled to show what character of, and how many, crossings were necessary for the proper use of his premises. The question of the validity of a contract which provides that a private crossing over a railroad shall be left open was raised by this appellant in the case of *Railway Co. v. Schawe* (Tex. Civ. App.) 55 S. W. 357; and the court of civil appeals for the Third district, in their opinion in said case, hold that such contract is not against public policy. We are not inclined to question the soundness of that opinion. Under the common law, the owner of land over which a railroad is constructed is entitled to a way of necessity over such railroad. Such way must be adequate and reasonably convenient, and sufficient to meet the necessities of the owner. This common-law right has not been abridged or restricted by our statutes upon the subject, and, if it were necessary for the proper use of appellee's premises that an open crossing be left over appellant's railroad, appellee was entitled to show such necessity, and its existence enforced upon the appellant the duty of constructing such crossing. *Railway Co. v. Chennault* (Tex. Civ. App.) 60 S. W. 58.

We think there is no reversible error shown in the record of this case, and the judgment of the court below is affirmed. Affirmed.

BELL et al. v. WILLIAMS et al.

(Court of Civil Appeals of Texas. Feb. 15, 1902.)

TRESPASS TO TRY TITLE—PUBLIC LANDS—BURDEN OF PROOF—INSTRUCTION—EVIDENCE.

1. Where plaintiffs in trespass to try title to public lands claimed by them and defendant as additional lands have not obtained an award of the land from the commissioner, and their applications were not filed prior to the application of defendant, they have the burden of showing that defendant was not an actual settler on her home tract at the time she made application to purchase the additional lands, or of showing that she was acting in collusion with her son to fraudulently acquire the land for the latter.

2. Where the court fails to give a clear instruction fixing the burden of proof as to such issues on the plaintiff, it is error to instruct that a certified copy of defendant's application to purchase her home lands could not be considered as evidence that she had settled on such lands, when she applied for the purchase of the additional lands, as it destroys her

prima facie proof of prior settlement as established by the application and proof that it was accepted by the land commissioner; and especially is such instruction erroneous and prejudicial when defendant does not testify.

Appeal from district court, Palo Pinto county; W. J. Oxford, Judge.

Trespass to try title by C. C. Williams and another against W. K. Bell and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Howard Martin and F. O. McKinsey, for appellants. John H. Eaton and Geo. A. McCall, for appellees.

STEPHENS, J. October 20, 1899, Wilson Bates sued W. K. and R. M. Bell in trespass to try title to recover the W. $\frac{1}{2}$ of section 66, block 2, Palo Pinto county. November 14, 1899, C. C. Williams sued Wilson Bates and W. K. and R. M. Bell in trespass to try title to recover not only the W. $\frac{1}{2}$ of said section 66, but also the N. $\frac{1}{2}$ and the S. E. $\frac{1}{4}$ of section 58, in same block. December 27, 1900, Wilson Bates answered the suit of Williams with a disclaimer as to section 58 and a plea of not guilty as to section 66. The Bells answered both suits with separate pleas of not guilty. On motion of Bates and Williams the two suits were consolidated and tried together, the trial resulting in a verdict and judgment in favor of Bates for the land claimed by him and in favor of Williams for the other tracts, from which the Bells have appealed. The court instructed a verdict against W. K. Bell (who held all the lands in controversy under the award of the land commissioner), because he had lost title to the basic section before making his application to purchase the additional lands, as was decided in *Bell v. Williams* (Tex. Civ. App.) 56 S. W. 774. The application of Bates and of R. M. Bell to purchase the W. $\frac{1}{2}$ of 66 and the applications of R. M. Bell to purchase the N. $\frac{1}{2}$ and the S. E. $\frac{1}{4}$ of 58 were filed in the general land office at the same time,—8 o'clock a. m., September 20, 1897. The second applications of Williams (the first having been made before the land was on the market) were not filed till July 5, 1899. All parties applied to purchase the lands in controversy as additional lands. The only controverted issues of fact submitted to the jury were: (1) Whether or not R. M. Bell was an actual settler on her home tract, the S. E. $\frac{1}{4}$ of section 42 (awarded to her May 24, 1897), when she applied to purchase it, May 5, 1897, and whether or not she still occupied it when she applied to purchase the additional lands; (2) whether or not, in making the original purchase, or in making applications to purchase the additional lands, she was acting in collusion with her son W. K. Bell to acquire the same for him. There was a general verdict in favor of Bates for the W. $\frac{1}{2}$ of 66 and in favor of Williams for what he claimed out of the other section.

The court undertook to instruct the jury

as to the burden of proof, but failed, we think, to distinctly place it on Bates and Williams, who undoubtedly held the affirmative of these issues. They were both plaintiffs as to R. M. Bell, and as such were required to show a superior right to the lands sued for. Neither of them had obtained an award from the land commissioner, and neither of them had filed an application prior to hers; that of Bates being contemporaneous, and those of Williams subsequent. The home tract of R. M. Bell had been awarded to her upon application to purchase it as an actual settler, which award had never been canceled, and a prima facie case was thus made in her favor of actual settlement in the first instance. A certified copy of this application was read in evidence, but R. M. Bell, who was both aged and decrepit, did not appear as a witness at the trial. The court instructed the jury that they could not consider it as evidence of actual settlement on her home section, and to disregard it entirely on that issue. This charge had the effect of destroying the prima facie case made in favor of R. M. Bell when she proved that the application had been accepted by the land commissioner, and was especially to her detriment as she did not testify before the jury; and the charge on the burden of proof was, to say the least, confusing, for we have found it difficult to determine ourselves where the court meant to place the burden of proof on the controverted issues of fact. The charge submitting the issue of collusion is not entirely free from the objections made to it in appellants' brief. We find no merit in assignments raising other questions. Because the court erred in the charges affecting the burden of proof and in singling out and withdrawing from the consideration of the jury the application of R. M. Bell upon which the land commissioner had made an award, the judgment must be reversed, and the cause remanded for a new trial.

STREET v. ROBERTSON et al.¹

(Court of Civil Appeals of Texas. Feb. 8, 1902.)

EVIDENCE—PAROL EVIDENCE TO VARY CONTRACT—EVIDENCE OF CONSIDERATION—NEGOTIABILITY OF NOTES—FAILURE OF CONSIDERATION—APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY.

1. Where a trust deed to secure notes for \$750 recites that it is given in consideration of \$10, and the uses, purposes, and trusts set forth in the deed, and no consideration is recited in the notes, evidence is admissible in an action thereon to show the real consideration, as, it being apparent that the deed and notes were executed in pursuance of an agreement which the parties did not express in writing, the rule excluding parol proof of a consideration different from a contractual consideration recited in a contract has no application.

2. Notes are rendered nonnegotiable by a provision that no other property owned by the

maker, or which he may acquire, shall be subjected to their payment, except the property included in a trust deed given to secure them; and the maker may plead failure of consideration in an action on the notes by an innocent purchaser thereof.

3. An assignment of error in overruling a general demurrer to an answer, and in not sustaining a number of special exceptions, which embodies a number of distinct propositions of law embraced in the ruling, but which is relied on as a single proposition, and is only followed by a brief statement and citation of authorities, is a violation of the rules prescribed by the supreme court, and will not be considered on appeal.

Error from district court, Comanche county; N. R. Lindsey, Judge.

Action by J. G. Street against Flora Robertson and others. From a judgment in favor of the defendants, the plaintiff brings error. Affirmed.

N. J. Wade, for plaintiff in error. G. H. Goodson, for defendants in error.

STEPHENS, J. March 5, 1895, G. W. L. Robertson executed three promissory notes, for \$250 each, payable to A. W. Allen or order, and at the same time executed a deed of trust to secure them, naming T. C. Hill, trustee. These instruments were in the usual form, but were qualified by the following clause inserted in each of them: " * * * It is understood that the tract of land this day conveyed to T. C. Hill, as trustee, to secure the payment of this note, is the only property of the maker of this note that shall be subject to this debt, and that no other property he now or may own hereafter shall be subject in any way or be held for the payment of this note, or any part thereof." The notes were assigned before maturity to J. G. Street, who prosecutes this writ of error from a judgment denying him the right of recovery on the ground of failure of consideration.

The assignment to Robertson by Allen of the right to sell a washing machine of a given patent in a given territory in Texas was the consideration for the notes and deed of trust, though not named therein. Ten dollars, and the uses, purposes, and trusts set forth in the deed of trust, were recited as the consideration for its execution, and no consideration whatever was recited in the notes. The objection that proof of the real consideration by parol was inadmissible was therefore properly overruled. Evidently the notes and deed of trust were executed in pursuance of a more comprehensive agreement which the parties did not undertake to express in writing, and the familiar rule which excludes proof by parol of a consideration different from a contractual one recited in the written instrument has no application. We also concur with the district judge in holding that the clause above quoted rendered the notes nonnegotiable. The promise was, in effect, one to pay the sums specified in the notes, or only the proceeds of the sale of the property mortgaged, if less

¹ Rehearing denied March 8, 1902.

than the total sum named in the notes. See case cited in notes to Tied. Com. Paper, § 28, where the promise was to pay the proceeds of a shipment of goods. That failure of consideration was available, see *Ablovich v. Bank* (Tex. Civ. App.) 54 S. W. 794. Besides, the evidence showed beyond question that plaintiff in error acquired two of the notes, at least, with notice of the alleged failure of consideration.

These conclusions would require the first, second, third, sixth, and seventh assignments of error, even if sufficient in form and properly briefed, to be overruled. We do not, however, feel at liberty to ignore the objections so pointedly made by counsel for the defendants in error to these and other assignments as presented in brief of plaintiff in error. The objections to the first and second assignments may not be well taken, but those made to the third, fifth, sixth, seventh, eighth, and ninth we must sustain, or else be guilty ourselves of violating the rules prescribed by the supreme court. To show that the rules have not been observed, we have only to quote from the brief of plaintiff in error, as a sample, the third assignment, which, though it complains of the overruling of a general demurrer and several special exceptions, and embodies half a dozen distinct propositions, is itself relied on as a proposition, and is followed by no other proposition, but only by a brief statement, of five or six lines, with citation of authorities. It reads thus: "The court erred in overruling the general and special exceptions of plaintiff to defendants' first amended original answer, because: (1) It attempts to vary a contract in writing by parol, setting up by parol another and different contract from that sued on, without alleging facts sufficient to show fraud or failure of consideration of the notes and mortgage sued on. (2) Said answer pleads conclusions, merely; alleges no facts which would authorize evidence to determine whether the consideration had failed, or A. W. Allen defrauded the defendant. (3) Said answer admits title passed to defendant, and complains only of want of an 'assignment' in evidence thereof; and therefore plaintiff, being assignee of the notes, is not liable for the debt, default, and miscarriage of A. W. Allen with reference to the clerical work of executing a suitable conveyance. (4) Said answer is insufficient because defendant fails and refuses to tender back the consideration already received by him for his notes, which he alleges to be 'useful and valuable.' (5) Said answer contains no description of said improvements, their value, or that they would be of service to defendant. It is not alleged that such improvements are patentable, and there is nothing to distinguish the original machine from the so-called improvements. Their dependence upon each other, utility, or relations are not shown. (6) It appears from

66 S.W.—71

said answer that defendant and A. W. Allen fully understood each other at and before the time of the trade, and the defendant assumed the risk of the happening of a future event, to wit, the issuance of patent on certain improvements, which patent had already been applied for, and would, under the contract, inure to him. Perhaps this uncertainty which defendant fully contemplated was the very inducement of his closing the trade, if he could thereby purchase from Allen at a reduced price. The court erred in not sustaining said general and each and all of said twelve special exceptions to the first amended original answer of defendant, as fully set out and contained in plaintiff's second supplemental petition, which is here referred to and made a part of this assignment."

The fourth assignment seems subject to the like objection that two distinct propositions are covered both by it and by the proposition submitted under it, but, as an examination of the record shows it to be clearly without merit, we need not consider it further.

This leaves for consideration only the tenth and eleventh assignments, complaining of the court's refusal to give two special instructions requested by plaintiff in error, to the effect that Robertson was estopped, by his conduct in selling some of the washing machines, and accepting transfers of the prospective patent right, from pleading a failure of consideration; but these assignments must be overruled, because, if for no other reason, no estoppel was pleaded by plaintiff in error. *Rail v. Bank* (Tex. Civ. App.) 22 S. W. 865, and case there cited.

The evidence tended to show that the failure of Allen to procure the contemplated patent within a reasonable time was, under the circumstances of this case, a failure of consideration, but no complaint is made of the verdict.

Judgment affirmed.

CARDWELL et al. v. MASTERSON et al.
(Court of Civil Appeals of Texas. Jan. 23, 1902.)

PLACE OF TRIAL—RESIDENCE OF DEFENDANTS—JOINDER OF ACTIONS—FORECLOSURE OF LANDLORD'S LIEN—JUNIOR MORTGAGEE—CONVERSION.

1. Under Rev. St. art. 1194, subd. 4, exempting from the rule that one shall not be sued out of the county of his domicile a case where there are several defendants residing in different counties, an action against a tenant for rent and to foreclose the landlord's lien, and against parties claiming as mortgagees under a mortgage from the tenant, for conversion of property subject to the lien, may be maintained in the county of the tenant's domicile, though the other parties are domiciled in another county; the tenant being a necessary party.

2. In an action to foreclose a landlord's lien, joined with an action against a junior mortgagee, an allegation that the mortgagee is a

serting title to property subject to the lien is sufficient, without an averment that such mortgage was delivered and registered.

3. An action against a tenant to foreclose a landlord's lien is properly joined with an action against others for conversion of property subject to the landlord's lien.

Appeal from district court, Wharton county; Wells Thompson, Judge.

Action by Mamie Cardwell and others against J. R. Masterson and others. From a judgment of dismissal, plaintiffs appeal. Reversed.

G. G. Kelley, for appellants. Terry, Balinger, Smith & Carvin, for appellees.

GILL, J. This suit was brought by appellants, Mamie and Estelle Cardwell, in the district court of Wharton county, against J. R. Masterson, Jr., who then resided in Wharton county, and G. H. and W. E. Mensing, composing the firm of Mensing Bros. & Co., residents of Galveston county. The suit as against Masterson was for the purpose of recovering \$1,200, less certain credits, as rent of the Cardwell plantation, in Wharton county, for the year 1897, and to foreclose the landlord's lien upon the crops raised thereon during that year by Masterson, who was the lessee. The members of the firm of Mensing Bros. & Co. were made parties defendant under an allegation that they were holders of a mortgage from Masterson on 150 bales of cotton to be raised on the Cardwell plantation during the year named; that the mortgage lien was junior to and subject to the landlord's lien sought to be foreclosed; that 41 bales of cotton had been delivered to them by Masterson at Galveston, Tex.; that they refused to point out the 41 bales of cotton to plaintiffs, and had converted it to their own use. Judgment for the value of the 41 bales was sought as against them. Masterson did not answer, but made default. Mensing Bros. & Co. interposed a plea of personal privilege, setting up their right to be sued in Galveston county; alleging that they were improperly joined as defendants in the suit against Masterson; that the action against them was one of tort, whereas the suit against Masterson was for breach of contract; and that the petition presented a misjoinder of causes of action. The same questions were made by exceptions to the petition, the latter disclosing the residence of the parties, and their relation to plaintiffs' claim, and the property against which the lien was asserted. The court sustained the plea of privilege, and dismissed the suit as against Mensing Bros. & Co., but rendered judgment against Masterson for the debt, and foreclosed the landlord's lien upon all the crops raised upon the plantation for the year 1897. From the judgment of dismissal, plaintiffs have appealed.

By the petition it was alleged, in substance, that the Cardwell plantation was leased to Masterson for the year 1897, and

that he entered thereon and raised crops; that, by reason of the lease, plaintiffs had a landlord's lien on all the crops so raised for the payment of the rent; that in February of that year Masterson executed and delivered to Mensing Bros. & Co. a mortgage on 150 bales of the cotton to be raised on the premises for that year; that at various times in the fall of 1897 Masterson shipped to Mensing Bros. & Co., at Galveston, certain bales of cotton covered by the landlord's lien, the number shipped aggregating 41 bales; that Mensing Bros. & Co. had refused the demand of plaintiffs to point out the 41 bales so received by them, and had converted them to their own use. The value was alleged, and judgment prayed therefor. The action of the court in dismissing the cause as to the Mensings is assigned as error. Appellees contend that the action of the court is correct: First, because the suit, as against them, is one of tort, whereas the suit against Masterson is on contract, and the two cannot be joined; second, the petition, fairly construed, alleges that Masterson, in shipping the cotton to the Mensings, parted with all interest therein, and the joint suit cannot be maintained unless he retained some interest in the cotton shipped, so that he would have an interest in the application of the amount which might be recovered against the Mensings; third, because the allegation that the Mensings were junior lienholders under the alleged mortgage is insufficient to hold them, because it is not alleged the mortgage was duly delivered and placed of record.

The right of appellants to join the appellees in the suit against Masterson depends upon whether the appellees were, in any event, proper or necessary parties to that suit; for it is conceded that they did not reside in Wharton county, and no other fact exists which would authorize the suit against them in a court other than that of their residence. One having a cause of action against several defendants residing in different counties may bring his suit in the county where any one of them resides. Rev. St. art. 1194, subd. 4. It has been held that in such case the defendant in whose county the suit is brought must be not only a proper, but a necessary, party to the suit. *Chaison v. Beauchamp* (Tex. Civ. App.) 33 S. W. 303. In *Railway Co. v. Mangum*, 68 Tex. 342, 4 S. W. 617, it is held that the defendant residing in the county in which the suit is brought must be either a necessary or a proper party defendant, but in the case last cited the court was not called on to make the distinction. However this may be, it cannot be doubted that, in the case before us, Masterson was the principal defendant, and a party absolutely necessary to the suit for debt and foreclosure. If, then, the Mensings were either necessary or proper parties to the original suit, the trial court

erred in dismissing the case. That junior lienholders and those claiming an interest in the property covered by the lien may be joined in the foreclosure suit is well settled, and is not questioned by the appellees. The appellants alleged that the Mensings were junior mortgagees. So upon this ground alone they should have been held in the suit. But appellees contend that the appellants did not allege that they had a valid mortgage. This contention is based upon the absence of allegations that the mortgage was delivered and registered. We are of opinion this contention is unsound. It was not necessary that appellants should allege that appellees were claiming under a valid mortgage. It was enough to aver that they were asserting a mortgage lien which appellants wished to preclude or adjust by the judgment. But if the allegations as to the mortgage should be held insufficient, they were nevertheless properly joined as defendants in the suit on the allegation of possession and conversion of a part of the property covered by the lien. The fact that the cause of action against Masterson was for breach of contract, and that against appellees sounded in tort, does not render this holding unsound. Had the conversion been subversive of the rights of both the appellants and Masterson, the suit, as against appellees, would have been none the less one of tort, and yet it is well settled that in such case the appellees could have been properly joined. *Cobb v. Barber*, 92 Tex. 309, 47 S. W. 963. It is reasoned that the mortgagor has an interest in the property converted which would authorize an action in his own behalf. That he is also interested in seeing that the proceeds are applied to the extinguishment of the debt, and the fact that the party charged with conversion would have the right, if separately sued by the mortgagee, to have the mortgagor made a party, in order that he may be protected against a double recovery, is also given controlling weight. While in *Cobb v. Barber*, supra, a doubt is expressed as to whether the party charged with conversion could be properly joined in a case where the mortgagor is alleged to have parted with his entire interest; the question is not decided, and it seems to us that the reasons controlling in the one case apply with equal force in the other. In the case before us the appellees had an interest in the result of the controversy between appellants and Masterson. If the debt for the payment of which the lien existed had been discharged or reduced, the fact was useful to their protection. If the crops not affected by the conversion were sufficient to discharge the lien, the question could be best adjudicated with all parties before the court, thus avoiding a multiplicity of suits. As said by Chief Justice James in *Parlin & Orendorff Co. v. Miller* (Tex. Civ. App.) 60 S. W. 881: "But, properly considered, ap-

pellants' liability is not distinct from the debt, but depends upon and grows out of it. It is only by reason of the debt that the mortgagee can pursue the purchaser of mortgaged property. Such a purchaser, with notice, who destroys the subject of the mortgage, becomes liable to the mortgagee for the value of the property to the extent of the debt. Looking to the substance, instead of the form, the consequence of such an act is to make him liable for the debt pro tanto." To join such parties in foreclosure suits seems to have been the uniform practice, and, while the exact question does not seem to have been decided, we think the cases above cited and those cited below fairly indicate the trend of judicial opinion: *Templeman v. Gresham*, 61 Tex. 59; *Taylor v. Felder* (Tex. Civ. App.) 23 S. W. 489; *Zapp v. Johnson*, 87 Tex. 641, 30 S. W. 861. Appellees have cited no case in point, and we are of opinion that those cited holding that suits sounding in contract cannot be joined with those sounding in tort ought not to control in determining the question before us. The rule is not absolute, and is subject to many exceptions. Thus, a suit upon contract may be joined with a suit for damages growing out of a tort, when the tort grew out of the breach of the contract.

The right of appellants to maintain the suit for conversion in Wharton county depending on whether appellees were proper parties to the foreclosure proceeding, and we being of opinion that they were, it follows that the judgment of dismissal must be reversed, and the cause remanded, and it is so ordered. Reversed and remanded.

On Motion for Rehearing.

(March 8, 1902.)

We have carefully considered the motion for rehearing, but have found no reason to change our views. Counsel for appellees call our attention to the part of the opinion in which the cases of *Chalson v. Beauchamp*, 12 Tex. Civ. App. 112, 34 S. W. 308, and *Railway Co. v. Mangum*, 68 Tex. 342, 4 S. W. 617, are referred to, and complain that the meaning of the court is not plain. It may be that the writer was not fortunate in his effort to make his meaning clear. In *Chalson v. Beauchamp*, supra, it is said: "* * * To authorize a suit against a defendant in a county other than the one in which he has his domicile, * * * his codefendant must be a necessary as well as a proper party." A closer inspection of the case shows that the point was not up for decision, as it was correctly held that the party urging the plea of privilege was not even a proper party to the suit. *Halloway v. Blum*, 60 Tex. 625, is cited in support of the proposition, but in that case the parties complaining were also held not to be proper parties. In *Railway Co. v. Mangum*, supra, it is declared that

such a defendant must either be a necessary or a proper party, but the court was not called on to make the distinction. Now, we meant to say in the main opinion that, for the purposes of this case, it was immaterial which statement of the rule was correct. Masterson being the main party to the suit, and residing in the county of the forum when the suit was brought, satisfied the rule as more strictly stated in the case first cited. But it is contended that, while Masterson was a necessary party to the suit for debt and foreclosure, he was not a necessary party to the suit for conversion. In *Cobb v. Barber*, 92 Tex. 309, 47 S. W. 963, the suit was against the maker of a note secured by a lien on cattle, but no foreclosure was asked. Certain parties were made defendants under allegations that they had converted property covered by the lien given to secure the note, and judgment was asked against them for the value of the converted property. They resided in another county, and made the same question as to venue and misjoinder as is made here. Whether the debtor had parted with his interest in the converted property was not alleged. The court held that they were properly joined, and that the plea to the venue should have been overruled. We understand, of course, that appellees undertake to distinguish this case from that on the ground that it is a fair inference from the allegations here that Masterson had parted with his interest in the cotton alleged to have been converted. This question was left open in *Cobb's Case*, supra, but we decided it on appellees' construction of the pleadings, and still think our conclusion correct. The vice in appellees' position is the assumption that the suit for conversion cannot be joined with a suit on the debt, losing sight of the fact that the latter is the basis of the lien which gives the plaintiff the right to maintain the action for conversion. In *Cobb's Case*, supra, on which appellees rely, the suit was so joined. In the case cited, Justice Brown says: "Our system does not favor the bringing of a multiplicity of suits, and therefore permits all causes of action growing out of the same transaction to be joined, and all interests in the same property or fund to be litigated and the equities of the parties adjusted in the same suit." It is apparent that an application of this rule to the case at hand would further this policy of the law. It may safely be said that a fair construction of the pleadings authorizes the inference that Masterson delivered the cotton to the appellants to go as a credit upon the second mortgage, and that appellants so received it. If the first lien had been satisfied, or if the debt did not in fact exist, appellees had no cause of action. These questions could be properly litigated only in a suit to which Masterson was a party. But they were also necessarily involved in the suit for conversion. If the debt was less

than the value of the converted property, the recovery against appellants could not exceed the debt. If it was more than the value of the property, the recovery could not exceed the property. In this view of the case, we were struck with the force of Judge James' remarks quoted at length in the main opinion. If the property was in the hands of appellants without the assent of Masterson, it would amount to a technical conversion, and both he and the lienholders might so treat it. They might also proceed against the property itself. But it is apparent that the actual difference between a proceeding against the property in the hands of appellants and an action for its conversion is so slight that their attitude toward the parties and the actual result is practically the same. Yet if the cotton was existent and in the hands of appellants, and they were asserting a claim thereto, the right of appellees to join them in this suit could not be questioned. We do not think the technical common-law rule that a suit for tort cannot be joined with a suit upon contract has, under our system, any application to cases of this sort. In this view of the case, and in the light of the case of *Cobb v. Barber*, supra, we regard it as immaterial whether the petition is sufficient to sustain a judgment for foreclosure or not.

The motion is overruled.

DAVIS v. McCAULEY.¹

(Court of Civil Appeals of Texas. Feb. 1, 1902.)

SCHOOL LANDS—AWARD—APPRAISAL—CONTEST—BURDEN OF PROOF—EVIDENCE—SETTLEMENT.

1. Where school land has been awarded to an applicant by the commissioner of the land office, the burden is on an adverse applicant who contests the award on the ground that the land had not been appraised at the price offered by the first applicant to show that it had not been so appraised.

2. Where school land has been awarded to an applicant at \$1 per acre, certificates from the general land office that the land was once valued at \$2 per acre, and afterwards the classification was changed, and the north half valued at \$1, but not showing whether the south half was so changed, do not show that it had not all been appraised at \$1 before the award was made.

3. Where one contesting an award of school land made his application before April 19, 1901, when the act of 1901, p. 292, providing that, if any purchaser shall fail to reside on and improve the land purchased by him, he shall forfeit the land and all payments made thereon, took effect, the question whether the owner to whom the land was awarded continued to reside on the land after the award is immaterial.

Error from district court, Roberts county; B. M. Baker, Judge.

¹ Rehearing denied March 6, 1902.

Action by A. E. Davis against M. McCauley. From a judgment for defendant, plaintiff brings error. Affirmed.

John W. Veale and L. C. Heare, for appellant. Hendricks & Coffee and H. E. Hoover, for appellee.

STEPHENS, J. School section 180, block No. 2, Gray county, is the subject of this controversy. The land was awarded to M. McCauley January 20, 1900, upon his application, dated October 2, 1899, and filed in the general land office two days later, to purchase it as dry grazing land at \$1 per acre. The validity of this sale was disputed by A. E. Davis, who brought this suit, relying upon two subsequent applications of his own, one dated November 14, 1900, in which he offered to purchase the section as dry grazing land at \$1 per acre, and the other April 8, 1901, in which he offered to purchase it as dry grazing land at \$2 per acre, neither of which was accepted.

The grounds of objection to the sale to McCauley were that the land had never been appraised at \$1 per acre, and that McCauley's settlement failed to meet the requirements of the law. Both issues were submitted to the jury, and determined in favor of McCauley. Davis complains of the action of the court in submitting the issue of appraisal to the jury; but, if there was error in this, it was not to his prejudice. Inasmuch as the land had been awarded to McCauley, who was still recognized by the commissioner of the land office as the purchaser, the burden was on Davis to show that there had not been any appraisal at \$1 per acre, which we think he failed to do. He read in evidence certificates from the general land office showing that the land had been classified as agricultural land, and valued at \$2 per acre, under the act of 1887, and that this classification had been changed under the act of 1897 to dry grazing land, and that the appraisal of the north half of the section had been reduced June 18, 1898, to \$1 per acre, but failing to show whether or not the appraisal of the south half had been so changed. It was within his power, by taking the deposition of the land commissioner, or possibly by interrogating the clerk of the county court of Roberts county, who testified as a witness on the trial, to prove the negative fact relied on by him, that no such change had been made; and this he should have done, instead of merely offering a few certificates, inconclusive within themselves, which, at best, left the matter in doubt, and failed to overcome the presumption arising from the action of the commissioner in awarding the land to McCauley.

As to the sufficiency of the evidence to sustain the finding that McCauley was an actual settler when he made his application, it seems to us that the case is quite as strong

as that of Borchers v. Mead, 43 S. W. 301, in which we felt constrained to grant a rehearing in order to uphold the verdict. Whether or not he continued to be an actual settler after the land was awarded to him was immaterial in this case; the act of 1901, p. 292, not having gone into effect until April 19, 1901, which was after the last application of Davis. Dowding v. Ditmore (recently decided by us) 65 S. W. 486, and cases there cited.

The objections to the court's rulings in the admission and exclusion of testimony are sufficiently answered in the brief of defendant in error.

Judgment affirmed.

METROPOLITAN LIFE INS. CO. v. DARENKAMP, City Treasurer, et al.¹

(Court of Appeals of Kentucky. March 11, 1902.)

CITY ORDINANCES—RULES OF CONSTRUCTION —LICENSE TAX BASED ON INSURANCE PREMIUMS—MANDAMUS.

1. Every clause or word of an ordinance should be presumed to have been intended to have some force and effect.

2. Ordinances levying taxes are to be construed most strongly against the government and in favor of a citizen, and their provisions are not to be extended by implication beyond the clear import of the language used.

3. Under a city ordinance requiring every insurance company doing business in the city to pay annually to the city treasurer, as a license tax, a certain sum on every \$100 "of premiums received on business done in the city," the tax must be based on premiums received on new policies issued, and not upon premiums received on outstanding policies.

4. Mandamus lies to compel a city treasurer to accept a certain sum tendered in payment of a license tax, and to issue a receipt therefor, and to compel the city clerk, upon the presentation to him of such receipt, to issue a license.

Appeal from circuit court, Kenton county. "Not to be officially reported."

Action by the Metropolitan Life Insurance Company against Frank Darenkamp, city treasurer, and Theo Von Hoen, city clerk, for mandamus. Judgment for defendants, and plaintiff appeals. Reversed.

S. D. Rouse, for appellant. F. J. Hanlon, for appellees.

BURNAM, J. This appeal involves the construction of the following ordinance of the city of Covington: "Be it further ordained, that every life, fire, accident, casualty or indemnity insurance company doing business in the city of Covington shall, on or before the first day of May, 1901, pay to the city treasurer the sum of \$1.50 on every \$100 of premiums received on business done in the city of Covington from May 1st, 1900, to and including December 31, 1900. And on the same amount for each succeeding year pre-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

vious to and including the 31st of December of the year in which the license is payable and issued. The computation for the license shall be made upon the premiums of said company, firm or corporation for the year in which the license is payable, excepting for the year immediately preceding the first of January in the year in which the license is payable, excepting for the year of 1900, a sworn statement of which, made at the home office or at its principal office in the city of Covington, by one of its officers or agents, shall be furnished to the city clerk and city treasurer on the application for said license." Appellant instituted this suit against appellees in April, 1901. It alleged "that in pursuance to the provisions of said ordinance, and in compliance therewith, it did upon the 30th day of April, 1901, furnish to the defendant Theo Von Hoen, city clerk, and to the defendant Frank Darenkamp, city treasurer, a statement of the premiums received by it for business done in said city of Covington from May 1, 1900, to and including December 31, 1900, which said statement was true, and was sworn to by E. T. Gale, who was and is one of its officers, and made application for a license to do business in the city of Covington for the year next ensuing after and including said 1st day of May, 1901, and with said statement and application for a license it tendered to said defendant Frank Darenkamp, city treasurer as aforesaid, \$—— in payment of said license so applied for, as by said ordinance is required. Said statement is filed herewith, marked 'A.' It says that the said sum, to wit, \$——, is \$1.50 on every \$100 of premiums received on business done in the city of Covington from May 1, 1900, to and including December 31, 1900, but plaintiff says that notwithstanding said furnishing of said statement as aforesaid, in compliance with the ordinance set out, the said defendant Frank Darenkamp, city treasurer, wrongfully and without authority, and contrary to the provisions of the ordinance, and contrary to the duty imposed upon him by law, declined and refused to accept and to receipt for said money, and the said defendant Theo Von Hoen wrongfully and without authority, and contrary to the provisions of the ordinance, and contrary to the duty imposed upon him by law, refused to issue to it a license to do business in the city of Covington; both of said defendants, and each one of them, wrongfully and erroneously, and contrary to the plain meaning of the provisions of the ordinance in question, contending that the words, '\$1.50 on every \$100.00 of premiums received on business done in the city of Covington,' mean that said plaintiff is required to pay \$1.50 on every \$100.00 received as premiums upon all its outstanding policies; both upon those issued within the period named, to wit, from May 1, 1900, to and including December 31, 1900, as well as upon those issued and outstanding before said May 1,

1900,"—and asked that a mandamus be awarded, commanding Darenkamp, as treasurer, to accept in payment of such license from plaintiff an amount calculated upon the premiums received on policies written within the period named, and to issue a receipt therefor, and that an order of mandamus should issue, commanding the defendant Theo Hoen, city clerk, upon the presentation to him of such receipt, to issue the plaintiff a license to do business in the city of Covington for the year next ensuing after May 1, 1901. Accompanying the petition, and filed as a part of it, was a statement sworn to and signed by plaintiff's superintendent, reciting that the company had received in premiums upon the business done within the time indicated \$7,081.67. The defendants filed a general demurrer to the petition, which was sustained, and the petition was dismissed, and from that judgment the plaintiff appeals to this court.

The particular phraseology of the ordinance which we are asked to construe, "premiums received on business done," is very obscure, and, if any meaning is to be attached to the words "on business done," we must conclude that they refer to premiums paid upon new policies issued by the company between May 1 and December 31, 1900. If the ordinance did not mean this, they should have been omitted altogether. There is no clearer or more reasonable rule of construction than that every clause or word of an ordinance should be presumed to have been intended to have some force and effect; and "ordinances levying taxes and imposing duties on citizens are to be construed most strongly against the government and in favor of the citizen, and their provisions are not to be extended by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out, although standing upon a close analogy." See Auth. St. Const. §61, and *U. S. v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690. And "statutes regulating trade and the conduct of merchants ought to be perfectly clear and intelligible to persons of their description." See *Dwar. St.* 742. We are therefore of opinion that the only license which can be collected under the ordinance is \$1.50 on every \$100 of premiums received on new business done by the appellant in the city from the 1st day of May, 1900, until the 31st day of December, 1900, and on the same amount for each succeeding year.

It is suggested by counsel for appellees that mandamus is not a proper method of testing this point. We think otherwise. Section 477 of the Civil Code of Practice provides that "the writ of mandamus as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined."

ed by law, and is granted on the motion of the party aggrieved, or of the commonwealth when the public interest is affected." Appellees are both executive and ministerial officers of the city of Covington, and it was their duty, under the ordinance, to have accepted the money tendered by appellant, and issued the license provided by the ordinance.

For the reasons indicated, the judgment is reversed and the cause remanded, with instructions to grant the relief prayed.

BILLINGTON v. JONES et al.

(Supreme Court of Tennessee. Dec. 21, 1901.)

WILL—REVOCATION—INDORSEMENT—DECLARATION SHOWING INTENT.

Decedent wrote in pencil upon his will, "This will is null and void," and signed his name, and declared before witnesses that the will was defaced and killed. The paper was then placed in a lock drawer, where it was found after his death, 12 or 15 years later. During this period he referred to the will but once, to the effect that he never would have peace about it. Held, that his indorsement made on the will, and his declaration made at the time, together with his not treating it as being in effect, though keeping it for so long a period, constituted a revocation of the will under the civil and ecclesiastical laws.

Appeal from circuit court, Marshall county; W. C. Houston, Judge.

Proceeding by W. K. Billington for the probate of an alleged will of Reuben Billington, deceased. C. J. Jones and others contest. From a finding against the will, proponent appeals. Affirmed.

Walker McLain and Marshall & Armstrong, for appellant. Smithson, Armstrong & Neil, for appellees.

WILKES, J. This is an issue of devisavit vel non over the will of Reuben Billington. The cause was heard before the trial judge in the court below, and the issue was found against the will, and the executor has appealed and assigned errors.

There is no controversy but that the instrument was duly executed in proper form by Reuben Billington, but the contention is that it was revoked and rendered null and void by an indorsement upon it. It was executed in 1881, and was left in the care of James Wallace, one of the subscribing witnesses, where it remained some four or five years. Mr. Billington then went to the witnesses, and called for the will, remarking that he wanted to make some changes in it. He took it home with him, and kept it for some time in its original condition. His wife was not satisfied with it, because it did not, as she thought, make an equal distribution of his property among his children, and importuned him to change or destroy it. After an attack of illness he desired to go to California to see one of his children and as a

means of restoring his health. His wife made a condition of her going with him that he should destroy the will. He thereupon, in answer to her importunities, took the will, and wrote upon it below the signature, in pencil, the following words: "This will is null and void. R. Billington." After thus writing on it, he said to his wife, "Now I have defaced it, and it is killed." The act of writing was witnessed by his wife and daughter, but they did not at the time know what was written. He placed the paper away in a lock drawer, and it was not seen again for more than 12 years,—perhaps as many as 15,—and not until after his death, when it was found in the drawer, with other papers, some of which were valuable and others not. The proof shows that he was a man of sound mind, and fully at himself, up to his last sickness and death. He appears to have referred to his will only one time during these years, and that was in the presence of his son, the executor, to the effect that it seemed he would never have any peace about the will. The trial judge was of opinion from the proof that the testator, after executing his will, became dissatisfied with it, and wrote upon it with the purpose of revoking it, and that the writing and signature, made under the circumstances, showed an intention to cancel, and was sufficient to revoke and cancel, the will. It is assigned as error that this writing and signature did not amount to a revocation, but that the will could only be revoked by destroying, or by executing some instrument of dignity equal to the will itself, and that this writing was not of that dignity. The fact that the testator kept the paper for a number of years among his valuable papers is urged as an indication that he intended it to continue to be his will, and to take effect as such, while, on the other hand, the fact that the indorsement, made in pencil, was allowed to remain on the will, and that it was never referred to in the course of 15 years but once, and then in an indefinite manner, is cited to show that it was considered that the will was canceled, and no longer effective. This extraneous testimony appears to be quite equally balanced, and to throw but little, if any, light upon the real question whether the will was intended to be revoked and canceled or not. So that we must consider the legal effect of the revoking clause and the acts and statements of the maker of the instrument made at the time of the indorsement as the determinative feature of the case. Under the English statute of frauds (29 Car. II. c. 3), it was provided, in substance, that there should be no revocation of a written will duly executed except by burning, canceling, tearing, or obliterating. This statute is not in force in Tennessee, and the question in Tennessee, except in cases of revocation by means of a nuncupation will under our statute (Shan-

non's Code, § 3900), is controlled by the rules of the civil and ecclesiastical laws, so far as they have become a part of the common law. The important question in all such cases is the intention of the testator. If the testator does some act entirely different from those mentioned in the statute, but with the full intention to revoke, it will be a revocation. Pritch. Wills, § 266. And so if he attempt to destroy the will with the purpose of revoking the will, but does not succeed, the act done is effectual to make the revocation; as, for instance, if the testator attempts to burn his will, and believes he has done so, but by the fraud of another a different paper is burned, it will be a revocation if the testator really intended it to be so, and honestly believed the will destroyed. Smiley v. Gambill, 2 Head, 164. The question of the intention to revoke and of the acts done to effect it are for the jury, while the effect of the act done is a matter for the court. The facts being found, the court will decide whether or not they amount to a revocation. Ford v. Ford, 7 Humph. 104; Smiley v. Gambill, 2 Head, 168. The intention to revoke, and some act done to carry that intention into execution, must concur. Schouler, Wills (3d Ed.) §§ 387, 388. A mere expression of an intention to revoke, without some act to carry it into effect, is not sufficient. Allen v. Huff, 1 Yerg. 409. A written will of either personalty or realty cannot be revoked by mere parol. Allen v. Huff, 1 Yerg. 404; Marr v. Marr, 2 Head, 307, 308; Rodgers v. Rodgers, 6 Helsk. 496, 498; Allen v. Jeter, 6 Lea, 674. If a maker of a will erase his signature, and afterwards resign it, without an intention to cancel, it will not amount to a revocation or cancellation; but if there is a burning, canceling, tearing, or otherwise destroying of the instrument, it will be sufficient. Frear v. Williams, 7 Baxt. 550, 553. And if alterations and obliterations are made with a view of afterwards making a different disposition of the property, they will not amount to a revocation or cancellation if the subsequent disposition is not effectually carried out. Stover v. Kendall, 1 Cold. 560, 561. It was held in Connecticut that the words, "This will is invalid," indorsed upon the back of an instrument otherwise perfect as a will, was a sufficient cancellation or revocation; there being no statute in that state upon the subject. Witter v. Mott, 2 Conn. 67; Card v. Grinman, 5 Conn. 164, 167; Pritch. Wills, § 271; Graham v. Burch (Minn.) 28 Am. St. Rep. 344, 351, notes (s. c. 49 N. W. 697). In the case at bar it is evident that the revoking clause was written by the testator and signed by him; that he afterwards became dissatisfied with its contents, and intended to cancel and revoke it, and so stated to his wife in presence of his daughter, and that from that time forward he did not consider that it had any force or efficiency. The only circumstance militat-

ing against this view is that he placed the paper in a lock drawer, and kept it for 16 years, without destroying it; but this is counterbalanced by the proof that he did not treat it as being in effect, or refer to it as being still his will, nor did he erase the revoking clause, though it was in pencil, and might easily have been obliterated if he desired. Under all these circumstances we must hold that the will was revoked and canceled, and was not in effect at the death of R. Billington, and the judgment of the court below is affirmed, with costs.

DANIEL v. GILES.

(Supreme Court of Tennessee. Dec. 14, 1901.)

ASSAULT AND BATTERY—ACTION FOR DAMAGES—DEFENSE—PROVOCATION—MITIGATION OF DAMAGES.

1. Although any provocation calculated to arouse the passions of a reasonable man, if offered at the time of an assault, or so recently as to be a part of the *res gestæ*, will be considered in mitigation of damages, no words or insults can actually justify an assault.

2. An instruction in an action for assault that, if the jury believed that defendant assaulted plaintiff because of insults, and not because he believed plaintiff was about to assault him, plaintiff would be entitled to recover just such damages as defendant had inflicted upon him, and that, if they found for plaintiff, he would be entitled to recover for mental and physical suffering, loss of time, etc., was erroneous, in that it eliminated the consideration of provocation as an element in mitigation of damages.

Appeal from circuit court, Montgomery county; B. D. Bell, Judge.

Action by Tim Giles, Jr., against W. M. Daniel, Jr. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Dancy Fort and J. D. Taylor, for appellant. Leech & Savage, Gholson & Lyle, and Daniel & Daniel, for respondent.

McALISTER, J. Plaintiff below brought this suit to recover damages for an assault and battery inflicted upon him by the defendant, Daniel. The trial resulted in a verdict and judgment against the defendant for \$500. Daniel appealed, and has assigned errors. The court properly charged the jury that no words or insults or opprobrious epithets would justify an assault. It is well settled, however, that any provocation calculated to heat the blood or arouse the passions of a reasonable man, if offered at the time of the assault, or so recently as to become a part of the *res gestæ*, is admissible in evidence, and must be considered by the jury in mitigation of damages. *Jacaway v. Dula*, 7 Yerg. 82, 27 Am. Dec. 492; *Chambers v. Porter*, 5 Cold. 273. It is assigned as error that the charge of the trial judge virtually eliminated from the consideration of the jury in assessing the damages the proof of provocation. On this subject the court charged that: "If the plain-

tiff, Tim Giles, Jr., was upon the witness stand, and became stubborn or insolent or insulted the defendant, and the defendant, aroused or excited by his conduct and by the insult that he offered or believed he offered, struck and injured the plaintiff when he did not believe that plaintiff was going to assault him, but his action in striking him was based upon the insults alone, and not upon an honest belief that he was about to be assaulted by him, then the plaintiff would be entitled to recover just such damages as the defendant inflicted upon him. No man has a right to assault another except in necessary self-defense; and, if the plaintiff was assaulted by the defendant, and it was not in necessary self-defense, or upon his belief founded upon reasonable grounds that he was going to be assaulted, the plaintiff should recover just such damages as he has sustained." The court then proceeds to instruct the jury that if they find for the plaintiff under the charge he would be entitled to recover for mental and physical suffering, loss of time, medical expenses, etc. The court failed to instruct the jury that any insulting language or provocation offered by the plaintiff at the time of the assault should be considered in mitigation of damages. On the contrary, the consideration of the provocation for any purpose is entirely excluded by the court in his hypothetical statement of facts, and the jury were instructed that, unless the proof showed the defendant acted in self-defense at the time of the assault, the plaintiff would be entitled to recover just such damages as he had sustained. This is an affirmative error, for which the judgment must be reversed, and the cause remanded.

AMERICAN LEAD PENCIL CO. v. DAVIS.

(Supreme Court of Tennessee. Dec. 21, 1901.)

MASTER AND SERVANT — DANGEROUS MACHINERY — NEGLIGENCE — WARNING — EVIDENCE — JURY — INSTRUCTIONS — DAMAGES.

1. Where plaintiff was injured by being caught in an unprotected pulley near where he was required to work in defendant's factory, it was not error to overrule a general objection to testimony as to the location and condition of the machines and pulley by one who followed plaintiff at the work, especially where the next witness testified that there had been no change.

2. Where an inexperienced boy of 10 years was injured while at work by being caught by an unprotected pulley near where he worked in a pencil factory, and had not been warned of the danger, an instruction that the jury might allow punitive or exemplary damages if they believe from all the evidence that the defendant employer was guilty of gross negligence, or acted in a reckless disregard of the safety of the child, was not error.

3. Where plaintiff, a boy of 10 years, was so injured while at work in defendant's factory as to necessitate the amputation of his right arm, a verdict of \$2,875 was not excessive.

Appeal from circuit court, Marshall county; W. C. Houston, Judge.

Action by Clarence J. Davis, by his father, as next friend, against the American Lead Pencil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Smithson, Armstrong & Neil and Thompson & Wallace, for appellant. Marshall & Armstrong, for appellee.

CALDWELL, J. While in the employment of the American Lead Pencil Company at its factory in Lewisburg, Tenn., Clarence J. Davis, a boy 10 years old, received such personal injuries as necessitated the amputation of his right arm. By his father, as next friend, he brought this action against the company, and obtained verdict and judgment for \$2,875 as damages. The company prosecutes this appeal in error from that judgment, and raises several objections to the proceedings below.

1. It was the duty of the plaintiff, in the course of his work for the defendant, to tie in bundles the penholders that dropped from each of two planers into boxes. These planing machines were near each other, and in close proximity to the pulley on which the plaintiff was caught and injured. With a view of corroborating his own testimony as to the location and unprotected condition of these machines, the plaintiff introduced James Bearden, who testified as follows: "I worked there after Davis was hurt. I know how the planers were arranged and located while I worked there, but don't know how it was when plaintiff was hurt. There were three machines side by side. Two were from four to six feet apart, [and] there was no protection from the belt or pulley while I was there." This statement about the situation was admitted over objection of the defendant, and its admission is assigned as error. The assignment is bad, because the objection was general, being, "Defendant excepted to the question" (Telephone Co. v. Poston, 94 Tenn. 696, 30 S. W. 1040; Crane v. State, 94 Tenn. 80, 28 S. W. 317); also because testimony relating to condition soon after catastrophe, nothing else appearing, was competent as tending to show condition at that time; and, finally, because the next witness said, "Machines [were] in same place and condition when Jim Bearden worked there that they were when Davis worked there." If the testimony excepted to had disclosed the fact of subsequent repair of supposed defect in condition or arrangement of machinery, it would have been incompetent under the principle announced in Railroad Co. v. Wyatt, 104 Tenn. 433, 58 S. W. 308, 78 Am. St. Rep. 926. But such was not the purport of the testimony. It indicated no change in the locus in quo.

2. Again, it is assigned as error that the court charged the jury that they might allow punitive or exemplary damages if they believed, from all the facts and circumstances, that the defendant was "guilty of gross ne-

ligence," or acted in "reckless disregard of the safety of the child." The objection is twofold: (1) That the instruction was unsound in law; and (2) that it was not justified by the evidence. Neither point is well taken. The instruction correctly makes either "gross negligence" on the part of the defendant or its "reckless disregard of the safety of the child," if proven, a basis for punitive or exemplary damages, in the discretion of the jury. "Gross negligence"—which is the milder of the two expressions—is one of the terms used by the authorities in stating the general rule that such damages are allowable in actions of tort whenever "fraud, malice, gross negligence, or oppression" intervenes. Exactly those four terms are so employed in Sedg. Dam. (6th Ed.) at page 35, and in many of our cases, including the following: *Byram v. McGuire*, 3 Head, 532; *Dougherty v. Shown*, 1 Heisk. 306; *Robins v. Frazier*, 5 Heisk. 101; *Haley v. Railroad Co.*, 7 Baxt. 242; *Cox v. Crumley*, 5 Lea, 533; *Railroad Co. v. Gulman*, 11 Lea, 103, 40 Am. Rep. 279; *Transportation Co. v. Smith*, 16 Lea, 501, 1 S. W. 280; *Telegraph Co. v. Shaw*, 102 Tenn. 318, 52 S. W. 163; *Traction Co. v. Lane*, 108 Tenn. 388, 389, 53 S. W. 557, 46 L. R. A. 549. Gross negligence, then, is undoubtedly one ground for the allowance of punitive or exemplary damages; and for the greater reason is that degree of turpitude described by the stronger expression of the charge, "reckless disregard of the safety of the child," also a ground for the allowance of such damages. Sutherland gives support for the latter form of expression when, in discussing the subject, he says damages of this kind "are allowed when a wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to misconduct and recklessness." 1 Suth. Dam. (2d Ed.) p. 845. That language of Sutherland was adopted by this court in two of the cases just cited (11 Lea, 103; 103 Tenn. 389, 53 S. W. 557, 46 L. R. A. 549), and also in *Railway Co. v. Lee*, 90 Tenn. 573, 18 S. W. 268, as another mode of stating some of the grounds for allowing damages of this kind. The supreme court of the United States expresses the same general thought in somewhat different phraseology, not confining itself to any particular words. *Day v. Woodworth*, 13 How. 371, 14 L. Ed. 181; *Railroad Co. v. Arms*, 91 U. S. 493, 23 L. Ed. 374; *Scott v. Donald*, 165 U. S. 86, 17 Sup. Ct. 265, 41 L. Ed. 632. None of these authorities deny, but, on the contrary, all of them that are to the exact point in effect affirm, that what amounts to gross negligence under the facts of the particular case or to a disregard of the safety of the person injured, is a discretionary ground for punitive or exemplary damages; and in that affirmation they give the amplest support to the present instruction of the trial judge. The testimony of the plaintiff was to the effect

that he, though only 10 years old, and inexperienced, was, by the defendant, without any warning or instructions, put to work near uncovered and dangerous machinery, in consequence of which, while moving from one position to another in the effort to discharge his duty as directed, his arm was caught, and the injuries for which he sues were inflicted upon him. This testimony unmistakably tends to show gross negligence and recklessness on the part of the defendant, and that tendency was enough to justify the submission of the question to the jury. "It is for the court to determine whether the evidence tends to show facts which warrant exemplary damages. The sufficiency of the facts is for the jury." 1 Suth. Dam. (2d Ed.) p. 867, § 403. So the instruction complained of was both sound in law and justified by the evidence. Moreover, it is clear that the jury did not allow punitive or exemplary damages. That being true, the instruction, if not correct, as it has been found to be, would be harmless, and therefore not ground for reversal.

3. Finally, the only other assignment of error that need be mentioned is that which complains of the verdict as excessive, and this may be disposed of very briefly. In cases of this character—actions for personal injuries.—it is always the duty of the jury, in the first instance, to determine the amount of compensatory damages it will allow; and the court is authorized to interfere on the ground of excessiveness only when the allowance is so large as to evince passion, prejudice, partiality, caprice, or corruption on the part of the jury. *Packet Co. v. Hobbs*, 105 Tenn. 46, 58 S. W. 278. The present verdict evinces no such vice. A fair and impartial jury might reasonably allow \$2,875 as compensation for the pain, anguish, and dismemberment found to have been suffered by the plaintiff through the negligence of the defendant.

Affirmed.

MEMORANDUM DECISIONS.

WARD v. MORRIS et ux. (Supreme Court of Arkansas. Feb. 15, 1902.) Appeal from Ashley chancery court; J. G. Williamson, Special Chancellor. Suit by Robert H. Ward against J. W. Morris and wife. From a decree in favor of defendants, plaintiff appeals. Affirmed. Geo. W. Norman, for appellant. Robert E. Craig, for appellees.

BATTLE, J. Robert H. Ward instituted a suit, in the Ashley chancery court against J. W. Morris and his wife, Mollie H. Morris, to recover of them \$350, which Robert W. Ward owed him for the rent of a farm for the year 1897, and alleged that they were liable to him for such amount, because they took possession of 20 bales of cotton grown upon the farm rented to Robert W. during the year 1897, and, with notice that he had a lien on the same for

rent, converted it to their own use. The defendants answered, and alleged that the plaintiff was indebted to them in the sum of \$797.99 for supplies furnished, at his request, to raise the crop of 1897, and asked judgment for the same. After hearing the evidence, the court found that the plaintiff was indebted to the defendant J. W. Morris in the sum of \$790.29 for goods and supplies advanced to him, at his request, in the year 1897, and that the defendant M. H. Morris received 20 bales of the cotton grown by the plaintiff's tenant in the year 1897, upon which he had a lien for \$550, the amount due for rent, and that the value of the cotton was \$496.91, for which she was indebted to him, and rendered judgment against him and in her favor for the balance remaining after deducting the value of the cotton from his indebtedness to her; and the plaintiff appealed. The only question presented to our consideration for decision is, was the appellant indebted to Mrs. Morris in the amount found by the court? That is a question of fact. We think that the evidence was sufficient to sustain the chancellor. The decree is affirmed.

BUCKMAN et al. v. LYLE. (Court of Appeals of Kentucky, Jan. 28, 1902.) Appeal from circuit court, Henderson county. "Not to be officially reported." Action by Mary H. Lyle against W. T. Buckman and another for the allotment of dower. Judgment for plaintiff, and defendants appeal. Affirmed. Montgomery Merritt, for appellants. Yeaman & Yeaman, for appellee.

PAYNTER, J. The appellee, Mary Lyle, is the widow of John N. Lyle. During coverture the husband was seised and possessed of a tract of land in Henderson county containing 376 acres. The appellant Morrow owns about 136 acres of that boundary, and the appellant W. T. Buckman the balance, each of whom have owned their separate parcels since 1870. The appellee had never released her right to dower in the property. It appeared that the Morrow tract could not be divided, so as to allot to plaintiff her dower therein in kind, without materially impairing its value. The court adjudged that she should be compensated by Morrow in money on the basis of rental value of the land, if it were now in the condition it was when sold from her deceased husband. The court allowed her \$440.70. She was allotted dower in the Buckman tract; the court adjudging that by reason of the improvements made on it by Buckman its value has been enhanced, so that, from the value of \$80 when he purchased it, it is now worth \$50 per acre, and, instead of allotting one-third in value of land, she was allowed one-fifth in value as it now stands. There is no question made as to the correctness of the rule of law which the court followed in the allotment of the dower. The question here for review is whether the court erred in fixing the rental value of the land, etc., and in determining the amount Morrow should pay and the quantity of land allotted as dower out of the Buckman tract. A great many witnesses were introduced on this question. Necessarily the testimony offered consisted in the opinions of the several witnesses. They differed as to the rental value of the land at the time appellants purchased it, and also as to its present rental value. It would be unprofitable to enter into a discussion of the testimony of the several witnesses introduced. We presume the court, on trying the case, knew the witnesses, which enabled him to determine what weight should be given to their opinions as to the rental value of the land. In view of the conflict in the testimony, we are inclined to give some weight to the findings of the court, and therefore affirm the judgment.

CARTER v. INGRAM et al. (Court of Appeals of Kentucky, Feb. 18, 1902.) Appeal from circuit court, Pulaski county. "Not to be officially reported." Action by B. B. Carter against Miles N. Ingram and others to subject land to the payment of a debt. Judgment for defendants, and plaintiff appeals. Affirmed. Harry L. Fogg, Robt. H. Winn, Hazelrigg & Chenault, and Ed. C. O'Rear, for appellant. O. H. Waddle, for appellees.

DU RELLE, J. John Ingram, the father of appellees, purchased in 1871 the farm which had been owned by Hugh Ward, his father-in-law, in Morgan county, Ky., for the recited consideration of \$700 cash. In 1888 he appears to have been the owner of about 53 acres of land in Montgomery county, which he seems to have acquired as the result of a land trade, and which, in January of that year, he conveyed to his wife, Annie Ward Ingram, for the recited consideration of love and affection, and the further consideration of \$1,000 cash, paid by the grantee from her separate estate, derived from a sale of the real estate of her father, Hugh Ward. John Ingram owned and lived upon this land for a number of years prior to this transfer. In March, 1891, he borrowed from one Mize \$500, executing a note therefor, due 12 months after date, with appellant Carter as surety. In December, 1891, the Montgomery county tract was traded for a tract of 85½ acres in Pulaski county, Ingram paying \$500 cash to boot; the deed being made to John Ingram, though, as claimed, it was intended it should be made to his wife. The \$500 boot was raised by a mortgage on the tract thus acquired. Some four years later, in November, 1895, Ingram and wife conveyed the Pulaski land to their sons, Miles N. and Hugh O. Ingram, one-half each; each grantee assuming payment of one-half of the \$500 mortgage. In 1896 Hugh C. Ingram sold his half of the land to one B. L. Allen for \$600, with which he paid one-half the mortgage debt assumed by him, and advanced to his brother Miles a like amount to pay the latter's half of the mortgage debt, taking a mortgage upon Miles' half to secure the payment of the loan. In July, 1896, Miles N. Ingram and wife conveyed his 17½ acres to one Hendricks, the grantee assuming the payment of the mortgage to H. C. Ingram, and in addition, though this was not recited in the deed, conveyed to Miles N. Ingram another tract of 82 acres of land. Appellant Carter having been obliged to pay the debt of John N. Ingram, upon which he was surety, brought suit to subject this 82-acre tract to the payment of his claim against the estate of John Ingram, who had died some two years previous. The defenses relied on are: First, that there was no fraudulent intent in the conveyance by Ingram to his wife, but that it was a bona fide conveyance for value, the true consideration being expressed in the deed; and, second, that in any event either Ingram or his wife was entitled to homestead in the Montgomery county tract as against the plaintiff's claim, that the trade for the Pulaski county tract was a mere transfer of their homestead right to another tract of land, and that the value of the latter tract, less the \$500 debt upon it, did not amount to \$1,000. There is considerable conflict of testimony, and the weight of testimony seems to be against the existence of any sufficient valuable consideration for the transfer from Ingram to his wife. On the other hand, the evidence tends to support the claim that they were, or one of them was, entitled to homestead therein; and, while there is considerable evidence to show this tract was worth more than the amount of the homestead exemption, the fact remains that it was traded, with \$500 boot, for the Pulaski county land, one-half of which was subsequently sold for \$600, which was presumably a fair, voluntary sale. Upon this

state of fact, the chancellor decided that the defense based upon the claim of homestead was made out by the evidence, and dismissed the petition. Giving to the finding of the chancellor upon the facts the weight to which we think it entitled, we are not inclined to disturb his judgment. The judgment is therefore affirmed.

O'REAR, J., not sitting.

COMMONWEALTH, to Use of BRUFF, v. BURNETT et al. (Court of Appeals of Kentucky. March 11, 1902.) Appeal from circuit court, Christian county. "Not to be officially reported." Action by the commonwealth, to the use of J. W. Bruff, against R. A. Burnett and others, on an indemnifying bond. Judgment for defendants, and plaintiff appeals. Affirmed. Harry Ferguson and Breathitt & Fowler, for appellant. J. W. Downer, C. H. Bush, and J. T. Hanberry, for appellees.

PAYNTER, J. This is the third appeal in this case. 44 S. W. 966; 52 S. W. 965. In the opinion delivered on the second appeal, the court ruled that the only issues to be submitted to the jury are: (1) Was the rick of hay gotten of appellant by James Burnett? (2) If so, was it accepted by him under authority from his father in satisfaction of the judgment in contest? Testimony was offered touching the issues stated, and the court by appropriate instructions submitted them to the jury. The appellee R. A. Burnett testified that he never gave his son James Burnett authority, by letter or otherwise, to accept a rick of hay in satisfaction of his judgment. His son James testifies that he never had such authority, and that he never agreed to accept one in satisfaction of the judgment; that he never received a rick of hay from appellant, but only two loads, worth about \$4 each. The appellant, Bruff, testified that James Burnett showed him a letter from his father, which authorized him to make whatever agreement he saw proper in the purchase of the hay from the appellant. He endeavors to support his testimony by that of two of his children. There are circumstances in this case which tend to support the appellee that the hay received by his son was not in satisfaction of the judgment. There is great conflict in the testimony as to whether James Burnett received a rick of Hay, or only two loads. He testified that he only received two loads, which were delivered by appellant, Bruff. In this he was supported by testimony of two disinterested witnesses, who testified as to their opportunity of knowing the quantity of hay received by Burnett. On the other hand, plaintiff, Bruff, and two of his children, testify that James Burnett received the rick of hay. In this they were supported by the testimony of other witnesses. If the hay was received at all, it was about 14 years before the witnesses testified on the trial. The jury saw the witnesses and heard them testify on both these issues. It was more capable of judging as to their credibility than we are. The witnesses who testified for appellant on the question as to whether a rick was received outnumber those of the appellees; but it is quality, not quantity, that should weigh most with the jury. We cannot say that the verdict is flagrantly against the weight of the evidence, and it is only in cases where it is that this court will disturb the verdict. The judgment is affirmed.

HASKELL v. CHAMBERS' ADM'R et al. (Court of Appeals of Kentucky. Feb. 21, 1902.) Appeal from circuit court, Boyd county. "Not to be officially reported." Action by Harriet A. Haskell against Henry A. Haskell and others to cancel a deed. Judgment for

plaintiff, and defendant Henry A. Haskell appeals. Affirmed. D. W. Steele and R. C. Burns, for appellant. D. K. Weis and Jas. H. Hazelrigg, for appellees.

BURNAM, J. At the April term, 1894, of the Boyd circuit court, the Ashland National Bank recovered a judgment for \$900, with interest and cost, against James A. Haskell, O. J. Chambers, and Harriet A. Haskell upon an obligation which Mrs. Haskell had signed as security for her co-obligors. An execution issued on the judgment, which was levied upon certain lots belonging to Mrs. Haskell fronting on Winchester avenue in the city of Ashland; and they were sold by the sheriff on the 23d of June, 1894, and bought by Joseph Lordier at the price of \$953.21, upon three months' credit. Previous to his purchase Lordier agreed that Mrs. Haskell could redeem the lots at the expiration of 90 days or within a reasonable time. Sometime after the purchase Lordier transferred the benefit of his bid to the appellant, Henry A. Haskell, who was a grandson of plaintiff and a son of J. A. Haskell. Mrs. Haskell was induced to consent to this transfer by representations made to her by her son, J. A. Haskell, that it would be better for her grandson to hold the property for her than Lordier, as he might at the expiration of the 90 days claim to be the absolute owner thereof. To enable Henry A. Haskell to raise the money to pay Lordier, his grandmother conveyed to him by general warranty deed 20 feet off of the west side of lot No. 10 for the nominal consideration of \$500. He thereupon mortgaged the lot so conveyed to a building and loan association for \$500, using the money so borrowed, with an additional sum furnished by himself, amounting in the aggregate to \$977.04, to pay the amount due Lordier. He thereupon took possession of the lots, and induced the sheriff, who had sold the property to Lordier, to execute to him a deed to all three of them, and proceeded to rent out the buildings and collect the rents and make such improvements as he saw fit, claiming to be the absolute owner thereof. Thereupon the grandmother, Mrs. Haskell, instituted this suit, in which she alleges that the defendant had, before he redeemed the property from Lordier, agreed with her that he would hold it for her benefit, and that whenever she refunded to him the moneys advanced by him to redeem the property, with interest, he would turn it over to her. She alleges that the property was reasonably worth \$3,500, and that the rental value thereof was not less than \$20 per month, and asked that the deed executed by the sheriff to appellant be canceled, and that he be adjudged to hold the property, outside of the 20-foot lot, in trust for her, subject to his equitable lien for moneys advanced by him to redeem it. The defendant answered that he had redeemed the property from Lordier at the special instance and request of his grandmother, after being informed by her that she was unable to redeem it, and that she preferred that he should own it rather than Lordier; that, in addition to the debt due Lordier, the lots were incumbered by a mortgage debt for \$1,000 to the National Building & Loan Association, which he was to assume; that the sheriff's deed was made to him with the knowledge and consent of his grandmother; and that he had taken possession of the property with her full knowledge and approval, and had paid the annually accruing premiums and dues on the debt to the building and loan association, and the taxes and insurance, and made valuable and lasting improvements and repairs upon the property, upon the assumption that it belonged to him. The pleadings being made up and proof taken, the chancellor rendered a judgment at the May term, 1899, in which it was decreed that the defendant H. A. Haskell was the owner and entitled to the possession of the 20-foot lot on the northwest side of lot No.

10. being the lot covered by the deed executed to him by appellee; that he had a lien upon the remaining lots for the balance due him for moneys advanced to pay Lordier, and also for any sums expended by him for improvements, repairs, insurance, and taxes, and for the various amounts paid to the national building and loan association, with interest from date of payment; and that he should be charged with a reasonable rent for lots Nos. 11 and 12,—and directed the cancellation of the sheriff's deed, and referred the case to the master commissioner to settle with appellant. On the 20th of March, 1900, the defendant filed a copy of this judgment with the clerk of this court, and had an appeal granted. On October 30, 1900, upon his motion, he was granted until the first day of the January term, 1901, and this time was subsequently extended until the 14th of January, when he filed a copy, not only of the record, which had been made previous to the judgment appealed from, but also included copies of all subsequent papers and proceedings in the case, including the report of settlement made by the master commissioner under the judgment appealed from, with an elaborate list of exceptions filed thereto in the trial court. No final judgment, however, seems to have been rendered upon the issues raised by the exceptions, and no additional appeal is prosecuted. The sole question before this court, therefore, on this appeal, is the correctness of the judgment of June, 1898. The question is purely one of fact, about which the evidence is conflicting; and giving, as we must, some weight to the judgment of the chancellor as to the weight of the testimony, we do not feel authorized to disturb his findings. Judgment affirmed.

HENRY et al. v. THOMPSON. (Court of Appeals of Kentucky. Jan. 23, 1902.) Appeal from circuit court, Metcalfe county. "Not to be officially reported." Action by James A. Thompson against J. R. Henry and others to enforce a lien on land. Judgment for plaintiff, and defendants appeal. Affirmed. J. W. Compton, for appellants. Dehoney & Falkner, for appellee.

GUFFY, C. J. The appellee instituted this action in the Metcalfe circuit court against the appellants for the collection of a certain note for \$75, which was alleged to be part of the purchase money for a tract of land described in the petition; and it was claimed that a lien existed upon the land to secure the payment of said note, the note having been executed to one Edwards and by him sold to the appellee. It was further alleged that the note was executed by Mary Henry, the wife of J. R. Henry and that the land was conveyed to her by deed, which, it seems, was never recorded. Afterwards she and her husband conveyed the land to J. S. Henry. The defendants denied the assignment, and in fact interposed almost every imaginable defense that could be thought of against the note and plaintiff's claim for the enforcement of his alleged lien. It is contended for appellee that the deed from J. R. and Mary Henry to J. S. Henry recognized the note in controversy. Various depositions were taken in support of plaintiff's claim, as well as some to sustain defense of J. S. Henry. The court finally rendered judgment against J. R. Henry for the amount of the note, and adjudged a sale of the land named in the petition to satisfy the judgment. Afterwards the appellants filed petition for a new trial, which, after being prepared and submitted, was dismissed, and an injunction granted staying the judgment dissolved. Appellants excepted to both judgments, and prayed an appeal, which was granted. The judgment first referred to was rendered in November, 1898. The original suit was instituted in 1896. In December, 1899,

appellants procured an appeal from the clerk of this court and executed a supersedeas bond. The judgment of November, 1898, is the judgment from which this appeal is prosecuted. The appellants have failed to point out any error in the judgment appealed from, and, after a careful consideration of the record, we fail to discover any error prejudicial to the substantial rights of the appellants. The judgment is therefore affirmed, with damages.

HURBERT v. JACKEY. (Court of Appeals of Kentucky. Jan. 29, 1902.) Appeal from circuit court, Jefferson county, common pleas division. "Not to be officially reported." Action by Henry Jackey against Jacob Hurbert to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals. Affirmed. Woolfolk & Klein, for appellant. W. A. Earl, and Andrew A. Haggan, for appellee.

WHITE, J. This is an action for breach of contract of a written lease. The answer presented a denial and cross action for damages for breach. There was a trial by jury, and a verdict and judgment for appellee, the plaintiff below, for \$120. Appellant moved for judgment notwithstanding the verdict. This was denied, and he prosecutes this appeal. There is no bill of exceptions in the record, so there is presented no question save as to the pleadings. If the pleadings authorize a judgment for appellee, there can be no reversal. The petition alleges that plaintiff and defendant entered into a contract in writing, and then copied the contract in full into the petition. It is then stated that plaintiff had partly performed his part, and was ready, willing, and able to continue so to do, but that defendant had prevented him, and had failed and refused, not only to permit plaintiff, but do himself what was required of defendant. The amount of damage is set forth and judgment sought. In our opinion this presented a cause of action. The answer admitted the contract, but denied a breach by defendant in any particular as charged, or at all, and denied the damage alleged, or at all. In a separate paragraph is pleaded a breach by plaintiff and an allegation of damage, for which judgment was sought. This answer seems to be sufficient, both as a defense and as a cross petition. The reply denied the breach charged as by plaintiff, and denied damage as alleged, or at all. These pleas seem to us to present a square issue as to who broke the contract and the damage done the other by such breach. It is admitted that the contract was entered into and had been broken. This was a sharp issue of fact, properly submissible to a jury. The pleadings sustain the judgment, and, as no other question is presented, there appears no error. Judgment affirmed, with damages.

LOUISVILLE & N. R. CO. v. FERN. (Court of Appeals of Kentucky. Jan. 15, 1902.) Appeal from circuit court, Harrison county. "Not to be officially reported." Action by Lucy Fern against the Louisville & Nashville Railroad Company to enforce a judgment. Judgment for plaintiff, and defendant appeals. Affirmed. Blanton & Berry and E. W. Hines, for appellant. W. S. Cason, for appellee.

O'REAR, J. The same question is presented in this record as in the case of Railroad Co. v. Biddell (this day decided) 66 S. W. 34. Upon authority of that case, and for the reasons therein stated, the judgment is affirmed.

PRUDENTIAL LIFE INS. CO. v. DAREN-KAMP, Treasurer, et al. (Court of Appeals of Kentucky. March 11, 1902.) Appeal from circuit court, Kenton county. "Not to be officially reported." Action by the Prudential

Life Insurance Company against Frank Darenkamp, treasurer, and another, for a mandamus. Judgment for defendants, and plaintiff appeals. Reversed. S. D. House, for appellant. F. J. Hanlon, for appellees.

BURNAM, J. The facts and legal questions involved upon the appeal in this case are identical with those considered in the case of Insurance Co. v. Darenkamp (this day decided) 66 S. W. 1125; and, for reasons indicated in the opinion filed in that case, the judgment is reversed, and cause remanded, with instruction to grant appellant the relief sought in its petition.

TERRY v. TERRY. (Court of Appeals of Kentucky. March 7, 1902.) Appeal from circuit court, Breathitt county. "Not to be officially reported." Proceeding of forcible entry by Miles Terry against Jacob Terry. Judgment for defendant, and plaintiff appeals. Affirmed. J. J. C. Bach and W. W. Vaughan, for appellant. Marcum & Pollard, for appellee.

BURNAM, J. For reasons given in the case of Terry v. Terry (this day decided) 66 S. W. 1024, the judgment in this proceeding is affirmed.

WRIGHT et al. v. STEGER et al. (Court of Appeals of Kentucky. Dec. 4, 1901.) Appeal from circuit court, Marion county. "Not to be officially reported." Rule by J. D. Steger, administrator, and others, against Wright & Moss and H. W. Rives to pay over money collected. Judgment that response to rule was insufficient, and defendants appeal. Affirmed. S. J. Spalding and L. S. Pence, for appellants. John McChord, for appellees.

WHITE, J. The appellants, Wright & Moss, a firm of attorneys, and H. W. Rives, an attorney, were ruled to pay over money collected in an action in favor of appellee Steger, as administrator of Lucy A. Steger, in which he recovered judgment against N. R. Christie, amounting to \$1,860.50; the amount retained by appellants being \$800. In their response to the rule appellants admitted collecting the money and retaining \$800. This sum they claimed as their fee in prosecuting the suit against Christie by which the money was recovered. Upon hearing the response and the issue thereon as to the amount of fee due to appellants, the court adjudged a fee of \$400 to be reasonable, and directed the balance, \$400, to be paid over to appellees, and from that judgment this appeal is prosecuted. The facts as they appear from the record are: Appellees employed appellants Wright & Moss to prosecute a suit for settlement of the estate of Lucy Steger, and to collect of Christie the sum stated. This agreement was in writing. The firm of Wright & Moss instituted suit for settlement in Taylor circuit court, making Christie a party thereto. Upon special demurrer to the jurisdiction of the Taylor circuit court the action as to Christie was dismissed. The claim against Christie seems to have been the principal, if not the only, asset of Lucy Steger, and the settlement suit is yet undecided. After the dismissal for want of jurisdiction of the Taylor circuit court as to Christie, Wright & Moss employed Rives to assist them in the action against Christie which was brought in Marion county. This action was very bitterly fought by Christie, both in the circuit court and in this court. The proof shows that there was considerable feeling and ill will shown in the case by the parties litigant, and during the taking of proof there appeared danger of personal conflict between the administrator and Christie. The proof took a wide range and consumed a great deal of time. Upon final hearing appellant Rives was, on his motion, adjudged a fee

of \$150 for his services in the case. An appeal was prosecuted to this court, and affirmed on both original and cross appeals. It appears that the same judge who rendered the judgment here appealed from tried the case against Christie, and adjudged to Rives his fee of \$150. Upon hearing he has allowed \$250 additional. The execution of the written contract is admitted, and by its terms would include the prosecution of the suit against Christie in Marion county; but we do not think such could have been contemplated by the parties. It was evidently thought that all the matters could be settled in Taylor circuit court, and, as the evidence of indebtedness by Christie was plain, it cannot be that Wright & Moss undertook that protracted litigation for that small fee. It seems from the statement of the administrator that he did not consider the contract to cover the Marion county case. This, then, must be fixed on quantum meruit. From the amount involved, the character of the case, the allowance made to Rives at the trial at his solicitation, and the proof heard, as well as from our own knowledge of the case on the appeal of Christie, we are not disposed to disturb the amount fixed by the court below as a reasonable fee, \$400, for the whole services. The judgment will not be disturbed, unless flagrantly against the evidence, which, in our opinion, it does not appear to be. Judgment affirmed.

STATE v. ELLIOTT. (Supreme Court of Missouri, Division No. 2. Feb. 4, 1902.) Appeal from criminal court, Jackson county; John W. Wofford, Judge. Thomas Elliott was convicted of murder in the second degree, and appeals. Affirmed. I. B. Kimbrell, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

BURGESS, J. Under an indictment charging defendant with murder in the second degree, for shooting to death with a shotgun his brother, David Elliott, defendant was convicted of that offense, and his punishment fixed at 10 years' imprisonment in the state penitentiary. He appeals. It appears from the record that the defendant and the deceased, David Elliott, who were brothers, lived at the town of Sibley, in Jackson county, at the time of the homicide. Their residences were about 50 yards apart, and between them was a ravine about 20 feet wide and of about the same depth. There had existed bad feeling between the brothers for some time, growing out of accusations said to have been made by deceased against defendant and his wife for stealing his (deceased's) chickens. On the morning of the homicide the defendant came to the brink of this ravine and called to his brother, saying that he wanted to speak to him, immediately beginning to quarrel over the alleged charges that his brother had been making against him about stealing chickens. After some hot words between the two men, the deceased started up the hill toward the defendant, and defendant ran back to the house, where he secured a shotgun, and when he came out of the house held the gun ready to fire. He pulled the gun up, and told his brother to stop, which the brother did, and defendant lowered the gun. They spoke a few words back and forth, when defendant raised the gun again, and the defendant's wife jumped between them. The defendant told her to stand aside. She did so, and the fatal shot was fired. The load of shot entered the deceased's body to the front of the left side, and passed through the heart, and on through the body, and lodged just beneath the skin, just back of the right side. David Elliott fell forward on his face, dead. The deceased, when he approached the defendant, had no weapon of any kind, and was making no violent threats, and had no means of carrying any threats into execution. The defendant was 44 years of age.

and his brother was 50 years old. They were men of about the same physical strength; the defendant being a little taller than, but not quite so heavy as, his brother. When the shot was fired the two men were so close together that the entire load from the gun entered the body of the deceased, tearing a hole through the body as large as a silver dollar. There was some evidence that the defendant had threatened the life of his brother shortly before this encounter between them. Defendant is not represented in this court, but several reasons are assigned, in the motion for a new trial, for setting the verdict aside and for a new trial. We are, however, after a careful examination of the record, satisfied that none of them were well grounded. Defendant had a fair trial, and no reason to complain of anything which occurred therein. The indictment is free from objection, and in form often approved by this court. Finding no reversible error in the record, we affirm the judgment. All concur.

STATE ex inf. CROW, Atty. Gen., v. COFFIN. (Supreme Court of Missouri. Feb. 19, 1902.) In banc. Appeal from circuit court, Jackson county; E. P. Gates, Judge. Quo warranto by the state, on the relation of Edward C. Crow, attorney general, against G. O. Coffin. From a judgment in favor of respondent, the relator appeals. Reversed. The Attorney General, F. M. Black, and Fyke, Yates, Fyke & Snyder, for appellant. Sanford B. Ladd, for respondent.

BURGESS, C. J. This is a twin case to the case of *State v. Lund* (decided at the present term, and not yet officially reported) 66 S. W. 1062, the only difference being that in that case the respondent was proceeded against as city comptroller of Kansas City, while in the case at bar respondent is proceeded against as city physician of said city. Therefore, for reasons given in that case, the judgment of the court below is reversed, and judgment of ouster entered here against the respondent. All concur, except **ROBINSON, J.**, who dissents and will express his views in separate opinion.

WILHELM v. STATE. (Court of Criminal Appeals of Texas. Jan. 29, 1902.) Appeal from district court, Lamar county; Ben H. Denton, Judge. Henry Wilhelm was convicted of burglary, and he appeals. Affirmed. **Robt. A. John**, Asst. Atty. Gen., for the State.

BROOKS, J. Under an indictment in two counts, charging burglary, appellant was convicted, and given 10 years in the penitentiary. The first count is good, and substantially complies with the approved forms. *White's Ann. Code Cr. Proc.* § 432; *Willson, Cr. Forms*, § 460. The record contains neither statement of facts nor bill of exceptions. No error appearing in the record, the judgment is affirmed.

WOODS v. STATE. (Court of Criminal Appeals of Texas. Jan. 29, 1902.) Appeal from district court, Ft. Bend county; Wells Thompson, Judge. Ephraim Woods was convicted of an assault with intent to commit rape, and he appeals. Affirmed. **Robt. A. John**, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to commit rape, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal. The only question raised by the bill of exceptions is to certain remarks of the district attorney while addressing the jury. These remarks, as insisted by appellant, suggest the race question, and were calculated to injure him before the jury. As explained by the

court, it does not occur to us that they were of that character. Consequently they afford no ground for reversal. We have examined the record carefully, and in our opinion the evidence sustains the verdict. There being no error in the record, the judgment is affirmed.

KELLETT v. TRICE. (Court of Civil Appeals of Texas. Feb. 19, 1902.) Appeal from district court, McLennan county; Sam R. Scott, Judge. Action for divorce by Callie R. Trice (formerly Kellett) against William M. Kellett. Judgment for defendant was modified by the court of civil appeals (30 S. W. 706), and questions certified. For opinion of supreme court, see 66 S. W. 51. Affirmed. **A. C. Prendergast** and **L. W. Campbell**, for appellant. **Wm. L. Prather** and **Clark & Bolinger**, for appellee.

FISHER, C. J. The opinion of the supreme court in answer to the questions certified in this case settles all the questions adversely to the contention of appellant, as asserted in his assignments of error. The evidence sustains that portion of the judgment in favor of appellee against appellant for the sum of \$1,500. This is complained of in appellant's tenth, eleventh, and twelfth assignments of error. The evidence shows that the consideration given for the note was the separate property of the appellee. Kellett promised to pay her the amount stated in the note, to wit, the sum of \$3,000, \$1,500 of which was paid to the attorney of appellee, and for which she does not contend, leaving a balance due to her of \$1,500. We find no error in the record, and the judgment is affirmed.

LYLES v. CLARK et al. (Court of Civil Appeals of Texas. Jan. 29, 1902.) Appeal from Sterling county court; P. D. Caulson, Judge. Action between H. Q. Lyles and Clark & Morrow. Judgment for the last-named parties, and the former appeals. Affirmed. **J. W. Swarts**, for appellant. **W. F. Kellis**, for appellees.

COLLARD, J. In this case there is no statement of facts, and no assignments of error are found in the record. There being no fundamental error, the judgment of the lower court is affirmed.

SIMMONS et al. v. MEYER BROS. DRUG CO. et al. (Court of Civil Appeals of Texas. Jan. 11, 1902.) Appeal from district court, Grayson county; Rice Maxey, Judge. Action by D. A. Simmons and others against Meyer Bros. Drug Company and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed. **Barrett, Simmons & Freeman** and **Galloway & Templeton**, for appellants. **L. B. Eppstein, A. H. Culver, and A. G. Moseley**, for appellees.

RAINEY, C. J. This is a companion case to the case of *Simmons v. Richards* (this day decided by this court) 66 S. W. 687. In that case the appellant sought to set aside a judgment recovered by the appellees, and in this case appellants are resisting a motion to have the funds in the hands of the court paid to appellees. The facts and issues in both cases are practically the same, and our conclusions, both as to the law and facts pertaining to the rights of appellees to recover in the case of *Simmons v. Richards et al.*, are applicable in this case. The judgment is affirmed.

WEHNER et al. v. LAGERFELT.¹ (Court of Civil Appeals of Texas. Dec. 18, 1901.) Appeal from district court, El Paso county;

¹ Rehearing denied January 22, 1902.

J. M. Goggin, Judge. Action by Carl O. Lagerfelt against Peter Wehner and others. From a judgment for plaintiff, defendants appeal. Affirmed. Millard Patterson and C. N. Buckler, for appellants. Beall & Kemp, for appellee.

NEILL, J. This is a companion case of *Wehner & White v. Dagmar Lagerfelt* (decided by this court on the 11th instant) 66 S. W. 221. With the exceptions of there being different parties plaintiff and the extent of the injuries, the cases are the same. With these exceptions, the cause of action, the proof establishing it, the exceptions to the testimony, the charge of the court, and the assignments of error in this case are identical with

those in the case mentioned. The appellee is the younger brother of Dagmar, referred to in her case as being with her when she was injured, through appellants' negligence, by coming in contact with the live wire. He was then eight years old, and was injured at the same time and in the same way; his injuries being less severe than his sister's. He recovered a judgment for \$200. The questions for decision being identical with those determined in the other case, we adopt and make the opinion in that case our opinion in this, both as to findings of fact and of law, with the exceptions herein stated, and order the clerk to file a copy thereof with the papers in this case. The judgment is affirmed.

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Recovery of tax paid, see "Taxation," § 4.

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Taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

Wages, see "Master and Servant," § 1.

Wrongful execution, see "Execution," § 5.

Particular forms of action.

See "Ejectment"; "Replevin"; "Trespass," § 2; "Trespass to Try Title"; "Trove and Conversion."

Particular forms of special relief.

See "Divorce"; "Injunction"; "Marshaling Assets and Securities"; "Partition," § 2; "Quieting Title"; "Specific Performance."

Abatement of nuisance, see "Nuisance," § 1.

Cancellation of written instrument, see "Cancellation of Instruments."

Determination of adverse claims to real property, see "Quieting Title."

Enforcement of vendor's lien, see "Vendor and Purchaser," § 5.

Establishment and enforcement of right of homestead, see "Homestead," § 5.

Establishment and enforcement of trust, see "Trusts," § 5.

Establishment of boundaries, see "Boundaries," § 2.

Establishment of will, see "Wills," § 4.

Foreclosure of mortgage, see "Chattel Mortgages," § 5; "Mortgages," § 5.

Reformation of written instrument, see "Reformation of Instruments."

Removal of cloud on title, see "Quieting Title."

Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 3.

Setting aside will, see "Wills," § 4.

Trial of tax title, see "Taxation," § 7.

Particular proceedings in actions.

See "Appearance"; "Continuance"; "Costs"; "Damages"; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Removal of Causes"; "Trial"; "Venue."

Default, see "Judgment," § 2.

Verdict, see "Trial," § 15.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers"; "Sequestration."

Notice of pendency of action, see "Lis Pendens."

Stay of proceedings, see "Appeal and Error," § 10.

Proceedings in exercise of special jurisdictions.

Courts of limited jurisdiction in general, see "Courts," § 4.

Criminal prosecutions, see "Criminal Law."

Suits in equity, see "Equity."

Suits in justices' courts, see "Justices of the Peace," § 3.

§ 1. Joinder, splitting, consolidation, and severance.

The joinder of causes of action is left in large measure to the discretion of the trial court.—*Gulf, W. T. & P. Ry. Co. v. Browne* (Tex. Civ. App.) 341.

A motion to vacate an order consolidating actions, after acquiescing therein for seven months, held too late.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

An action against a tenant to foreclose landlord's lien is properly joined with an action against others for conversion of property subject to the lien.—*Cardwell v. Masterson* (Tex. Civ. App.) 1121.

ACTION ON THE CASE.

See "Trespass," § 2.

ADJOINING LANDOWNERS.

See "Boundaries"; "Fences."

ADJUDICATION.

Operation and effect of former adjudication, see "Judgment," §§ 9, 10.

ADMINISTRATION.

Of estate of bankrupt, see "Bankruptcy," § 2.
Of estate of decedent, see "Executors and Administrators."
Of property by receiver, see "Receivers," § 3.
Of trust property, see "Trusts," § 3.

ADMISSIONS.

As evidence in civil actions, see "Evidence," § 6.

ADULTERY.

See "Bigamy."

Of wife as bar to dower, see "Dower," § 2.

On a prosecution for adultery, evidence otherwise irrelevant held admissible as introducing other evidence which was relevant.—Roller v. State (Tex. Cr. App.) 777.

Evidence of defendant's declarations held admissible as tending to show intimacy between herself and the party with whom she was charged with having committed adultery.—Roller v. State (Tex. Cr. App.) 777.

ADVANCES.

By landlord to tenant, see "Landlord and Tenant," § 4.

ADVERSE CLAIM.

To real property, see "Quieting Title."

ADVERSE POSSESSION.

See "Limitation of Actions."

By tenants in common, see "Tenancy in Common," § 1.

§ 1. Nature and requisites.

Payments on a mortgage debt held to prevent the possession of the mortgagee becoming adverse.—Goodman v. Pareira (Ark.) 147.

As against a title derived from the state, plaintiff was entitled to judgment quieting his title to only so much of the land in dispute as had been inclosed by fencing for seven years prior to the institution of the action.—Asher Lumber Co. v. Clemmons (Ky.) 12.

A deed executed to a trustee being void, because the beneficiary was of unsound mind, no lapse of time can give him title as against the beneficiary or his heirs.—Spicer v. Holbrook (Ky.) 180.

Plaintiffs cannot, in support of their claim of title by possession, rely upon the fact that they built a cabin on the land in controversy and installed a tenant therein after action brought:—Jones v. Patterson (Ky.) 377; Patterson v. Davis, Id.; Davis v. Patterson, Id.

A patentee who actually settled on the land embraced in his patent was in possession to the extent of his boundary, and the subsequent creation of a new county including a part of the land did not interrupt this possession.—Kentucky Union Co. v. Cornett (Ky.) 728.

Where a portion of the heirs sold their interests in the land inherited, the possession of the purchaser was not adverse to the other

heirs or to the widow's claim to dower.—Sergeant v. North Cumberland Mfg. Co. (Ky.) 1030.

Adverse possession of land for 15 years under a parol gift gives the donee a perfect title.—Logan v. Phenix (Ky.) 1042.

A tax deed is not support for a plea of three years' limitation without evidence that it was executed in completion of a sale regularly made for taxes duly levied and assessed.—Gillaspie v. Murray (Tex. Civ. App.) 252.

Tax deeds are admissible in support of a plea of five years' limitation, without proof of validity of the sale for taxes.—Gillaspie v. Murray (Tex. Civ. App.) 252.

Possession by defendants held not to be under a deed, and therefore that they could only claim title by adverse possession under statute of limitations of 10 years.—Mass v. Bromberg (Tex. Civ. App.) 468.

§ 2. Pleading, evidence, trial, and review.

In trespass to try title, testimony held to sustain finding that defendant's possession was not adverse to plaintiff.—Mass v. Bromberg (Tex. Civ. App.) 468.

AFFIDAVITS.

See "Depositions."

In garnishment proceedings, see "Garnishment," § 4.

In justice's court, see "Justices of the Peace," § 4.

Verification of claim against decedent's estate, see "Executors and Administrators," § 5.

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

ALLOWANCE.

To surviving wife, husband, or children of decedent, see "Executors and Administrators," § 4.

ALTERATION.

Of geographical or political divisions, see "Schools and School Districts," § 2; "Towns," § 1.

ALTERATION OF INSTRUMENTS.

See "Forgery"; "Reformation of Instruments."

AMENDMENT.

Of pleading, see "Pleading," § 5.

Of pleading as ground for continuance, see "Continuance."

Of record on appeal or writ of error, see "Appeal and Error," §§ 11, 12.

Of statute, see "Statutes," § 3.

On appeal or writ of error, see "Appeal and Error," §§ 16-24.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Appeal and Error," § 2; "Courts," § 3; "Justices of the Peace," § 2.

ANIMALS.

Carriage of live stock, see "Carriers," § 3.

Description of animals in chattel mortgage, see "Chattel Mortgages," § 1.

Fence laws, see "Fences."

Injuries from operation of railroad, see "Railroads," § 8.

Injuries to animals from defects in railroad fence, see "Railroads," § 1.

Fee for service of stallion under contract insuring conception *held* collectible, where the mare was traded during the period of gestation, though known not to be with foal.—*Pitchcock v. Donnahoo* (Ark.) 145.

Under Rev. St. 1895, art. 5043c, as qualified by article 5043k, the commission provided for by article 5043a had no power to establish a state quarantine line against Texas or splenic fever, which was not identical with one established by the United States department of agriculture.—*Ft. Worth & D. C. Ry. Co. v. Master-son* (Tex. Sup.) 833.

Under the stock law, the owner of animals prohibited from running at large is conclusively negligent, if they so run, and liable for their trespass on premises sufficiently fenced to turn animals authorized to so run.—*Frazer v. Bedford* (Tex. Civ. App.) 573.

Action for damages from animals running at large is maintainable; the remedy by impounding being cumulative.—*Frazer v. Bedford* (Tex. Civ. App.) 573.

ANNULMENT.

Of will, see "Wills," § 4.

ANSWER.

In pleading, see "Pleading," § 3.

APOTHECARIES.

See "Druggists."

APPEAL AND ERROR.

See "Exceptions, Bill of"; "New Trial."

Appellate jurisdiction of particular courts, see "Courts," § 5.

Costs, see "Costs," § 5.

Review of proceedings of justices of the peace, see "Justices of the Peace," § 4.

Review in particular civil actions.

See "Divorce," § 1.

By or against infants, see "Infants," § 2.

Review of criminal prosecutions.

See "Criminal Law," §§ 25-29; "Homicide," § 8.

§ 1. Nature and form of remedy.

The court of civil appeals will not certify a question to the supreme court unless some one of its members is in doubt about the question certified, or the question itself is of great public interest.—*Habermann v. Heidrich* (Tex. Civ. App.) 705.

§ 2. Decisions reviewable.

Orders of the court refusing to require bond for costs or affidavit from the appellant suing as next friend are not subject to cross appeal.—*Spicer v. Holbrook* (Ky.) 180.

As a judgment restraining the collection of a fee bill is not a judgment for the recovery of money or property, an appeal lies therefrom, though the value in controversy is less than \$200.—*Shackelford v. Phillips* (Ky.) 419.

Where plaintiff sued to recover \$1,000, and defendant corporation by its answer admitted a liability of \$1.40, upon appeal by defendant from a judgment against it for \$200, the

amount in controversy was less than \$200.—*Illinois Cent. R. Co. v. Landram* (Ky.) 599.

An appeal lies to the court of appeals from a judgment of the circuit court refusing, upon appeal from the county court, to grant a license to sell liquor.—*Appeal of Candill* (Ky.) 723.

Though a judgment recites that the submission is for judgment only on the question whether or not defendants should pay interest on a mortgage, yet, as the effect of the judgment is to refuse to enforce the mortgage lien, an appeal lies.—*Forest Hill Building & Loan Ass'n v. McKroy's Ex'r* (Ky.) 1031.

A judgment in an action under Rev. St. arts. 4565, 4566, to determine the justice and reasonableness of a decision of the railroad commission, *held* a final judgment from which an appeal could be taken.—*Railroad Commission of Texas v. Weld* (Tex. Sup.) 1006.

A judgment against the railroad commission in an action under *Sayles' Ann. Civ. St. art. 4566*, *held* not a final judgment, from which an appeal could be taken, by the mere fact that it gave costs to plaintiff.—*Railroad Commission of Texas v. Weld* (Tex. Civ. App.) 122.

A judgment against the railroad commission, in an action under *Sayles' Ann. Civ. St. art. 4565*, *held* not a final judgment, from which an appeal could be taken.—*Railroad Commission of Texas v. Weld* (Tex. Civ. App.) 122.

Setting aside an interlocutory judgment by default during the term at which it is entered is a matter resting within the sound discretion of the trial court, and is not subject to review.—*Norton v. Maddox* (Tex. Civ. App.) 319.

§ 3. Right of review.

Refusal to sustain exceptions to garnishing creditor's allegation that bank deposit was made by debtor to defeat his wife's claim for alimony *held* harmless error as against debtor's assignee.—*Norton v. Maddox* (Tex. Civ. App.) 319.

Debtor's fraudulent assignee *held* not entitled to complain of court's action in vacating interlocutory order determining adversely the claim of another person.—*Norton v. Maddox* (Tex. Civ. App.) 319.

An assignment of error by a party claiming ownership in the property involved, complaining of a decree in favor of another party to the record, will not be considered, when the court adjudges that the party complaining is not such owner.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

§ 4. Presentation and reservation in lower court of grounds of review.

The contention that the finding of a referee was without support in the evidence need not be considered, where the pleadings did not raise the issue on which the finding was made.—*Smith v. Baer* (Mo.) 166.

The act of plaintiff in an action on a saloon keeper's bond for selling liquor to a student, in amending his complaint and in offering evidence in support thereof, and asking instructions based on the theory of the amended complaint, *held* not to preclude the plaintiff from urging on appeal that he was entitled to recovery without proving the additional facts pleaded in the amendment.—*Peacock v. Limburger* (Tex. Sup.) 704.

In order to have the action on a trial judge reviewed for a refusal to file conclusions, a bill of exceptions should be taken.—*Wetz v. Wetz* (Tex. Civ. App.) 869.

Findings of fact covering every issue material to the judgment will not be inquired into for their correctness on appeal, unless assailed by proper exceptions.—*Drake v. Davidson* (Tex. Civ. App.) 889.

§ 5. — Objections and motions, and rulings thereon.

It is too late to contend on appeal that plaintiff, sued as trustee, was not a proper party to the suit because he had no real interest therein.—*Hadley v. Bryan* (Ark.) 921.

Objection that copies filed with petition are not properly attested *held* too late on appeal; the petition alleging without denial that the papers are true copies.—*Henning v. Stengel* (Ky.) 41; *Fishback v. Mehler, Id.*; *Clark v. Bitzer, Id.*

Defendant cannot complain upon appeal of an error in placing upon him the burden of proof, where he accepted it without objection.—*Bass v. Brown* (Ky.) 720.

An objection to certain testimony that it is irrelevant and immaterial is insufficient to present, on appeal, the question of the admissibility of the testimony.—*Whittle v. State* (Tex. Cr. App.) 771.

A finding in reconvention that defendants sustained damage, from the wrongful suing out of an injunction, to a certain sum, in the absence of an exception to the plea and a statement of facts, cannot be disturbed.—*Cates v. McClure* (Tex. Civ. App.) 224.

Where, in an action against a sleeping car company for lost baggage, there is no testimony as to value other than that of plaintiff, and the court finds about one-third of his estimate, the finding should not be set aside on objection, first taken on appeal, to the admissibility of part of plaintiff's testimony.—*Pullman Palace Car Co. v. Arents* (Tex. Civ. App.) 329.

The objection that the proper predicate was not laid for expert testimony, if not urged when the testimony was offered, need not be considered on appeal.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Civ. App.) 588.

§ 6. — Motions for new trial.

An error in refusing instructions cannot be reviewed on appeal, unless made a ground for new trial.—*Evening Post Co. v. Caulfield* (Ky.) 502.

An assignment complaining of a verdict on a ground not called to the attention of the trial court on the motion for new trial cannot be considered.—*Von Carlowitz v. Bernstein* (Tex. Civ. App.) 464.

Where a party aggrieved by a special verdict does not move to set it aside and grant a new trial, and does not, on appeal, assign as error the overruling of such motion, error, if any, is waived.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

§ 7. Parties.

Where plaintiff appeals under Laws 1891, p. 70, amending Rev. St. 1889, § 2246, from a new trial after a judgment in his behalf, and files a short transcript, but dies before his bill of exceptions is prepared, the trial court may revive the action in favor of his administrator.—*Crawford v. Chicago, R. I. & P. Ry. Co.* (Mo.) 350.

Where plaintiff dies after appealing from an order granting a new trial, and the trial court revives the action in favor of his administrator, it is unnecessary to obtain a further revival in the supreme court.—*Crawford v. Chicago, R. I. & P. Ry. Co.* (Mo.) 350.

An appearance in the trial court of plaintiff's administrator and defendant, and the filing of a stipulation, *held* a revival of the action in favor of the administrator, though the plaintiff had appealed before his death from an order granting a new trial.—*Crawford v. Chicago, R. I. & P. Ry. Co.* (Mo.) 350.

§ 8. Requisites and proceedings for transfer of cause.

Act March 16, 1899, § 1, limiting the time for taking appeals, *held* not to apply to an order or judgment existing prior to the passage of the act.—*Rankin v. Schofield* (Ark.) 197.

In an ordinary action the limitation of two years as to the granting of an appeal runs only from the time the motion for new trial is overruled.—*Reiser v. Southern Planing Mill & Lumber Co.* (Ky.) 286.

Where final judgment dissolving an injunction was rendered December 18th, and 20 days was given appellant in which to apply to the court of appeals to reinstate the injunction pending the appeal, a motion filed in the clerk's office of the court of appeals January 6th, but not entered in court until January 8th, was too late.—*African Baptist Church v. White* (Ky.) 410.

Under Rev. St. arts. 2255, 2256, 2258, the time for filing the bond on appeal from the county court *held* to run from the date of the order appealed from, and not from an order overruling a motion for a new trial.—*Milo v. Nuske* (Tex. Sup.) 544.

Under 1 Sayles' Ann. Civ. St. art. 1402, where the petition and bond for a writ of error are filed within a year after the entry of the judgment sought to be reviewed, it is in time, though the writ is not served until after the year has elapsed.—*Leavitt v. Brazelton* (Tex. Civ. App.) 465.

Under Rev. St. art. 1389, the court will assume jurisdiction under a writ of error sued out within a year after a judgment was entered as corrected.—*Hall v. Read* (Tex. Civ. App.) 809.

§ 9. Effect of transfer of cause or proceedings therefor.

Under Civ. Code Prac. § 747, the court of appeals has no power, upon appeal from an order dissolving an injunction on final hearing, to reinstate the injunction pending the appeal, except after notice.—*African Baptist Church v. White* (Ky.) 410.

§ 10. Supersedeas or stay of proceedings.

A supersedeas, not issued until after time for filing transcript has expired, must be discharged.—*Walston v. City of Louisville* (Ky.) 385.

An appeal from an order revoking letters of administration, made in compliance with Rev. St. 1899, § 278 et seq., *held* to operate as a supersedeas, so as to entitle appellant to retain the assets of the estate and to devert the probate court of any authority in regard thereto.—*Cuendet v. Henderson* (Mo.) 1079.

§ 11. Record and proceedings not in record.

Where an appeal requires a consideration of the evidence, and no abstract thereof is filed in accordance with supreme court rule 9, the appeal may be dismissed.—*Hays v. Comstock-Castle Stove Co.* (Ark.) 649.

Appellants were entitled to have an appeal granted by the clerk, without first dismissing an appeal granted to them by the lower court; but a motion by appellee, made before submission of the appeal granted by the clerk to dismiss the appeal granted below, must prevail; the transcript not having been duly filed.—*Walston v. City of Louisville* (Ky.) 385.

A stenographer's transcript, sent up as a part of the record, cannot be considered, unless attested by the judge.—*Mann v. Moore* (Ky.) 723.

Though an order of court shows that the court gave to the jury instruction "No. 1," to the giving of which both parties excepted, a paper copied into the record, purporting to be that instruction, cannot be considered, when

not identified.—*Housman's Adm'r v. Long* (Ky.) 821.

A schedule, not filed within 90 days after the appeal was granted, was filed without authority of law.—*Mitchell v. Stoddard Co. Bank* (Ky.) 823.

A schedule filed on an appeal, which was afterwards abandoned, cannot be recognized on another appeal, taken more than a year thereafter.—*Mitchell v. Stoddard Co. Bank* (Ky.) 823.

A contention that there was no substantial evidence to support a finding of a referee will not be considered, unless the abstract is sufficient to enable the court to decide the contention.—*Smith v. Baer* (Mo.) 166.

Where plaintiff dies after appeal from an order granting a new trial, but before filing a bill of exception, and the action is revived in favor of his administrator by the trial court, the supreme court has no jurisdiction to complete the record or to allow a bill of exceptions.—*Crawford v. Chicago, R. I. & P. Ry. Co.* (Mo.) 350.

Under Rev. St. arts. 1379-1382, a statement of facts filed after the statutory time must be stricken from the files, where no sufficient excuse is shown.—*Stubbs v. Landa Cotton Oil Co.* (Tex. Civ. App.) 213.

The statement in a bill of exceptions of all the facts proven on the trial cannot be treated as a statement of facts.—*Cates v. McClure* (Tex. Civ. App.) 224.

The court of appeals cannot receive and consider affidavits and certificates of the clerk of the trial court that the record on appeal is incorrect.—*Southern Pac. Co. v. Winton* (Tex. Civ. App.) 477.

Where a cause is transferred from one district court to another, in which it is tried, the order of transfer and proceedings in the court in which such order is entered, certified by the clerk, become ipso facto a part of the record of the cause.—*Southern Pac. Co. v. Winton* (Tex. Civ. App.) 477.

§ 12. — Questions presented for review.

Refusal of instructions cannot be reviewed, in the absence of the instructions given.—*Housman's Adm'r v. Long* (Ky.) 821.

Motion for trial by jury on certain counts of the petition, being no part of the record, was not made so by bill of exceptions filed the next term after the motion was overruled.—*Smith v. Baer* (Mo.) 166.

The rejection of evidence as to general usage, in a suit to cancel a deed, etc., held insufficient to support an assignment of error.—*Morton v. Morris* (Tex. Civ. App.) 94.

Where error is assigned to an instruction on the ground that the general charge covered it, and there is no statement under the assignment verifying such fact, the assignment should not be sustained.—*First Nat. Bank v. Watson* (Tex. Civ. App.) 232.

Where the bill of exceptions does not indicate the ground on which evidence was excluded, an assignment of error based on such exclusion cannot be entertained.—*Lindsey v. State* (Tex. Civ. App.) 332.

Facts incorporated in a bill of exceptions held insufficient to show that alleged error in the suppression of depositions was material.—*Caplen v. Hawkins* (Tex. Civ. App.) 471.

An objection to the admission of evidence not contained in the statement of facts will not be considered on appeal.—*Schuwirth v. Thumma* (Tex. Civ. App.) 691.

An assignment of error that the court erred in refusing to hear argument from defendant

on the conclusion of the testimony held unsupported.—*Wetz v. Wetz* (Tex. Civ. App.) 869.

A judgment will not be reversed by reason of error in refusing to suppress a deposition, when it does not appear that the deposition was introduced on the trial of the case.—*St. Louis S. W. Ry. Co. v. Jacobson* (Tex. Civ. App.) 1111.

§ 13. Assignment of errors.

Assignment of error on the ground of variance held not sustained.—*J. S. Mayfield Lumber Co. v. Carver* (Tex. Civ. App.) 216.

An assignment of error containing more than one question, and not followed by propositions on each issue relied on, will not be considered on appeal.—*Mundine v. Pauls* (Tex. Civ. App.) 254.

An assignment of error, not a proposition in itself or followed by a proposition pointing out the error complained of, held waived.—*Boone v. Herald News Co.* (Tex. Civ. App.) 313.

An assignment of error which complains of the court's action upon two motions seeking different relief and involving several questions will not be considered.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

An assignment of error covering several pages of the brief and specifying several different propositions held not void.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

An assignment of error that the court erred in overruling the motions for a new trial and for judgment notwithstanding the verdict for the reasons set forth in the motions, not followed by any proposition, will not be considered.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

Where, in an action by a grantor of a street railway for failure of the grantee to operate the railway as required by the deed, there is no assignment calling in question the amount of the damages awarded, the court, on appeal, will not disturb the damages assessed by the jury.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

A party not assigning as error the court's refusal to set aside a special verdict cannot complain of the judgment because certain findings are unsupported by the evidence.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

Under rule 20 of the court of civil appeals, assignment of error in divorce proceedings as to admission of evidence held abandoned.—*Wetz v. Wetz* (Tex. Civ. App.) 869.

Under Rev. St. art. 1018, and rules 22-27 of the court of civil appeals, assignment of error addressed to the overruling of a general demurrer and special exceptions is too general.—*Wetz v. Wetz* (Tex. Civ. App.) 869.

Assignment of error that judgment was contrary to law and evidence held too general.—*Wetz v. Wetz* (Tex. Civ. App.) 869.

An assignment of error, combining several propositions of law as one proposition, is a violation of the supreme court rules, and will not be considered on appeal.—*Street v. Robertson* (Tex. Civ. App.) 1120.

§ 14. Briefs.

Where, under an assignment of error, testimony set out in the bill of exceptions as objected to is not quoted in the brief, while that quoted in the brief does not seem to have been objected to, such assignment cannot be sustained.—*J. S. Mayfield Lumber Co. v. Carver* (Tex. Civ. App.) 216.

Appeal dismissed for failure of appellant to use proper diligence in the prosecution thereof

and noncompliance with the terms of an agreement as to the filing of briefs.—*Emerson v. A. F. Shapleigh Hardware Co.* (Tex. Civ. App.) 570.

Under Rev. St. arts. 1014, 1417, an appeal in which appellant's briefs were not filed until 92 days after the transcript was filed, and only 2 days before set for submission, will be dismissed.—*Elkins v. Kempner* (Tex. Civ. App.) 578.

Propositions under an assignment of error cannot be considered, where no such assignment is copied in the brief.—*Luedde v. Hooper* (Tex. Civ. App.) 802.

§ 15. Dismissal, withdrawal, or abandonment.

Where appellant failed to file his transcript in time and abandoned his appeal, granted by the lower court, and procured the clerk of the court of appeals to grant him a new appeal, appellees were entitled to have the abandoned appeal dismissed, with damages.—*Beyer v. Schehr* (Ky.) 24.

Under Rev. St. art. 1400, where the appeal bond is only equal to the probable amount of costs, the appeal should be dismissed, unless a sufficient bond is furnished within such time as the court may prescribe.—*Stubbs v. Landa Cotton Oil Co.* (Tex. Civ. App.) 213.

Where the court of civil appeals continues motion to affirm on certificate to enable appellant to perfect that record, but he instead prosecutes a writ of error, the motion to affirm will prevail.—*Rio Grande & E. P. Ry. Co. v. Mendoza* (Tex. Civ. App.) 250.

The failure of an appellant to correct a record, as authorized by the appellate court, and the commencing of proceedings in error, *held* to authorize the grant of appellee's motion for affirmance, and the dismissal of the appeal and writ of error.—*Rio Grande & E. P. Ry. Co. v. Mendoza* (Tex. Civ. App.) 578.

The failure to file assignments of error constitutes an abandonment of the appeal, though proper notice of appeal has been given.—*Clawson v. Williams* (Tex. Civ. App.) 702.

§ 16. Review.

On an appeal from probate court, the cause of action cannot, by amendment, be changed to a different action.—*Jackson v. Gorman* (Ark.) 346.

Though the chancellor, in distributing an assigned estate, has applied erroneous principles, yet, where he has reached the correct result, his judgment will not be disturbed.—*Shewmaker v. Yankey* (Ky.) 1.

The conclusion of a reference is not to be considered in reviewing the court's action in deciding on the necessity for reference.—*Smith v. Baer* (Mo.) 166.

Where the trial court directs a verdict, no question of error in refusing charges is in the case on appeal.—*Still v. City of Houston* (Tex. Civ. App.) 76.

Where the unchallenged verdict of a jury, alone or in connection with facts deduced from the evidence, will support the judgment, the court, on appeal, must affirm it.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

Dissolution of temporary injunction *held* not assignable as error after decree adverse to appellant and failure to file supersedeas bond.—*Rumby v. Boyd* (Tex. Civ. App.) 874.

§ 17. — Parties entitled to allege error.

Defendant cannot complain that instructions given on plaintiff's motion assumed the existence of a disputed fact, where the instructions asked by him contained the same error.—*First*

Nat. Bank v. Germania Safety Vault & Trust Co. (Ky.) 718.

The action of the trial court in fixing a commissioner's allowance cannot be reviewed on appeal, where he is not a party.—*Reed v. Reed* (Ky.) 819.

Appellant cannot complain of an erroneous instruction given on motion of appellee, where he asked an instruction of the same import.—*Louisville & N. R. Co. v. Penrod's Adm'r* (Ky.) 1013, 1042.

Appellant cannot complain of an instruction which is in substance the same as an instruction asked by him.—*Hommel v. Lewis* (Ky.) 1041.

Where instructions requested by defendants referred the jury to plaintiff's petition for a determination of the issues, defendant cannot complain on appeal of a similar error in the instructions given by the court.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

Where, in an action for breach of covenant in a deed, defendants cause their grantors with similar covenant to be impleaded, and appeal from the judgment refusing them relief, plaintiffs on such appeal cannot complain that they were not given judgment against such impleaded parties.—*Johnson v. Blum* (Tex. Civ. App.) 461.

Where, in an action against a husband and wife for breach of covenant in their deed, both appeal from the judgment against the husband alone, plaintiffs, without appealing, may assign error in the refusal of the court to give them judgment against the wife.—*Johnson v. Blum* (Tex. Civ. App.) 461.

Where judgment is rendered against a defendant in favor of the plaintiff, and execution awarded in plaintiff's favor for the entire judgment, the defendant cannot object to an adjudication that plaintiff's attorney is entitled to an interest in the recovery as an attorney fee.—*St. Louis S. W. Ry. Co. v. Jacobson* (Tex. Civ. App.) 1111.

§ 18. — Presumptions.

Where the evidence is not in the record, it will be presumed that it was sufficient to support the judgment.—*Norman v. Poole* (Ark.) 433.

Where a part of the evidence is omitted from the record, it will be presumed that the omitted part is sufficient to support the judgment.—*Baskett v. Tippin* (Ky.) 374.

A contention that Acts 1891, p. 170, had been given a retroactive effect, where it was in issue whether usurious interest had been received on a note, *held* without merit.—*Marx v. Hart* (Mo.) 200.

It will be presumed on appeal, in support of a judgment, so as to justify the trial court's finding that the question of notice to him was immaterial, that the trial court found that a judgment creditor, purchasing at his own execution sale and testifying that he credited his bid on his judgment, was not a purchaser for value.—*Masterson v. Burnett* (Tex. Civ. App.) 90.

Where, on appeal from order overruling motion to retax costs, there is no statement of facts in the record, though time was given in which to file same, it will be presumed that there was no error.—*Texas & P. Ry. Co. v. Davis* (Tex. Civ. App.) 508.

In support of judgment, *held*, that a fact, though not specially found, would be presumed under the circumstances.—*Puster v. Anderson* (Tex. Civ. App.) 684.

§ 19. — Discretion of lower court.

An application for new trial on the ground of surprise is peculiarly addressed to the dis-

cretion of the trial court, which will not be disturbed unless palpably abused, especially where the new trial has been granted.—*Henry Vogt Mach. Co. v. Pennsylvania Iron Works Co. (Ky.) 734.*

In an action by a lineman against a telephone company for injury received by breaking of a cross-arm, evidence *held* to show that no verdict for plaintiff could stand, and hence the case was within the exception to the rule against reversing the trial court in granting one new trial.—*Roberts v. Missouri & K. Tel. Co. (Mo.) 155.*

Under Rev. St. 1899, § 694, the power of the court to try separately some of the counts of a petition is discretionary, and its exercise will not be reviewed, except for abuse.—*Smith v. Baer (Mo.) 166.*

A judgment against a plaintiff for costs under Rev. St. arts. 1428-1438, is an adjudication which will not be revised, except for manifest abuse of discretion on the part of the court awarding such judgment.—*Cox v. Patten (Tex. Civ. App.) 64.*

Taxing costs rests largely in the discretion of the trial court, and its ruling in regard thereto will not be revised, unless the record shows abuse of such discretion.—*Cox v. Patten (Tex. Civ. App.) 64; Texas & P. Ry. Co. v. Davis (Tex. Civ. App.) 598.*

A motion for a third continuance is addressed to the discretion of the court.—*Gulf, O. & S. F. Ry. Co. v. Burroughs (Tex. Civ. App.) 83.*

§ 20. — Questions of fact, verdicts, and findings.

An alleged failure to observe the preponderance of the evidence cannot be reviewed on appeal.—*St. Louis, I. M. & S. Ry. Co. v. Wilson (Ark.) 661.*

Whatever opinion the court may have as to the facts it does not feel authorized to set aside a second verdict for plaintiff.—*Louisville & N. R. Co. v. Kemery's Adm'r (Ky.) 20.*

The evidence being conflicting as to the genuineness of the signature to a note, the chancellor's finding that the note was not genuine will not be disturbed.—*Carpenter v. Carpenter (Ky.) 814.*

Conflicting evidence in an action in ejectment examined, and *held*, that the finding for plaintiff should be reversed; there being a legal and equitable defense, and it not appearing on which defense the finding was based, or that the legal defense was clearly before the triors of fact.—*McNear v. Williamson (Mo.) 160.*

The practice of reviewing the findings on conflicting evidence in equity cases will not be extended to cases tried by referees, though the reference was compulsory.—*Smith v. Baer (Mo.) 166.*

Under the constitution the supreme court has the right to review the facts as well as the law in any case, however it may have been tried.—*Smith v. Baer (Mo.) 166.*

Though the supreme court is disposed to defer to the judgment of the trial court, where evidence is to be weighed or the credibility of witnesses determined, the trial court can have no advantage, where the whole record is documentary, except the proof of uncontested facts.—*Halstead v. Mustion (Mo.) 258.*

The findings of a court, supported by evidence, are not reviewable on appeal.—*Murphy v. Gabbert (Mo.) 536.*

Error assigned that witness fees were improperly taxed *held* not to be considered.—*Cox v. Patten (Tex. Civ. App.) 64.*

A verdict on conflicting evidence will not be disturbed.—*Texas & P. Ry. Co. v. Tarkington (Tex. Civ. App.) 137; Gulf, O. & S. F. Ry. Co. v. Bryant (Tex. Civ. App.) 804.*

Where preponderance of evidence is not clearly against the findings, the judgment will not be reversed.—*J. S. Mayfield Lumber Co. v. Carver (Tex. Civ. App.) 216.*

§ 21. — Harmless error.

An erroneous instruction will be presumed on appeal to have been prejudicial, unless the contrary appears.—*Neal v. Brandon (Ark.) 200.*

Instruction denying mortgagor certain credits *held* harmless, in replevin for mortgaged property, where the credits were insufficient to totally cancel the mortgage debt.—*Neal v. Brandon (Ark.) 200.*

Under Civ. Code Prac. § 134, there can be no reversal for any error which did not affect the substantial rights of appellant.—*Breedlove v. Louisville & N. R. Co. (Ky.) 16.*

Error in permitting a rule to be read was harmless, where defendant had already brought out on the cross-examination of a witness the fact that the rule was in existence.—*Louisville & N. R. Co. v. Kemery's Adm'r (Ky.) 20.*

An instruction permitting a recovery of compensatory damages only for injuries resulting from the gross negligence of the foreman, plaintiff's superior, was more favorable to defendants than they were entitled to have.—*Goodwin v. Smith (Ky.) 179.*

Error in an action for libel based upon a newspaper publication referring to plaintiff as ex-clerk of the penitentiary, and stating that an expert accountant had found him to be short in his accounts, in admitting as evidence a judgment to the effect that plaintiff was clerk of the penitentiary when the publication complained of was made, *held* harmless.—*Evening Post Co. v. Caulfield (Ky.) 502.*

Statement of prosecuting attorney, in penal action against railroad company for permitting gaming on train, *held* not substantially prejudicial.—*Louisville & N. R. Co. v. Commonwealth (Ky.) 505.*

In an action by a next friend, any error in permitting the next friend to testify, after other witnesses had testified, *held* harmless, where the testimony related only to a matter already shown by other evidence.—*Whitman McNamara Tobacco Co. v. Wurm (Ky.) 609.*

Where it was evident that the judgment was based exclusively upon only one of two defenses relied on, errors referring exclusively to the other defense were harmless.—*Robinson & Co. v. Hill (Ky.) 623.*

There can be no reversal for an error in admitting incompetent testimony to establish a fact the existence of which the instructions asked by both parties assumed.—*First Nat. Bank v. Germania Safety Vault & Trust Co. (Ky.) 716.*

Where defendant, on whom was the burden of proof, was given the concluding argument, he cannot complain that the court first ruled that the burden was on plaintiffs.—*Stem v. Whitney (Ky.) 820.*

Defendant railroad company cannot complain of instruction authorizing the jury to find for plaintiff administrator if the death of his intestate was caused by the failure to give "suitable signals" of street crossing, though no other signal could have been given than by a whistle or bell.—*Louisville & N. R. Co. v. Penrod's Adm'r (Ky.) 1013, 1042.*

Where a conveyance of property is adjudged void as to plaintiff, she cannot complain that it is adjudged valid as between husband and

he grantee, subject to her claims.—*Schultze v. Schultze* (Tex. Civ. App.) 56.

In an action for injuries to realty from fire, he erroneous admission in evidence of a deed showing plaintiff's title to the land *held* harmless.—*Gulf, C. & S. F. Ry. Co. v. Burroughs* (Tex. Civ. App.) 83.

Admission of alleged immaterial evidence in an action against a railroad company for negligently allowing fire to escape *held* not prejudicial to defendant.—*Gulf, C. & S. F. Ry. Co. v. Burroughs* (Tex. Civ. App.) 83.

Referring the jury to the petition to determine the negligent acts of defendant in issue, in an action by a servant for injuries, *held* harmless error, when considered in connection with the pleading and evidence.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

In an action against railroad for firing property, instruction respecting use of spark arresters, not actually correct, *held* not prejudicial.—*St. Louis & S. W. Ry. Co. of Texas v. Miller* (Tex. Civ. App.) 139.

In an action against railroad company for firing property, refusal of instruction that company was only required to use ordinary care in keeping the spark arresters in good condition *held* harmless.—*St. Louis & S. W. Ry. Co. of Texas v. Miller* (Tex. Civ. App.) 139.

In an action for trespass to property, an instruction that the title thereto was in the party under whom plaintiff claimed *held* harmless, where the evidence showed that plaintiff had peaceful possession and that defendant had no title.—*Diamond v. Smith* (Tex. Civ. App.) 141.

The admission of evidence of statements merely confirmatory of undisputed evidence *held* not prejudicial.—*San Antonio & A. P. Ry. Co. v. Gray* (Tex. Civ. App.) 229.

Where the failure to award certain damages to plaintiff, who appeals from an inadequate judgment in his favor, could not possibly have resulted from the giving of an erroneous instruction, the error was harmless.—*Patterson v. Southern Pac. Co.* (Tex. Civ. App.) 308.

In action for injuries from fencing public thoroughfare and leaving fence unguarded on dark night, admission of oral evidence of title to ground fenced *held* harmless error.—*Ablene Cotton Oil Co. v. Briscoe* (Tex. Civ. App.) 315.

Where parts of a deposition are excluded, but the parts admitted are clear and positive as to all material facts which would be shown by the facts excluded, the error, if any, in such exclusion, is harmless.—*Norton v. Maddox* (Tex. Civ. App.) 319.

Where a disinterested witness has been permitted without objection to testify to a certain fact, the receipt of testimony of the same fact from an interested witness over objection is not ground for reversal.—*Norton v. Maddox* (Tex. Civ. App.) 319.

An omission to correctly indorse the name of a pleading is not prejudicial error.—*Norton v. Maddox* (Tex. Civ. App.) 319.

Where, in a proceeding in garnishment, the intervener agrees with plaintiffs in claiming that money deposited with the garnishee by another was the property of the judgment debtor, such intervener is not prejudiced by the admission of evidence tending to prove such fact.—*Norton v. Maddox* (Tex. Civ. App.) 319.

The improper joinder of a person as defendant in an action is not prejudicial to the other defendants, where all the costs incurred by reason of his joinder are taxed against him.—*Lindsey v. State* (Tex. Civ. App.) 332.

Where, in an action of forcible entry and detainer of school land, the commissioner's

certificate shows a sale to plaintiff, a cancellation of such sale, and reinstatement because the cancellation was erroneous, a rejection of that part of the certificate showing the cancellation is not prejudicial to defendant.—*Renfro v. Harris* (Tex. Civ. App.) 460.

Admission of evidence of an assignment by a street railway corporation to all its directors of the right to damages for a breach of an agreement of a grantee of the corporation is harmless, where the jury found that the corporation sustained no damages by reason of such breach.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

Admission of evidence of the claim of the director of a corporation as individuals to the ownership of corporate property by virtue of their purchase at a trustee's sale under a void deed of trust is harmless error, where the court decided against such claim.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

Conductor and fireman cannot be said, as matter of law, to have known engineer did not see horse before blowing whistle, or to have been bound to warn him.—*Gulf, C. & S. F. Ry. Co. v. Milner* (Tex. Civ. App.) 574.

Where defendant is entitled to prove certain facts under a general denial, the action of the court in sustaining a demurrer to a special answer alleging such facts is not reversible error.—*Neville v. Mitchell* (Tex. Civ. App.) 579.

Where it is conceded that the evidence of the injury is sufficient to support the verdict, the admission of erroneous evidence as to such injury is harmless error.—*Missouri, K. & T. Ry. Co. of Texas v. Walden* (Tex. Civ. App.) 584.

Where defendant violated a contract by which plaintiffs were authorized to sell his lands, after such contract had been renewed, in an action for such breach, evidence of plaintiff's activity under the original contract could not injuriously affect defendant's interests.—*McLane v. Maurer* (Tex. Civ. App.) 693.

The error in permitting persons constituting in effect a single party to have more challenges than allowed to a single party *held* harmless, unless the opposite party is thereby injured.—*Watts v. Dubois* (Tex. Civ. App.) 698.

The court's action in excluding from the evidence a document *held* harmless, where other evidence showed the facts tended to be proved by the document.—*Watts v. Dubois* (Tex. Civ. App.) 698.

Admission of opinion evidence of brakeman *held* not prejudicial, when his opinion accorded with the testimony in the case.—*International & G. N. Ry. Co. v. Vinson* (Tex. Civ. App.) 800.

Proof of the prior possession of real estate being sufficient to sustain trespass to try title as against a mere trespasser, error assigned in the admission of evidence concerning plaintiff's title will not be considered on appeal.—*Mumme v. McCloskey* (Tex. Civ. App.) 853.

Permitting an improper and unnecessary party to intervene in an action on a note *held* prejudicial error.—*Wilson v. Tyler Coffin Co.* (Tex. Civ. App.) 865.

Assignment of error complaining that the court adjourned without giving plaintiff sufficient time to prepare his bill of exceptions, and without passing on motion for new trial, *held* unsupported.—*Wetz v. Wetz* (Tex. Civ. App.) 869.

§ 22. — Error waived in appellate court.

Agreed statement of facts that only issue on appeal was one of law eliminated all questions of fact from the case.—*Hardman v. Crawford* (Tex. Sup.) 206.

Rulings of a trial court which were not assigned as error in the appellate court will not be considered by the supreme court.—*City of Dallas v. Dallas Consol. Electric St. Ry. Co.* (Tex. Sup.) 835.

§ 23. — Subsequent appeals.

Upon a second appeal, the opinion of the court on the former appeal is the law of the case.—*Louisville & N. R. Co. v. Penrod's Adm'r* (Ky.) 1013, 1042.

Direction on former appeal of specific instructions that burden of proof was on defendant held law of the case.—*Campbell v. Fidelity & Casualty Co. of New York* (Ky.) 1033.

§ 24. Determination and disposition of cause.

Where the appellate court held that an action was barred by limitations as to some of appellees, a reversing and remanding order, making no reservation as to those not appearing to be barred, applied to the whole case.—*Memphis & L. R. R. Co. v. Organ* (Ark.) 922.

There can be no reversal for an error in admitting evidence which did not prejudice defendant's rights.—*Louisville & N. R. Co. v. Kemery's Adm'r* (Ky.) 20.

When a judgment appealed from was based on and merely intended to carry into effect another judgment, which has since been reversed, it must also be reversed.—*Mitchell v. Stoddard Co. Bank* (Ky.) 823.

A judgment against a city for illegally acquiring and disposing of plaintiff's property for taxes will not be reversed because interest is allowed to plaintiff for a month and a half longer than authorized.—*City of Houston v. Walsh* (Tex. Civ. App.) 106.

Where plaintiff was an actual settler on school land, an assignment of error that the court, by overruling defendant's plea to jurisdiction, decided "that a naked trespasser, who has fenced in free land, may invoke the remedy of forcible entry and detainer, and dispossess a bona fide settler," is without merit.—*Renfro v. Harris* (Tex. Civ. App.) 460.

Where the judgment rendered is the only result possible under the evidence it will not be reversed on appeal for errors committed at the trial.—*Forst v. Rothe* (Tex. Civ. App.) 575.

Plaintiff, in trespass to try title, who failed to appeal or file cross assignments against his co-appellees, held not entitled, on a reversal of judgment, to a judgment against his co-appellees, though warranted by the evidence.—*Clawson v. Williams* (Tex. Civ. App.) 702.

APPEARANCE.

By garnishee, see "Garnishment," § 2.

Defendant corporation, by prosecuting an appeal, held to have entered its appearance, though defendant's objection to the jurisdiction should have been sustained.—*Louisville & N. R. Co. v. Jordan* (Ky.) 27.

Where plaintiffs, acting on a void order of transfer of an action, file a petition for the same cause of action in the court to which they supposed the action was transferred, though called an "amended original petition," they thereby commence a new action, and defendants, by appearing generally therein without citation, give the court jurisdiction.—*Southern Pac. Co. v. Winton* (Tex. Civ. App.) 477.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 3.

APPLICATION.

Of assets in general, see "Marshaling Assets and Securities."

Of proceeds of sale of trust property, see "Trusts," § 3.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 2.

Of guardian ad litem, see "Infants," § 2.

Of municipal officers, see "Municipal Corporations," § 4.

Of public officers in general, see "Officers," § 1.

Of receiver, see "Receivers," § 2.

ARBITRATION AND AWARD.

§ 1. Award.

Where extent of the interest of a decedent in partnership assets was submitted to arbitration, and the award was accepted by the parties, as the administrator failed to show that the surviving partner was indebted to his intestate on any individual account, he was entitled to recover only that amount.—*Thompson's Adm'r v. Thompson* (Ky.) 1007.

ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 5.

In criminal prosecutions, see "Criminal Law," § 17.

ARRAIGNMENT.

See "Criminal Law," § 6.

ARREST.

See "Escape"; "Prisons."

Illegal arrest, see "False Imprisonment."

§ 1. On criminal charges.

Under Code Cr. Proc. arts. 107-112, a city marshal has no right to arrest a person threatening to take the life of another.—*Allen v. State* (Tex. Cr. App.) 671.

ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide," § 3.

§ 1. Civil liability.

A verdict for \$450 for an assault by a man upon a boy 12 years of age in a public park in the presence of others held not so excessive as to indicate passion or prejudice.—*Hollins v. Gorham* (Ky.) 823.

An instruction in an action for assault held erroneous, in that it eliminated the consideration of provocation as an element in mitigation of damages.—*Daniel v. Giles* (Tenn.) 1128.

Although provocation and insults may be considered in mitigation of damages, they cannot justify an assault.—*Daniel v. Giles* (Tenn.) 1128.

§ 2. Criminal responsibility.

A person acquitted of aggravated assault on an alleged officer cannot be convicted of a simple assault in resisting arrest by such officer.—*Brown v. State* (Tex. Cr. App.) 547.

On a prosecution for aggravated assault, evidence held insufficient to sustain a conviction.—*McLendon v. State* (Tex. Cr. App.) 553.

On a prosecution for aggravated assault, an instruction held erroneous, in that it suggested that the accused first assaulted the prosecutor; such a state of facts not being shown by the evidence.—*McLendon v. State* (Tex. Cr. App.) 553.

On a prosecution for an aggravated assault, an instruction to the effect that accused, in repelling an attack made by the prosecutor, could use only the degree of force necessary, *held error*.—*McLendon v. State* (Tex. Cr. App.) 553.

On a prosecution for an aggravated assault, an instruction that accused could protect himself against an assault by the prosecutor, only if the prosecutor's assault was calculated to inflict serious injury, *held error*.—*McLendon v. State* (Tex. Cr. App.) 553.

Information for aggravated assault *held* not bad for duplicity.—*Nelson v. State* (Tex. Cr. App.) 775.

Evidence *held* to sustain conviction for aggravated assault.—*Nelson v. State* (Tex. Cr. App.) 775.

Evidence *held* sufficient to sustain a prosecution for aggravated assault with intent to inflict serious bodily injury.—*Yeary v. State* (Tex. Cr. App.) 1106.

An indictment for an assault and the infliction of serious bodily injury, charging an assault "thereby inflicting serious bodily injury," is not bad in not charging that defendant "inflicted" such injuries.—*Yeary v. State* (Tex. Cr. App.) 1106.

An indictment charging an assault and the infliction of serious bodily injury, or an aggravated assault with intent to commit such injury, *held* sufficient.—*Yeary v. State* (Tex. Cr. App.) 1106.

Evidence of statements made by a conspirator before an assault *held* admissible in a prosecution for the assault.—*Yeary v. State* (Tex. Cr. App.) 1106.

The admission of evidence in a prosecution for an assault of a speech claimed to have been the motive of the crime *held* not erroneous.—*Yeary v. State* (Tex. Cr. App.) 1106.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 2.
Of damages, see "Damages," § 4.
Of expenses of public improvements, see "Municipal Corporations," § 5.
Of tax, see "Taxation," § 3.

ASSETS.

Marshaling, see "Marshaling Assets and Securities."

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 18.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

In bankruptcy, see "Bankruptcy," § 2.

Transfers of particular species of property, rights, or instruments.

See "Bills and Notes," § 4; "Bonds," § 1; "Judgment," § 12; "Mortgages," § 3.

Title bond, see "Vendor and Purchaser," § 4.
Vendor's lien, see "Vendor and Purchaser," § 6.

§ 1. Requisites and validity.

Under Sand. & H. Dig. § 489, checks issued by a company to its employes, redeemable only in merchandise at the company's store, were assignable.—*Martin-Alexander Lumber Co. v. Johnson* (Ark.) 924.

A contract by which a street railroad company obligates itself to construct and operate a street railroad is assignable under the general law and under Rev. St. art. 308.—*Lakeview Land Co. v. San Antonio Traction Co.* (Tex. Sup.) 768.

Under Rev. St. arts. 3025, 4647, a surviving wife's cause of action for negligence resulting in the death of her husband is not assignable before suit is brought thereon.—*Southern Pac. Co. v. Winton* (Tex. Civ. App.) 477.

§ 2. Rights and liabilities of parties.

Where an attorney assigned to a creditor his fee due from trustees, and they led him to believe that the only question was one of amount, to be fixed by the court, they cannot, as against the assignee, retain any part of amount allowed for their own use.—*Stone v. Hart* (Ky.) 191.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," § 2.

§ 1. Rights and remedies of creditors.

The costs of a suit for the settlement of an assigned estate must be paid out of the general fund, if sufficient for that purpose; but, if insufficient such expenses may be paid out of the fund adjudged to the fourth mortgagee.—*Shewmaker v. Yankey* (Ky.) 1.

In distributing an assigned estate, the court will not marshal securities, where it will prejudice general creditors to do so.—*Shewmaker v. Yankey* (Ky.) 1.

Under Sayles' Ann. Civ. St. art. 82, an assignee for the benefit of creditors is not compelled to allow a claim presented and verified by a creditor, if he believes it illegal.—*Briam v. Sullivan* (Tex. Civ. App.) 572.

§ 2. Rights and remedies of assignor.

The burden of proof rests upon the party against whom judgment would go if no evidence were offered.—*Mann v. Alves* (Ky.) 1011.

§ 3. Liabilities on assignees' bonds.

Any of the parties to a bond of an assignee for creditors may be sued alone on a breach.—*Hays v. Comstock-Castle Stove Co.* (Ark.) 649.

A judgment on the bond of an assignee for the benefit of creditors should only be for the damages to the parties named as plaintiffs, though the action is for their benefit and all other creditors who may join therein.—*Hays v. Comstock-Castle Stove Co.* (Ark.) 649.

An action by a creditor on the bond of an assignee for the benefit of creditors may be maintained in any state in which the surety on the bond is found given.—*Hays v. Comstock-Castle Stove Co.* (Ark.) 649.

A cause of action on a bond of an assignee for creditors does not accrue to a distributee until the trustee has been ordered to pay a definite sum and has failed to do so.—*Stone v. Hart* (Ky.) 191.

A bond executed by assignees for creditors is for the benefit of all who may be entitled to share in the assets, though the covenant is to the assignor alone.—*Stone v. Hart* (Ky.) 191.

ASSOCIATIONS.

See "Beneficial Associations"; "Building and Loan Associations."

ASSUMPSIT. ACTION OF.

See "Money Paid"; "Work and Labor."

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 7.

ATTACHMENT.

See "Garnishment"; "Sequestration."

Against corporation, see "Corporations," § 5.

§ 1. Claims by third persons.

The execution by the claimant of the attached property of the bond provided for by Civ. Code Prac. § 214, and the delivery of the property to him thereunder, do not discharge the lien created by the levy; and he must make himself a party to the action, under Civ. Code Prac. § 29, or be concluded by the judgment therein.—*Deposit Bank v. Thomason* (Ky.) 604.

Though a bond executed by the claimant of attached property did not conform to the requirements of Civ. Code Prac. § 214, it was not void, as the obligors will not be heard to complain that it does not contain substantially all the necessary conditions demanded by that section.—*Deposit Bank v. Thomason* (Ky.) 604.

Where such a bond is defective, it is the duty of the court, upon the request of any person interested, to require a new and sufficient bond to be executed, to have the same effect as if originally executed.—*Deposit Bank v. Thomason* (Ky.) 604.

§ 2. Liabilities on bonds or undertakings.

Under Civ. Code Prac. § 232, the liability of the obligors on claimant's bond may be tried out in the original action in which the attachment issued.—*Deposit Bank v. Thomason* (Ky.) 604.

There is no breach of such a bond until there has been a judgment subjecting the property and the debtor has failed to satisfy the judgment, and until then an action on the bond is premature.—*Deposit Bank v. Thomason* (Ky.) 604.

ATTENDANCE.

Of witness, see "Witnesses," § 1.

ATTORNEY AND CLIENT.

Absence of counsel as ground for new trial, see "New Trial," § 1.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 5.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 17.

Attorneys as public officers, see "Attorney General"; "District and Prosecuting Attorneys."

Attorney's fees in action against decedent's estate, see "Executors and Administrators," § 6.

Attorney for absentee, see "Absentees."

Attorneys in fact, see "Principal and Agent." Right of attorney to intervene for fees in action causing death, see "Death," § 2.

Stipulations in notes for attorney's fees, see "Bills and Notes," § 2.

§ 1. Retainer and authority.

Plaintiff *held* to have a right to discharge her attorney, and the institution of the action to enjoin him from collecting the judgment which he had obtained was notice of his discharge.—*O'Neal v. Spalding* (Ky.) 11.

Knowledge of attorney, employed by the purchaser of land only to examine the title, that the vendor was insolvent, is not imputable to the purchaser.—*Weil v. Reiss* (Mo.) 946.

§ 2. Duties and liabilities of attorney to client.

Equity has jurisdiction of a suit by client against his attorney to decree a trust in favor

of the client as to money fraudulently obtained from the client by the attorney.—*Maloney v. Terry* (Ark.) 919.

Judgment plaintiff *held* entitled to an injunction restraining her attorney from collecting the judgment, though he had a lien thereon for a reasonable fee.—*O'Neal v. Spalding* (Ky.) 11.

§ 3. Compensation and lien of attorney.

An agreement by an attorney not to charge for his services *held* binding on his partner, though ignorant of the agreement.—*Stone v. Hart* (Ky.) 191.

Attorneys were entitled to the contract price for their services, where they obtained the desired relief without bringing suit, which it was contemplated, when the contract was made, would have to be brought.—*Browder v. Long's Ex'r* (Ky.) 600.

A client who agrees to pay his attorneys one-half of what they "recover" is liable only for one-half of what he actually obtains by the judgment recovered.—*Leslie v. York* (Ky.) 751.

ATTORNEY GENERAL.

Under Const. art. 5, § 21, and article 10, § 2, *held*, the legislature had power to authorize the attorney general to control suits in district courts to enforce penalties for violation of railroad laws.—*Moore v. Bell* (Tex. Sup.) 45.

AUTHORITY.

Of agent, see "Principal and Agent," §§ 2, 3. Of broker, see "Brokers," § 1.

AWARD.

See "Arbitration and Award," § 1.

BAILMENT.

See "Banks and Banking," § 1; "Carriers," § 2; "Pledges."

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

§ 1. Petition, adjudication, warrant, and custody of property.

The discharge of plaintiff from arrest after discharge in bankruptcy by the United States court upon a writ of habeas corpus does not conclude defendants in suit for false imprisonment, in the absence of anything to show what was in issue there.—*Bennett v. Lewis* (Ky.) 523.

§ 2. Assignment, administration, and distribution of bankrupt's estate.

In an action by the father of a bankrupt to recover possession of goods held by defendant as assignee in bankruptcy, evidence tending to show that the bankrupt was in a position to furnish the money to plaintiff to purchase the goods sued for was admissible.—*Rudy v. Katz* (Ky.) 18.

While it was competent for plaintiff to prove the transaction between him and the firm from which he purchased the goods, it was not competent for him to prove that that firm did not have any dealings with the firm composed of the bankrupt and his brother.—*Rudy v. Katz* (Ky.) 18.

It was competent for defendant to prove any facts tending to show that plaintiff had no funds with which to buy and pay for the goods sued for.—*Rudy v. Katz* (Ky.) 18.

Evidence that the bankrupt did not report any assets when he filed his petition in bankruptcy was admissible.—*Rudy v. Katz* (Ky.) 18.

The discharge in bankruptcy of a debtor, after the rendition of judgment against his garnishee, *held* not to discharge the latter.—*Marx v. Hart* (Mo.) 260.

Under Bankr. Act 1898, § 67f, a sale of realty under execution issued less than four months prior to the time when the execution defendant is declared a bankrupt will not be avoided at the suit of a former grantee.—*Hutchins v. Cantu* (Tex. Civ. App.) 138.

Agreement by trustee in bankruptcy as to division and disposition of property sought to be recovered from another by the bankrupt's assignee *held* not beyond the authority of the trustee.—*Simmons v. Richards* (Tex. Civ. App.) 687.

Agreement, between trustee in bankruptcy and party suing as assignee of the bankrupt to recover property from another, that, in case the assignee had judgment, he should be entitled to a certain sum and the trustee to the excess, *held* not fraudulent.—*Simmons v. Richards* (Tex. Civ. App.) 687.

Where a bankrupt disclaimed interest in property sought to be recovered from another by his assignee, one claiming under the bankrupt by a subsequent conveyance *held* estopped.—*Simmons v. Richards* (Tex. Civ. App.) 687.

A trustee in bankruptcy cannot be compelled to account, in a collateral proceeding involving title to the bankrupt's property, for funds he has received as trustee; but such relief must be obtained through the court appointing him.—*Simmons v. Richards* (Tex. Civ. App.) 687.

§ 3. Rights, remedies, and discharge of bankrupt.

Bankr. Act 1898, § 16, *held* not to authorize the discharge of a garnishee, where, after judgment against him, the principal debtor is discharged in bankruptcy.—*Marx v. Hart* (Mo.) 260.

BANKS AND BANKING.

§ 1. Functions and dealings.

Sand. & H. Dig. c. 18, forbidding the creation of currency, did not include checks issued by a company to its employes, redeemable only in merchandise at the company's store.—*Martin-Alexander Lumber Co. v. Johnson* (Ark.) 924.

A bank may apply a deposit to the payment of a debt against a firm of which the depositor is a member, or, when sued, may plead the firm debt as a set-off.—*Owsley v. Bank of Cumberland* (Ky.) 33.

Though it may be beyond the scope of a partnership to execute notes as surety, yet the mere fact that a partner signed the firm name under his own was not sufficient to charge a bank discounting the note with notice that the firm was surety merely.—*Warren Deposit Bank v. Younglove* (Ky.) 749.

A bank, entitled to discount a negotiable note so that it may be placed upon the footing of a foreign bill of exchange, need not exercise care to learn whether there are defenses thereto.—*Warren Deposit Bank v. Younglove* (Ky.) 749.

That a borrower was officially connected with a bank as director is insufficient to charge it with notice of its fraudulent purposes in negotiating a loan.—*Southern Commercial Sav. Bank v. Slattery's Adm'r* (Mo.) 1066.

§ 2. National banks.

A receiver of a national bank, coming into a state court to enforce a mortgage securing a bank debt, *held* subject to the laws of the

state as to fraudulent mortgages.—*Watts v. Du-bois* (Tex. Civ. App.) 698.

BAR.

Of action by former adjudication, see "Judgment," § 9.

Of dower, see "Dower," § 2.

BASTARDS.

§ 1. Illegitimacy in general.

Burden of proof is on one asserting illegitimacy to show that the husband could not possibly have been the father of the child.—*Sergeant v. North Cumberland Mfg. Co.* (Ky.) 1036.

BATTERY.

See "Assault and Battery."

BAWDY HOUSE.

See "Disorderly House."

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

Widow of decedent leaving no personal estate except a funeral benefit certificate, that fund having been paid to the widow, she could not retain it as part of her distributive share, but must pay it on burial expenses.—*Redmond's Adm'r v. Redmond* (Ky.) 745.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.

In criminal prosecutions, see "Criminal Law," §§ 7-13.

BETTING.

See "Gaming."

BIAS.

Of witness, see "Witnesses," § 4.

BIGAMY.

An indictment for bigamy *held* a substantial compliance with the form of White's Ann. Code Cr. Proc. art. 458, § 11.—*Esser v. State* (Tex. Cr. App.) 776.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF LADING.

See "Carriers," § 2.

BILL OF SALE.

See "Sales," § 3.

BILLS AND NOTES.

Discount by banks, see "Banks and Banking," § 1.

Operation and effect of usury laws, see "Usury," § 1.

§ 1. Requisites and validity.

A judgment on a note given for a patent, holding the note invalid as a violation of Sand.

& H. Dig. § 498, *held* not a bar to a subsequent suit against the maker for a balance due for the price of the patent.—*Roth v. Merchants' & Planters' Bank* (Ark.) 918.

§ 2. Construction and operation.

Where a note provided for an attorney's fee of 10 per cent., should "judicial proceedings" be used in collecting it, such fee was not collectible on payment of the note by an assignee for benefit of creditors.—*Briam v. Sullivan* (Tex. Civ. App.) 572.

Evidence *held* not sufficient to show that a note stipulating for attorney's fees was deposited with attorneys for collection, so as to require payment of the attorney's fees.—*Hall v. Read* (Tex. Civ. App.) 800.

§ 3. Negotiability and transfer.

Notes are rendered nonnegotiable by a provision that no property owned by the maker, except that included in a trust deed given to secure their payment, shall ever be subjected to their judgment, and the maker may plead failure of consideration in an action on the notes by an innocent purchaser.—*Street v. Robertson* (Tex. Civ. App.) 1120.

§ 4. Rights and liabilities on indorsement or transfer.

The mere insolvency of the obligor in an assigned note is not sufficient to render the assignor liable to the assignee upon his implied contract to refund the money. Assignee, in order to recover, must allege facts showing that he has used due diligence to collect the note and has failed; the allegation of a legal conclusion to that effect not being sufficient.—*Anderson v. Penick* (Ky.) 732.

BONA FIDE PURCHASERS.

Of lands, see "Vendor and Purchaser," § 4.
Of mortgaged property, see "Chattel Mortgages," § 4.

BONDS.

Computation of interest on bond, see "Interest," § 2.
Liability of sheriff for taking insufficient attachment bond, see "Sheriffs and Constables," § 3.
Mortgage bonds, see "Mortgages," § 3.
Railroad bonds, see "Railroads," § 3.
Sureties on bond, see "Principal and Surety."
Title bond, see "Vendor and Purchaser," § 1.

Bonds for performance of duties of trust or office.

See "Assignments for Benefit of Creditors," § 3;
"Executors and Administrators," § 6;
"Sheriffs and Constables," § 4.
Tax collector's bond, see "Taxation," § 5.

Bonds in legal proceedings.

See "Appeal and Error," § 10; "Attachment," §§ 1, 2; "Costs," § 2; "Criminal Law," § 27.

§ 1. Negotiability and transfer.

Mortgagor *held* not estopped from pleading against an assignee of the bonds any defense which she had and might have used against mortgagee before notice of the assignment.—*Murray v. Duffy* (Ky.) 1038.

§ 2. Performance or breach of condition.

Where the holder of a bond received the amount thereof from one whom he had reason to believe was making payment for the obligor, there was a payment, and not a sale of the bond.—*Judah v. Kentucky Trust Co.* (Ky.) 607.

BOUNDARIES.

See "Fences"; "Schools and School Districts," § 2; "Towns," § 1.

§ 1. Description.

Courses and distances in a patent must yield to well-known objects called for.—*Allen v. Puiham* (Ky.) 722.

§ 2. Evidence, ascertainment, and establishment.

Neither a surveyor whom plaintiff directed to locate the line in controversy, nor her son whom she told to assist him, *held* authorized to bind plaintiff by an agreement locating the line.—*Higginson v. Schaneback* (Ky.) 1040.

On an issue as to boundary line, though deeds of both parties referred to plat recorded in county clerk's office, evidence showing the survey as marked on the ground *held* properly admitted.—*McLane v. Grice* (Tex. Civ. App.) 709.

BREACH.

Of condition, see "Insurance," § 8.
Of contract, see "Contracts," § 3; "Sales," § 3; "Vendor and Purchaser," § 3.
Of warranty, see "Sales," §§ 5, 7.

BREACH OF THE PEACE.

Evidence that defendant called witness a God damn liar was sufficient to justify a conviction of breach of the peace.—*Johnson v. State* (Tex. Cr. App.) 1097.

BRIBERY.

Accepting bribe by prosecuting attorney as malfeasance in office, see "District and Prosecuting Attorneys."

BRIDGES.

§ 1. Regulation and use for travel.

Notice of the defective condition of a bridge maintained by a city to officers not charged with the care thereof *held* not to render the city liable.—*City of San Antonio v. Ball* (Tex. Civ. App.) 713.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 14.

BROKERS.

§ 1. Employment and authority.

In an action by a broker to recover commissions for making a sale, evidence *held* not to justify the conclusion that defendant ratified the agency claimed by plaintiff.—*Howe v. Miller* (Ky.) 184.

Where a contract authorizing plaintiffs to sell defendant's lands within a certain period provided that defendant might sell all or any part of the land, such proviso did not authorize him to revoke their authority before the time expired, when they had excited an active demand and were rapidly selling.—*McLane v. Maurer* (Tex. Civ. App.) 693.

A contract authorizing plaintiffs to sell defendant's land construed, and *held* not to contemplate the survey and subdividing of all the land before any could be sold.—*McLane v. Maurer* (Tex. Civ. App.) 693.

§ 2. Compensation and lien.

Exchange of real estate *held* to have been effected by agent, and that he was entitled to his commissions.—*Blair v. Slosson* (Tex. Civ. App.) 112.

§ 3. Actions for compensation.

In an action to recover a real estate commission, in which defendant alleged that the contract was procured through fraud, the burden of proof was on defendant.—*Stem v. Whitney* (Ky.) 820.

Question whether owner of real estate, in order to induce broker to accept stipulated sum for commissions, agreed to pay him more if deal proved satisfactory, *held* properly submitted to jury.—*Blair v. Slosson* (Tex. Civ. App.) 112.

BUILDING AND LOAN ASSOCIATIONS.

In an action by assignee of building association, *held* error to dismiss the petition of the assignee and to give the association judgment for the balance of the debt.—*United States Building & Loan Ass'n's Assignee v. Foreman* (Ky.) 877.

In an action by the assignee of a building association to recover a loan, it was error to strike out certain parts of the petition which averred the subscription of stock by defendant, the precipitation of the maturity by reason of the insolvency and assignment of the association, the payment of dues on stock, and the book value of the stock and dividends thereon.—*United States Building & Loan Ass'n's Assignee v. Foreman* (Ky.) 877.

Payments by a borrowing member as dues on stock cannot by operation of law be applied to the extinguishment of the debt and interest after the association has become insolvent.—*Vinton v. National Building & Loan Ass'n* (Ky.) 510.

In an action to reopen a settlement made with a building association and to recover usury paid, *held* error to dismiss plaintiff's petition upon the ground that she should be charged with her share of the losses of the business, where no effort had been made to ascertain them.—*Olliges v. Kentucky Citizens' Building & Loan Ass'n's Assignee* (Ky.) 617.

Where the exaction of monthly payments on stock in a building association is part of a scheme to cover usurious interest on the loan, the full monthly payments will be applied on the principal of the loan, and not their withdrawal value merely.—*American Mut. Bldg. & Sav. Ass'n v. Daugherty* (Tex. Civ. App.) 131.

Evidence examined, and *held*, that a subscription for stock in a building association, an application for a loan, etc., were but one transaction, and a mere scheme to cover usurious interest.—*American Mut. Bldg. & Sav. Ass'n v. Daugherty* (Tex. Civ. App.) 131.

BURDEN OF PROOF.

In civil actions, see "Evidence," § 3.

BURGLARY.

§ 1. Prosecution and punishment.

Indictment for burglary need not state the value of the goods stolen; larceny in commission of burglary being a felony, without regard to value.—*State v. Yandle* (Mo.) 532.

To connect defendant with the ownership and possession, when arrested, of a telescope in the room with him, in which were the stolen goods, testimony that he claimed clothing therein is pertinent.—*State v. Yandle* (Mo.) 532.

Recent possession of goods taken by burglars is *prima facie* evidence of the burglary, as well as of the larceny.—*State v. Yandle* (Mo.) 532.

Circumstantial evidence *held* not to sustain a conviction for burglary.—*Stevens v. State* (Tex. Cr. App.) 549.

On a prosecution for burglary, where the owner or occupant of the premises is a witness, his nonconsent to the alleged crime must be shown.—*Ridge v. State* (Tex. Cr. App.) 774.

CALENDARS.

Computation of time, see "Time."
Of causes for trial, see "Trial," § 2.

CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."

Rescission of contracts, see "Vendor and Purchaser," § 2.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

§ 1. Right of action and defenses.

Petition in action to cancel a trust deed *held* invalid for failing to tender amount alleged to be due.—*Fry v. Piersol* (Mo.) 171.

Petition to cancel a mortgage for dress *held* insufficient, where it does not allege that nothing was due.—*Fry v. Piersol* (Mo.) 171.

A court of equity has jurisdiction to order the cancellation of a deed, though it is void on its face.—*Morton v. Morris* (Tex. Civ. App.) 94.

§ 2. Proceedings and relief.

A plaintiff, seeking to enjoin the foreclosure of a trust deed because it was given to escape a threatened criminal prosecution, has the burden of showing that the deed was executed to escape such prosecution.—*Fry v. Piersol* (Mo.) 171.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

Admissions by employé of carrier, see "Evidence," § 6.

§ 1. Control and regulation of common carriers.

Sayles' Ann. Civ. St. art. 4565, only authorizes the trial of a judicial controversy between the railroad commission and any person aggrieved by any regulation, etc.—*Railroad Commission of Texas v. Weld* (Tex. Civ. App.) 122.

§ 2. Carriage of goods.

Evidence *held* insufficient to show that damage sustained by goods in transit was due to act of God, and not to carrier's negligence.—*Gulf, W. T. & P. Ry. Co. v. Browne* (Tex. Civ. App.) 341.

Carrier *held* entitled to retain freight charges out of goods refused by consignee and sold under his directions.—*Gulf, W. T. & P. Ry. Co. v. Browne* (Tex. Civ. App.) 341.

Evidence *held* insufficient to warrant finding that vegetables shipped over defendant's road were damaged by delay at point of shipment.—*San Antonio & A. P. Ry. Co. v. Thompson* (Tex. Civ. App.) 792.

A railroad company, chargeable with unreasonable delay in holding a car containing vegetables, is liable for the natural consequences thereof, even beyond its own line.—*San Antonio & A. P. Ry. Co. v. Thompson* (Tex. Civ. App.) 792.

Measure of damages for delay in holding car containing vegetables at original destination after change in destination has been made, is difference in values at changed destination.—*San Antonio & A. P. Ry. Co. v. Thompson* (Tex. Civ. App.) 792.

§ 3. Carriage of live stock.

A railroad company, undertaking to transport live stock, is liable for the negligence of its agents and servants, but not as insurer.—*Louisville & N. R. Co. v. Harned* (Ky.) 25.

Where the shipper undertakes to care for the stock, and to load and unload it, the burden of proof is on him to show that any injury was the result of the carrier's negligence.—*Louisville & N. R. Co. v. Harned* (Ky.) 25.

Juries cannot disregard unimpeached and uncontradicted testimony as to the value of live stock killed or injured by the negligence of a carrier.—*Louisville & N. R. Co. v. Harned* (Ky.) 25.

Where there was testimony that a racing mare, while being transported, was thrown down by reason of the unusual manner in which the train was handled, the question of negligence was for the jury.—*Louisville & N. R. Co. v. Harned* (Ky.) 25.

Evidence that injuries to stock in process of transportation caused disease from which they died *held* to authorize jury to conclude that the disease resulted from the injuries received, and a second verdict for plaintiffs will not be set aside.—*Louisville & N. R. Co. v. Wathen* (Ky.) 714.

Where evidence as to whether disease from which horses died was caused by injuries received while being carried by defendant railroad company or by other causes, the instruction that the jury could not find any damages against defendant for any injury to or depreciation not due to its negligence was as far as it was proper for the court to go.—*Louisville & N. R. Co. v. Wathen* (Ky.) 714.

A carrier of live stock is not liable for injury to the stock, unless caused by his negligence; but, when negligence on his part is shown, the extent of injury is for the jury.—*Louisville & N. R. Co. v. Wathen* (Ky.) 714.

Presumption indulged that, when shipper applied to defendant railroad company's agent for a car to ship his stock, he anticipated shipping under the usual contract, so as to exclude idea of fraud or mistake.—*Richmond, N. I. & B. R. Co. v. Richardson* (Ky.) 1035.

A void state quarantine line against Texas fever, established under Rev. St. 1895, art. 5043c, *held* not to justify a railroad company in violating article 4535, by refusing to receive cattle consigned to a point within the void quarantine line.—*Ft. Worth & D. C. Ry. Co. v. Masterson* (Tex. Sup.) 833.

In an action against a railroad company for damages received by cattle during carriage, written contracts of shipment *held* to merge all understandings between plaintiff and defendant prior thereto.—*San Antonio & A. P. Ry. Co. v. Barnett* (Tex. Civ. App.) 474.

In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, the shipping report, signed by agent of plaintiff and the connecting lines, *held* not to change written contracts for shipment between plaintiff and defendant.—*San Antonio & A. P. Ry. Co. v. Barnett* (Tex. Civ. App.) 474.

In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, that the way bill issued by defendant described the shipment as a through one *held* not to change written contracts for the shipment.—*San Antonio & A. P. Ry. Co. v. Barnett* (Tex. Civ. App.) 474.

In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, that the way bill issued by defendant described the shipment as a through one *held* no proof of

agency between defendant and the connecting line.—*San Antonio & A. P. Ry. Co. v. Barnett* (Tex. Civ. App.) 474.

Refusal of the court, in an action against a railroad company for damages to cattle received during carriage, to instruct the jury to find a verdict for defendant, *held* proper.—*San Antonio & A. P. Ry. Co. v. Barnett* (Tex. Civ. App.) 474.

§ 4. Carriage of passengers.

Where one who was permitted to ride on a freight train as a mere matter of accommodation was thrown while leaving it as it moved rapidly, the railroad company *held* not liable for his death resulting therefrom.—*Peak's Adm'r v. Louisville & N. R. Co.* (Ky.) 993.

Evidence considered, and *held* to justify submitting to the jury the question whether plaintiff's resistance, while a railroad passenger, of the payment of an illegal bridge toll until an assault was made, was for the purpose of enhancing damages.—*Patterson v. Southern Pac. Co.* (Tex. Civ. App.) 308.

A passenger on a railroad, who resists payment of an illegally enacted bridge toll until force is used on his person, for the sole purpose of enhancing his damages, is not entitled to recover for such added indignities.—*Patterson v. Southern Pac. Co.* (Tex. Civ. App.) 308.

Evidence as to the loss of a valise stolen through an open window of a sleeping car at a Mexican station *held* to justify findings that the company was negligent, and that the owner was not negligent.—*Pullman Palace Car Co. v. Arents* (Tex. Civ. App.) 329.

A railroad company *held* not negligent as a matter of law in failing to announce on its trains their arrival at stations.—*Houston & T. C. R. Co. v. Goodyear* (Tex. Civ. App.) 862.

§ 5. — Personal injuries.

In an action by a prospective passenger against a railway company for injuries for its failure to properly heat its waiting room at a depot, for permitting such room to be and remain locked, and for permitting annoyance and insults, an instruction *held* erroneous as permitting the jury to award punitive damages for the conduct of the company's agent, in the absence of sufficient evidence of such conduct.—*St. Louis, I. M. & S. Ry. Co. v. Wilson* (Ark.) 661.

In an action by a prospective passenger against a railway company for its failure in midwinter to properly heat its waiting room, an instruction *held* not erroneous, as eliminating defendant's negligence and making it an insurer, where it maintained that it had performed its duty and requested no instruction on the subject.—*St. Louis, I. M. & S. Ry. Co. v. Wilson* (Ark.) 661.

In an action by a prospective passenger against a railway company for permitting its waiting room to be locked, an instruction *held* not erroneous, where defendant denied knowledge of the depot being locked.—*St. Louis, I. M. & S. Ry. Co. v. Wilson* (Ark.) 661.

In an action by a prospective passenger against a railway company for injuries sustained at its depot waiting room by reason of annoyances and insults from persons there, an instruction as to defendant's liability *held* not prejudicial, being limited in its application to the conduct of the company's agent.—*St. Louis, I. M. & S. Ry. Co. v. Wilson* (Ark.) 661.

In an action by a prospective passenger against a railway company for injuries sustained at its depot waiting room by reason of annoyances and insults, an instruction as to defendant's liability *held* erroneous, in the ab-

sence of sufficient evidence of the language of the company's agent.—*St. Louis, I. M. & S. Ry. Co. v. Wilson* (Ark.) 661.

In an action by a prospective passenger against a railway company for injuries for its failure to properly heat its waiting room, for permitting such room to be and remain locked, and for annoyances and insults, an instruction *held* erroneous as warranting damages for mental suffering for conduct of the company's agent, in the absence of sufficient proof of such conduct.—*St. Louis, I. M. & S. Ry. Co. v. Wilson* (Ark.) 661.

A failure of a railway company to properly heat its depot waiting room in midwinter for the comfort of prospective passengers is *prima facie* evidence of negligence.—*St. Louis, I. M. & S. Ry. Co. v. Wilson* (Ark.) 661.

A railway company is liable for its agent's knowingly permitting its waiting room at a station to be and remain locked, against the protest of a prospective passenger therein, when by the exercise of ordinary care such agent could have prevented it.—*St. Louis, I. M. & S. Ry. Co. v. Wilson* (Ark.) 661.

A railway company is liable for injuries sustained by a prospective passenger at its depot waiting room for its failure to exercise ordinary care to protect him from annoyances and insults.—*St. Louis, I. M. & S. Ry. Co. v. Wilson* (Ark.) 661.

As plaintiff sought to recover for the negligence of defendant railroad company in failing to keep its road in repair, his cause of action was in tort, though he also alleged a contract with defendant to carry him safely as a passenger.—*Chesapeake & N. Ry. v. Hanmer* (Ky.) 375.

The court properly instructed the jury that they might award punitive damages to a passenger, if there was gross neglect; there being sufficient evidence to authorize the submission of that question.—*Louisville & N. R. Co. v. McClain* (Ky.) 391.

Where the conductor of a train beckoned to a passenger as they were nearing his station, and the passenger, going to the door, swung off in the dark, the carrier was not liable.—*Illinois Cent. R. Co. v. Hanberry* (Ky.) 417.

The fact that, in an action for personal injuries, there was a plea of fraud in obtaining compromise settlement, did not entitle defendant to have the action transferred to the equity docket.—*Louisville & N. R. Co. v. Carter* (Ky.) 508.

In an action for injuries sustained by plaintiff on jumping from a moving train, he having been aboard the train to seat his wife, *held* proper to permit witness to testify that the train did not stop long enough to enable one who had bought a ticket for it to get on.—*Texas & P. Ry. Co. v. Crockett* (Tex. Civ. App.) 114.

In an action for injuries sustained by plaintiff on his jumping from a moving train, which he had boarded to seat his wife, *held* proper to permit a witness to testify that he had attended his mother on the train that morning, and that he had done the same thing before with other passengers.—*Texas & P. Ry. Co. v. Crockett* (Tex. Civ. App.) 114.

Language by conductor of a railroad to a passenger *held* insulting and calculated to humiliate and mortify.—*Texas & P. Ry. Co. v. Tarkington* (Tex. Civ. App.) 137.

In an action against a railroad company, based on insulting and humiliating language of a conductor to a passenger, *held* immaterial that the conductor did not intend to charge the passenger with dishonesty.—*Texas & P. Ry. Co. v. Tarkington* (Tex. Civ. App.) 137.

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Language of a railroad conductor, addressed to a passenger, *held* to imply a charge of dishonesty, in that she was attempting to have her child transported without paying fare.—*Texas & P. Ry. Co. v. Tarkington* (Tex. Civ. App.) 137.

The evidence raising no issue as to a passenger's temperament, an instruction that, if the language of a conductor to her was not reasonably calculated to cause a person of ordinary temper to be so humiliated, she could not recover, was properly refused.—*Texas & P. Ry. Co. v. Tarkington* (Tex. Civ. App.) 137.

In an action against a railway for injuries to a passenger, an instruction that it is not negligence of itself for a railway passenger to stand on the platform of a moving train was improper.—*St. Louis S. W. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 879.

In an action against a railway for injuries to a passenger, *held*, that the court should have instructed as to contributory negligence.—*St. Louis S. W. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 879.

In an action against a railway for injuries to a passenger while on the platform, a charge assuming that he was leaning against the car door, and that, if the door was shut to prevent his falling, he could not recover, *held* incorrect.—*St. Louis S. W. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 879.

In an action against a railway for injuries to a passenger while standing on the platform, *held*, that an instruction should have been given that if the porter knew, or could have known, that plaintiff was leaning against the car door, and closed the door with ordinary care to prevent plaintiff falling, plaintiff could not recover.—*St. Louis S. W. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 879.

In an action against a railway company for injuries sustained by alighting from a train, it was not error to reject evidence that there were no lights at the station; failure to provide lights not being pleaded.—*Milligan v. Texas & N. O. R. Co.* (Tex. Civ. App.) 896.

Plaintiffs, in an action against a railroad for death resulting from the derailment of a train, *held* confined in their proof to the specific allegations as to the cause of the derailment.—*Johnson v. Galveston, H. & N. Ry. Co.* (Tex. Civ. App.) 906.

Charge, in an action against a railroad for death resulting from the derailment of a train, to find for defendant if a broken axle was the sole cause of the accident, *held* not erroneous as excusing defendant, notwithstanding the broken axle might have been due to its negligence.—*Johnson v. Galveston, H. & N. Ry. Co.* (Tex. Civ. App.) 906.

Charge, in an action against a railroad for death resulting from the derailment of a train, to find for defendant if a broken axle was the cause of the accident, *held* not erroneous as being on the weight of the evidence.—*Johnson v. Galveston, H. & N. Ry. Co.* (Tex. Civ. App.) 906.

Failure of the court, in an action against a railroad for death resulting from the derailment of a train, to mention spreading rails and loose spikes in a charge reciting the facts alleged by plaintiff, *held* not error.—*Johnson v. Galveston, H. & N. Ry. Co.* (Tex. Civ. App.) 906.

§ 6. — Contributory negligence of person injured.

Petition in an action for injuries sustained by plaintiff on his jumping from a moving train *held* not to show plaintiff guilty of negligence as a matter of law.—*Texas & P. Ry. Co. v. Crockett* (Tex. Civ. App.) 114.

In an action for injuries sustained by plaintiff on jumping from a moving train, which he had boarded to seat his wife, *held* proper to admit evidence that others had jumped off the train just before and in the presence of plaintiff without injury.—*Texas & P. Ry. Co. v. Crockett* (Tex. Civ. App.) 114.

In an action for injuries by jumping from a moving train, evidence *held* to warrant finding that plaintiff was not negligent.—*Texas & P. Ry. Co. v. Crockett* (Tex. Civ. App.) 114.

In an action against a railway for injuries to a passenger, requested instructions assuming that it was negligence for a passenger to stand on the platform of a moving train and violate a rule of the company were incorrect.—*St. Louis S. W. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 879.

§ 7. — Ejection of passengers and intruders.

The fact that one who was not identified as the conductor assisted a child of eight years from train before she reached her station does not render the carrier liable.—*Louisville & N. R. Co. v. Jordan* (Ky.) 27.

A verdict for \$250 for the ejection of an infant passenger from a train *held* grossly excessive.—*Louisville & N. R. Co. v. Jordan* (Ky.) 27.

A railroad company had the right to eject a violent drunken passenger, and incurred no liability therefor; no more force being used than was necessary.—*Chesapeake & O. Ry. Co. v. Saulsberry* (Ky.) 1051.

Where a passenger, after being properly ejected, was injured in running beside the moving train with the intention to get on again, the company owed him no legal obligation to stop the train for the purpose of ascertaining whether he had been injured.—*Chesapeake & O. Ry. Co. v. Saulsberry* (Ky.) 1051.

CARRYING WEAPONS.

See "Weapons."

CASE ON APPEAL.

Making and settlement, see "Appeal and Error," §§ 11, 12.

Necessity for purpose of review, see "Appeal and Error," §§ 11, 12.

CATTLE.

See "Animals."

CAUSE OF ACTION.

See "Action."

CENSUS.

Judicial notice of census, see "Evidence," § 1.

CERTIFICATE.

As evidence, see "Evidence," § 9.

CHAMPERTY AND MAINTENANCE.

A deed is champertous, and void, if executed, when another was in the adverse possession of the land, though such possession had not continued for 15 years.—*Logan v. Phenix* (Ky.) 1042.

In an action on the bond of a liquor dealer, rejection of evidence to show that an intervenor willfully instigated and prosecuted the

suit *held* error.—*Watelsky v. Cox* (Tex. Civ. App.) 327.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of criminal prosecutions, see "Criminal Law," § 3.

CHARACTER.

Of witness, see "Witnesses," § 4.

CHARGE.

By carrier, see "Carriers," § 2.

To jury in civil actions, see "Trial," §§ 7-13.

To jury, in criminal prosecutions, see "Criminal Law," § 19.

CHATTEL MORTGAGES.

See "Pledges."

§ 1. Requisites and validity.

A chattel mortgage, describing the property as "two gray mares," contains a sufficient description, where second mortgages had actual notice as to the mares referred to.—*Blythe v. Crump* (Tex. Civ. App.) 885.

§ 2. Filing, recording, and registration.

A mortgagee of personalty was not at fault in failing to give notice of the mortgage by registration or otherwise to the citizens of another state into which the property was removed, where sufficient time therefor did not elapse between the removal and a sale of the property to a person without notice.—*Blythe v. Crump* (Tex. Civ. App.) 885.

§ 3. Construction and operation.

A mortgagee's lien on personalty follows the mortgaged property into another state, to which it is removed without his knowledge or consent.—*Blythe v. Crump* (Tex. Civ. App.) 885.

A judgment in a foreclosure action, wherein the decisive question is the priority of one of two mortgages, rendered without determining such question, will be reversed.—*Blythe v. Crump* (Tex. Civ. App.) 885.

§ 4. Removal or transfer of property by mortgagor.

Where a defendant in an action to foreclose a chattel mortgage and for conversion pleads payment in money and property, a bill of sale conveying property the proceeds of which were to be credited on the debt, and a sale by the mortgagee of certain property for a sum less than its value, *held* admissible.—*Watts v. DuBois* (Tex. Civ. App.) 698.

In an action by a receiver to foreclose a mortgage and for conversion of mortgaged property, a document signed by the mortgagors *held* admissible, where the mortgagee took possession of the property by virtue of it.—*Watts v. DuBois* (Tex. Civ. App.) 698.

A mortgagee of personal property converted by third persons may elect to recover the value thereof from the latter, and is not required to enforce his mortgage.—*Parlin & Orendorff Co. v. Moore* (Tex. Civ. App.) 798.

An innocent purchaser of personalty incumbered by a mortgage takes title subject to the lien, where the mortgagees are not negligent in respect to giving notice.—*Blythe v. Crump* (Tex. Civ. App.) 885.

§ 5. Foreclosure.

In an action by a receiver of a bank to foreclose a mortgage to secure a debt to the bank, declarations of a third person, employed by the

agent of the receiver to procure the mortgage, to one of the mortgagors, *held admissible*.—*Watts v. Dubois* (Tex. Civ. App.) 698.

CHEAT.

See "Fraud."

CHECKS.

Assignability of checks for merchandise, see "Assignments," § 1.
Employer's checks for merchandise as currency, see "Banks and Banking," § 1.
Given in accord and satisfaction, see "Accord and Satisfaction."

CHILD.

See "Bastards"; "Guardian and Ward"; "Infants."

CHOSE IN ACTION.

Assignment, see "Assignments."

CHURCH.

See "Religious Societies."

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship ground of jurisdiction of United States court, see "Removal of Causes," § 1.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate assigned for creditors, see "Assignments for Benefit of Creditors," § 1.
Against estate of decedent, see "Executors and Administrators," § 5.
To property levied on, see "Attachment," § 1.
To property subjected to garnishment, see "Garnishment," § 5.

CLERKS OF COURTS.

Clerk's fees as costs, see "Costs," § 3.
Mandamus to compel clerk of court to enter sentence, see "Mandamus," § 1.

CLOUD ON TITLE.

See "Quieting Title."

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 10.

COLLATERAL ATTACK.

On judgment, see "Judgment," § 7.

COLLATERAL SECURITY.

See "Pledges."

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1; "Guaranty."

COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 3.
Of taxes, see "Taxation," § 5.

COMBINATIONS.

See "Conspiracy"; "Monopolies," § 1.

COMITY.

Between courts, see "Courts," § 6.

COMMERCE.

Carriage of goods and passengers, see "Carriers."

COMMISSION MERCHANTS.

See "Factors."

COMMISSIONS.

Of broker, see "Brokers," § 2.
Of executor or administrator, see "Executors and Administrators," § 9.
Of tax collector, see "Taxation," § 5.
Of trustee, see "Trusts," § 4.

COMMON CARRIERS.

See "Carriers."

COMMON LAW.

Presumption as to common law of sister state, see "Common Law," § 2.

COMMON SCHOOLS.

See "Schools and School Districts," §§ 1-4.

COMMUNITY PROPERTY.

See "Husband and Wife," § 4.

COMPENSATION.

For performance of contract, see "Contracts," § 2.
For property taken for public use, see "Eminent Domain," § 1.
For services, see "Master and Servant," § 1.
Of attorney, see "Attorney and Client," § 3.
Of broker, see "Brokers," § 2.
Of county officers, see "Counties," § 1.
Of executor or administrator, see "Executors and Administrators," § 9.
Of sheriff or constable, see "Sheriffs and Constables," § 2.
Of tax collector, see "Taxation," § 5.
Of trustee, see "Trusts," § 4.
Of witness, see "Witnesses," § 1.

COMPETENCY.

Of evidence in civil actions, see "Evidence," § 4.
Of evidence in criminal prosecutions, see "Criminal Law," § 9.
Of experts as witnesses, see "Evidence," § 11.
Of jurors, see "Jury," § 3.
Of witnesses in general, see "Witnesses," § 2.

COMPLAINT.

In criminal prosecution, see "Criminal Law," § 5; "Indictment and Information."

COMPOSITIONS WITH CREDITORS.

See "Compromise and Settlement."

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction"; "Payment."

Compromise of claim against bankrupt estate, see "Bankruptcy," § 2.

In an action to recover for personal injuries, in which plaintiff repudiated a compromise, held a verdict for plaintiff was against the evidence.—*Louisville & N. R. Co. v. Carter* (Ky.) 508.

COMPUTATION.

Of interest, see "Interest," § 2.

Of period of limitation, see "Limitation of Actions," § 2.

Of time, see "Time."

CONCEALED WEAPONS.

See "Weapons."

CONCLUSION.

Of witness, see "Evidence," § 11.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

In deeds, see "Deeds," § 2.

In insurance policies, see "Insurance," § 3.

In wills, see "Wills," § 5.

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 13.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 2.

Of parties to contract or conveyance, see "Fraudulent Conveyances," § 1.

CONFUSION OF GOODS.**§ 1. Rights and remedies of persons interested.**

In replevin for property which has innocently been mingled with defendant's property of the same nature and quality as that sued for, plaintiff may recover the quantity to which he is entitled from the common mass, if the separation may be made without injury.—*Rust Land & Lumber Co. v. Isom* (Ark.) 434.

Where property which is the subject of replevin is so mixed with property of the defendant as to be indistinguishable, it is not necessary for plaintiff to show that the property was so mingled with the intention of preventing identification.—*Rust Land & Lumber Co. v. Isom* (Ark.) 434.

CONNECTING CARRIERS.

See "Carriers," § 2.

CONSIDERATION.

In deed, see "Deeds," § 1.

Of accord, see "Accord and Satisfaction."

Of contract, see "Contracts," § 1.

Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.

Parol or extrinsic evidence, see "Evidence," § 10.

CONSOLIDATION.

Of actions, see "Action," § 1.

Of causes for trial, see "Trial," § 2.

Of corporations, see "Corporations," § 7.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 11.

§ 1. Criminal responsibility.

Conspiracy may be proved by circumstances.—*Hudson v. State* (Tex. Cr. App.) 668.

CONSTITUTIONAL LAW.*Provisions relating to particular subjects.*

See "Appeal and Error," § 20; "Attorney General"; "Courts," § 2; "Eminent Domain," § 1; "Judges," § 1; "Master and Servant," § 2; "Mechanics' Liens," § 1; "Monopolies," § 1; "Municipal Corporations," §§ 4, 5; "Penalties," § 1; "Public Lands," § 2; "Taxation," § 1.

Enactment and validity of statutes, see "Statutes," § 1.

Special or local laws, see "Statutes," § 2.

§ 1. Vested rights.

Where a valid order is made under Rev. St. 1899, § 9079, separating the office of circuit clerk and recorder of deeds, and a recorder is appointed under section 9080, the clerk and ex officio recorder is not entitled to serve the term for which he was elected, but must deliver the office of recorder to the appointee.—*State ex inf. Crow v. Evans* (Mo.) 355.

§ 2. Retrospective and ex post facto laws.

Act March 16, 1899, § 2, amending Sand. & H. Dig. § 1027, is unconstitutional in so far as it deprives infants of the right to appeal from a judgment existing against them at the passage of the act.—*Rankin v. Schofield* (Ark.) 197.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 14.

Defendant corporation was entitled to a continuance to enable it to take the deposition of a material witness in another state, where its attorney filed his affidavit showing due diligence.—*Louisville & N. R. Co. v. Harned* (Ky.) 25.

Application for a continuance on the ground of the absence of witnesses held properly denied.—*Gulf, C. & S. F. Ry. Co. v. Burroughs* (Tex. Civ. App.) 83.

Where, in an action for breach of contract, defendant applies for a continuance to show that the contractor was another than defendant, but shows no diligence, the application is properly refused.—*J. S. Mayfield Lumber Co. v. Carver* (Tex. Civ. App.) 216.

The amendment of a petition at the close of the trial was held not ground for a continuance on account of the absence of witnesses.—*J. S. Mayfield Lumber Co. v. Carver* (Tex. Civ. App.) 216.

Where witnesses appeared and testified before the trial was concluded, error in refusing continuance on the ground of their absence was harmless.—*J. S. Mayfield Lumber Co. v. Carver* (Tex. Civ. App.) 216.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."
 Assignment, see "Assignments."
 Cancellation, see "Cancellation of Instruments."
 Damages for breach, see "Damages," § 2.
 Novation, see "Novation."
 Operation and effect of champerty, see "Champerty and Maintenance."
 Operation and effect of customs or usages, see "Customs and Usages."
 Operation and effect of gaming laws, see "Gaming," § 1.
 Operation and effect of usury laws, see "Usury," § 1.
 Parol or extrinsic evidence, see "Evidence," § 10.
 Reformation, see "Reformation of Instruments."
 Specific performance, see "Specific Performance."
 Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of parties.

See "Building and Loan Associations"; "Carriers," § 2; "Municipal Corporations," § 5.
 Agents, see "Principal and Agent," § 3.
 Attorneys, see "Attorney and Client," § 8.
 Married women, see "Husband and Wife," § 1.
 Partners, see "Partnership," § 3.

Contracts relating to particular subjects.

See "Interest."
 Breeding, see "Animals."
 Ground for mechanics' liens, see "Mechanics' Liens," § 2.
 Traffic contracts between railroads, see "Railroads," § 2.
 Transportation of goods, see "Carriers," § 2.

Particular classes of express contracts.

See "Bills and Notes"; "Bonds"; "Covenants"; "Exchange of Property"; "Guaranty"; "Insurance"; "Liens"; "Partnership"; "Sales."
 Bills of lading, see "Carriers," § 2.
 Leases, see "Landlord and Tenant."
 Sales of realty, see "Vendor and Purchaser."
 Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Money Paid"; "Work and Labor."

Particular modes of discharging contracts.

See "Accord and Satisfaction"; "Payment."

§ 1. Requisites and validity.

Where a railroad company grants permission to another to construct a building on its right of way, on condition that it shall not be liable for loss by fire from its locomotives, the condition is valid.—*Greenwich Ins. Co. v. Louisville & N. R. Co.* (Ky.) 411.

Where an annuity agreed to be paid in consideration of the release of a debt amounted to more than legal interest, and was to be paid quarterly, the contract was supported by a sufficient consideration.—*Price's Adm'x v. Price's Adm'x* (Ky.) 529.

A contract between a building association and a borrowing member, by which they settled the matter of usury contained in the debt, held valid.—*United States Building & Loan Ass'n's Assignee v. Denny* (Ky.) 622.

Where a husband and wife, claiming that she is the owner of a tract of public school land for full consideration paid, execute a deed with covenant of warranty of title purporting to convey such tract, the husband is liable on such covenant, notwithstanding the pretended conveyance of such land was illegal.—*Johnson v. Blum* (Tex. Civ. App.) 461.

Where, acting under a void assignment, an assignee has collected the fees of an officer, the moneys so collected cannot be recovered from such assignee by the officer, or reached by his creditors in garnishment proceedings.—*Willis v. Weatherford Compress Co.* (Tex. Civ. App.) 472.

Where the fees of a public officer are collected by another under a void assignment of such fees, such collection is ineffectual as to such officer, and they are still uncollected so far as he is concerned.—*Willis v. Weatherford Compress Co.* (Tex. Civ. App.) 472.

A contract with a candidate for public office to pay him certain sums for the privilege of selecting his deputies and receiving his fees held void.—*Willis v. Weatherford Compress Co.* (Tex. Civ. App.) 472.

An agreement between competing bidders, providing for a division of profits, held not to render the successful bidder liable to the other under the agreement.—*Daily v. Hollis* (Tex. Civ. App.) 586.

A contract providing that a private crossing over a railroad shall be left open is not against public policy.—*Gulf, C. & S. F. Ry. Co. v. Clay* (Tex. Civ. App.) 1115.

§ 2. Construction and operation.

Where a sewing machine company agreed to give an agent 1 machine as a premium in case he sold 12, he was not entitled, on selling and paying for 11 machines, to retain a twelfth one as a premium.—*White Sewing Mach. Co. v. Logan* (Ark.) 348.

Two writings executed at the same time and relating to the same matter are to be construed together.—*Price's Adm'x v. Price's Adm'x* (Ky.) 529.

It must be presumed that the parties to a contract acted with reference to the law as it had then been declared by the highest court of the state.—*Graves County Water Co. v. Ligon* (Ky.) 725.

Contractors held not entitled to recover for a building partially erected, but destroyed by storm before completion.—*Bartlett v. Bisbey* (Tex. Civ. App.) 70.

Where a building contract provides for the payment of a certain per cent. as the work progresses, and at a given time the per cent. specified has been paid, the balance of the estimated value has not accrued and is not due to the contractor.—*Medley v. American Radiator Co.* (Tex. Civ. App.) 86.

Where a contract authorizing plaintiffs to sell defendant's lands provided that they should devote "their business energies, time, and attention" to such business, a charge that they were not required to devote their entire time, but reasonable diligence, in procuring purchasers, was proper.—*McLane v. Maurer* (Tex. Civ. App.) 693.

§ 3. Performance or breach.

In an action for breach of a contract authorizing plaintiffs to sell defendant's lands, it was competent to show that defendant, knowing a certain person was in plaintiffs' employ, without their knowledge employed him at the same time to sell for defendant, thereby interfering with plaintiffs' sales.—*McLane v. Maurer* (Tex. Civ. App.) 693.

§ 4. Actions for breach.

Where, in a suit by an attorney to recover for services, the defense was payment according to contract, plaintiff could not show bad faith, when not pleaded.—*Tennant v. Fawcett* (Tex. Civ. App.) 80.

Where the plaintiff bases his right to recover on a contract by which an officer assigns the fees of his office, which is void as against public policy, the illegality of the contract need

not be pleaded to make it available.—*Willis v. Weatherford Compress Co.* (Tex. Civ. App.) 472.

Where a contract authorizing plaintiffs to sell lands fixes a minimum price, leaving the asking price to be agreed on, a complaint for breach of such contract which alleges that such price was agreed to is sufficient.—*McLane v. Maurer* (Tex. Civ. App.) 693.

Where a contract authorizing plaintiffs to sell land within certain time is extended with slight changes by indorsement thereon, in an action for the breach before the extended time has expired, it is proper to declare on both contracts.—*McLane v. Maurer* (Tex. Civ. App.) 693.

CONTRADICTION.

Of record, see "Appeal and Error," §§ 11, 12.
Of witness, see "Witnesses," § 4.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," §§ 2, 3.

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Conveyances by or to particular classes of parties.

See "Corporations," § 5; "Executors and Administrators," § 7; "Guardian and Ward," § 1; "Infants," § 1.

Agents, see "Principal and Agent," § 3.
Married women, see "Husband and Wife," § 2.
Trustee under trust deed, see "Mortgages," § 4.

Conveyances of particular species of property.

See "Easements," § 1; "Homestead," § 2.
Community property, see "Husband and Wife," § 4.

Separate property of married women, see "Husband and Wife," § 2.

Water rights, see "Waters and Water Courses," § 2.

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

Bills of sale, see "Sales," § 3.

CORPORATIONS.

Promoters of corporation as partners, see "Partnership," § 1.

Particular classes of corporations.

See "Beneficial Associations"; "Building and Loan Associations"; "Municipal Corporations"; "Religious Societies."

Telegraph and telephone companies, see "Telegraphs and Telephones," § 1.

Water companies, see "Waters and Water Courses," § 3.

§ 1. Incorporation and organization.

An architect employed by agent of prospective corporation held entitled, on abandonment of organization, to treat the agent as trustee for the corporation as to the land which agent was to turn over to corporation in payment of stock subscription.—*Friedman v. Janssen* (Ky.) 752.

§ 2. Corporate name, seal, domicile, by-laws, and records.

A trade-name, consisting simply of a generic term, will not be protected.—*Industrial Mutual Deposit Co. v. Central Mutual Deposit Co.* (Ky.) 1032.

§ 3. Members and stockholders.

A stockholder held not entitled to specific performance of a contract between defendant and the corporation, by which the corporation was to convey to defendant certain land.—*Collier v. Deering Camp Ground Ass'n* (Ky.) 183.

§ 4. Officers and agents.

An agreement between a director of a corporation and the corporation that property secured by the former should be his individual property is valid.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

While one director may contract with a corporation, the entire board of directors cannot do so.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

A party, charging that the officers of a corporation had misapplied certain corporate funds, which should have been in part applied to his claim against the corporation, must, in order to recover against such officers as individuals, show what part of such funds should have been applied to his claim.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

§ 5. Corporate powers and liabilities.

The fact that the railroad property of defendant corporation had been sold under decree of court furnished no reason for dismissing an action by a passenger for injuries, as the corporation continued to exist, at least until its liabilities were settled.—*Chesapeake & N. Ry. v. Hanmer* (Ky.) 375.

Where an organizer of a corporation turned over merchandise, receiving in payment shares of the corporation, his knowledge that he held part of the goods as factor merely did not charge the corporation with notice, though he was its president.—*Wyeth v. Renz-Bowles Co.* (Ky.) 825.

The fact that defendant corporation, having no property in the state subject to execution, was proceeding to a liquidation, and distributing its net assets among its stockholders, held to authorize an attachment.—*Wyeth v. Renz-Bowles Co.* (Ky.) 825.

The corporation, having paid for the goods in stock, was not a purchaser for value so long as the shares remained in the hands of the person from whom it bought the goods.—*Wyeth v. Renz-Bowles Co.* (Ky.) 825.

Under Rev. St. art. 1194, exception 23, an action against a private corporation domiciled in one county on a contract arising in another county may be sued in the latter.—*Gulf, W. T. & P. Ry. Co. v. Browne* (Tex. Civ. App.) 341.

Where a director received a deed to lands intended for the corporation, but outside of the power of the latter to acquire, it cannot compel a conveyance thereof from him.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

Under Batts' Ann. Civ. St. art. 651, relating to the powers of private corporations to acquire real property, a street railway corporation cannot acquire blocks of land not coming within the classes specified in the statute.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

Burden of proof held to be upon plaintiff, in an action upon a note signed on behalf of a corporation by the president thereof, to show that the corporation had assumed the payment of the note.—*Wilson v. Tyler Coffin Co.* (Tex. Civ. App.) 865.

§ 6. Insolvency and receivers.

A person's claim for injuries inflicted by an insolvent corporation, though not reduced to judgment, is an equitable lien on its property, constituting its officers trustees thereof for his benefit.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

§ 7. Consolidation.

Where a railroad corporation, after acquiring all the stock of another railroad, accepted a transfer of all the latter's property, subject to its bonded indebtedness and all "other indebtedness," the purchaser became liable for the torts of the vendor theretofore committed.—*Louisville & N. R. Co. v. Biddell* (Ky.) 34.

§ 8. Foreign corporations.

A foreign corporation, empowered by its charter to acquire and hold real and personal property, may acquire and hold such property in Texas which it has purchased outside the state, though the corporation has no permit to do business in the state, under Rev. St. arts. 745, 746.—*Lakeview Land Co. v. San Antonio Traction Co.* (Tex. Sup.) 766.

CORROBORATION.

Of witness in general, see "Witnesses," § 4.

COSTS.

§ 1. Nature, grounds, and extent of right in general.

The matter of taxing costs is largely in the discretion of the trial court.—*Texas & P. Ry. Co. v. Davis* (Tex. Civ. App.) 598.

§ 2. Security for payment.

Action on plaintiffs' attorneys in making deposits on costs held not to prevent the filing of a motion to require security for costs.—*Edwards v. Middleton* (Tex. Civ. App.) 570.

§ 3. Amount, rate, and items.

Under Rev. St. arts. 1205, 1206, a stenographer's bill, not exceeding the limit prescribed by the statute and approved by the lower court, held properly taxed as costs.—*Cox v. Patten* (Tex. Civ. App.) 64.

Under Rev. St. art. 2494, a clerk cannot tax costs for filing subpoenas and citations issued by him.—*Texas M. Ry. Co. v. Parker* (Tex. Civ. App.) 583.

A clerk may tax costs for filing affidavits of witnesses showing their attendance; the same not being issued by the clerk, within the meaning of Rev. St. art. 2494.—*Texas M. Ry. Co. v. Parker* (Tex. Civ. App.) 583.

Under Rev. St. art. 2453, a clerk cannot charge fees for recording the return on a citation; there being no law requiring the recording of such return.—*Texas M. Ry. Co. v. Parker* (Tex. Civ. App.) 583.

A clerk for taking an affidavit of a witness and issuing a certificate of attendance, as provided by Rev. St. art. 2268, can only make one charge therefor in taxing costs.—*Texas M. Ry. Co. v. Parker* (Tex. Civ. App.) 583.

A witness is not liable to the clerk for the latter's issuance of a certificate of attendance for such witness; the fee therefor being properly taxed as costs.—*Texas M. Ry. Co. v. Parker* (Tex. Civ. App.) 583.

§ 4. Taxation.

A plaintiff, who submitted without objection to the ruling of the lower court under Rev. St. arts. 1428-1438, adjudging him to pay costs, and who paid such costs, held to have waived all objection thereto.—*Cox v. Patten* (Tex. Civ. App.) 64.

§ 5. On appeal or error, and on new trial or motion therefor.

The clerk of the court of appeals may charge for a copy of the transcript, though no copy was in fact made, if there was, instead, a loan of the original transcript.—*Shackelford v. Phillips* (Ky.) 419.

Under Civ. Code Prac. § 737, appellant corporation having brought up the entire record of the settlement of an estate, embracing irrelevant litigations, it will be required to pay for the immaterial parts of the record.—*Forest Hill Building & Loan Ass'n v. McEvoy's Ex'r* (Ky.) 1081.

§ 6. In criminal prosecutions.

Where one convicted of crime appeals, but dies before his appeal is submitted, neither the sureties on his appeal bond nor his estate are liable for any costs.—*Kelly v. State* (Tex. Or. App.) 774.

CO-TENANCY.

See "Tenancy in Common."

COUNTERFEITING.

See "Forgery."

COUNTIES.

Judicial notice as to county officers, see "Evidence," § 1.

§ 1. Government and officers.

The county treasurer held not responsible to plaintiff, who had loaned money to the county, on account of the money paid into the treasury by him.—*Dotson v. Fitzpatrick* (Ky.) 403.

Under Sayles' Civ. St. art. 2495c, as construed in connection with articles 2495g, 2495k, a county officer is not entitled to retain commissions on fines collected by him.—*Ellis County v. Thompson* (Tex. Sup.) 48.

Under Laws 1897 (Sp. Sess.) p. 8, § 12, and Sayles' Civ. St. art. 2495c, a county clerk is not entitled to deduct one-fourth of all fees collected by him before salaries of his deputies are paid.—*Ellis County v. Thompson* (Tex. Sup.) 48.

Under Laws 1897 (Sp. Sess.) p. 8, § 10, as originally enacted, county clerk held not entitled to one-fourth of all the fees collected by him.—*Ellis County v. Thompson* (Tex. Sup.) 48.

Under Sayles' Civ. St. art. 2495f, a county treasurer has no right to collect delinquent fees after the expiration of his term of office.—*Ellis County v. Thompson* (Tex. Sup.) 48.

Under Rev. St. arts. 1535, 1537, subda. 7, 8, a member of the county commissioners' court cannot take and enforce an assignment of the claim of a contractor against the county to accrue on an unfinished contract to build a jail.—*Knippa v. Stewart Iron Works* (Tex. Civ. App.) 322.

§ 2. Property, contracts, and liabilities.

Under Const. art. 3, § 55, the transfer by a county commissioners' court of a judgment entered on a bail bond to an agent of the sureties for their benefit, for less than the sum due on the judgment, is void.—*Lindsey v. State* (Tex. Civ. App.) 332.

Under Rev. St. art. 845, a commissioners' court cannot sell at a discount a judgment belonging to the county to the judgment debtors, or to their agent for their benefit.—*Lindsey v. State* (Tex. Civ. App.) 332.

§ 3. Fiscal management, public debt, securities, and taxation.

An order by the board of county commissioners of Floyd county, evidencing a loan to the

county, providing for its payment by the sheriff out of the county levy, *held* valid, except as to an agreement therein to pay 10 per cent. interest.—*Dotson v. Fitzpatrick* (Ky.) 403.

As the act required the sheriff to pay taxes, when collected, to the treasurer of the board, "or those entitled to receive same," the board had authority to direct the sheriff to make payment directly to plaintiff.—*Dotson v. Fitzpatrick* (Ky.) 403.

§ 4. Claims against county.

Where plaintiff, who had loaned money to a county for a valuable consideration, extended the time of payment until the sheriff, who was to pay the debt, became insolvent, the county was thereby released.—*Dotson v. Fitzpatrick* (Ky.) 403.

§ 5. Actions.

Rev. St. art. 790, prohibiting suit against a county, unless the claim on which suit is founded shall have first been presented to the commissioners' court for allowance, has no application to an action of trespass to try title against the county.—*Bowie County v. Powell* (Tex. Civ. App.) 237.

In an action to set aside the alleged fraudulent transfer of a judgment, evidence considered, and *held*, that the issues should have been submitted to the jury.—*Lindsey v. State* (Tex. Civ. App.) 332.

COUNTY BOARD.

See "Counties," § 1.

COURTS.

See "Criminal Law," § 2.

Judges, see "Judges."

Judicial supervision of acts of municipal bodies, see "Municipal Corporations," § 1.

Justices' courts, see "Justices of the Peace."

Mandamus to inferior courts, see "Mandamus," § 1.

Province of court and jury, see "Trial," §§ 7-13.

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

Right to review action of religious societies, see "Religious Societies."

Right to trial by jury, see "Jury," § 1.

§ 1. Nature, extent, and exercise of jurisdiction in general.

Evidence *held* to show that the transfer of a claim was not collusive, for the purpose of obtaining jurisdiction.—*National Exch. Bank v. Foley* (Tex. Civ. App.) 249.

A passenger, entering a sleeping car at a station in Texas to go to a point in Mexico, may sue for violation of the contract in a county in Texas in which the car company has an agent, though the fare was not collected until the train entered Mexico, and neither plaintiff nor defendant resides in such state.—*Pullman Palace-Car Co. v. Arents* (Tex. Civ. App.) 329.

§ 2. Establishment, organization, and procedure in general.

Act April 13, 1886, establishing a board of commissioners for Floyd county, to take the place of the court of claims, was not unconstitutional.—*Dotson v. Fitzpatrick* (Ky.) 403.

§ 3. Courts of general original jurisdiction.

Under Ky. St. § 1820, the circuit court cannot, by allowing the joinder of a number of separate causes of action for the infringement of a ferry license, acquire jurisdiction of the action to recover the prescribed penalty, as the statutory mode must be pursued.—*Blackwood v. Tanner* (Ky.) 500.

A mortgagee, suing in the district court to foreclose a mortgage on real and personal property, may join as parties defendant third persons alleged to have converted the personal property, though the value thereof is less than \$500.—*Parlin & Orendorff Co. v. Moore* (Tex. Civ. App.) 798.

A mortgagee of real and personal property, suing to foreclose his mortgage, may join junior mortgagees of the personal property as defendants, and have their rights adjudicated, regardless of the amount involved.—*Parlin & Orendorff Co. v. Moore* (Tex. Civ. App.) 798.

§ 4. Courts of limited or inferior jurisdiction.

Where the court had jurisdiction over the amount of damages claimed in an original petition, an amended petition, in which the damages claimed had been raised by accrued interest above the jurisdictional amount, *held* improper, but not to deprive the court of jurisdiction up to its maximum limit.—*San Antonio & A. P. Ry. Co. v. Barnett* (Tex. Civ. App.) 474.

Where the court had jurisdiction over the amount of damages claimed in an original petition, which amount, as claimed in an amended petition, was raised by accrued interest above the court's jurisdiction, the defect could be cured by amendment.—*San Antonio & A. P. Ry. Co. v. Barnett* (Tex. Civ. App.) 474.

§ 5. Courts of appellate jurisdiction.

Under Act March 20, 1901, increasing the jurisdiction of the courts of appeal, a cause pending in the supreme court, which is not submitted until the October, 1901, term, and which comes within the increased jurisdiction of the courts of appeal, will be certified to the proper court of appeals.—*Crawford v. Dixon* (Mo.) 159.

A constitutional question *held* to have been fairly raised, so as to warrant an appeal from the circuit court to the supreme court, rather than to the Kansas City court of appeals.—*Marx v. Hart* (Mo.) 260.

Where, in a suit to quiet title, the court finds the title in plaintiffs, but decrees a lien for taxes paid by defendant, the validity of which lien is the question on appeal, the cause will be transferred to the appellate court.—*Rowe v. Current River Land & Cattle Co.* (Mo.) 928.

The question whether defendant was entitled to an instruction on the burden of proof in a libel suit *held* not to involve a construction of Const. art. 2, § 14, so as to give the supreme court jurisdiction of an appeal therein.—*Hanson v. Pulitzer Pub. Co.* (Mo.) 940.

Under Const. § 6, amendment of 1884, a case cannot be certified by the court of appeals to the supreme court, when only a single point therein is decided, but only after a decision of the case.—*Gipson v. Powell* (Mo.) 969.

Under Laws 1899, p. 170, where the decision of one court of civil appeals was in conflict with that of another, the question should have been certified to the supreme court, although a prior decision of the supreme court had seemingly settled the question.—*McCurdy v. Conner* (Tex. Sup.) 664.

The decision of a court of civil appeals as to the correctness of an instruction in trespass to try title *held* to be in such conflict with the decision of another court of civil appeals on the same question as to require such question to be certified to the supreme court.—*McCurdy v. Conner* (Tex. Sup.) 664.

Under Laws 1899, p. 170, to require a question to be certified to the supreme court by a court of civil appeals, the conflict between its decision and that of another court of civil appeals must be well-defined.—*McCurdy v. Conner* (Tex. Sup.) 664.

Under Const. art. 5, § 3, and Rev. St. art. 946, the supreme court *held* to have power to issue a mandamus to compel a court of civil appeals to certify, as required by Laws 1899, p. 170, to the supreme court a question as to which its decision was in conflict with that of another court of civil appeals.—*McCurdy v. Conner* (Tex. Sup.) 664.

Mandamus to compel a court of civil appeals to certify a question to the supreme court, as required by Laws 1899, p. 170, should be sued out within a reasonable time, and before the court has issued its mandate, or while such mandate is still in the control of such court.—*McCurdy v. Conner* (Tex. Sup.) 664.

Where it did not appear from the answer to a petition for a mandamus to compel a court of civil appeals to certify a question to the supreme court, as required by Laws 1899, p. 170, that the court had lost control of its mandate, it would not be held that the mandamus was not applied for within a reasonable time.—*McCurdy v. Conner* (Tex. Sup.) 664.

§ 6. Concurrent and conflicting jurisdiction, and comity.

A cause appealed to a circuit court from a probate court cannot be transferred to a chancery court.—*Jackson v. Gorman* (Ark.) 346.

COVENANTS.

§ 1. Actions for breach.

Where the grantee in a deed is sued by her grantee of the same premises for breach of her covenant of warranty, the land being public school land, and causes her grantors to be impleaded, she is entitled to judgment against them for the consideration paid by her, with interest, though no judgment is recovered against her.—*Johnson v. Blum* (Tex. Civ. App.) 461.

In an action by a grantor of a street railway against the assignee of the grantee for damages for failure to operate the railway as required by the deed, the grantee is not a necessary party.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 4.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances"; "Marshaling Assets and Securities."

Of devisees or legatees, see "Wills," § 10.

Of intestate, see "Descent and Distribution," § 1.

Rights and remedies of surety, see "Principal and Surety," § 3.

Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of assignments, see "Assignments for Benefit of Creditors," § 1.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 3.

CRIMINAL LAW.

See "Witnesses."

Arrest of accused, see "Arrest," § 1.

Computation of time as to sentence in criminal prosecution, see "Time."

Costs in criminal prosecutions, see "Costs," § 6.

Disqualification of judge in criminal prosecution, see "Criminal Law," § 1.

Grand jury, see "Grand Jury."

Indictment, information, or complaint, see "Indictment and Information."

Mandamus to compel entry of sentence in criminal prosecution, see "Mandamus," § 1.

Penalties, see "Penalties."

Prisons, see "Prisons."

Prosecuting officers, see "District and Prosecuting Attorneys."

Offenses by particular classes of parties.

See "District and Prosecuting Attorneys."

Particular offenses.

See "Adultery"; "Assault and Battery," § 2; "Bigamy"; "Breach of the Peace"; "Burglary"; "Conspiracy," § 1; "Disorderly House"; "Escape"; "Forgery"; "Gaming," § 3; "Homicide"; "Incest"; "Larceny"; "Perjury"; "Rape"; "Receiving Stolen Goods"; "Robbery."

Offenses relating to weapons, see "Weapons."

Violation of fence laws, see "Fences."

Violation of liquor laws, see "Intoxicating Liquors," §§ 4, 5.

§ 1. Nature and elements of crime and defenses in general.

Under Pen. Code, art. 391, the fact that an accomplice or participant in any of the offenses to which the article relates testifies for the state in regard to such offenses exonerates him from punishment, whether his testimony is given before or after his indictment or arrest, or that of any of the other parties.—*Griffin v. State* (Tex. Cr. App.) 782.

The incompetency of grand jurors to testify as to transactions before them *held* not a sufficient objection to evidence offered by one accused of gaming to show that he had testified before the grand jury, and was thus under Pen. Code, art. 391, exempt from punishment.—*Griffin v. State* (Tex. Cr. App.) 782.

Under Pen. Code, art. 198, punishing gaming for money within the limits of any city on Sunday, a person cannot be convicted for gaming at a residence outside the corporate limits of a city, though the residence was on platted ground adjacent to the city.—*Borders v. State* (Tex. Cr. App.) 1102.

§ 2. Jurisdiction.

Code Cr. Proc. art. 471, not requiring the transcript of an indictment to state the nature of the offense charged in the indictment, a misdescription in a transcript of the offense charged in the indictment *held* not to vitiate the indictment.—*Roller v. State* (Tex. Cr. App.) 777.

§ 3. Venue.

Where a change of venue is granted on motion of accused, it is too late, after verdict, to object for the first time that the county to which the venue was changed is not adjacent to that in which the indictment was found.—*Yontz v. Commonwealth* (Ky.) 383.

§ 4. Former jeopardy.

Acquittal of defendant in collusive trial before a justice *held* no bar to an indictment for the same offense.—*State v. Caldwell* (Ark.) 150.

Mayor's court *held* to have jurisdiction of an offense abandoned by justice court.—*Town of Salem v. Colley* (Ark.) 195.

A conviction of negligent homicide *held* an acquittal of all degrees of culpable homicide above that.—*Flynn v. State* (Tex. Cr. App.) 551.

A former trial, wherein the proceedings were void because of the disqualification of the judge, will not support a plea of former jeopardy.—*Ex parte Graham* (Tex. Cr. App.) 840.

§ 5. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

Under Code Cr. Proc. art. 470, preliminary complaint made by C. cannot be substituted for lost complaint made by D.—*Morrison v. State* (Tex. Cr. App.) 779.

§ 6. Arraignment and pleas, and nolle prosequi or discontinuance.

Refusal to instruct that a former trial and acquittal for carrying a pistol as a weapon was not a bar to prosecution as to a certain count in the indictment *held* not erroneous.—*State v. Caldwell* (Ark.) 150.

Instruction that the fact that a prior prosecution was instigated by defendant's attorney and trial had before time set is no defense *held* error, though such facts may be considered in determining whether the former prosecution was collusive.—*State v. Caldwell* (Ark.) 150.

Question whether prosecution in justice court was instituted in order to elude prosecution in circuit court *held* to be for the jury.—*State v. Caldwell* (Ark.) 150.

Ground of demurrer to plea of former acquittal *held* abandoned on prosecution's joining issue on the plea.—*State v. Caldwell* (Ark.) 150.

No arraignment is necessary upon a trial for a misdemeanor.—*Griffin v. Commonwealth* (Ky.) 740.

The indictment being read to the jury, it will be presumed, unless the contrary appears, that the plea of not guilty was entered.—*Hinkle v. Commonwealth* (Ky.) 1020.

§ 7. Evidence.

In a prosecution under Rev. St. 1899, § 7261, for falsely personating an elector, the book of registration in which the name of the party personated appears as a voter *held* sufficient to prove that he was a lawful elector.—*State v. Shelley* (Mo.) 430.

Evidence corroborating the testimony of an accomplice *held* sufficient to authorize a refusal of a cautionary instruction as to the weight to be given the uncorroborated testimony of an accomplice.—*State v. Koplan* (Mo.) 967.

On a prosecution for the theft of cattle belonging to an unknown owner, evidence of the testimony of witnesses before the grand jury and grand jurors as to what was done by the grand jury to ascertain the nonownership was proper.—*Clements v. State* (Tex. Cr. App.) 301.

On a prosecution for theft, testimony that defendant told witness he had purchased the property and had a bill of sale therefor *held* not secondary evidence of the contents of such bill of sale.—*Clements v. State* (Tex. Cr. App.) 301.

Evidence of a former homicide and flight *held* proper, to show purpose and intent.—*Cortez v. State* (Tex. Cr. App.) 453.

§ 8. — Facts in issue and relevant to issues, and res gestæ.

Evidence that another had been convicted of the burglary is not admissible to show that defendant was not guilty.—*State v. Yandle* (Mo.) 532.

In a prosecution for theft, where it appeared that defendant had been prosecuted for seduction and had afterwards married, *held* error to question his mother as to whether she knew the daughter, etc.—*Mercer v. State* (Tex. Cr. App.) 565.

In prosecution for rape, testimony that on a certain morning, before the alleged crime, witness heard defendant call his (defendant's) wife a "damn pot-gutted bitch," *held* inadmissible.—*Hefner v. State* (Tex. Cr. App.) 841.

In a prosecution for an assault with intent to murder which occurred after dark in mid-summer some three miles from defendant's house, evidence that his shirt was found hanging in his room the next morning in a wet or damp condition *held* material.—*Baines v. State* (Tex. Cr. App.) 847.

Evidence that, either when called on the next morning after prosecutrix was shot, or without being called on, accused refused without apparent reason to help witnesses hunt for tracks of the guilty person, or to assist them in searching for evidence, was material.—*Baines v. State* (Tex. Cr. App.) 847.

§ 9. — Materiality and competency in general.

In a prosecution for homicide, where defendant claimed that deceased had raped his wife, defendant could not show that deceased was not impotent.—*Tatum v. State* (Tex. Cr. App.) 563.

A witness, having testified, on cross-examination, that he had been running a "joint" in the capacity of detective, *held* not entitled to show who employed him as detective, nor at whose instance he had operated the "joint."—*McGee v. State* (Tex. Cr. App.) 562.

Where a witness testified, on cross-examination, that he had been running a "joint" in the capacity of detective, *held* error to permit the state to prove that the witness came to town and opened a "joint," at the request of certain persons, to detect defendant in crime.—*McGee v. State* (Tex. Cr. App.) 562.

On a prosecution against one for assaulting his wife with intent to murder, cross-examination of defendant *held* erroneous.—*Hall v. State* (Tex. Cr. App.) 783.

§ 10. — Admissions, declarations, and hearsay.

On prosecution for theft of a horse, which defendant had taken off the range to his own premises, where he exercised ownership over it, evidence that he said the horse was an estray, and that he refused to sell it, was not admissible.—*Bennett v. State* (Ark.) 198, 914.

Evidence of defendant, on prosecution for theft of a horse, *held* not admissible, as being an attempt to prove innocence by his own assertions.—*Bennett v. State* (Ark.) 198, 914.

Testimony as to a conversation between a witness and deceased, and between deceased and another, *held* inadmissible on trial for murder.—*Commonwealth v. Bright* (Ky.) 604.

Declarations of third persons that they had seen defendants pass on the morning of the burglary is hearsay.—*State v. Yandle* (Mo.) 532.

In a prosecution for theft, testimony, offered to show the owner's want of consent to the taking of the stolen property, that witness testified as a prosecuting witness on the examining trial, is incompetent, because hearsay.—*Farris v. State* (Tex. Cr. App.) 299.

On prosecution for murder, evidence of statements by defendant's wife, not made in his hearing or presence, *held* inadmissible.—*Millard v. State* (Tex. Cr. App.) 300.

Evidence of prior agreement among members of posse as to what they should do *held* inadmissible against one charged with killing a member of the posse.—*Cortez v. State* (Tex. Cr. App.) 453.

Declarations of others that a killing was done by another than defendant *held* not admissible for him.—*Cortez v. State* (Tex. Cr. App.) 453.

Testimony that defendant could talk English *held* not objectionable as a declaration of his.—*Cortez v. State* (Tex. Cr. App.) 453.

In prosecution for adultery, testimony *held* admissible to show that "Ed. B.," by which

name the woman's husband was known to defendant, was the same person as "John E. B.," his name as averred in the indictment.—*McDaniel v. State* (Tex. Cr. App.) 549.

In a prosecution for theft, testimony by the prosecuting witness that he was employed by a third person for the purpose of detecting the parties suspected of crime in the vicinity, including defendant, *held* inadmissible.—*Mercer v. State* (Tex. Cr. App.) 555.

On a trial for crime, defendant *held* not permitted to prove that he had sent money to certain persons out of the state so that they might attend court as witnesses.—*Click v. State* (Tex. Cr. App.) 1104.

§ 11. — Acts and declarations of conspirators and co-defendants.

Declarations of one before conspiracy *held* admissible against co-conspirator.—*Hudson v. State* (Tex. Cr. App.) 668.

Evidence of acts and conversations by persons conspiring to commit the assault *held* admissible.—*Yeary v. State* (Tex. Cr. App.) 1106.

§ 12. — Opinion evidence.

On a trial for homicide, certain statements to a physician by deceased *held* properly excluded, as being only matters of opinion and corroborative of other witnesses for accused.—*Young v. State* (Ark.) 658.

On a trial for forgery, the comparison of the signature alleged to be forged with a genuine signature on an instrument is inadmissible, where profert of the latter instrument was not made for comparison.—*Whittle v. State* (Tex. Cr. App.) 771.

Where defendant, on trial for forging an indorsement of a note, alleged that the prosecutrix made the indorsement, *held* error to permit the prosecutrix to sign her name before the jury, and present such signature in connection with signature claimed to be forged.—*Whittle v. State* (Tex. Cr. App.) 771.

Witnesses may testify that footprints observed about the scene of the assault with intent to murder appeared to be the same as defendant's, though no measurement thereof was made.—*Baines v. State* (Tex. Cr. App.) 847.

The testimony of a witness in identification of a piece of paper exhibited to him in a prosecution of a defendant for shooting his sister-in-law *held* competent.—*Baines v. State* (Tex. Cr. App.) 847.

§ 13. — Confessions.

Confessions of boy accused of rape *held* admissible.—*State v. Armstrong* (Mo.) 961.

To make confession admissible, witness must understand the language in which it was given.—*Cortez v. State* (Tex. Cr. App.) 453.

An officer's warning *held* adequate to authorize the admission of a declaration made thereupon by the accused.—*Baines v. State* (Tex. Cr. App.) 847.

§ 14. Time of trial and continuance.

Defendant *held* entitled to continuance because of absence of material witness, summoned by state, but absent because of sickness.—*Cortez v. State* (Tex. Cr. App.) 453.

Where defendant has shown an utter lack of diligence to procure absent witnesses, it is not error to refuse his application for continuance.—*Corley v. State* (Tex. Cr. App.) 453.

In prosecution for homicide, denial of continuance for absent witnesses *held* error.—*Jemison v. State* (Tex. Cr. App.) 842.

§ 15. Trial.

An objection to all the testimony of a witness on the ground of hearsay *held* too general.—*Click v. State* (Tex. Cr. App.) 1104.

The inadmissibility, in a prosecution for assault, of evidence of a fight between other persons, is not raised by an objection that such evidence is hearsay or irrelevant.—*Yeary v. State* (Tex. Cr. App.) 1106.

§ 16. — Reception of evidence.

Refusal of evidence *held* not prejudicial error, in view of the manner in which the testimony was attempted to be introduced.—*Burns v. State* (Tex. Cr. App.) 303.

Where a witness for the state testified that he had been convicted of horse theft, a certified copy of his pardon, and his testimony to the effect that he had been pardoned, *held* not open to objection of being irrelevant and immaterial.—*Wines v. State* (Tex. Cr. App.) 788.

Where certain testimony was introduced merely for the purpose of impeaching defendant's witness, *held* not necessary to limit it to such purpose.—*Duffy v. State* (Tex. Cr. App.) 844.

In a prosecution for assault with intent to kill, it was competent to show that the ground near where the assault occurred appeared next morning to have been disturbed, without first identifying the tracks as defendant's.—*Baines v. State* (Tex. Cr. App.) 847.

The state cannot introduce in evidence the deposition of a witness.—*Garza v. State* (Tex. Cr. App.) 1098.

§ 17. — Arguments and conduct of counsel.

The attorney for the prosecution, in stating his case after reading the indictment, need not state in detail the character of the charge or the evidence to be introduced.—*Hinkle v. Commonwealth* (Ky.) 816.

Where the county attorney read to the jury the indictment and the indorsements thereon, whereupon the attorney for the commonwealth said to the jury the indictment was his statement, no further statement to the jury was necessary.—*Hinkle v. Commonwealth* (Ky.) 1020.

An allusion to a former conviction in violation of Code Cr. Proc. art. 823, *held* not to constitute reversible error, if unintentional and accidental, and made for no ulterior purpose.—*Baines v. State* (Tex. Cr. App.) 847.

Error by the prosecuting attorney, in a prosecution for aggravated assault, in commenting to the jury on defendant's failure to testify, is not rendered harmless by the action of the court in rebuking the attorney and instructing the jury to disregard the improper statements.—*Good v. State* (Tex. Cr. App.) 1099.

§ 18. — Province of court and jury in general.

Whether confession was voluntary *held* for jury.—*Cortez v. State* (Tex. Cr. App.) 453.

Charge *held* to be on the weight of evidence.—*Hudson v. State* (Tex. Cr. App.) 668.

An instruction, in a prosecution for cattle theft, as to the consideration of certain evidence, *held* an instruction on the weight of the evidence, and erroneous.—*Wallace v. State* (Tex. Cr. App.) 1102.

An instruction in a criminal case as to the effect to be given defendant's admissions *held* an instruction on the evidence, and erroneous.—*Wallace v. State* (Tex. Cr. App.) 1102.

§ 19. — Necessity, requisites, and sufficiency of instructions.

It is error, in instructing the jury in a criminal case, not to require them to believe "beyond a reasonable doubt" the existence of the facts necessary to constitute guilt.—*Ison v. Commonwealth* (Ky.) 184.

As only one accomplice testified, it was sufficient to instruct the jury that accused could not be convicted on the testimony of an accomplice, without adding the words "or accomplices."—*Yontz v. Commonwealth* (Ky.) 383.

The failure to give an instruction as to the effect of an alibi *held* erroneous.—*State v. Koplan* (Mo.) 967.

It is not error to refuse a request to charge on an issue not raised by the evidence.—*Terry v. State* (Tex. Cr. App.) 451.

Error in allowing state to prove that its witness opened a "joint," at the instance of certain persons, to detect defendant in crime, *held* not cured by instructions.—*McGee v. State* (Tex. Cr. App.) 562.

A charge in a prosecution for murder *held* erroneous, because without foundation in the evidence.—*Allen v. State* (Tex. Cr. App.) 671.

On a prosecution for an assault upon a wife with intent to murder, evidence *held* not to authorize an instruction based upon the hypothesis that her father had forbidden him to come on his premises.—*Hall v. State* (Tex. Cr. App.) 788.

An instruction attempting to exclude certain evidence which had been admitted *held* erroneous, as not indicating sufficiently the evidence to be excluded.—*Hall v. State* (Tex. Cr. App.) 783.

A paragraph of a charge *held* not erroneous, because omitting reference to reasonable doubt, where the jury were fully instructed as to such issue in other parts of the charge.—*Ramirez v. State* (Tex. Cr. App.) 1101.

Charge as to circumstantial evidence, that the jury must believe accused committed the offense, is not erroneous because of omitting the words "and no other person."—*Ramirez v. State* (Tex. Cr. App.) 1101.

Where there is no direct evidence of the taking in a prosecution for cattle theft, but possession is relied on as proof thereof, an instruction as to circumstantial evidence should be given.—*Wallace v. State* (Tex. Cr. App.) 1102.

§ 20. — Requests for instructions.

Failure to instruct on motive is not error; there being no request therefor, and defendant not having requested the court to instruct on all the law of the case.—*State v. Melvin* (Mo.) 534.

A requested instruction is properly refused, where covered by one already given of the court's own motion.—*State v. Armstrong* (Mo.) 961.

Where the charge given is correct, and covers defendant's defense as presented in his testimony, it is not error to refuse to give an unnecessary special charge requested by him.—*Corley v. State* (Tex. Cr. App.) 453.

§ 21. — Objections to instructions or refusal thereof, and exceptions.

The giving of an instruction like one asked for by defendant cannot be complained of by him.—*State v. Melvin* (Mo.) 534.

An objection, in a motion for a new trial, that the court erred in its charge, *held* too general to be considered.—*Hearne v. State* (Tex. Cr. App.) 773.

§ 22. — Custody, conduct, and deliberations of jury.

Under Rev. St. 1899, § 2629, special oath need not be administered officer at the time of placing the jury in his charge.—*State v. Armstrong* (Mo.) 961.

A verdict fixing a fine and imprisonment, in pursuance of an agreement to add the amount and length of time fixed by each juror and

divide the sum by the number of jurors, *held* improper.—*Good v. State* (Tex. Cr. App.) 1036.

§ 23. — Verdict.

A general verdict of guilty under an indictment containing two distinct phases of the offense of abusive language *held* sufficient, where the evidence will sustain either allegation.—*Wilborne v. State* (Tex. Cr. App.) 559.

The court on appeal will not quash an indictment, though containing defective counts, where one count is sufficient and the verdict is general; there being no statement of facts, and no motion to quash having been made in limine.—*McKinney v. State* (Tex. Cr. App.) 769.

A verdict finding several defendants guilty and assessing their punishment is a separate verdict as to each.—*Garza v. State* (Tex. Cr. App.) 1098.

§ 24. Motions for new trial and in arrest.

Defendant's motion for a new trial for newly-discovered evidence, not supported by affidavit, *held* properly denied.—*State v. Fletcher* (Mo.) 429.

A motion for a new trial for newly-discovered evidence, after defendant had changed his plea from not guilty to guilty, *held* properly refused.—*Boyce v. State* (Tex. Cr. App.) 568.

§ 25. Appeal and error, and certiorari.

Under Act March 18, 1899, certiorari *held* not to lie to quash mayor's court judgment of conviction because of irregularities in the trial.—*Town of Salem v. Colley* (Ark.) 195.

Under Code Cr. Proc. art. 886, an appeal will be dismissed, where the appellant has not entered into a recognizance and is allowed to exercise his own pleasure as to going to jail.—*Walton v. State* (Tex. Cr. App.) 546.

Until the sentence in a criminal case has been properly passed and entered on the minutes of the court below, an appeal will not lie.—*Jones v. State* (Tex. Cr. App.) 559.

A variance between the language of the appellate court and that of the record in an appeal *held* not sufficient to justify a rehearing.—*Boyce v. State* (Tex. Cr. App.) 568.

§ 26. — Presentation and reservation in lower court of grounds of review.

There can be no reversal for a failure to read the indictment to the jury, unless it is assigned as a ground for new trial.—*Ison v. Commonwealth* (Ky.) 184.

Where defendant moved the court to instruct the jury to find him not guilty, and the instructions and verdict show that he was tried upon a plea of not guilty, there can be no reversal because the record fails to show the nature of his plea.—*Griffin v. Commonwealth* (Ky.) 740.

If evidence is admissible for any purpose, objection merely that it is incompetent, irrelevant, and immaterial will not allow review of its admission.—*State v. Yandle* (Mo.) 532.

Remarks of counsel in arguing case to jury *held* not ground for new trial, where no exception was taken.—*State v. Armstrong* (Mo.) 961.

Where no exception is taken to the refusal to give an instruction to acquit, the questions presented thereby will not be considered on appeal.—*State v. Koplan* (Mo.) 967.

An objection to secondary evidence of a bill of sale *held* to have been waived.—*Clements v. State* (Tex. Cr. App.) 301.

Under Code Cr. Proc. art. 723, certain alleged errors of the court *held* not reviewable, because not excepted to.—*Young v. State* (Tex. Cr. App.) 567.

An objection that the county attorney acted unfairly in his opening speech cannot be considered, in the absence of a bill of exceptions thereto.—*Nelson v. State* (Tex. Cr. App.) 775.

A bill of exceptions which merely charges that certain evidence is immaterial is insufficient to authorize a consideration of the evidence.—*Yeary v. State* (Tex. Cr. App.) 1106.

§ 27. — Proceedings for transfer of cause, and effect thereof.

Under Code Cr. Proc. art. 887, an appeal from conviction of a misdemeanor will be dismissed, where the recognizance misstates the amount of the fine assessed.—*Driggs v. State* (Tex. Cr. App.) 548.

A recognizance which does not state the amount of punishment assessed is defective.—*Staudifer v. State* (Tex. Cr. App.) 550.

A recognizance which is joint, and not several, is defective.—*Standifer v. State* (Tex. Cr. App.) 550.

A recognizance on appeal, which fails to state the punishment imposed on appellant, as required by Code Cr. Proc. art. 887, is fatally defective and ground for dismissal.—*Tinkle v. State* (Tex. Cr. App.) 555.

Under Code Cr. Proc. art. 887, an appeal in which the recognizance does not state the amount of punishment will be dismissed.—*Waldrup v. State* (Tex. Cr. App.) 555.

That a recognizance on appeal from a conviction of misdemeanor fails to state the punishment imposed *held* ground for dismissal.—*Crowley v. State* (Tex. Cr. App.) 559.

A recognizance on appeal from a conviction of misdemeanor, which fails to require appellant to appear before the court and "to abide the judgment of the court of criminal appeals," *held* fatally defective.—*Harkey v. State* (Tex. Cr. App.) 559.

§ 28. — Record and proceedings not in record.

Under Cr. Code Prac. § 336, the 60 days allowed for filing transcript of record in the clerk's office of the court of appeals in a felony case runs from the date of the judgment, and not from the date of the filing of the bill of exceptions, unless the time for filing bill of exceptions is extended to a subsequent term.—*Gray v. Commonwealth* (Ky.) 387.

Bill of exceptions *held* not sufficiently identified, and that the evidence would not be considered.—*State v. Baty* (Mo.) 428.

Where the time for filing a bill of exceptions is extended "up to" June 28th, a bill on that day is in time.—*State v. Fletcher* (Mo.) 429.

Where the record shows that the term at which defendant was convicted adjourned October 24, 1901, and the statement of facts was filed November 4, 1901, so that the 10 days allowed had expired on November 3d, the statement will be stricken on motion.—*Millard v. State* (Tex. Cr. App.) 300.

Where the record does not contain a statement of facts or bill of exceptions, neither the evidence nor charge of the court will be reviewed on appeal.—*Thorn v. State* (Tex. Cr. App.) 300.

Grounds of motion for a new trial relating to admission of testimony cannot be considered, where no bill of exceptions is reserved.—*Burns v. State* (Tex. Cr. App.) 303.

Where the charge was oral, and not contained in the record, alleged error in the refusal of a requested special charge cannot be considered.—*Hays v. State* (Tex. Cr. App.) 548.

A record of an appeal in a criminal case, which does not contain a notice to the trial court of the appeal, *held* defective.—*McArthur v. State* (Tex. Cr. App.) 555.

Where, on appeal from a conviction, the statement of facts is not approved by the presiding judge, it cannot be considered.—*Young v. State* (Tex. Cr. App.) 567.

Bills of exception, not approved by the presiding judge, cannot be considered on appeal.—*Gerstenkorn v. State* (Tex. Cr. App.) 568.

Where a bill of exceptions to certain matter is disapproved by the trial judge, and appellant fails to prepare and present a bill supported by bystanders, the matter complained of will not be considered.—*Nelson v. State* (Tex. Cr. App.) 775.

The court, on appeal in a criminal case, where there is no bill of exceptions or statement of facts, will not consider a motion for a new trial based on questions relating to the sufficiency and admissibility of the evidence.—*Esser v. State* (Tex. Cr. App.) 776.

Bills of exceptions to the admission of testimony that a prosecutrix twice testified before the grand jury cannot be revised, when they do not show what her testimony was.—*Baines v. State* (Tex. Cr. App.) 847.

The court on appeal will not consider the propriety of the remarks of the district attorney, where such remarks are not verified by bill of exceptions.—*Garza v. State* (Tex. Cr. App.) 1098.

The record and showing on an appeal in a criminal case *held* sufficient to show that the prosecuting attorney was guilty of improper argument.—*Good v. State* (Tex. Cr. App.) 1099.

§ 29. — Review.

There can be no reversal on the evidence in a criminal case, if there is any evidence tending to show guilt.—*Ison v. Commonwealth* (Ky.) 184.

The failure of a bill of exceptions to state that the indictment was read to the jury does not authorize the assumption that it was not read.—*Ison v. Commonwealth* (Ky.) 184.

The fact that the commonwealth's attorney in his argument made reference to the guilt of one who was not on trial was not prejudicial to accused.—*Yontz v. Commonwealth* (Ky.) 383.

A judgment of conviction cannot be reversed for insufficiency of the evidence, where there is any tending to show guilt.—*Hinkle v. Commonwealth* (Ky.) 816.

Where the record of a court of general jurisdiction is silent about a matter necessary to confer jurisdiction, the existence of such matter, nothing appearing to the contrary, will be presumed.—*State v. Baty* (Mo.) 428.

Record *held* sufficient, though not showing adjournment to a certain day; it being presumed that the want of the entry was the fault of the clerk.—*State v. Baty* (Mo.) 428.

Where no statement of facts was in the record, the appellate court cannot say that an error in the admission of evidence was prejudicial.—*Millard v. State* (Tex. Cr. App.) 300.

Error in refusing evidence that a state's witness was in jail at a certain time *held* harmless.—*Burns v. State* (Tex. Cr. App.) 303.

Where, on the trial of a criminal case, the court read a special charge requested by defendant to the jury, and stated to them that it was given as the law applicable to the case, the omission of the judge to sign such charge is not reversible error.—*Terry v. State* (Tex. Cr. App.) 451.

Testimony admitted in prosecution for adultery *held* not prejudicial to defendant, even if erroneously received.—*McDaniel v. State* (Tex. Cr. App.) 549.

Certain letters, introduced for impeaching purposes, *held* properly admitted.—*Wilhelm v. State* (Tex. Cr. App.) 567.

On prosecution for arson, certain evidence held admissible on the question of motive.—*Wilhelm v. State* (Tex. Cr. App.) 587.

Omission by court of the word "and" in quoting count of information held immaterial.—*Nelson v. State* (Tex. Cr. App.) 775.

Error in admitting a certificate of the clerk of the district court for the purpose of amending transcript of an indictment held harmless, where the alleged defect in the transcript did not vitiate the indictment.—*Roller v. State* (Tex. Cr. App.) 777.

The impeachment of a witness on an immaterial matter in a criminal case is not harmless error.—*Collins v. State* (Tex. Cr. App.) 840.

Under Code Cr. Proc. art. 723, as amended March 12, 1897, error in stating the punishment for cattle theft is not ground for reversal, when the minimum penalty was imposed.—*Ramirez v. State* (Tex. Cr. App.) 1101.

§ 30. Punishment and prevention of crime.

The statute authorizing a jail sentence of not less than one month for aggravated assault does not mean a calendar month.—*Yeary v. State* (Tex. Cr. App.) 1106.

CROPS.

Renting on shares, see "Landlord and Tenant," § 5.

Rights and liabilities between vendor and purchaser of land, see "Vendor and Purchaser," § 4.

CROSS COMPLAINT.

See "Pleading," § 3.

CROSS-EXAMINATION.

See "Witnesses," § 8.

CURTESY.

See "Dower."

Where no child had been born of a marriage when act of March 15, 1894, regulating the property rights of husband and wife took effect, the husband had no vested right to an estate by curtesy, and that statute is valid as to him to the extent that it abolishes such right, though a child was thereafter born of the marriage.—*Phillips v. Farley* (Ky.) 1006.

CUSTODY.

Of child, see "Divorce," § 2.

Of jury, see "Criminal Law," § 22; "Trial," § 14.

CUSTOMS AND USAGES.

In construing written instruments, evidence is competent which places the court in the position of the parties at the time the contract was made.—*Buckwalter v. Hutcherson* (Ky.) 602.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 1.

Opinion evidence as to damages, see "Evidence," § 11.

Damages for particular injuries.

See "Assault and Battery," § 1; "Death," § 2; "Fraud," § 2; "Nuisance," § 1.

Breach by buyer of contract for sale of goods, see "Sales," § 6.

Caused by servant, see "Master and Servant," § 10.

From stock, see "Animals."

Infringement of ferry franchise, see "Ferries," § 1.

Obstruction of passway over railroad, see "Railroads," § 1.

Personal injuries caused by operation of railroad, see "Railroads," § 6.

To employees, see "Master and Servant," § 9.

To goods in course of transportation, see "Carriers," § 2.

To passenger, see "Carriers," §§ 4-7.

Wrongful ejection of passenger, see "Carriers," § 7.

Recovery in particular actions or proceedings.

See "Trespass," § 2; "Trespass to Try Title," § 3.

§ 1. Exemplary damages.

Punitive damages may be awarded against a corporation for an injury resulting from the gross negligence of its servants.—*Chesapeake & O. Ry. Co. v. Dodge* (Ky.) 606.

§ 2. Measure of damages.

Measure of damages, in an action by an administrator to recover damages for causing the death of his intestate, determined.—*Smith's Adm'x v. Middleton* (Ky.) 388.

Measure of damages stated for breach of a contract authorizing plaintiffs to sell defendant's land.—*McLane v. Maurer* (Tex. Civ. App.) 693.

Where, in an action for breach of a contract authorizing plaintiffs to sell defendant's lands, a large quantity of the land had been sold by them, and there was no testimony that the remaining lands would have been sold for a higher average price, the damages should not be based on an estimate higher than such average.—*McLane v. Maurer* (Tex. Civ. App.) 693.

§ 3. Inadequate and excessive damages.

Verdict for \$825 for personal injuries will not be set aside as excessive.—*Chesapeake & O. Ry. Co. v. Dodge* (Ky.) 606.

A verdict for \$13,000 for the loss of an arm by plaintiff, who was 34 years of age and earning \$1 a day, is excessive.—*Louisville & N. R. Co. v. Lowe* (Ky.) 736.

Evidence in an action for personal injuries to an adult laboring man held to sustain a verdict for \$5,000.—*Pauck v. St. Louis Dressed Beef & Provision Co.* (Mo.) 1070.

Where plaintiff, a boy of 10 years, was so injured while at work in defendant's factory as to necessitate the amputation of his right arm, a verdict of \$2,875 was not excessive.—*American Lead Pencil Co. v. Davis* (Tenn.) 1129.

Damages awarded for personal injuries held warranted.—*Texas & P. Ry. Co. v. Crockett* (Tex. Civ. App.) 114.

Verdict showing that it was based on the supposition that the result of injury would be permanent, where the only evidence of permanency left it in serious doubt, reduced.—*San Antonio & A. P. Ry. Co. v. Gray* (Tex. Civ. App.) 229.

Where a railroad engineer, 41 years of age, earning from \$135 to \$150 a month, was so injured that one of his legs is, and perhaps will remain, practically useless, a greater amount than \$16,000 for such injury is excessive.—*San Antonio & A. P. Ry. Co. v. Connel* (Tex. Civ. App.) 246.

On an issue as to the value of improvements removed from land, a verdict for \$225 held not excessive.—*Smith v. Frio County* (Tex. Civ. App.) 711.

A verdict of \$13,500 for injuries received by an engineer in a collision held not excessive.—*St. Louis S. W. Ry. Co. v. Kelton* (Tex. Civ. App.) 887.

§ 4. Pleading, evidence, and assessment.

Where the court, upon motion of defendant, appointed two physicians to examine plaintiff as to his injuries, but defendant, before any examination, withdrew its motion, it was error to permit the physicians thus appointed to testify, over defendant's protest, as to an examination made after the motion was withdrawn.—*South Covington & C. St. Ry. Co. v. Stroh* (Ky.) 177.

The allegation of specific personal injuries, followed by the allegation that plaintiff was "otherwise greatly hurt and wounded," does not authorize proof of injuries other than those specifically alleged.—*Chesapeake & N. Ry. v. Hanmer* (Ky.) 375.

Where plaintiff had been fully examined by five surgeons of defendant at different times, and there was little conflict in their evidence, there was no substantial error in overruling defendant's motion for a personal examination at the time of the trial.—*Louisville & N. R. Co. v. McClain* (Ky.) 391.

Evidence as to doctors' bills paid by plaintiff was not admissible, in the absence of any allegation of any such special damages in the petition.—*Illinois Cent. R. Co. v. Hanberry* (Ky.) 417.

Evidence in an action for personal injuries held inadmissible on the question of earning capacity.—*Houston & T. C. R. Co. v. Gee* (Tex. Civ. App.) 78.

Where a trial court is of opinion that a verdict is excessive, it may require a reduction thereof.—*San Antonio & A. P. Ry. Co. v. Connell* (Tex. Civ. App.) 248.

In an action for breach of a contract authorizing plaintiffs to sell defendant's lands, it was competent to examine witnesses as to the demand for such lands, and applications to purchase and offers therefor made, and the probable cost of selling the remaining lands.—*McLane v. Maurer* (Tex. Civ. App.) 693.

In an action for breach of a contract by which plaintiffs were authorized to sell defendant's lands, and to have one-half of the price received in excess of a certain sum, an allegation of what they would have realized from the sale forms a sufficient basis for the recovery of damages.—*McLane v. Maurer* (Tex. Civ. App.) 693.

In an action for personal injuries, held error to refuse to charge that plaintiff could not recover for suffering which he could have prevented by reasonable care, nor for a bone felon on his other hand, not bruised at the time of the accident.—*St. Louis S. W. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 879.

In an action for injuries to a physician, evidence of a physician of another place to the amount of his own obstetrical business held inadmissible.—*St. Louis S. W. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 879.

In an action for injuries, an averment that plaintiff's leg was crushed and dislocated was sufficient to admit evidence of an injury to his hip.—*St. Louis S. W. Ry. Co. v. Kelton* (Tex. Civ. App.) 887.

In an action for injuries, a general allegation that plaintiff was caught and crushed in a wreck, etc., was sufficient, in the absence of objection, to admit evidence of a particular injury which was not included in the statement of particular injuries following the general allegation.—*St. Louis S. W. Ry. Co. v. Kelton* (Tex. Civ. App.) 887.

DEATH.

By wrongful act of carrier, see "Carriers," §§ 4-7.

Caused in operation of railroad, see "Railroads," § 5.

Liability of master for wrongful death of servant, see "Master and Servant," § 2.

Measure of damages for injuries causing death, see "Damages," § 2.

Of grantor in trust deed as revocation of power of sale, see "Mortgages," § 4.

Of party to action ground for abatement, see "Abatement and Revival," § 1.

Pending appeal, see "Appeal and Error," § 7.

Suspension of running of statute of limitation, see "Limitation of Actions," § 2.

§ 1. Evidence of death and of survivorship.

Where the question was whether the beneficiary in a life policy had survived the insured, both having perished in a flood, evidence held insufficient to raise any issue as to the survivorship.—*Hildebrandt v. Ames* (Tex. Civ. App.) 128.

§ 2. Actions for causing death.

Under Sand. & H. Dig. §§ 5051, 5058, right of action held not to exist in next of kin of person under 14 years of age for damages for the death of such person while employed in a coal mine.—*Kansas & T. Coal Co. v. Gabsky* (Ark.) 915.

The fact that the widow of a person killed by the negligence of another and his only child were both infants at the time of his death did not extend the period of limitation beyond one year from the death.—*Van Vactor's Adm'r v. Louisville & N. R. Co.* (Ky.) 4.

An action by a father, as administrator, under Ky. St. § 6, to recover damages for the death of his child, did not abate upon the death of the father, but should have been revived in the name of his successor as administrator; the recovery, after the payment of funeral expenses, costs of administration, and costs of recovery, being for the benefit of the father's estate.—*Thomas' Adm'r v. Maysville Gas Co.* (Ky.) 398.

A verdict for \$15,000 for the death of a girl 14 years of age is so excessive as to indicate passion or prejudice.—*Board of Internal Improvement for Lincoln County v. Moore's Adm'r* (Ky.) 417.

Where plaintiff sought to recover both for pain and suffering and for death, and the court, without requiring him to elect, required the action to be tried as an action for death, a new trial having been granted, plaintiff was not concluded on the second trial by the election made by the court.—*Louisville Ry. Co. v. Will's Adm'r* (Ky.) 628.

Though plaintiff elected to sue for pain and suffering, instead of death, she was not prejudiced by the admission of evidence as to the earning capacity of her intestate, or as to his age and condition of health.—*Louisville Ry. Co. v. Will's Adm'r* (Ky.) 628.

A cause of action for pain and suffering cannot be joined with the statutory cause of action for death, and plaintiff must elect which he will prosecute.—*Louisville Ry. Co. v. Will's Adm'r* (Ky.) 628.

A cause of action for death cannot be properly joined with one for the pain and suffering of the decedent.—*Lewis' Adm'r v. Taylor Coal Co.* (Ky.) 1044.

In action for death, the measure of damages is the value of decedent's life "to the plaintiffs."—*Houston & T. C. R. Co. v. Johnson* (Tex. Civ. App.) 72.

The measure of damages, in an action by parents for the wrongful death of their son, defined.—*Cole v. Parker* (Tex. Civ. App.) 135.

Where plaintiff alleges negligence on the part of defendant and its employés, failure to charge as to the effect of negligence on the part of

the employes *held* prejudicial error.—*Cole v. Parker* (Tex. Civ. App.) 135.

Persons dealing with electricity, and failing to exercise proper care to see that their plant is properly constructed, are liable for death resulting therefrom, though the plant itself is operated by their employes.—*Cole v. Parker* (Tex. Civ. App.) 135.

Under Rev. St. art. 3027, the amount of damages in an action for death is within the discretion of the jury, subject to revision by the court when abused.—*Cole v. Parker* (Tex. Civ. App.) 135.

Under Rev. St. 1895, art. 3017, a person is not liable for the acts of his employes, causing death, but death must result from his own immediate act.—*Cole v. Parker* (Tex. Civ. App.) 135.

Where, in an action against a railroad company by a mother for the negligent killing of her married son, she is 73 years old, living with her married daughter, and the son, earning \$100 a month, had contributed \$50 per year for her support, a verdict of more than \$1,000 is excessive.—*Southern Pac. Co. v. Winton* (Tex. Civ. App.) 477.

Where an attorney performs services for a widow in the prosecution of an action against a railroad company for negligence resulting in the killing of her husband, the claim of such attorney for compensation is not an interest in the cause of action which entitles him to intervene in such suit.—*Southern Pac. Co. v. Winton* (Tex. Civ. App.) 477.

Charge, in an action against a railroad for death resulting from the derailment of a train, to find for defendant, unless the gangrenous condition causing death resulted from an injury caused by such derailment, *held* properly given.—*Johnson v. Galveston, H. & N. Ry. Co.* (Tex. Civ. App.) 906.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Declarations against interest, see "Evidence," § 7.

Estates, see "Descent and Distribution"; "Executors and Administrators."

Testimony as to transactions with persons since deceased, see "Witnesses," § 2.

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 7.

As evidence in criminal prosecutions, see "Criminal Law," § 10.

DEDICATION.

§ 1. Nature and requisites.

Evidence *held* insufficient to show a dedication of a sewer to a city.—*Diamond v. Smith* (Tex. Civ. App.) 141.

Evidence *held* to show dedication and acceptance of a street.—*Gibbs v. Ashford* (Tex. Civ. App.) 858.

§ 2. Operation and effect.

Where it was stipulated by the original dedication of a street that it was not to be opened until required by some abutting owner, one

such owner, while entitled to have the street opened, had no right to tear away fence of an opposite owner against his objection.—*Hommel v. Lewis* (Ky.) 1041.

DEEDS.

See "Reformation of Instruments," § 1.

Cancellation, see "Cancellation of Instruments."

Conveyance of lands held adversely, see "Champerly and Maintenance."

Covenants in deeds, see "Covenants."

Estoppel by deed, see "Estoppel," § 1.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Made in execution of power, see "Powers," § 1.

Parol or extrinsic evidence, see "Evidence," § 10.

Record as notice, see "Vendor and Purchaser," § 4.

Reformation, see "Reformation of Instruments."

Reservation of growing timber in deed, see "Logs and Logging."

Deeds by or to particular classes of parties.

See "Executors and Administrators," § 7; "Infants," § 1.

Married women, see "Husband and Wife," § 1, 2.

Trustee under trust deed, see "Mortgages," § 4.

Deeds of particular species of property.

See "Homestead," § 2.

Community property, see "Husband and Wife," § 4.

Separate property of married women, see "Husband and Wife," § 2.

Water rights, see "Waters and Water Courses," § 2.

Particular classes of deeds.

Of trust, see "Mortgages."

§ 1. Requisites and validity.

A conveyance completely executed will be upheld as against the grantor or his heirs, though not supported by a valuable consideration.—*Neurenberger v. Lehenbauer* (Ky.) 15.

As the grantors caused the deed to be recorded, there was *prima facie* a delivery, though the deed was returned by the clerk to the grantors, and remained in their possession, there being a reasonable presumption that they intended to part with the title; and, the gift being beneficial to the grantee, acceptance will be presumed.—*Lay v. Lay* (Ky.) 371.

Where a deed conveying land to a mother and her infant children was delivered to the mother, an acceptance by the children must be presumed; and it was proper to cancel a second deed by the grantor conveying the land to the mother alone.—*Hacker v. Hoover* (Ky.) 382.

A deed conveying land in consideration of the grantee's undertaking to support the grantor while he lived *held* properly set aside as obtained by undue influence.—*Johnson v. Stone-street* (Ky.) 621.

Though a bargain is an unequal one, yet, as there was a consideration and no duress is shown, the deed will not be set aside.—*McKinley v. McKinley* (Ky.) 831.

The delivery of a deed to a minor is not ineffectual by reason of minority alone.—*McNear v. Williamson* (Mo.) 160.

A deed of conveyance in ordinary form, containing a clause that at the grantor's death the deed "is to come immediately into effect, but not until then," *held* testamentary in character,

and inoperative as a deed.—*Murphy v. Gabbert* (Mo.) 536.

Evidence held to show fraudulent representations, justifying cancellation of deed.—*Morley v. Harrah* (Mo.) 942.

In a suit by a grantor to avoid his deed, evidence held insufficient to show that he was incompetent.—*Wilson v. Jackson* (Mo.) 972.

The rejection of evidence in a suit to cancel a deed executed by an agent in excess of his authority, that his authority was extended, held not error under the pleadings.—*Morton v. Morris* (Tex. Civ. App.) 94.

Where a deed executed by an agent is void as not being within his authority, it is not error to reject defendant's evidence that the agreed price was the full value of the land.—*Morton v. Morris* (Tex. Civ. App.) 94.

Deed conveying 110 acres out of a 310-acre tract, and describing the 310 acres accurately, sufficiently describes tract conveyed.—*Mass v. Bromberg* (Tex. Civ. App.) 468.

In an action on notes and to foreclose a lien on realty, held, that certain answers to special issues did not show that a certain conveyance had not been induced by fraud.—*Harrington v. Clafin* (Tex. Civ. App.) 898.

§ 2. Construction and operation.

Where a deed of gift to an infant son, subject to a lease for 22 years, provided that at the end of the lease the possession was to be vested in the grantee, the title vested immediately, subject to the lease.—*Lay v. Lay* (Ky.) 371.

A gift held beneficial to an infant, since the reservation is really for the benefit of the grantors, the lessee being only a nominal party, and they must therefore, as between them and the grantee, pay the taxes.—*Lay v. Lay* (Ky.) 371.

The mere fact that a deed included land which the grantor had a right to convey did not vest the grantee with either the title or possession of land embraced in the deed to which the grantor had no valid legal title.—*Jones v. Patterson* (Ky.) 377; *Patterson v. Davis, Id.*; *Davis v. Patterson, Id.*

An agreed order dismissing an action for divorce, in which the wife sought alimony and maintenance, must be read in connection with a deed executed on the same day, to determine what the agreement was as to the deed.—*Hacker v. Hoover* (Ky.) 382.

A deed conveying land to grantor's wife for the life of grantor, "and at his death to revert and reinvest in fee simple to his heirs at law or devisees, should he leave a will," passed only a life estate; the grantor retaining the fee.—*Whayne v. Davis* (Ky.) 827.

In construing a deed, all parts of the technical words in the granting and habendum clauses importing a fee must yield to a clause, following the covenant of general warranty, limiting the interest of the grantee to a life estate.—*Atkins v. Baker* (Ky.) 1023.

A deed held to create a vested remainder in fee in favor of the children of the grantee for life.—*Tindall v. Tindall* (Mo.) 1092.

Where a grantor conveys realty for the maintenance of a school to increase the value of adjacent property, he cannot insist on a forfeiture, after the school has been maintained, until he has disposed of his adjacent property.—*Maddox v. Adair* (Tex. Civ. App.) 811.

Where realty is conveyed on condition subsequent, and the condition is complied with, the grantor cannot complain of an abandonment of the property and the intrusion of a trespasser.—*Maddox v. Adair* (Tex. Civ. App.) 811.

Where a grantor conveys property for a school, and has not objected to the school established, he cannot claim a forfeiture after the discontinuance of the school, on the ground that the grantees failed to establish the school required by the condition.—*Maddox v. Adair* (Tex. Civ. App.) 811.

§ 3. Pleading and evidence.

Evidence in an action in ejectment held not to entitle the defendant to equitable relief.—*McNear v. Williamson* (Mo.) 160.

A defendant in an action to recover land, who attacks the deed under which plaintiff claims title, has the burden of showing its invalidity.—*Murphy v. Gabbert* (Mo.) 536.

Evidence held to justify a finding that a man paid no consideration for a deed.—*Hodges v. Hodges* (Tex. Civ. App.) 289.

Where a married man, representing himself as single, married a woman and obtained from her a deed of her property without consideration, a finding that such deed was fraudulently obtained is justified.—*Hodges v. Hodges* (Tex. Civ. App.) 289.

DE FACTO OFFICERS.

See "Officers," § 1; "Sheriffs and Constables," § 1.

Town officers, see "Towns," § 2.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Judgment by, see "Judgment," § 2.

DEFICIENCY.

On sale of land, see "Vendor and Purchaser," § 3.

DELAY.

In delivering telegraph message, see "Telegraphs and Telephones," § 2.

In transportation or delivery of goods by carrier, see "Carriers," § 2.

DELIVERY.

Of deed, see "Deeds," § 1.

DEMURRER.

In pleading, see "Pleading," § 4.

DEPOSITIONS.

See "Witnesses."

As evidence in criminal prosecutions, see "Criminal Law," § 16.

In actions against infants, see "Infants," § 2.

A carbon copy of a deposition of plaintiff, taken in another action, held not admissible against plaintiff, as it was taken in shorthand, and never read or signed by him after it was typewritten.—*Louisville & N. R. Co. v. Carter* (Ky.) 508.

DEPOSITS.

In bank, see "Banks and Banking," § 1.

DEPUTIES.

See "Sheriffs and Constables," § 1.

DESCENT AND DISTRIBUTION.

See "Curtesy"; "Dower"; "Executors and Administrators"; "Homestead," § 8.

As affected by validity of marriage, see "Marriage."

Estoppel of heirs by judgment against ancestor, see "Judgment," § 10.

§ 1. Rights and liabilities of heirs and distributees.

Plaintiffs, asserting as heirs title to growing trees, must allege and prove that their ancestor owned the land at the time of his death, and that they were his only children, or that they claim by conveyance from children not joined as plaintiffs.—*Gayheart v. Sibley* (Ky.) 1041.

Petition in suit to foreclose a vendor's lien note held to show jurisdiction in the district court.—*Brandenburg v. Norwood* (Tex. Civ. App.) 587.

A judgment in a suit on a vendor's lien note, establishing a lien on the land, but not against defendant, held proper.—*Brandenburg v. Norwood* (Tex. Civ. App.) 587.

DESCRIPTION.

Of devisees or legatees in will, see "Wills," § 5.

Of property conveyed, see "Boundaries," § 1; "Deeds," § 2.

Of property devised or bequeathed, see "Wills," § 5.

DETINUE.

See "Replevin."

DEVICES.

See "Wills."

DIRECTING VERDICT.

In civil actions, see "Trial," § 6.

DISABILITIES.

Effect on limitation, see "Limitation of Actions," § 2.

Of married women, see "Husband and Wife," § 1.

Of slaves, see "Slaves."

DISCHARGE.

From indebtedness, see "Accord and Satisfaction"; "Bankruptcy," § 3; "Compromise and Settlement."

From liability as guarantor, see "Guaranty," § 2.

From liability as surety, see "Principal and Surety," § 2.

From service as juror, see "Jury," § 2.

Of judgment, see "Judgment," § 13.

DISCONTINUANCE.

Of action, see "Dismissal and Nonsuit," § 1.

DISCOUNTS.

By bank, see "Banks and Banking," § 1.

DISCRETION OF COURT.

As to joinder of causes of action, see "Action," § 1.

As to taxation of costs, see "Costs," § 1.

Review in civil actions, see "Appeal and Error," § 19.

Review of discretionary action of court, see "Appeal and Error," § 2.

DISMISSAL AND NONSUIT.

Dismissal of appeal, see "Appeal and Error," §§ 11, 12.

Dismissal of appeal or writ of error, see "Appeal and Error," §§ 14, 15; "Criminal Law," § 27.

§ 1. Voluntary.

Pleadings and the record held not to show that a joint defendant had been dismissed, although an order for a temporary injunction against his co-defendant excluded him upon an answer of disclaimer.—*Diamond v. Smith* (Tex. Civ. App.) 141.

A petition against two defendants, using in its commencement the word "defendant," instead of "defendants," but showing by its caption and body that recovery was sought against both, held to charge both with the matter therein complained of.—*Diamond v. Smith* (Tex. Civ. App.) 141.

Where a nonsuit is entered, an order setting aside such nonsuit reinstates the cause, and leaves it pending in the court making such orders, notwithstanding an intermediate void order transferring the cause to another court has been entered.—*Southern Pac. Co. v. Winton* (Tex. Civ. App.) 477.

§ 2. Involuntary.

Where a judgment of dismissal for failure to comply with a rule for costs is insufficient as originally entered, the clerk can, during the term, correct the defect and enter a proper judgment.—*Edwards v. Middleton* (Tex. Civ. App.) 570.

Facts held to entitle plaintiff, in an action dismissed for failure to comply with a rule for costs, to reinstatement.—*Edwards v. Middleton* (Tex. Civ. App.) 570.

DISORDERLY CONDUCT.

See "Breach of the Peace."

DISORDERLY HOUSE.

Complaint for keeping disorderly house held good.—*Bass v. State* (Tex. Cr. App.) 558.

Instruction in prosecution for keeping disorderly house held not misleading.—*Bass v. State* (Tex. Cr. App.) 558.

Instruction in prosecution for keeping disorderly house held responsive to complaint.—*Bass v. State* (Tex. Cr. App.) 558.

DISQUALIFICATION.

Of judge, see "Judges," § 1.

DISSOLUTION.

Of partnership, see "Partnership," § 5.

DISTRIBUTION.

Of estate assigned for creditors, see "Assignments for Benefit of Creditors," § 1.

Of estate of decedent, see "Descent and Distribution"; "Executors and Administrators," § 6.

DISTRICT AND PROSECUTING ATTORNEYS.

Argument and conduct at trial in criminal prosecutions, see "Criminal Law," § 17.

Under Mansf. Dig. § 3233, and Act 1895 amending Sand & H. Dig. §§ 6010, 6011, the prosecuting attorney can claim a fee in justice's court only when he prosecutes a case in person or by deputy in the cases mentioned in act of 1895.—*State v. McNair* (Ark.) 144.

Impeachment of a commonwealth's attorney is not a condition precedent to his indictment for malfeasance in office.—*Commonwealth v. Rowe* (Ky.) 29.

A commonwealth's attorney, who takes a bribe to dismiss an indictment, may, at the option of the commonwealth, be indicted either for malfeasance in office or, under Ky. St. § 1366, for the offense of taking a bribe.—*Commonwealth v. Rowe* (Ky.) 29.

Admission of testimony tending to show that a county court had not ordered a prosecuting attorney to appear in the court of appeals on appeal of a case held error, in an action for compensation therefor.—*Meador v. Texas County* (Mo.) 944.

Under Rev. St. 1899, § 4951, the question of the necessity of prosecuting attorney appearing in the court of appeals on appeal of a criminal case, and that of the quantum meruit, are questions of fact for the county court in the first instance, and the circuit court if appeal is taken.—*Meador v. Texas County* (Mo.) 944.

Under Rev. St. arts. 4577, 4579, held, the district attorney has no authority to appear and prosecute suits for violation of railroad laws.—*Moore v. Bell* (Tex. Sup.) 45.

DITCHES.

See "Drains."

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

DIVORCE.

§ 1. Jurisdiction, proceedings, and relief.

Where a decree of divorce awards the custody of a child to the wife, and awards alimony for the child's support, such decree is conclusive, if not appealed from.—*Schultze v. Schultze* (Tex. Civ. App.) 56.

An assignment that the court erred in granting a divorce, because there was no proof on the record that plaintiff was a bona fide resident of the state, or that she had resided in the county for six months, will not be reviewed, where the motion for new trial failed to call the question to the attention of the trial court.—*Wetz v. Wetz* (Tex. Civ. App.) 869.

Assignment that court erred in awarding custody of children to wife on granting her a divorce, without hearing evidence as to who was best fitted to care for them, held not supported.—*Wetz v. Wetz* (Tex. Civ. App.) 869.

§ 2. Custody and support of children. Defendant's motion to modify a judgment granting the wife a divorce, and granting her the custody of the only child of the marriage, held properly overruled.—*Railey v. Bailey* (Ky.) 414.

Where a decree of divorce awards the custody of a child to the wife, and requires a payment by the husband for its support, but does not make such allowance a lien on his property,

such allowance ceases on his dying testate, leaving such child sole legatee.—*Schultze v. Schultze* (Tex. Civ. App.) 56.

Where, in an action by a divorced wife to collect alimony in the divorce decree for the support of a child, on the husband's death pending the action, the payment of the amount should not be enforced by execution, but certified to the county court.—*Schultze v. Schultze* (Tex. Civ. App.) 56.

DOCKETS.

Of causes for trial, see "Trial," § 2.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 9.

DOMICILE.

For purpose of taxation, see "Taxation," § 2.

DONATIONS.

See "Gifts."

DOWER.

See "Curtesy."

To set up defense in action on bond, see "Bonds," § 1.

§ 1. Nature and requisites.

A widow is entitled to dower under Ky. St. § 2132, in land conveyed by her husband to another for the purpose of defeating her dower right.—*Redmond's Adm'x v. Redmond* (Ky.) 745.

An occasional cutting of timber and tan bark by the husband upon an uninclosed tract of wild land, and the listing of the land for taxation in his name, is not sufficient evidence of seisin to vest in him the fee, so as to entitle the wife to dower.—*Smallridge v. Hazlett* (Ky.) 1048.

Under Ky. St. § 2142, widow held not entitled to dower in land which the husband held under title bond, but sold and conveyed before his death.—*Smallridge v. Hazlett* (Ky.) 1048.

§ 2. Inchoate interest.

The widow must elect whether she will take dower or homestead, as she is not entitled to both.—*Redmond's Adm'x v. Redmond* (Ky.) 745.

Under Ky. St. § 2133, the adultery of the wife does not bar her claim to dower, where she continues to live with the husband.—*Sergeant v. North Cumberland Mfg. Co.* (Ky.) 1036.

DRAINS.

§ 1. Establishment and maintenance.

Where a ditch was a necessity to the lands of plaintiffs, and had been in use for over 30 years, plaintiffs were entitled to a mandatory injunction requiring defendant to remove an obstruction.—*Baskett v. Tippin* (Ky.) 374.

DRUGGISTS.

As employers, see "Master and Servant," § 10. Regulation of sales of intoxicating liquor by druggists, see "Intoxicating Liquors," §§ 3, 4.

While a regular physician may sell drugs to his own patients, he is subject to the penalty prescribed if, not being a registered pharmacist, he fills prescriptions sent to him by others.—*Commonwealth v. Hovious* (Ky.) 8.

EASEMENTS.

See "Dedication"; "Highways."

§ 1. Creation, existence, and termination.

Defendant, having for more than 30 years used a passway over plaintiff's land, *held* to have acquired a right to the way by prescription.—*Bowen v. Cooper* (Ky.) 601.

§ 2. Extent of right, use, and obstruction.

Plaintiff *held* not entitled to a mandatory injunction to compel defendant to remove a gate across a private passway owned by plaintiff over the lands of defendant.—*Bland v. Smith* (Ky.) 181.

Defendant is not liable for an injury received by plaintiff, an adult, in passing over a fence wrongfully built by defendant across a passway, limited to use of plaintiff's mother and minor children.—*Carter v. Louisville & N. R. Co.* (Ky.) 1006.

EJECTION.

Of passenger, see "Carriers," § 7.

EJECTMENT.

See "Trespass to Try Title."

§ 1. Right of action and defenses.

Defendant in ejectment, having alleged that a deed executed by her to the plaintiff was obtained by fraud, and also that it was never delivered, the pleadings showed a defense at law, and she was not entitled to equitable relief.—*McNear v. Williamson* (Mo.) 160.

Plaintiff in ejectment cannot recover, unless he shows a legal title to all or a portion of the land in controversy.—*Becker v. Strocher* (Mo.) 1083.

§ 2. Jurisdiction, parties, process, and incidental proceedings.

Persons holding separate and distinct portions of a tract of land cannot be joined as parties defendant in ejectment to recover the entire tract.—*Becker v. Strocher* (Mo.) 1083.

§ 3. Pleading and evidence.

Where defendant in ejectment alleged that a deed executed by her to the plaintiff was fraudulently obtained, and also that it was never delivered, the equitable defense was an admission of delivery only so far as the trial of the equity issues were concerned.—*McNear v. Williamson* (Mo.) 160.

§ 4. Damages, mesne profits, improvements, and taxes.

Ky. St. § 3728, giving a lien for improvements to an unsuccessful occupying claimant, applies only to one who claims to derive title from the commonwealth.—*Wintersmith v. Price* (Ky.) 2.

Where a purchaser acted in good faith in buying from unauthorized agent, he is entitled to compensation for his improvements to the extent they have enhanced the vendible value of the property.—*Floyd v. Mackey* (Ky.) 518.

ELECTION.

Between testamentary provisions and other rights, see "Wills," § 8.

ELECTION OF REMEDIES.

Against person converting mortgaged property, see "Chattel Mortgages," § 4.

ELECTIONS.

Local option elections, see "Intoxicating Liquors," § 1.

School district elections, see "Schools and School Districts," §§ 2, 8.

ELECTRICITY.

Electric companies as employers, see "Master and Servant," §§ 3, 8.

Where defendants permitted a broken wire on one of their electric light poles to become connected with an electric wire and charged with a dangerous current, it was immaterial whether such broken wire belonged to them or not.—*Wehner v. Lagerfelt* (Tex. Civ. App.) 221.

Where plaintiff was injured by a wire hanging from defendants' pole which was connected with defendants' electric wire, a request to charge that defendants' negligence was not the proximate cause of the injury should be refused.—*Wehner v. Lagerfelt* (Tex. Civ. App.) 221.

EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," § 5.

§ 1. Compensation.

Rev. St. 1889, § 1825, *held* not to give an additional right to damages to abutting property owners for the construction of a street railway, and such property owners are only entitled to damages for injuries peculiar to the property owned by them.—*Nagel v. Lindell Ry. Co.* (Mo.) 1090.

Where land has been taken for a public road, the landowner cannot obstruct the same, though he has not been paid for such taking.—*Race v. State* (Tex. Cr. App.) 560.

Under Const. art. 1, § 17, the legislature may authorize acts for the public good that may result in damage to the individual, without requiring as a condition precedent that damages be first paid.—*Rische v. Texas Transp. Co.* (Tex. Civ. App.) 324.

The operation of a freight street railway entitles an abutting owner to damages for an injury inflicted on his property, not suffered in common with other property along its route.—*Rische v. Texas Transp. Co.* (Tex. Civ. App.) 324.

§ 2. Proceedings to take property and assess compensation.

The order of the county commissioners' court, approving the report of the jury of view, showing a condemnation of land, raises no presumption that the jury caused notice of the proceeding to be legally served on the owner.—*Bowie County v. Powell* (Tex. Civ. App.) 237.

Evidence *held* to show service of notice in condemnation proceedings.—*Bowie County v. Powell* (Tex. Civ. App.) 237.

§ 3. Remedies of owners of property.

The act of a street railroad company in tearing up the street preparatory to building its road, and piling ties and rails in the street, is not such a damage to an abutting property owner as will authorize an injunction to restrain the construction of the road.—*Nagel v. Lindell Ry. Co.* (Mo.) 1090.

An injunction to restrain a freight street railway company from operating its road *held* properly denied, on the ground that the injury was not irreparable.—*Rische v. Texas Transp. Co.* (Tex. Civ. App.) 324.

Where a street railway company, incorporated for transportation of freight, has obtained

the sanction of the municipal authorities, an abutting property owner cannot restrain its use of the street.—*Rische v. Texas Transp. Co.* (Tex. Civ. App.) 324.

EMPLOYES.

See "Master and Servant."

ENCROACHMENT.

On highways, see "Highways," § 3.

ENTRY.

Of judgment, see "Judgment," § 4.

ENTRY, WRIT OF.

See "Ejectment."

EQUITY.

Equitable estoppel, see "Estoppel," § 2.

Equitable liens, see "Lien."

Relief against judgment, see "Judgment," § 6.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments"; "Fraudulent Conveyances"; "Injunction"; "Marshaling Assets and Securities"; "Nuisance," §§ 1, 2; "Partition," § 2; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

Accounting between partners to gaming transaction, see "Gaming," § 1.

Fraud of attorney, see "Attorney and Client," § 2.

§ 1. Masters and commissioners, and proceedings before them.

Where the chancellor deemed the master's report insufficient upon matters referred, a reference was proper.—*Forest Hill Building & Loan Ass'n v. McEvoy's Ex'r* (Ky.) 1031.

ERROR, WRIT OF.

See "Appeal and Error."

ESCAPE.

Evidence held to show defendant guilty of forcibly effecting his escape.—*Hinkle v. Commonwealth* (Ky.) 816.

Under Ky St. § 1398, providing for the punishment of any person who, while lawfully arrested, effects his escape from an officer, an indictment following the language of the statute is sufficient.—*Hinkle v. Commonwealth* (Ky.) 816.

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 2.

Of courts, see "Courts," § 2.

Of highways, see "Highways," § 1.

Of public schools, see "Schools and School Districts," § 2.

Of trusts, see "Trusts," § 5.

Of will, see "Wills," § 4.

ESTATES.

See "Courtesy"; "Dower"; "Homestead"; "Life Estates"; "Remainders"; "Reversions"; "Tenancy in Common."

Created by deed, see "Deeds," § 2.

Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."

Estates for years, see "Landlord and Tenant."

ESTOPPEL.

By judgment, see "Judgment," § 10.

Of infant as to conveyance of land by parent, see "Infants," § 1.

Of married women, see "Husband and Wife," §§ 1, 2.

To abate nuisance, see "Nuisance," § 2.

To allege error, see "Appeal and Error," § 17.

To attack appointment of receiver, see "Receivers," § 2.

To claim homestead, see "Homestead," § 4.

To deny legality of levy of execution, see "Execution," § 4.

To object to instruction in criminal prosecution, see "Criminal Law," § 21.

To object to municipal assessment, see "Municipal Corporations," § 5.

To plead payment of mortgage debt, see "Mortgages," § 3.

To rescind contract for sale of land, see "Vendor and Purchaser," § 2.

To set up claim against purchaser at execution sale, see "Execution," § 3.

§ 1. By deed.

A purchaser from the husband is not estopped by the husband's deed from explaining the nature of a seisin and showing that it was not of such a character as entitled his wife to dower.—*Smallridge v. Hazlett* (Ky.) 1043.

Vendee, accepting deed reciting certain notes as its consideration, and reserving a vendor's lien therefor, could not show that the notes were given to secure loan.—*Walsh v. Ford* (Tex. Civ. App.) 864.

§ 2. Equitable estoppel.

An estoppel is not available, unless specially pleaded.—*Excelsior Coal Min. Co. v. Virginia Iron & Coal Co.* (Ky.) 373.

Plaintiffs were not estopped to assert their claims to goods which had been transferred to defendant by another, where they did not know of the intention to transfer the goods, nor of the transfer when it was made.—*Wyeth v. Renz-Bowles Co.* (Ky.) 825.

Plaintiffs held not estopped to recover the value of goods alleged to have been converted by defendant by reason of the fact that their attorney by mistake first brought suit against another.—*Wyeth v. Renz-Bowles Co.* (Ky.) 825.

Defendant held estopped to deny plaintiff's ownership of goods which had been destroyed by fire, where both parties held policies of insurance upon the goods.—*Wyeth v. Renz-Bowles Co.* (Ky.) 825.

A creditor, receiving the benefit of a transfer of the accounts of the debtor under a contract releasing the guarantors of the debtor, cannot deny such consideration in an action against the guarantors.—*Martin v. Rotan Grocery Co.* (Tex. Civ. App.) 212.

EVIDENCE.

See "Depositions"; "Witnesses."

Admissibility of evidence under pleading, see "Pleading," § 7.

Applicability of instructions to evidence, see "Trial," § 10.

Harmless error in admission of evidence, see "Appeal and Error," § 21.

Inability to obtain evidence as ground for new trial, see "New Trial," § 1.

Questions of fact for jury, see "Trial," § 6.

Reception at trial, see "Criminal Law," § 18; "Trial," § 4.

Review on appeal or writ of error, see "Appeal and Error," §§ 12, 20.

As to particular facts or issues.

See "Adverse Possession," § 2; "Boundaries," § 2; "Damages," § 4; "Death," § 1; "Dedication," § 1; "Deeds," § 3; "Fraudulent Conveyances," § 3; "Marriage," "Payment," § 1.

Agency, see "Principal and Agent," § 1. Contributory negligence of passengers, see "Carriers," § 6.

Custom, see "Customs and Usages."

Defense of statute of frauds, see "Frauds, Statute of," § 5.

Existence of highway, see "Highways," § 1.

Legitimacy, see "Bastards," § 1.

Separate estate of married woman, see "Husband and Wife," § 2.

Testamentary capacity, see "Wills," § 2.

To aid construction of will, see "Wills," § 5.

Undue influence in procuring making of will, see "Wills," § 3.

Validity of deed, see "Deeds," § 1.

Whether instrument constitutes mortgage, see "Mortgages," § 1.

In actions by or against particular classes of parties.

See "Carriers," §§ 2, 3, 5; "Corporations," § 5; "Counties," § 5; "Master and Servant," §§ 9, 10; "Railroads," §§ 5-7, 9.

Administrators, see "Executors and Administrators," § 8.

Mortgagors, see "Chattel Mortgages," § 4.

Telegraph companies, see "Telegraphs and Telephones," § 2.

In particular civil actions or proceedings.

See "Forcible Entry and Detainer," § 1; "Libel and Slander," § 2; "Replevin," § 1; "Trespass to Try Title," § 2; "Trove and Conversion," § 1.

Foreclosure of mortgage, see "Chattel Mortgages," § 5.

For injuries caused by fence, see "Fences."

For malicious prosecution, see "Malicious Prosecution," § 1.

For penalties, see "Penalties," § 1.

For penalty for violation of gaming laws, see "Gaming," § 2.

For price of goods, see "Sales," §§ 6, 7.

On insurance policy, see "Insurance," § 5.

To cancel written instrument, see "Cancellation of Instruments," § 2.

To collect taxes, see "Taxation," §§ 5, 6.

To try title to public lands, see "Public Lands," § 2.

To vacate judgment, see "Judgment," § 6.

In criminal prosecutions.

See "Adultery," "Assault and Battery," § 2; "Burglary," § 1; "Conspiracy," § 1; "Criminal Law," §§ 7-13; "Homicide," § 6; "Incest," "Larceny," § 2; "Rape," § 1.

For violation of liquor laws, see "Intoxicating Liquors," § 5.

§ 1. Judicial notice.

The court will take judicial notice of the published official census of the United States, for the purpose of determining the population of the several counties of the state at a given period.—State ex inf. Crow v. Evans (Mo.) 355.

Where, in an action to foreclose the lien of a judgment rendered in another county, no issue as to its validity was raised below, and a judgment in an action of the same title has been reversed in the appellate court, that court cannot take judicial notice that it is the same action.—Goodwin v. Harrison (Tex. Civ. App.) 308.

The court will take judicial notice of who was clerk of the county in which a court is sitting at the time of filing of an abstract of judgment from another county.—Goodwin v. Harrison (Tex. Civ. App.) 308.

§ 2. Presumptions.

In a common-law action to recover damages for personal injuries inflicted in another state, it will be presumed that the common law prevails in that state.—Chesapeake & N. Ry. v. Hammer (Ky.) 375.

§ 3. Burden of proof.

As defendant by its answer denied that plaintiff, a passenger, was injured at all, the burden of proof was upon plaintiff.—Louisville & N. R. Co. v. McClain (Ky.) 391.

§ 4. Relevancy, materiality, and competency in general.

In an action to recover for injury to a passenger, the fact that there were outcries by other passengers may be shown as a part of the res gestæ.—Louisville & N. R. Co. v. Carothers (Ky.) 385.

The financial condition of the contesting heir cannot be considered in a will contest case.—Wood v. Carpenter (Mo.) 172.

Declaration of engineer, on his attention being called to runaway horse, after he had blown whistle, held part of res gestæ.—Gulf, C. & S. F. Ry. Co. v. Milner (Tex. Civ. App.) 574.

In action against receiver of electric light company for personal injuries, evidence of mode of ascending poles several years before held admissible.—Dupree v. Tamborilla (Tex. Civ. App.) 585.

In action for purchase price of goods, testimony that they were worth more than the price asked held admissible.—Schuwirth v. Thumma (Tex. Civ. App.) 691.

In an action on a note against a corporation as maker, testimony by a person who subsequently purchased the corporation as to how the former owner thereof treated the indebtedness was irrelevant, and its admission prejudicial error.—Wilson v. Tyler Coffin Co. (Tex. Civ. App.) 865.

§ 5. Best and secondary evidence.

In action for the death of plaintiffs' decedent, evidence as to contents of policies on the life of the deceased for plaintiffs' benefit held inadmissible.—Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.) 72.

Testimony as to contents of record kept by witness held properly excluded, when no reason for the nonproduction of the record itself was given.—St. Louis & S. W. Ry. Co. of Texas v. Miller (Tex. Civ. App.) 139.

Testimony held inadmissible, because not the best evidence.—Mass v. Bromberg (Tex. Civ. App.) 468.

§ 6. Admissions.

Declarations of plaintiff's partner, while in possession of goods which they claimed to own as partners, as to the real ownership of the goods, were admissible against plaintiff.—Rudy v. Katz (Ky.) 18.

Where there is no evidence, in a will contest case based on undue influence, of a conspiracy between certain legatees, evidence of an admission made by one legatee is not admissible on behalf of the contestant by reason of the allegation of such a conspiracy.—Wood v. Carpenter (Mo.) 172.

The admissions of one of several legatees named in a will held inadmissible on behalf of the contestant in a will contest case.—Wood v. Carpenter (Mo.) 172.

Testimony as to a declaration of a witness, his deposition having been lost, held properly admissible as the admission of an adverse party.—Marx v. Hart (Mo.) 260.

Where an action is tried on an amended petition, admissions in original petition held erroneously excluded, though it was not veri-

hed.—*First Nat. Bank v. Watson* (Tex. Civ. App.) 232.

In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, the declaration of defendant's engineer *held* admissible to prove the time the train was due at the connecting point.—*San Antonio & A. P. Ry. Co. v. Barnett* (Tex. Civ. App.) 474.

§ 7. Declarations.

In an action on a life policy by one claiming it as a gift from the insured, the declarations of the insured were competent to prove both the gift and the delivery.—*Lord v. New York Life Ins. Co.* (Tex. Sup.) 290.

In an action by a receiver of a bank to foreclose a mortgage to secure a debt to the bank, the declarations of the mortgagor, after the execution of the notes secured, in the presence of the agent of the receiver, *held* admissible.—*Watts v. Dubois* (Tex. Civ. App.) 698.

§ 8. Hearsay.

In an action to recover assets of a former firm by one of the partners, an objection to his testifying as to the terms of the dissolution, on the ground that it was hearsay, *held* properly overruled.—*First Nat. Bank v. Watson* (Tex. Civ. App.) 232.

In an action for breach of a contract authorizing plaintiffs to sell defendant's lands, testimony that another person had said to third parties that he was agent of defendant to sell such lands was incompetent.—*McLane v. Maurer* (Tex. Civ. App.) 693.

§ 9. Documentary evidence.

A full description of notes in a trust deed *held* sufficient proof of the execution of the same.—*Goodman v. Pareira* (Ark.) 147.

The record of an inspection of an engine by one who was not offered as a witness was not admissible as original evidence, not being a public record.—*Illinois Cent. R. Co. v. Barret* (Ky.) 9.

Under Rev. St. arts. 558, 559, a book entitled "Revised City Ordinances," published by a city council and containing all the ordinances then in force, is admissible to prove the contents of one of such ordinances.—*San Antonio & A. P. Ry. Co. v. Gray* (Tex. Civ. App.) 229.

A certificate of the clerk of a county court that at a certain time he had indexed a certain judgment record is not competent evidence of such indexing.—*Lindsey v. State* (Tex. Civ. App.) 332.

§ 10. Parol or extrinsic evidence affecting writings.

Parol testimony is admissible, not only to disprove the consideration recited in a deed, but to show the true consideration.—*Neurenberger v. Lehenbauer* (Ky.) 15.

Under Ky. St. § 472, authorizing the real consideration of a writing to be shown, the fact that an agreement was made in compromise of matters of dispute between the parties may be shown by extrinsic evidence.—*Price's Adm'x v. Price's Adm'x* (Ky.) 529.

Clerical mistake in the entry of a decree cannot be established by oral evidence.—*Board of Relief of C. P. Church v. Drummond* (Mo.) 930.

Clerical mistake in the entry of a decree cannot be established by parol evidence, though the relief is sought by a bill in equity.—*Board of Relief of C. P. Church v. Drummond* (Mo.) 930.

Where defendant contracted in writing to deliver a certain quantity of pecans at a specified place, time, and price, evidence that such pecans were to be grown in certain territory would add to the contract, and is inadmissible.

—*Hopkins v. Woldert Grocery Co.* (Tex. Civ. App.) 63.

Parol proof that a deed and mortgage were one transaction *held* admissible against prior judgment creditor of the purchaser, though he had no notice of the transaction.—*Masterson v. Burnett* (Tex. Civ. App.) 90.

Parol proof *held* admissible to show a deed and mortgage constituted one transaction.—*Masterson v. Burnett* (Tex. Civ. App.) 90.

A contract whereby an owner of real estate, in order to induce an agent to accept a stipulated sum for his services in effecting an exchange, agreed to pay him more if the deal proved satisfactory, *held* provable by parol evidence.—*Blair v. Slosson* (Tex. Civ. App.) 112.

Oral evidence *held* admissible in an action against guarantors to show consideration for their release.—*Martin v. Rotan Grocery Co.* (Tex. Civ. App.) 212.

Parol evidence *held* not admissible to show that the option of a lessee to buy was unconditional.—*De Vitt v. Kaufman County* (Tex. Civ. App.) 224.

Where a contract by which plaintiffs were authorized to sell defendant's land within a certain time was renewed, and certain changes then made by erasures and interlineations, testimony explaining such changes was competent.—*McLane v. Maurer* (Tex. Civ. App.) 693.

Parol evidence *held* admissible to show real consideration given for a trust deed and notes secured thereby, though the trust deed recited a different consideration.—*Street v. Robertson* (Tex. Civ. App.) 1120.

§ 11. Opinion evidence.

A medical expert, who had not seen the dead body of insured, and had not attended him, was not competent to express his opinion as to whether death was the result of accident or design.—*Manhattan Life Ins. Co. v. Beard* (Ky.) 35.

In an action on a partnership note against a surviving partner, his opinion that the note, to which his copartner had signed the firm name, was executed for money borrowed to make a payment on land purchased by the latter, was incompetent, as was also his opinion that a mortgage had been given.—*Warren Deposit Bank v. Younglove* (Ky.) 749.

In an action for the negligent destruction of pear trees, evidence that such trees add nothing to the value of the soil in that locality was inadmissible.—*Gulf, C. & S. F. Ry. Co. v. Burroughs* (Tex. Civ. App.) 83.

Admission of the testimony of plaintiff, in an action by a locomotive engineer for injuries received in a collision, to explain the meaning of the phrase "having his train under control," as used in a certain rule, *held* not erroneous.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

It was not error, in an action by a locomotive engineer for injuries received in a collision, to allow plaintiff to testify that he had his train under control.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

In an action for injuries sustained by plaintiff on his jumping from a moving train, *held* competent for him to testify that the train was not going very fast when he jumped off, and that he thought he could get off safely.—*Texas & P. Ry. Co. v. Crockett* (Tex. Civ. App.) 114.

A physician, who has no knowledge as to the effect of electricity on the human system, except from books, and is not an expert, *held* not competent to give an opinion thereon.—*Wehner v. Lagerfelt* (Tex. Civ. App.) 221.

A witness in an action against a railroad company for damages to cattle received during car-

riage *held* competent to testify as to the condition in which they would have been if they had been properly cared for, although he had not seen the cattle when shipped or en route.—*San Antonio & A. P. Ry. Co. v. Barnett* (Tex. Civ. App.) 474.

A witness in an action against a railroad company for damages to cattle received during carriage *held* competent to testify as to what caused the condition in which they arrived at destination.—*San Antonio & A. P. Ry. Co. v. Barnett* (Tex. Civ. App.) 474.

Question of the effect of a train striking a man standing or lying upon a railway track *held* the proper subject of expert testimony.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Civ. App.) 588.

In an action for goods and money delivered to defendant's employé, and claimed to have been so charged for defendant's convenience, the admission of testimony as to the witness' understanding of how the account was to run is error.—*Shaw v. Gilmer* (Tex. Civ. App.) 679.

Testimony *held* not objectionable as a conclusion of the witness.—*Schuwirth v. Thumma* (Tex. Civ. App.) 691.

Where the value of improvements on land was in issue, testimony of witness as to what he estimated the improvements to have cost, and that he did not think they had deteriorated much, *held* proper.—*Smith v. Frio County* (Tex. Civ. App.) 711.

In an action for personal injuries, *held* error to refuse to exclude answers of a witness which were mere conclusions and not responsive to the questions.—*St. Louis S. W. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 879.

EXAMINATION.

Of witnesses in general, see "Witnesses," § 3.

EXCEPTIONS, BILL OF.

In criminal prosecutions, see "Criminal Law," § 28.

Necessity for purpose of review, see "Appeal and Error," §§ 4-6, 11, 12.

§ 1. Nature, form, and contents in general.

Depositions read to the jury, and the record of another action read as evidence, being omitted from the bill of exceptions, cannot be considered as a part thereof.—*New York Life Ins. Co. v. Brown's Adm'r* (Ky.) 613.

§ 2. Settlement, signing, and filing.

Under Ky. St. § 1016, where a motion for a new trial was overruled December 10th, a bill of exceptions tendered February 13th was too late; there having been no extension of time.—*City of Covington v. Wilson* (Ky.) 8.

Where an order of reference was entered November 9, 1895, during the October term, and no bill of exceptions was filed during that term, a bill filed during the April term, 1896, was unavailing to save the exceptions.—*Smith v. Baer* (Mo.) 166.

A bill of exceptions, which has not been authenticated by being filed, cannot be considered.—*Wilson v. St. Louis & S. F. R. Co.* (Mo.) 928.

EXCESSIVE DAMAGES.

See "Damages," § 3.

EXCHANGE OF PROPERTY.

In a suit to avoid a transaction consisting of an exchange of tracts of land, on the ground

of fraud in the execution of one of the deeds, evidence *held* insufficient to prove any fraud.—*Wilson v. Jackson* (Mo.) 972.

Where a tract of land worth \$1,600 is exchanged for a tract worth \$1,000, there is no such discrepancy in their value as to authorize a cancellation of the transaction, though the owner of the latter tract had purchased it for a less sum for purposes of speculation.—*Wilson v. Jackson* (Mo.) 972.

In a suit to avoid a deed induced by fraudulent representations, evidence *held* not to show fraudulent representations of facts, nor a reliance on the representations made.—*Wilson v. Jackson* (Mo.) 972.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCUSABLE HOMICIDE.

See "Homicide," § 4.

EXECUTION.

See "Attachment"; "Garnishment"; "Judicial Sales."

Exemptions, see "Exemptions"; "Homestead." To collect alimony, see "Divorce," § 2.

§ 1. Property subject to execution.

Rev. St. art. 2547, cannot be construed to deprive a principal of title to his property held by an agent for the benefit of such agent's creditors.—*Cox v. Patten* (Tex. Civ. App.) 64.

Under Rev. St. art. 2547, property held in possession for two years by an agent appointed by an executor pursuant to the express authority and purpose of the will *held* not liable for such agent's debts.—*Cox v. Patten* (Tex. Civ. App.) 64.

A vendor of land who has transferred the lien notes *held* to have no interest in the land subject to sale under the execution.—*Brotherton v. Anderson* (Tex. Civ. App.) 682.

§ 2. Stay, quashing, vacating, and relief against execution.

The circuit court has jurisdiction to enjoin the collection of a fee bill issued by the clerk of the court of appeals, on the ground that it contains an item for which the services have not been rendered.—*Shackelford v. Phillips* (Ky.) 419.

§ 3. Sale.

Where it appears that the smaller of two tracts of farm land sold together, if they had been sold separately would have realized enough to satisfy the execution, it was proper to quash the sale and direct a resale under venditioni exponas.—*White v. Roberts* (Ky.) 758.

A grantee who fails to record his deed of conveyance must bear the loss resulting from a sale of the land under an execution against the grantor.—*Wilson v. Jackson* (Mo.) 972.

Owner of vendor's lien notes *held* not estopped to set up his claim against an execution purchaser.—*Brotherton v. Anderson* (Tex. Civ. App.) 682.

One purchasing land at an execution sale *held* to have had constructive notice of vendor's lien, though the lien notes were not recorded.—*Brotherton v. Anderson* (Tex. Civ. App.) 682.

Purchasers at execution sale get no title, as against holders of vendor's lien notes, having notice thereof before recording abstract of judgment.—*Fuster v. Anderson* (Tex. Civ. App.) 684.

§ 4. Return.

A sheriff, sued for conversion by levy and sale under execution, *held* estopped from denying the legality of the levy by his return on the execution.—Cox v. Patten (Tex. Civ. App.) 64.

§ 5. Wrongful execution.

In an action against a sheriff for conversion, irregularity in a levy of execution *held* immaterial.—Cox v. Patten (Tex. Civ. App.) 64.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Effect of administration on limitation, see "Limitation of Actions," § 2.

Survival of action to administrator, see "Abatement and Revival," § 1.

Testamentary trustees, see "Trusts."

Testimony as to transactions with decedents, see "Witnesses," § 2.

§ 1. Administration in general.

Where there was no personal estate to be administered or debts to be paid, an action by an administratrix to settle her accounts was properly dismissed.—Redmond's Adm'r v. Redmond (Ky.) 745.

§ 2. Appointment, qualification, and tenure.

Evidence *held* to show no change of residence by intestate previous to death, justifying appointment of administrator in county to which he had gone.—Jones' Adm'r v. Lay (Ky.) 720.

§ 3. Collection and management of estate.

In an action by a legatee to settle testator's estate, the personal representative was entitled to credit by taxes paid by her which accrued after the action was instituted.—Hood v. Maxwell (Ky.) 276.

A trust company, acting as administrator, *held* guilty of negligence in depositing the funds of the estate in an insolvent bank.—Germania Safety Vault & Trust Co. v. Driskell (Ky.) 610.

Knowledge of president of administrator trust company, who was also president of bank where funds were deposited, of the bank's insolvency, *held* knowledge of the trust company, in a controversy between it and the distributees of the estate.—Germania Safety Vault & Trust Co. v. Driskell (Ky.) 610.

Good faith of clerk of administrator trust company having immediate charge of deposits of funds of estate, and belief that bank was solvent, *held* not to exonerate the company, where its superior officers had knowledge of facts sufficient to charge them with notice.—Germania Safety Vault & Trust Co. v. Driskell (Ky.) 610.

An administrator trust company cannot rely on the general reputation of the bank where it deposits funds, as to solvency, where its president was also president of the bank.—Germania Safety Vault & Trust Co. v. Driskell (Ky.) 610.

Ex parte settlement made by administrator with the county court, and including as a part of receipts amount the estate had on deposit when bank closed, as evidenced by receiver's certificate, *held* not to preclude distributees from claiming from administrator any balance resulting from the loss of the deposit.—Germania Safety Vault & Trust Co. v. Driskell (Ky.) 610.

Agreement by distributee to appointment of trust company as administrator and to receive a part of administrator's commission for special services *held* not to estop him from questioning act of administrator in selecting a bank for deposit of funds.—Germania Safety Vault & Trust Co. v. Driskell (Ky.) 610.

Where one to whom land was conveyed as executor mortgaged it to secure his individual

debt, the purchaser at a sale made to enforce the mortgage lien was charged with notice of the trust.—Bertram v. Ross (Ky.) 638.

On setting aside foreclosure sale, purchaser *held* entitled to be reimbursed for moneys expended by him for valuable improvements to the extent they add to the salable value of the land, to be set off by the reasonable rental value of the land from the time the owner was entitled to possession.—Bertram v. Ross (Ky.) 638.

§ 4. Allowances to surviving wife, husband, or children.

Under Ky. St. § 2138, providing that "the wife shall be entitled to one-third of the rents and profits of her husband's durable real estate from his death till dower is assigned," the widow is entitled to the gross rents during that time without any deduction for taxes, insurance, or repairs.—Morton's Ex'rs v. Morton's Ex'r (Ky.) 641.

§ 5. Allowance and payment of claims.

The judgment of a probate court on the allowance of a claim cannot be attacked on an application to sell lands of the estate to pay debts.—Jackson v. Gorman (Ark.) 346.

The administratrix with the will annexed was not entitled to the allowance of a claim asserted by her against testatrix until she had filed her affidavit, together with that of some one else, proving the claim.—Hood v. Maxwell (Ky.) 276.

While a policy of life insurance assigned to one having no insurable interest cannot be enforced by the assignee, the assignment does not render the policy void.—New York Life Ins. Co. v. Brown's Adm'r (Ky.) 613.

Evidence considered, and *held* to justify a finding that services rendered by plaintiff to defendant's intestate were rendered in expectation of a legacy, induced by declarations of deceased, and hence that she was entitled to compensation.—Von Carlowitz v. Bernstein (Tex. Civ. App.) 464.

§ 6. Distribution of estate.

It was error to allow interest on a legacy until after a year from testator's death.—Hood v. Maxwell (Ky.) 276.

Services of attorneys of legatee, suing to settle an estate, cannot be charged up against the estate.—Hood v. Maxwell (Ky.) 276.

Where an executor was ordered to make a distribution under Rev. St. 1899, § 240, *held*, under the circumstances, that he could not assert that he need not obey the order, because no refunding bond had been given under section 239.—In re Pound's Estate (Mo.) 273; Pound v. Cassity, Id.

Rev. St. 1899, §§ 239, 240, are to be construed together, and, where distribution is made by an executor within two years after the letters, a refunding bond is required.—In re Pound's Estate (Mo.) 273; Pound v. Cassity, Id.

§ 7. Sales and conveyances under order of court.

Where the probate court has ordered a sale of land to pay debts, and the time for appeal has passed, it cannot be attacked on the ground that a proper showing was not made.—Jackson v. Gorman (Ark.) 346.

An administrator cannot be held personally liable on a covenant of warranty which recited that it was made in his capacity as administrator.—Dallas County v. Club Land & Cattle Co. (Tex. Sup.) 294.

An administrator cannot bind his estate by a covenant of warranty.—Dallas County v. Club Land & Cattle Co. (Tex. Sup.) 294.

§ 8. Actions.

In an action by an administrator, the defendant was entitled to have another person who was claiming to be administrator made a party.—*Jones' Adm'r v. Illinois Cent. R. Co. (Ky.)* (X99).

In an action by a person claiming to be administrator, in which defendant denied that the county court which made the appointment had jurisdiction to do so, the question as to where decedent resided held for the jury on the evidence.—*Jones' Adm'r v. Illinois Cent. R. Co. (Ky.)* 600.

Defendants in an action for conversion held to be wrongdoers, as against whom plaintiff's right of possession was sufficient to support the action.—*Bridges v. Williams (Tex. Civ. App.)* 120.

Evidence in an action for conversion held sufficient to support a judgment for plaintiff.—*Bridges v. Williams (Tex. Civ. App.)* 120.

§ 9. Accounting and settlement.

Where one of the executors, who kept a set of books, was allowed \$50 per month for that service in addition to his other allowances up to the date of the last settlement, he cannot complain of the refusal of a similar allowance for the subsequent years of the trust; comparatively few accounts being then left open.—*Morton's Ex'rs v. Morton's Ex'r (Ky.)* 641.

Allowance to executors for their services approved.—*Morton's Ex'rs v. Morton's Ex'r (Ky.)* 641.

Ky. St. § 3883, does not limit an executor to 5 per cent. of the cash distributed, but he is entitled to a reasonable allowance, not exceeding 5 per cent. on the entire personal estate.—*Reed v. Reed (Ky.)* 819.

Where the personal estate distributed by an executor amounted to about \$80,000, and only about \$15,000 was cash, it was error to restrict the executor to an allowance of 5 per cent. on the latter amount.—*Reed v. Reed (Ky.)* 819.

EXEMPLARY DAMAGES.

See "Damages" § 1.

EXEMPTIONS.

See "Homestead."

From taxation, see "Taxation," § 1.

§ 1. Nature and extent.

A single man, who is a land, loan, and insurance agent, is not entitled to a buggy and harness as exempt from execution as tools and apparatus belonging to his trade and profession.—*Cates v. McClure (Tex. Civ. App.)* 224.

A typewriter is not exempt, as a tool belonging to the profession of a physician, though he uses it in correspondence and advertising his business.—*Massie v. Achley (Tex. Civ. App.)* 582.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 11.

FALSE IMPRISONMENT.

See "Malicious Prosecution."

§ 1. Civil liability.

In an action for false imprisonment, defendants are not liable, unless the arrest was unlawful, however malicious their motive.—*Bennett v. Lewis (Ky.)* 523.

The fact that plaintiff, after his discharge in bankruptcy, was arrested under an order of ar-

rest procured by defendants upon a judgment of a state court rendered against him prior to his discharge, does not show the arrest unlawful.—*Bennett v. Lewis (Ky.)* 523.

FALSE SWEARING.

See "Perjury."

FEEES.

Of particular classes of officers or other persons.
See "District and Prosecuting Attorneys"; "Sheriffs and Constables," § 2; "Witnesses," § 1.

Attorney, see "Attorney and Client," § 3.
County officers, see "Counties," § 1.

FELLOW SERVANTS.

See "Master and Servant," § 6.

FENCES.

A person giving the notice provided for by Pen. Code, art. 797, is not guilty of a violation of article 794, for cutting loose his fence from the fence of another.—*Dennis v. State (Tex. Cr. App.)* 838.

Pen. Code, art. 794, provides for a penalty for acts affecting not only inclosed lands on which agricultural products are raised, but other lands as well.—*Dennis v. State (Tex. Cr. App.)* 838.

Where plaintiff's son was injured by riding against a barbed wire fence built across a road by defendant, it was not error to refuse to charge that, if defendant exercised ordinary care to prevent injury to persons who might be reasonably expected to pass along such road that night, plaintiff could not recover.—*Abilene Cotton Oil Co. v. Briscoe (Tex. Civ. App.)* 315.

Where plaintiff's son was injured by riding against a barbed wire fence built across a road by defendant, it was not error to admit evidence that defendant's agents knew that the fence was not on defendant's land.—*Abilene Cotton Oil Co. v. Briscoe (Tex. Civ. App.)* 315.

Where, in an action for injuries resulting from riding against a barbed wire fence built by defendant across a road, evidence that defendant left the fence unguarded and without warning is admitted without objection, defendant cannot object to the question of his negligence in that respect being submitted to the jury, on the ground that such negligence is not pleaded.—*Abilene Cotton Oil Co. v. Briscoe (Tex. Civ. App.)* 315.

A complaint, in an action for injuries resulting from contact with a barbed wire fence built by defendant across a road, held sufficient to warrant a charge permitting the jury to find negligence in leaving the fence without guard or warning.—*Abilene Cotton Oil Co. v. Briscoe (Tex. Civ. App.)* 315.

Where defendant, in inclosing its grounds with a barbed wire fence, built over onto the adjoining grounds and across a frequently traveled road, whereby plaintiff, in traveling such road, was injured, the fact that its manager believed the fence was on defendant's ground was immaterial.—*Abilene Cotton Oil Co. v. Briscoe (Tex. Civ. App.)* 315.

Evidence considered, and held to justify a finding that building a barbed wire fence across a frequently traveled road, and leaving it on a dark night without light or other warning to travelers, was negligence.—*Abilene Cotton Oil Co. v. Briscoe (Tex. Civ. App.)* 315.

FERRIES.**§ 1. Establishment and maintenance.**

The measure of damages for the infringement of a ferry franchise is the amount of tolls lost to the owners by diminution in the number of customers using the ferry.—*Blackwood v. Tanner* (Ky.) 500.

The income derived in former years from ferry tolls and the income received from the same source during the continuance of the infringement of a ferry license may be proved, to show the value of the franchise and the extent of the losses.—*Blackwood v. Tanner* (Ky.) 500.

The act of operating an unlicensed ferry within the prohibited distance of another ferry is an actionable wrong.—*Blackwood v. Tanner* (Ky.) 500.

As plaintiffs' ferry license was a joint one, and they executed a joint obligation to discharge their duties, they may sue jointly for loss of tolls from the illegal infringement of their franchise, though one of them ran the ferry one week and the other the next.—*Blackwood v. Tanner* (Ky.) 500.

FILING.

Bill of exceptions, see "Criminal Law," § 28; "Exceptions, Bill of," § 2.
Brief on appeal, see "Appeal and Error," § 14.
Record on appeal or writ of error, see "Appeal and Error," §§ 11, 12.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 2.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 20.

FIRES.

Caused by operation of railroad, see "Railroads," § 9.

FIXTURES.

The intention with which machinery is attached to realty is to be considered in determining if such machinery becomes a part of the realty, as between the owner and holder of a lien thereon.—*Mundine v. Pauls* (Tex. Civ. App.) 254.

Machinery placed on lots by a vendee, which may be removed without injury to the realty, does not become a part thereof as against one having a lien from the purchase of vendor's lien notes.—*Mundine v. Pauls* (Tex. Civ. App.) 254.

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.

Jurisdiction of justice's court in forcible detainer cases, see "Justices of the Peace," § 2.

§ 1. Civil liability.

As the sole question was whether plaintiff was in actual possession at the time of the alleged forcible entry, defendant's title papers were not admissible in evidence for him.—*Terry v. Terry* (Ky.) 1024.

Where, in an action of forcible entry and detainer of school land, it clearly appeared that plaintiff was in possession, that his possession was recognized by the land office, and that de-

fendant entered unlawfully, it was not error to direct a verdict for plaintiff.—*Renfro v. Harris* (Tex. Civ. App.) 460.

FORECLOSURE.

Of mortgage, see "Chattel Mortgages," § 5; "Mortgages," §§ 4, 5.

FOREIGN CORPORATIONS.

See "Corporations," § 8.

FORFEITURES.

For breach of condition in deed, see "Deeds," § 2.

Of dower, see "Dower," § 2.

Of insurance, see "Insurance," § 3.

FORGERY.

Under Rev. St. 1899, § 2001, proof of a fraudulent alteration of a check by defendant will support an indictment charging him with having forged, counterfeited, and falsely made the same.—*State v. Eaton* (Mo.) 539.

Indictment for forgery held based on Rev. St. 1899, § 2003, and that it need not aver that the check forged was uttered for a consideration.—*State v. Eaton* (Mo.) 539.

Where an indictment charges that defendant passed a forged check on a third person with intent to defraud, he may be convicted, though the proof shows that the third person was in the employ of another, and that the goods and money given in exchange belonged to the employer.—*State v. Eaton* (Mo.) 539.

In prosecution for forgery, defendant's demurrer to the evidence held properly overruled.—*State v. Eaton* (Mo.) 539.

FORMER ADJUDICATION.

See "Judgment," §§ 9, 10.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 4.

FORMS OF ACTION.

See "Ejectment"; "Replevin"; "Trespass," § 2; "Trove and Conversion."

FORNICATION.

See "Incest."

FRAUD.

See "Fraudulent Conveyances."

Against sureties, see "Principal and Surety," § 1.

By agents, see "Principal and Agent," § 2.

Effect on limitation, see "Limitation of Actions," § 2.

In exchange of property, see "Exchange of Property."

In procuring deed, see "Deeds," § 1.

In sales, see "Sales," § 1.

§ 1. Deception constituting fraud and liability therefor.

A misrepresentation may be actionable, though the person making it did not know it was false.—*Beatty v. Bulger* (Tex. Civ. App.) 893.

§ 2. Actions.

In an action for deceit in a sale, it is not necessary to expressly allege that plaintiff

would not have purchased, but for the false representations.—*Drake v. Holbrook* (Ky.) 512.

The measure of damages in such an action is the difference between the actual value of the stock and the value it would have had, if the corporation had been in the condition represented by defendant.—*Drake v. Holbrook* (Ky.) 512.

Defendant, being secretary and treasurer of the corporation at the time he sold his shares to plaintiff, cannot claim that his representations as to the financial condition of the corporation were made by him in ignorance of the fact that they were false.—*Drake v. Holbrook* (Ky.) 512.

FRAUDS, STATUTE OF.

§ 1. Promises to answer for debt, default, or miscarriage of another.

Statute of frauds, providing that no action shall be brought to charge any person upon a promise to answer for the debt of another, unless in writing, does not apply to a promise made to the debtor on a sufficient consideration for the benefit of a third person.—*Botkin v. Middlesborough Town & Land Co.* (Ky.) 747.

§ 2. Real property and estates and interests therein.

An alleged executed parol agreement for sale of land held not enforceable because within the statute of frauds.—*Newcomb v. Cox* (Tex. Civ. App.) 338.

A parol agreement by a husband, who has conveyed an undivided 110 acres of land out of a 310-acre homestead owned by him and his wife as community property, that the purchaser shall take his 110 acres out of a certain part of the property, where not made in fraud of the homestead rights of the wife, is valid.—*Mass v. Bromberg* (Tex. Civ. App.) 468.

§ 3. Requisites and sufficiency of writing.

A written contract for the sale of "115 acres of land," without further description, has no more force than a parol contract.—*Wortham v. Stith* (Ky.) 890.

§ 4. Operation and effect of statute.

Where a city by ordinance granted a water company a 25-year franchise, the water company holds the franchise subject to the terms on which it was granted, and cannot escape the burdens imposed, at least as to past transactions, upon the ground that the contract is void under the statute of frauds.—*Graves County Water Co. v. Ligon* (Ky.) 725.

Statute of frauds, providing that no action shall be brought to charge any person upon any agreement not to be performed within one year, unless in writing, applies only to agreements which are not to be performed upon either side within a year.—*Botkin v. Middlesborough Town & Land Co.* (Ky.) 747.

Where a vendor by parol elects to make a deed, rather than repay the consideration, the deed is not void under the statute of frauds.—*McKinley v. McKinley* (Ky.) 831.

§ 5. Pleading, evidence, trial, and review.

A refusal to instruct that a promise to answer for the debt of another is invalid, unless in writing, held erroneous in a suit to hold a landlord for a debt of his tenant.—*Neal v. Brandon* (Ark.) 200.

Where plaintiff's claim of an original promise to pay for goods and money delivered and charged to another than defendant is denied, the burden of plaintiff to establish his claim is not met by an affidavit to the account, under Rev. St. art. 2323.—*Shaw v. Gilmer* (Tex. Civ. App.) 679.

FRAUDULENT CONVEYANCES.

§ 1. Transfers and transactions invalid.

Money given by a debtor to his wife after plaintiff's debt was created still belonged to him, and therefore real estate purchased with the money in the wife's name may be subjected to plaintiff's debt.—*Beatty v. Thompson's Adm'r* (Ky.) 384.

Though property purchased by a debtor and conveyed to his wife after he became insolvent was paid for by him out of his own means, yet as the wife at the time placed in his hands several notes which were the proceeds of gifts which he had made to her while he was solvent, and out of those notes he afterwards reimbursed himself, the transaction was not fraudulent.—*Noel v. Gaines* (Ky.) 625.

A deed executed by a debtor with intent to defraud his creditors held void as to creditors, if the grantee had knowledge of the grantor's fraudulent intent.—*Huffman v. Leslie* (Ky.) 822.

A deed to a wife of land bought with her insolvent husband's money is fraudulent in law against an existing and prior creditor of the husband, and the land is subject to sale for his debt.—*Halstead v. Mustion* (Mo.) 253.

Purchaser held not to have had notice of fraud of vendor, so as to make him a participant therein, because of making no effort to stop payment of check.—*Weil v. Reiss* (Mo.) 946.

Where a divorced wife seeks to set aside in favor of her decree for alimony a mortgage by her husband to take up a prior mortgage and a new loan, it is not error, on setting aside the mortgage, to subordinate her claim to the prior mortgage.—*Schultze v. Schultze* (Tex. Civ. App.) 56.

A mortgage to secure a bona fide debt, executed by an insolvent mortgagor with intent to hinder his creditors, held valid, unless the mortgagee participated in the fraudulent intent.—*Watts v. Dubois* (Tex. Civ. App.) 698.

A mortgage to secure a fictitious debt, executed by an insolvent mortgagor with the intent to hinder other creditors, with the mortgagee's knowledge, held void as against the mortgagor's creditors.—*Watts v. Dubois* (Tex. Civ. App.) 698.

A mortgage in good faith on firm property to secure a firm debt and an individual partner's debt held valid, though the firm was insolvent.—*Watts v. Dubois* (Tex. Civ. App.) 698.

Evidence held to sustain finding that deed to son was made in fraud of creditors.—*Walters v. Cantrell* (Tex. Civ. App.) 790.

§ 2. Rights and liabilities of parties and purchasers.

Where a defendant in a divorce suit voluntarily conveys his real estate, and one knowing all the facts takes it as security for debts owing by defendant, such conveyance held fraudulent as to the claim of the wife for alimony.—*Schultze v. Schultze* (Tex. Civ. App.) 56.

§ 3. Remedies of creditors and purchasers.

The act of 1894, regulating the property rights of married women, has not changed the rule which places the burden of proof upon the wife in an action brought against her by her husband's creditor to reach land alleged to have been purchased by the husband and conveyed to her.—*Sikking v. Fromm* (Ky.) 760.

Evidence held to show that the purchaser had knowledge of the fraudulent intent of his grantor.—*Huffman v. Leslie* (Ky.) 822.

In an action to set aside an alleged fraudulent conveyance made by a corporation, evidence considered, and held, that it was void as to cred-

itors.—Johnson v. Stebbins-Thompson Realty Co. (Mo.) 933.

In a suit to set aside a conveyance as in fraud of creditors, evidence *held* insufficient to establish fraud.—Burnham v. Boyd (Mo.) 1088.

In a suit to set aside a conveyance as fraudulent, allegations that the deed was made to hinder and delay creditors, and was fraudulent, without specifications, are insufficient.—Burnham v. Boyd (Mo.) 1088.

Where, under a mortgage valid as between the parties, the mortgagee is given possession, a decree adjudging it fraudulent as to a creditor is not erroneous because such mortgagee remains in possession until the premises are sold.—Schultze v. Schultze (Tex. Civ. App.) 56.

Where deed to son conveyed 62 acres of land, and execution was levied on 26 acres as debtor's property, it was error, on decreeing the conveyance fraudulent at the instance of the execution creditor, to cancel the whole deed.—Walters v. Cantrell (Tex. Civ. App.) 790.

In trespass to try title, evidence *held* to sustain a finding that a transfer of the land by a judgment debtor was fraudulent as against plaintiff.—Tinsley v. Corbett (Tex. Civ. App.) 910.

FREIGHT.

See "Carriers," § 2.

GAMING.

On Sunday, see "Sunday."

§ 1. Gambling contracts and transactions.

Where a surety in a supersedeas bond has been compelled to pay a judgment on a note for money lost at gaming, if neither he nor any creditor of his sues within six months to recover the amount, any other person may do so.—Jacob v. Clark's Committee (Ky.) 37.

Money lost at gaming, though the payment be made on a judgment therefor, may be recovered by the loser or his creditor, or by any other person, if the loser or his creditor fails to sue within six months.—Jacob v. Clark's Committee (Ky.) 37.

A partner in the business of racing horses is not entitled in a settlement to credit by money lost by him on a bet made for the firm, betting upon horse races being illegal.—Central Trust & Safe Deposit Co. v. Respass (Ky.) 421.

The business of breeding, training, and racing horses for purses being legal, a partnership for that purpose may be settled by the chancellor.—Central Trust & Safe Deposit Co. v. Respass (Ky.) 421.

Equity will not entertain a bill for an accounting of profits in the case of a partnership in the business of "book making," or of making wagers on horse races; the business being illegal.—Central Trust & Safe Deposit Co. v. Respass (Ky.) 421.

Where a gambling contract was partially executed by partial payment and partial enjoyment of the illegal privileges sold, the rule applicable to the recovery of money paid in advance under an illegal contract wholly executory does not apply, and hence the partial payment cannot be recovered.—Ullman v. St. Louis Fair Ass'n (Mo.) 949.

A contract for sale of the privilege of book-making and pool-selling upon a race track *held* a gambling contract, and hence void.—Ullman v. St. Louis Fair Ass'n (Mo.) 949.

Pen. Code 1895, art. 388, prohibiting betting at any tenpin alley, was impliedly repealed as to licensed tenpin alleys by Gen. Laws 1897

(Called Sess.) p. 51, subd. 19.—Hill v. State (Tex. Cr. App.) 554.

§ 2. Penalties and forfeitures.

Admissions of certain evidence in a prosecution of a railroad company for permitting gaming on its train *held* not prejudicial, having been brought out by the witnesses explaining how they knew that gaming was done in the county, and the instructions confined the jury to what was done in that county.—Louisville & N. R. Co. v. Commonwealth (Ky.) 505.

Under Ky. St. § 1978, a railroad company may be punished for suffering gaming on a moving train under its control.—Louisville & N. R. Co. v. Commonwealth (Ky.) 505.

§ 3. Criminal responsibility.

Facts *held* to show that a bowling alley was kept for the purpose of betting, contrary to Gen. Laws 27th Leg. p. 287.—Blades v. State (Tex. Cr. App.) 565.

There can be no conviction of betting at a game of tenpins, where the alleged offense was committed prior to the passage of Gen. Laws 27th Leg. p. 267; Pen. Code 1895, art. 388, having been impliedly repealed by Gen. Laws 1897 (Called Sess.) p. 51, subd. 19.—Harris v. State (Tex. Cr. App.) 565.

Under Gen. Laws 27th Leg. p. 287, a charge requiring conviction, if it was found that accused kept or exhibited a bowling alley, *held* not erroneous, though the indictment charged only the exhibiting.—Blades v. State (Tex. Cr. App.) 565.

Allegations of an indictment for gaming *held* sufficient.—Gerstenkorn v. State (Tex. Cr. App.) 568.

Under Pen. Code, art. 388, a conviction may be had for betting on a game called "crack-loo," played by throwing coin at a crack in the floor.—Donathan v. State (Tex. Cr. App.) 781.

An indictment for gaming, charging that defendant unlawfully played "at a game of cards in a public place, to wit, a gaming house," sufficiently charges the offense.—Griffin v. State (Tex. Cr. App.) 782.

Under Pen. Code, art. 388, prohibiting gaming with dice, but providing that no person shall be indicted under such section for playing any such game at a private residence, an information which fails to negative the fact that the gaming was at a private residence is bad.—Borders v. State (Tex. Cr. App.) 1102.

GARNISHMENT.

See "Attachment."

Consolidation of proceedings for trial, see "Trial," § 2.

Effect of bankruptcy of debtor on liability of garnishee, see "Bankruptcy," § 3.
To collect taxes, see "Taxation," § 5.

§ 1. Persons and property subject to garnishment.

A balance to become due on an uncompleted building contract, indivisible in its nature, is not subject to garnishment.—Medley v. American Radiator Co. (Tex. Civ. App.) 86.

The lien of a garnishment attaches only to such liability as has accrued at the date of service, or which accrues between the service and the date for the answer.—Medley v. American Radiator Co. (Tex. Civ. App.) 86.

§ 2. Writ or summons and notice, service, and return.

Return of an officer in garnishment proceedings *held* to show a sufficient compliance with Rev. St. 1890, § 388, subd. 4.—Marx v. Hart (Mo.) 260.

One of the partnership made garnishee held competent to waive service of process and give jurisdiction over himself personally by voluntary appearance.—*Marx v. Hart* (Mo.) 260.

§ 3. Lien of garnishment and liability of garnishee.

A plaintiff in garnishment, having followed the steps pointed out in Rev. St. 1899, § 388, while not obtaining a clear lien on specific property in hands of garnishee, held to have obtained a lien giving him a right to hold the garnishee responsible for its value.—*Marx v. Hart* (Mo.) 260.

§ 4. Proceedings to support or enforce.

A final judgment cannot be rendered against a garnishee, in the absence of any showing that a judgment was ever rendered against the principal defendant.—*Norman v. Poole* (Ark.) 433.

A verdict in proceedings against a garnishee held not improper, though not specifying the particular value of each article held by the garnishee.—*Marx v. Hart* (Mo.) 260.

Judgment in garnishment proceedings held authorized under Rev. St. 1899, § 3452.—*Marx v. Hart* (Mo.) 260.

A garnishee, required to answer under *Sayles' Ann. Civ. St. arts. 220, 222*, is liable for any debt created in favor of the principal defendant between the time of the service of the writ and the return day.—*Gallagher v. Pugh* (Tex. Civ. App.) 118.

Under *Sayles' Ann. Civ. St. art. 245*, where garnishee admits his indebtedness either to defendant or to a third person, and asks the court to determine the matter, there is no necessity for a controverting affidavit.—*White v. San Miguel* (Tex. Civ. App.) 811.

§ 5. Claims by third persons

Where a creditor, by virtue of a garnishment, asserts a lien on funds not subject thereto, other creditors who have acquired rights in such fund may raise the defense.—*Medley v. American Radiator Co.* (Tex. Civ. App.) 86.

GIFTS.

Declarations of donor to prove gift, see "Evidence," § 7.

§ 1. Inter vivos.

Evidence relating to a gift of a life insurance policy held sufficient to submit the question to the jury.—*Lord v. New York Life Ins. Co.* (Tex. Sup.) 290.

GOOD FAITH.

Of purchaser, see "Vendor and Purchaser," § 4.

GRAND JURY.

See "Indictment and Information."

Competency of grand juror as witness, see "Witnesses," § 2.

An objection that certain grand juror was not impaneled, charged, and sworn held untenable under the facts.—*State v. Armstrong* (Mo.) 981.

GUARANTY.

See "Principal and Surety."

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

§ 1. Requisites and validity.

Information received from any source that goods were being delivered to the agent upon the faith of the guaranty was sufficient notice of acceptance to bind the guarantor.—*Greer Machinery Co. v. Sears* (Ky.) 521.

Where a written contract by a company appointing an agent to sell goods stipulated that it was not to be binding until signed by the president of the company, one who, prior to the signing of the contract by the president, executed a written guaranty of its performance, was entitled to notice of its acceptance.—*Greer Machinery Co. v. Sears* (Ky.) 521.

§ 2. Discharge of guarantor.

The holder of a bond upon which an unconditional guaranty was indorsed held entitled, upon the default of the principal, to look to the guarantor, and therefore the guarantor was not released by want of diligence in suing the principal.—*Yager v. Kentucky Title Co.* (Ky.) 1027.

§ 3. Remedies of creditors.

Instruction in suit to charge landlord with liability for tenant's account held erroneous, as taking that question from the jury.—*Neal v. Brandon* (Ark.) 200.

GUARDIAN AND WARD.

Authority of guardian's successor to exercise power of sale under trust deed to former guardian, see "Mortgages," § 4.
Guardian ad litem, see "Infants," § 2.

§ 1. Sales and conveyances under order of court.

In an action by a guardian against his ward for the sale of the ward's real estate and a re-investment of the proceeds, as provided by Civ. Code Prac. § 489, plaintiff must, as required by Id. § 492, subsec. 4, state facts showing that the sale will benefit defendant.—*Womble v. Price's Guardian* (Ky.) 370.

Plaintiff should have filed with his petition the title papers under which the property was held, as required by Civ. Code Prac. § 492, subsec. 2.—*Womble v. Price's Guardian* (Ky.) 370.

§ 2. Actions.

On an action to surcharge a settlement made by a guardian, brought in the county in which the guardian qualified, the court had jurisdiction to cancel a deed executed by the guardian conveying land to the ward located in another county.—*Dawkins v. Hough* (Ky.) 1047.

HANDWRITING.

Evidence of handwriting in criminal prosecution, see "Criminal Law," § 12.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 21.
In criminal prosecutions, see "Criminal Law," § 29; "Homicide," § 8.

HEALTH.

Appointment of health officers by municipal corporations, see "Municipal Corporations," § 4.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 8.
In criminal prosecutions, see "Criminal Law," § 10.

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Bridges"; "Municipal Corporations," § 7.
Accidents at railroad crossings, see "Railroads," § 6.
Liability of railroads for obstructing highways, see "Railroads," § 4.

§ 1. Establishment, alteration, and discontinuance.

A road which has been used by the public for more than 20 years, and as far back as the memory of the witnesses run, must be regarded as a public highway.—*Witt v. Hughes* (Ky.) 281.

A road recognized and worked by the public for some 25 years, and used by it for over 20 years, held a public road.—*Race v. State* (Tex. Cr. App.) 560.

A road becomes a public road when the commissioners' court recognizes it by assigning hands to work it, and the public use it as a public road.—*Race v. State* (Tex. Cr. App.) 560.

The mere failure of the commissioners' court to comply with all the statutes relating to laying out public roads will not per se render the land taken not a public road.—*Race v. State* (Tex. Cr. App.) 560.

A road may be shown to be a public road by evidence of long-continued use, assignment of hands to work it by the proper authorities, and the like.—*Race v. State* (Tex. Cr. App.) 560.

§ 2. Taxes, assessments, and work on highways.

The sheriff of Kenton county should have been enjoined from collecting a road and bridge tax levied exclusively upon the owners of property in the county outside the city of Covington, as the special acts authorizing such a tax were repealed by Ky. St. §§ 1833-1851.—*Johnson v. Boske* (Ky.) 400; *Savage v. Same*, Id.

Where plaintiffs allege that a tax is an unjust discrimination against them, and pray for all proper relief, there is enough in the petition to show their right to an injunction, on the ground that the special acts authorizing tax were repealed.—*Johnson v. Boske* (Ky.) 400; *Savage v. Same*, Id.

§ 3. Regulation and use for travel.

The fact that the travel on a road justified its being macadamized is sufficient to show that it should not be obstructed by a gate, and therefore the court should order the removal of the obstruction.—*Witt v. Hughes* (Ky.) 281.

HOLIDAYS.

See "Sunday."

HOMESTEAD.

Election between homestead and dower, see "Dower," § 2.

§ 1. Nature, acquisition, and extent.

Facts held not to show a separation of a part of a lot used for business purposes from a portion thereof used for residence purposes, so as to disentitle the owner to claim the entire lot as a homestead.—*Berry v. Meir* (Ark.) 439.

Defendant held entitled to a homestead as against the claim of plaintiff for money paid as defendant's surety.—*Vest v. Vest* (Ky.) 818.

Homestead acquired with proceeds of homestead in another state held not exempt from judgment on cause of action accrued before its acquisition.—*State Bank v. Dougherty* (Mo.) 832.

New homestead held to have been acquired with proceeds of old, and therefore exempt from execution under Rev. St. 1899, § 3623.—*Rose v. Smith* (Mo.) 940.

Where proceeds of mortgage on homestead are invested in a new homestead, the latter is exempt from execution, under Rev. St. 1899, § 3623.—*Rose v. Smith* (Mo.) 940.

Attorney's fees provided for in a building contract executed by a husband and wife for the

improvement of the homestead are not a lien on the homestead, though the contract gives a mechanic's and material man's lien thereon for money due the contractor.—*American Mut. Bldg. & Sav. Ass'n v. Daugherty* (Tex. Civ. App.) 131.

Evidence held to show that notes recited as consideration for deed were given in payment for the property, and therefore that vendor retained the legal title until their payment; a vendor's lien being reserved.—*Walsh v. Ford* (Tex. Civ. App.) 854.

Evidence held to justify a finding that plaintiff, in an action to recover realty sold under execution, had formed an intention to occupy the land as homestead prior to the execution.—*Foley v. Holtkamp* (Tex. Civ. App.) 891.

§ 2. Transfer or incumbrance.

Under Act March 11, 1891, deed of homestead held not void because the certificate of acknowledgment did not show that the wife of grantor acknowledged the execution of the deed, but only that she acknowledged that she had signed a relinquishment of dower.—*Seawell v. Dirst* (Ark.) 1053.

A parol gift of a part of a homestead by a husband held void for lack of compliance with the statutory requirements.—*Morris v. Wells* (Tex. Civ. App.) 248.

Where husband conveyed 110 acres out of 310-acre homestead tract, and subsequently authorized the purchaser to take his 110 acres from the south end of the whole tract, wife held authorized, after husband's death, to ratify such agreement.—*Mass v. Bromberg* (Tex. Civ. App.) 468.

§ 3. Rights of surviving husband, wife, children, or heirs.

The fact that the wife was not living with the husband at his death does not deprive her of the right to a homestead in property on which he made his home.—*Redmond's Adm'x v. Redmond* (Ky.) 745.

Under Ky. St. § 1707, the widow is entitled to a homestead in land of the husband occupied by him as such, subject to the right of his unmarried infant children to joint occupancy.—*Atkins v. Baker* (Ky.) 1023.

§ 4. Abandonment, waiver, or forfeiture.

Statements of the owner of land that it was subject to payment of his debts held not to estop such owner from afterwards claiming the land as a homestead, in an action by a party other than the one to whom such statement was made.—*Berry v. Meir* (Ark.) 439.

Under the statute requiring the consent of the wife to any conveyance or incumbrance of the homestead, a statement by the owner of realty that the land was subject to his debts could not operate as a binding promise not to take advantage of the homestead exemption.—*Berry v. Meir* (Ark.) 439.

Where defendant used a portion of his lot for business purposes and a portion as a site for his residence, the mortgaging of the residence by an instrument relinquishing homestead rights therein held not to estop him from claiming the entire lot as a homestead.—*Berry v. Meir* (Ark.) 439.

Where defendant used a portion of his lot for business purposes and a portion for residence purposes, a conveyance of the business portion to his wife did not estop him from afterwards claiming the entire lot as a homestead.—*Berry v. Meir* (Ark.) 439.

A house rented out by the debtor is not exempt as part of the homestead, though standing on the lot with the debtor's residence, and though the value of both houses does not exceed \$1,000.—*Garrison v. Penn* (Ky.) 14.

Where a debtor and his wife left the debtor's farm, renting out the dwelling house thereon and moving to a town, where they are more profitably employed, their indefinite intention to return to the farm will not prevent an abandonment of the homestead.—*White v. Roberts* (Ky.) 758.

Old homestead *held* to have been abandoned and new one established.—*Rose v. Smith* (Mo.) 940.

Evidence considered, and *held* to show that a husband had separated 1 lot out from the homestead block of 12 lots, and abandoned it as a homestead, before conveying it by his deed, in which his wife did not join, and that such deed conveyed a good title.—*Drew v. Wooten* (Tex. Civ. App.) 331.

§ 5. Protection and enforcement of rights.

Judgment debtor *held* to have a homestead, not exceeding \$2,500, in certain lands seized on execution.—*Jones v. Dillard* (Ark.) 202.

Right of homestead is a personal privilege, to be claimed in manner prescribed by statute.—*Jones v. Dillard* (Ark.) 202.

A judgment denying a debtor's right to the homestead exemption *held* binding on the wife of the debtor, though she was not a party to the proceeding.—*Frazier v. Brashears* (Ky.) 1038; *Lozier v. Frazier*, Id.

Where defendant and wife occupied two separate pieces of property in a manner calculated to convey the impression that each was a homestead, a deed of trust on one reciting that it was not a homestead, together with a written designation, executed at the same time, declaring that the other was a homestead, *held* to raise the question of estoppel.—*Parrish v. Hawes* (Tex. Sup.) 209.

An instruction, requested in an action to foreclose a deed of trust, on defense of homestead, *held* not predicated on the evidence.—*Parrish v. Hawes* (Tex. Sup.) 209.

Facts under which *held*, that mortgagee of property afterwards claimed to be a homestead might rely on such statements, and under which their right to rely thereon was not a question for the jury.—*Parrish v. Hawes* (Tex. Sup.) 209.

Answers of jury to special interrogatories in an action to recover realty, sold under execution and claimed by plaintiff as a homestead, *held* to sustain judgment for plaintiff.—*Foley v. Holtkamp* (Tex. Civ. App.) 891.

HOMICIDE.

§ 1. Murder.

A homicide *held* to have been committed without any provocation which could reduce it to anything less than murder in the first degree.—*State v. Jackson* (Mo.) 938.

In the absence of aid or encouragement, or prior agreement or conspiracy, defendant *held* not responsible for killing by another.—*Cortez v. State* (Tex. Cr. App.) 453.

§ 2. Manslaughter.

Evidence *held* to sustain a conviction of manslaughter.—*Crenshaw v. State* (Ark.) 196.

Mere lapse of time between formation of design to kill and the killing, where it is sought to reduce it to manslaughter for insulting conduct toward female relative, does not show absence of passion.—*Hudson v. State* (Tex. Cr. App.) 668.

§ 3. Assault with intent to kill.

Evidence that defendant stabbed a person, or was present aiding and abetting another in so doing, warrants a conviction as principal.—*State v. Melvin* (Mo.) 534.

§ 4. Excusable or justifiable homicide.

If deceased was about to commit a felony, defendant had the right to disarm him, but had no right to use more force than reasonably appeared necessary for that purpose.—*Burton v. Commonwealth* (Ky.) 516.

The court properly charged not to acquit on the ground of self-defense, if accused "sought out the difficulty with the deceased, and continued to engage in and to urge the difficulty up to and including the time of firing the fatal shot."—*Blankenship v. Commonwealth* (Ky.) 994.

A person, in preventing an injury to his person, may use whatever force is necessary, without first resorting to all other means within his power, Pen. Code, art. 677, referring to the protection of property.—*Allen v. State* (Tex. Cr. App.) 671.

Defendant in prosecution for homicide *held* justified in killing deceased, if such action was necessary in the resistance of an unlawful assault.—*Allen v. State* (Tex. Cr. App.) 671.

An instruction, in a prosecution for assault with intent to murder, as to defendant's right of self-defense, *held* proper.—*Hall v. State* (Tex. Cr. App.) 783.

One who intentionally provokes an assault, in order that he may kill his assailant, *held* guilty of assault with intent to murder, whether he shoots in self-defense or not.—*Hall v. State* (Tex. Cr. App.) 783.

Where one goes to a place intending to provoke a difficulty, if necessary, in order to see his children, and does anything causing his wife to assault him, and he shoots her, he is guilty of at least an aggravated assault.—*Hall v. State* (Tex. Cr. App.) 783.

On a prosecution for assaulting a wife with intent to murder, wherein defendant claimed that his wife assaulted him while he was attempting to visit his children, an instruction conditioning defendant's right of self-defense upon whether he had been forbidden or invited to come to the house was erroneous.—*Hall v. State* (Tex. Cr. App.) 783.

Where defendant is on trial for homicide claiming self-defense, a charge that he cannot justify on that ground, if he sought the meeting for the purpose of provoking a difficulty with intent to kill deceased, is error.—*Johnson v. State* (Tex. Cr. App.) 845.

§ 5. Indictment and information.

An indictment for murder, charging that defendants murdered deceased "by shooting him with powder and leaden balls," *held* sufficient.—*Blankenship v. Commonwealth* (Ky.) 994.

§ 6. Evidence.

It was error to permit defendant to prove that it was said that deceased was inclined to be domineering and overbearing among his own race.—*Commonwealth v. Bright* (Ky.) 604.

Evidence *held* to support a conviction of murder in the first degree.—*State v. Fletcher* (Mo.) 429.

In a prosecution for assault with intent to murder, an objection to prosecutrix's testimony that she found some of her clothing with oil poured on it *held* not well taken; the circumstances tending to show that it was done by accused.—*Baines v. State* (Tex. Cr. App.) 847.

Where defendant attempted to show by a witness that there was no motive for his shooting the witness' daughter, on the ground that good feeling existed between all the parties, it was competent for the state to show that differences did exist.—*Baines v. State* (Tex. Cr. App.) 847.

Where the theory of the state was that accused shot prosecutrix because defeated in attempts to seduce her, evidence of which it produced, it was competent for it to show that the

feeling existing between them was bad.—*Baines v. State* (Tex. Cr. App.) 847.

Witnesses identifying accused as being in a certain room where they were sleeping some time before the shooting occurred *held* properly allowed to identify him by a broken arm, and having it in a sling.—*Baines v. State* (Tex. Cr. App.) 847.

In a prosecution of accused for shooting his sister-in-law, it was competent to show the character of shot taken out of the pocket of a pair of pants which were found at his house, and which a witness stated belonged to accused.—*Baines v. State* (Tex. Cr. App.) 847.

A declaration made by the accused after his arrest *held* pertinent to meet an alibi set up by him.—*Baines v. State* (Tex. Cr. App.) 847.

§ 7. Trial.

Indictment for murder and evidence *held* sufficient to warrant an instruction as to conspiracy.—*Yontz v. Commonwealth* (Ky.) 383.

Instruction as to self-defense *held* not prejudicial to defendant.—*Williams v. Commonwealth* (Ky.) 401.

Defendant was not prejudiced by an instruction not to acquit on the ground of self-defense, if defendant commenced the conflict with intent to inflict on deceased some bodily harm.—*Williams v. Commonwealth* (Ky.) 401.

Defendant cannot complain that the instruction as to self-defense did not submit the question whether he had a right to believe himself in danger from the sons of deceased, where he did not by his testimony claim it.—*Williams v. Commonwealth* (Ky.) 401.

An instruction as to self-defense was erroneous, where the jury may have supposed from the language used that they must, in order to acquit, believe that defendant was actually in danger.—*Burton v. Commonwealth* (Ky.) 516.

Under an indictment for murder, if there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction on that hypothesis.—*Trabue v. Commonwealth* (Ky.) 718.

One accused of murder *held* entitled to instructions as to self-defense and manslaughter on the evidence.—*Trabue v. Commonwealth* (Ky.) 718.

Instruction on the right to arrest and resist *held* necessary, where member of posse is killed while attempting to arrest without warrant.—*Cortez v. State* (Tex. Cr. App.) 453.

Submission of issue as to negligent homicide *held* erroneous.—*Flynn v. State* (Tex. Cr. App.) 551.

Instruction as to rights of accused, in a prosecution for homicide, to protect his dwelling against unlawful assault, *held* erroneous, because not specifically applied to the circumstances of the case.—*Allen v. State* (Tex. Cr. App.) 671.

Charge in prosecution for murder *held* properly refused, because authorizing acquittal, though the killing might have been the result of sudden rage or resentment.—*Allen v. State* (Tex. Cr. App.) 671.

Under Pen. Code, art. 676, where homicide is committed to prevent murder, etc., and the weapons used by the aggressor are calculated to accomplish the purpose imputed to him, the legal presumption that he intended to accomplish such purpose should be given in the charge to the jury.—*Hall v. State* (Tex. Cr. App.) 783.

On a prosecution for assault with intent to murder, wherein the defense was self-defense, evidence *held* sufficient to bring the case under Pen. Code, art. 676, so as to require an instruction as to the presumption arising from

use of deadly weapons by the aggressor.—*Hall v. State* (Tex. Cr. App.) 783.

An instruction, in a prosecution for assaulting a wife with intent to murder, that defendant had a right, in order to see his children, to go upon the premises of his wife's father "in a peaceful manner," *held* proper.—*Hall v. State* (Tex. Cr. App.) 783.

Evidence on a trial for assault with intent to murder *held* not to warrant instructions on aggravated assault.—*Duffy v. State* (Tex. Cr. App.) 844.

§ 8. Appeal and error.

Where it is not disclosed that a foundation was properly laid for the admission of a statement as a dying declaration, a conviction will not be disturbed because of its exclusion.—*Young v. State* (Ark.) 658.

Though evidence, on a trial for murder, to the effect that, on the evening after the killing defendant said of deceased that he had been hard to get along with, and that he did not want to be bossed by deceased, may have been in chief, its admission after defendant closed his testimony *held* harmless error.—*Burton v. Commonwealth* (Ky.) 516.

An instruction for the state on a prosecution for murder which conflicted with another instruction given for the state, with respect to murder in the second degree, was not prejudicial to defendant, where he was not convicted of murder in the second degree.—*State v. Jackson* (Mo.) 938.

An instruction in a murder case defining "deliberation" *held* inaccurate, but not prejudicial to defendant, in the absence of any lawful provocation which could reduce the homicide to anything less than murder in the first degree.—*State v. Jackson* (Mo.) 938.

HORSES.

See "Animals."

HOSPITALS.

Duty of master to admit injured employé to hospital maintained by contributions from employes, see "Master and Servant," § 1.

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE.

See "Bigamy"; "Curtesy"; "Divorce"; "Dower"; "Marriage."

Adultery, see "Adultery."

Competency as witnesses, see "Witnesses," § 2. Conveyances to wife in fraud of creditors of husband, see "Fraudulent Conveyances," § 1. Privileged communications, see "Witnesses," § 2.

Rights of survivor, see "Executors and Administrators," § 4; "Homestead," § 3.

§ 1. Disabilities and privileges of coverture.

Married woman *held* not estopped to deny the authority of one who sold her land, where she never received any part of the purchase money or the notes executed therefor, or in any other way ratified or approved the sale.—*Floyd v. Mackey* (Ky.) 518.

Where a husband and wife join in a deed with covenant of warranty of a tract of land which they claimed she owned, the land in fact being public school land, in an action for breach of such covenant, judgment cannot be recovered against her, either on the covenant or because

the contract was illegal.—*Johnson v. Blum* (Tex. Civ. App.) 461.

Where plaintiff kept house, and nursed and cared for an invalid wife, under promise of a legacy, which was not given, the fact that the invalid's husband lived with her, and hence necessarily received benefit from the service, did not affect plaintiff's right to compensation from the wife's estate.—*Von Carlowitz v. Bernstein* (Tex. Civ. App.) 464.

In an action against the estate of a wife for necessary personal services rendered to her, it is not necessary to show that her husband was unable or refused to pay for such services.—*Von Carlowitz v. Bernstein* (Tex. Civ. App.) 464.

§ 2. Wife's separate estate.

Under Const. 1874, a deed executed by a husband of the wife's property, in which she joins and relinquishes dower, conveys the fee to grantee, who took without notice of the wife's claim.—*Jones v. Hill* (Ark.) 194; *Same v. Seaborn*, Id.

Where the wife's success in business was due to the skill of her husband as her agent, real estate purchased with the profits of the business was subject to the husband's debts.—*Blackburn v. Thompson* (Ky.) 5.

Though husband and wife signed a note jointly, the word "principal" appearing after the wife's name, *held* the wife was surety merely, and was therefore not bound.—*Postell v. Crumbaugh* (Ky.) 830.

Where plaintiff solicited defendant to buy her land from one to whom her husband had sold it, and to whom she and the husband jointly had executed a title bond, which he did, paying to plaintiff a part of the purchase price, plaintiff *held* estopped to claim that she was forced by threats to sign either the title bond or the deed to defendant.—*Frasure v. McGuire* (Ky.) 1015.

In the absence of any pleading or proof that land acquired by a wife during coverture was paid for out of her own means, it is presumed that it was paid for with money of her husband.—*Halstead v. Mustion* (Mo.) 258.

Under the statute of Texas defining the powers of married women, deeds executed to convey a wife's separate property through a trustee to the husband, to be held as community property, are void.—*Kellett v. Trice* (Tex. Sup.) 51.

Property devised to a woman for life, "to receive for her sole and separate use, and no other," the rents and profits thereunder, is her separate property, so that rents are not liable for husband's debts.—*Sullivan v. Skinner* (Tex. Civ. App.) 680.

Evidence *held* to sufficiently show that land conveyed to a husband was purchased for the benefit of his wife as her separate property out of the earnings of their minor son, and that the husband assented to such use of the earnings, and therefore that it belonged to her.—*Goldstein v. Cockrell* (Tex. Civ. App.) 878.

Property deeded to a wife in consideration of her relinquishment of rights in a homestead became hers, and the lien of a judgment against the husband could not attach thereto.—*Drake v. Davidson* (Tex. Civ. App.) 889.

Property deeded to a wife on her relinquishment of rights in a homestead *held* not subject to judgment against husband, though deed did not state it was her separate property.—*Drake v. Davidson* (Tex. Civ. App.) 889.

§ 3. Actions.

Where a married woman permitted a judgment by default on her promissory note, she cannot resist the enforcement of the judgment on the ground that she was a married woman

and the surety of her husband.—*Shanklin v. Moody* (Ky.) 502.

A judgment against a husband and wife may be satisfied out of the wife's separate property, though it does not specifically direct that execution may issue against her property.—*Walters v. Cantrell* (Tex. Civ. App.) 790.

Injunction will not lie to restrain execution against a wife's separate property on a judgment against husband and wife on a joint note, on the contention that the note was not given for necessities, or for expenses incurred for her separate estate, or for any tort committed by her.—*Walters v. Cantrell* (Tex. Civ. App.) 790.

§ 4. Community property.

A conveyance of a large amount of the wife's property and small amount of the husband's, for a consideration of one dollar paid by each to the other, to a trustee to reconvey to the husband to be held as community property, is without consideration.—*Kellett v. Trice* (Tex. Sup.) 51.

Children *held* entitled to a one-half interest in homestead and community property conveyed by the husband by deed in which the wife did not join.—*Colonial & U. S. Mortg. Co. v. Thetford* (Tex. Civ. App.) 103.

Purchaser of community property from surviving wife *held* to be an innocent purchaser as to one-half only.—*Burleson v. Alvis* (Tex. Civ. App.) 235.

Where defendants in trespass to try title had bought from a surviving wife with knowledge thereof, they were chargeable with notice that deceased had left children surviving him.—*Burleson v. Alvis* (Tex. Civ. App.) 235.

Where a surviving wife conveyed land by a deed reserving the vendor's lien, on a reconveyance, subsequent purchasers from her were charged with knowledge of the interest of her husband's heirs.—*Burleson v. Alvis* (Tex. Civ. App.) 235.

A deed by a husband of an undivided 110 acres out of a 310-acre tract owned by him and his wife as community property, and occupied by them as a home, will pass the title thereto, though the wife does not join therein.—*Mass v. Bromberg* (Tex. Civ. App.) 468.

ILLEGITIMATE CHILDREN.

See "Bastards."

IMPEACHMENT.

Of record, see "Appeal and Error," §§ 11, 12.
Of witness, see "Witnesses," § 4.

IMPLIED CONTRACTS.

See "Money Paid"; "Work and Labor."

IMPRISONMENT.

See "Arrest"; "False Imprisonment."
Escape of prisoner, see "Escape."

IMPROVEMENTS.

Allowance or recovery of compensation, see "Ejectment," § 4; "Trespass to Try Title," § 3.
Liens, see "Mechanics' Liens."
Public improvements, see "Municipal Corporations," § 5.

INCEST.

On a prosecution for incest, evidence *held* insufficient to sustain the conviction.—*Jennings v. State* (Tex. Cr. App.) 778.

INCUMBRANCES.

On property of intestate, see "Descent and Distribution," § 1.

INDEMNITY.

See "Guaranty"; "Principal and Surety."

INDICTMENT AND INFORMATION.

See "Grand Jury."

Effect of mistake in transcript as to indictment, see "Criminal Law," § 2.

In action for penalty, see "Penalties," § 1.

For particular offenses.

See "Assault and Battery," § 2; "Bigamy"; "Burglary," § 1; "Escape"; "Forgery"; "Gaming," § 3; "Homicide," § 5; "Larceny," § 2; "Rape," § 1; "Robbery."

Keeping disorderly house, see "Disorderly House."

Violation of liquor laws, see "Intoxicating Liquors," § 5.

§ 1. Necessity of indictment or presentment.

A prosecution on complaint in the county court is insufficient to sustain a conviction, unless there is an information based on the complaint.—*Faulkner v. State* (Tex. Cr. App.) 787.

§ 2. Finding and filing of indictment or presentment.

A second indictment against the same person for the same offense does not ipso facto quash the first.—*State v. Malvin* (Mo.) 534.

§ 3. Formal requisites of indictment.

An objection that indictment was not indorsed by duly appointed foreman of grand jury held untenable under the facts.—*State v. Armstrong* (Mo.) 961.

An indictment which fails to allege the date of the commission of the offense charged is fatally defective.—*Vallegas v. State* (Tex. Cr. App.) 769.

§ 4. Requisites and sufficiency of accusation.

Where a complaint was against George D., the information was not insufficient because the letter "D" was not completely made, owing to failure of the ink to trace a portion of it.—*Dodson v. State* (Tex. Cr. App.) 1098.

§ 5. Issues, proof, and variance.

Proof that stolen property, alleged in an indictment for larceny to have belonged to "John F. Hamilton," was the property of "John Houston," constitutes a fatal variance.—*Spears v. State* (Ark.) 660.

Where an information for embezzlement alleged that defendant's conversion of funds was without the consent of one Cliff S. but the statement of facts on appeal contained no reference to Cliff S., merely showing that "Dr. S." testified, the conviction will be reversed for want of evidence to sustain the allegation.—*Redding v. State* (Tex. Cr. App.) 1105.

INDORSEMENT.

Of indictment, see "Indictment and Information," § 3.

INFANTS.

See "Guardian and Ward."

Competency as witnesses, see "Witnesses," § 2. Custody and support on divorce of parents, see "Divorce," § 2.

§ 1. Property and conveyances.

An estoppel does not arise where the person setting up the estoppel knew all of the facts.—*Mathers v. Mathers* (Ky.) 832.

§ 2. Actions.

A compromise judgment, to which a guardian is a party, held not to preclude an appeal therefrom by the ward on attaining his majority.—*Rankin v. Schofield* (Ark.) 197.

Upon the failure of plaintiff, suing as next friend, to file affidavit of his right to sue and to execute bond for costs, the court should dismiss as to the infants; but, as they are necessary parties, they should, upon dismissal, be made defendants.—*Spicer v. Holbrook* (Ky.) 180.

The appointment of a guardian ad litem for an infant defendant 16 years of age before she had been served with process was premature, under Civ. Code Prac. § 38.—*Womble v. Price's Guardian* (Ky.) 370.

Under Civ. Code Prac. § 36, subsec. 3, it was error to render judgment against an infant defendant upon the report of the guardian ad litem that he had no defense to make, without any statement that he had examined the record.—*Womble v. Price's Guardian* (Ky.) 370.

Where the only defendant against whom a deposition is to be read is an infant, the deposition must be taken upon interrogatories, as required by Civ. Code Prac. § 574, except, as there provided, "in actions and proceedings for divorce and alimony and the custody of children, when involved in such a suit."—*Womble v. Price's Guardian* (Ky.) 370.

INFERIOR COURTS.

See "Courts," § 4.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INJUNCTION.**Restraining particular acts or proceedings.**

See "Execution," § 2; "Nuisance," §§ 1, 2.

Collection of judgment by attorney claiming lien for fees, see "Attorney and Client," § 2.

Collection of road tax, see "Highways," § 2.

Collection of school tax, see "Schools and School Districts," § 4.

Enforcement of judgment, see "Judgment," § 6.

Execution against separate estate of married woman, see "Husband and Wife," § 3.

Obstruction of easement, see "Easements," § 2.

Obstruction of drain, see "Drains," § 1.

Occupancy of office, see "Officers," § 2.

Taking of or injury to property for public use, see "Eminent Domain," § 3.

§ 1. Actions for injunctions.

Allegations that an ordinance authorizing the construction of a street railroad was procured by fraud and bribery held uncertain and insufficient in a suit to enjoin the construction of the road.—*Nagel v. Lindell Ry. Co.* (Mo.) 1090.

Allegations which are so uncertain that they do not raise an issue are not admitted by a demurrer.—*Nagel v. Lindell Ry. Co.* (Mo.) 1090.

Petition for injunction restraining commissioners' court from declaring a local option election valid held not to show that petitioner was entitled to sue because failing to allege that he was "legally" engaged in the retail liquor business.—*Harding v. Commissioners' Court of McLennan County* (Tex. Sup.) 44.

§ 2. Violation and punishment.

The language of an order of injunction should not be stretched to cover acts not fairly and reasonably within its meaning.—*Louisville & N. R. Co. v. Miller* (Ky.) 5.

Where a railroad company was required by injunction to deliver to another railroad company at a certain point all live stock consigned to a certain stock yards company, the order held not to embrace live stock shipped from another state, which was not originally consigned to the stock yards.—*Louisville & N. R. Co. v. Miller* (Ky.) 5.

INNKEEPERS.

Eating house keeper as employer, see "Master and Servant," § 10.

IN PAIS.

Estoppel, see "Estoppel," § 2.

INSANE PERSONS.

Effect of insanity of mortgagor, see "Mortgages," § 1.

Effect of insanity of party on operation of statute of limitations, see "Limitation of Actions," § 2.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of building and loan association, see "Building and Loan Associations."

Of corporation, see "Corporations," § 6.

INSPECTION.

Duty of master to inspect appliances, see "Master and Servant," § 3.

INSTRUCTIONS.

In civil actions, see "Trial," §§ 7-13.

In criminal prosecutions, see "Criminal Law," § 19; "Homicide," § 7.

INSURANCE.

Gift of insurance policy, see "Gifts," § 1.

Recovery on insurance policy by personal representative of insured, see "Executors and Administrators," § 5.

§ 1. Control and regulation in general.

Under a city ordinance requiring insurance companies to pay annually as a license tax a sum on every \$100 "of premiums received on business done in the city," the tax must be based on premiums received on new policies, and not upon premiums on outstanding policies.—*Metropolitan Life Ins. Co. v. Darenkamp* (Ky.) 1125.

§ 2. Insurable interest.

One who was permitted by a railroad company to construct a building on its right of way, upon condition that the company should not be liable for loss by fire, had, notwithstanding that condition, an insurable interest in the property.—*Greenwich Ins. Co. v. Louisville & N. R. Co.* (Ky.) 411.

§ 3. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

The insured does not forfeit his right to a paid-up policy by failing to make demand therefor within the time stipulated in the original policy.—*Washington Life Ins. Co. v. Miles* (Ky.) 740.

§ 4. Risks and causes of loss.

Under a policy providing that it shall be void if the insured "die by his own act, sane or insane," there can be no recovery if insured took his life, when he had mind enough to know that his act would probably result in his death.—*Manhattan Life Ins. Co. v. Beard* (Ky.) 35.

§ 5. Actions on policies.

In an action upon a policy insuring against damage by wind storm, plaintiff should have alleged notice of injuries within a reasonable time thereafter, or some excuse for failure to notify.—*Fallon v. Farmers' Home Mut. Aid Ass'n* (Ky.) 1029.

Evidence that the person who killed insured was seen lying in wait for him two or three weeks before held inadmissible.—*Campbell v. Fidelity & Casualty Co. of New York* (Ky.) 1033.

Upon an issue whether insured was drunk when killed, evidence that witness knew deceased well, and that he could drink large quantities of whisky without becoming drunk, held not admissible.—*Campbell v. Fidelity & Casualty Co. of New York* (Ky.) 1033.

Where a life policy provided that it should be payable to a certain beneficiary, if living, otherwise to the executors of the insured, in a suit by the administrator of the beneficiary against the insurance company and the administrator of insured, the burden was on plaintiff to show that his decedent had survived the insured.—*Hildebrandt v. Ames* (Tex. Civ. App.) 128.

Where defendant pleads provisions in the certificate of insurance sued on, plaintiff cannot prove a waiver of the provisions without pleading facts showing such waiver.—*United Benev. Soc. v. Shepherd* (Tex. Civ. App.) 577.

INTENT.

Fraudulent, see "Fraudulent Conveyances," § 1.

INTEREST.

See "Usury."

Insurable interest, see "Insurance," § 2.

On particular classes of liabilities.

Claims against municipal corporations, see "Municipal Corporations," § 5.

For property wrongfully sold for taxes, see "Taxation," § 7.

Legacies, see "Executors and Administrators," § 6.

§ 1. Rights and liabilities in general.

Where the jury find for plaintiff in an action for the purchase price of goods, he is entitled to legal interest from the date of sale.—*Schuwirth v. Thumma* (Tex. Civ. App.) 691.

§ 2. Time and computation.

A bond held not to authorize the compounding of interest on interest.—*Williams v. Carroll County* (Mo.) 955.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 2.

INTERPLEADER.

In action for causing death, see "Death," § 2.
In garnishment proceedings, see "Garnishment," § 5.

INTERVENTION.

In actions in general, see "Parties," § 3.
In attachment proceedings, see "Attachment," § 1.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Champerty as a defense in action on liquor dealer's bond, see "Champerty and Maintenance."

Effect of partial invalidity of law regulating sale of intoxicating liquor on other parts of law, see "Statutes," § 1.

Mandamus to compel issuance of liquor license, see "Mandamus," § 1.

§ 1. Local option.

An election under the local option law in a magisterial district having resulted in a vote against the sale of liquor, an election held within three years thereafter in a precinct forming part of the district was void.—*Tousey v. Stites* (Ky.) 277.

§ 2. Licenses and taxes.

Under Ky. St. § 4203, the county court did not abuse its discretion in refusing to grant a liquor license to one who had been selling liquor without license, and who further violated the law by selling to minors.—*Appeal of Caudill* (Ky.) 723.

The board of trustees of a town of the sixth class held to have discretion to refuse to grant a license to an improper person, or for the location of a saloon at an improper place.—*Riley v. Rowe* (Ky.) 909.

Trustees of town held to have properly refused a license applied for at a special meeting called for another purpose, at which all the members of the board were not present.—*Riley v. Rowe* (Ky.) 909.

§ 3. Regulations.

A person signing a petition to prohibit the sale of liquor has no right to withdraw his name from the petition without leave of court after it has been filed.—*Bordwell v. Dills* (Ark.) 646.

Ky. St. § 2558, relating to duty of druggist on sale of liquor, applies to localities where local option prevails under special laws, as well as where it exists by virtue of a vote taken under the general law.—*Lawson v. Commonwealth* (Ky.) 1010.

§ 4. Offenses.

Under an indictment for selling liquor in quantities less than five gallons, the court properly instructed to find defendant guilty if he "pretended to sell the witness ten gallons and let him have it by the small."—*Griffin v. Commonwealth* (Ky.) 817.

Though the local option law of 1886, applicable to Fleming county, authorizes a druggist to sell liquor upon a prescription, such a sale, made without the license required by Ky. St. § 4224, is unlawful.—*Powell v. Commonwealth* (Ky.) 818.

Under Ky. St. § 2558, certain instruction as to liability for retail sales and freedom from liability for wholesale sales held requisite in prosecution for violating the act.—*Griffin v. Commonwealth* (Ky.) 1034.

Rev. St. art. 5060g, authorizes a recovery from a saloon keeper selling liquors to a student, though the saloon keeper or his employees have no knowledge that the purchaser is a student.—*Peacock v. Limburger* (Tex. Sup.) 764.

Evidence held sufficient to show that tonic sold was intoxicating.—*Johnson v. State* (Tex. Cr. App.) 552.

Evidence on prosecution for violation of local option law held to sustain conviction.—*Young v. State* (Tex. Cr. App.) 567.

§ 5. Criminal prosecutions.

Under an indictment for selling liquor in quantities less than five gallons, it was proper to instruct to find defendant guilty if he "either directly or indirectly" sold whisky or brandy in less quantities than five gallons.—*Griffin v. Commonwealth* (Ky.) 817.

Instructions held to sufficiently present defendant's side of the evidence.—*Griffin v. Commonwealth* (Ky.) 817.

Instructions where evidence tended to show an attempt to evade a law prohibiting the sale of whisky by retail held to be correct.—*Hinkle v. Commonwealth* (Ky.) 1020.

Indictment for selling liquor by retail in violation of a local prohibitory law held sufficient.—*Hinkle v. Commonwealth* (Ky.) 1020.

Evidence held insufficient to support a conviction for knowingly giving intoxicating liquors to a minor.—*Cleveland v. State* (Tex. Cr. App.) 550.

On prosecution for violation of local option law, certain testimony held admissible as showing course of defendant's business.—*Young v. State* (Tex. Cr. App.) 567.

An instruction in a prosecution for a violation of the local option law held not an instruction on the facts.—*Bailey v. State* (Tex. Cr. App.) 780.

Evidence in a prosecution for a violation of the local option law held sufficient to sustain a conviction.—*Bailey v. State* (Tex. Cr. App.) 780.

Evidence on prosecution for unlawfully giving liquor to minor held sufficient to sustain conviction.—*Smith v. State* (Tex. Cr. App.) 780.

Evidence, in a prosecution for selling liquor to a minor, as to defendant's knowledge of the minority of the prosecuting witness, held sufficient to sustain a conviction.—*Earl v. State* (Tex. Cr. App.) 839.

§ 6. Searches, seizures, and forfeitures.

Acts 1899, p. 11, § 1, relating to search, seizure, and destruction of intoxicating liquors, being constitutional as to the seizure and destruction, the owners of liquor seized are not entitled to its release because the seizure was by virtue of a search warrant, which may be illegal.—*Ferguson v. Josey* (Ark.) 345.

ISSUES.

In civil actions, see "Pleading," § 7.

In criminal prosecutions, see "Indictment and Information," § 5.

Presented for review on appeal, see "Appeal and Error," §§ 4-6.

JAILS.

See "Prisons."

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 4.

JOINDER.

Of causes of action, see "Action," § 1.

Of cause of action for death with one for pain and suffering, see "Death," § 2.

Of parties in civil actions, see "Parties," §§ 1, 2.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

§ 1. Disqualification to act.

Under Code Cr. Proc. art. 606, and Const. art. 5, § 11, a judge is disqualified to sit in a criminal case where his grandfather was brother to defendant's grandmother.—*Gresham v. State* (Tex. Cr. App.) 845.

Where a judge is disqualified to sit in a criminal case because of consanguinity to defendant, the consent of the parties cannot remove his incapacity.—*Gresham v. State* (Tex. Cr. App.) 845.

A judge is not disqualified because he had proposed to assist the prosecution as counsel for a certain fee, which was never arranged or agreed to be paid.—*Baines v. State* (Tex. Cr. App.) 847.

JUDGMENT.

In justice's court, see "Justices of the Peace,"

§ 3.
Parol or extrinsic evidence, see "Evidence," § 10.

Review, see "Appeal and Error."

Sales under judgment, see "Judicial Sales."

In actions by or against particular classes of parties.

See "Husband and Wife," § 3.

Heirs, see "Descent and Distribution," § 1.

In particular civil actions or proceedings.

See "Garnishment," § 4; "Quieting Title," § 1; "Trespass to Try Title," § 3.

For breach of covenant, see "Covenants," § 1.
For sale of decedent's estate, see "Executors and Administrators," § 7.

On appeal or writ of error, see "Appeal and Error," § 24.

On note, see "Bills and Notes," § 1.

Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 3.

Setting aside judgment foreclosing tax lien, see "Taxation," § 7.

Trial of disputed claim against decedent's estate, see "Executors and Administrators," § 5.

§ 1. Nature and essentials in general.

It appearing from the clerk's certificate on the petition in an action and from a docket entry that a warning order was made, and the report of the warning order attorney appearing in the record, the fact that the warning order is not found after 20 years does not render the judgment void.—*Meddis v. Dellenger* (Ky.) 185.

A default judgment, rendered by a circuit court in favor of the commonwealth against the principal and sureties on the bond of a clerk, held not void as to the sureties, though the principal was dead at the time.—*Asher v. Commonwealth* (Ky.) 759.

§ 2. By default.

A default judgment against W. D. M. held sustained, though the sheriff's return showed service on P. M.—*Halstead v. Mustion* (Mo.) 258.

Under 1 Sayles' Ann. Civ. St. art. 1214, a judgment entered by default in an action where the citation stated the petition was filed on the 29th day of July, when it was in fact filed May 20th, should be vacated.—*Leavitt v. Brazelton* (Tex. Civ. App.) 465.

Under Rev. St. art. 1375, an application to set aside judgment against nonresident must set forth facts which, if true, would require the rendition of a different judgment, and such facts may be controverted and evidence heard as to their truth.—*Tinsley v. Corbett* (Tex. Civ. App.) 910.

A motion to set aside a judgment rendered in absence of defendant's counsel, accompanied by an affidavit of merits, held sufficient to authorize setting the judgment aside.—*Scottish Union & National Ins. Co. v. Tomkies* (Tex. Civ. App.) 1109.

§ 3. On trial of issues.

In an action by a city to recover taxes, it was error to give judgment for taxes for years as to which the action had been dismissed on plaintiff's motion.—*Reccius v. City of Louisville* (Ky.) 410.

Where a special verdict entitled a party to a judgment, the court must either set aside the verdict or render judgment thereon, but cannot render judgment contrary thereto.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

A party aggrieved by a special verdict cannot move the court for judgment notwithstanding such verdict.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

Act June 18, 1897, relating to the requisites of special verdicts, does not affect Rev. St. art. 1332, declaring that as between the parties a special verdict shall be conclusive, and article 1333, requiring the court to render a judgment on the special verdict, unless it is set aside.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

Under Act June 18, 1897, relating to requisites of special verdicts, the trial court cannot disregard a finding in a special verdict, though unsupported by the evidence.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

§ 4. Entry, record, and docketing.

Though a recital in an entry of judgment that the defendant was duly served may be overthrown by other parts of the record of equal dignity and importing equal verity, the question of jurisdiction must be determined from the whole record, and not from fragmentary portions thereof.—*Halstead v. Mustion* (Mo.) 258.

§ 5. Opening or vacating.

Under Civ. Code Prac. §§ 518, 520, proceedings to vacate or modify a judgment after the term by granting a new trial should be by an independent action; but where such a petition was filed by defendant in the action in which the judgment was rendered, and plaintiff's appearance was entered, its substantial rights were not prejudiced.—*Henry Vogt Mach. Co. v. Pennsylvania Iron Works Co.* (Ky.) 734.

Under Ky. St. § 968, providing that a court of continuous session "shall have control over its judgments for 60 days," etc., the day on which the judgment is rendered must be counted as one of the 60 days.—*Henry Vogt Mach. Co. v. Pennsylvania Iron Works Co.* (Ky.) 734.

Plaintiffs held not entitled to have a judgment against them vacated on the ground that neither they nor their authorized attorneys were present at the trial.—*Brashears v. Dickinson* (Ky.) 816.

A court of continuous session had power to set aside an order of sale after 60 days from entry thereof; motion therefor having been made before the expiration of 60 days.—*Forest Hill Building & Loan Ass'n v. McEvoy's Ex'r* (Ky.) 1031.

§ 6. Equitable relief.

The petition in an action to vacate a judgment on the ground of newly-discovered evidence held not to state a cause of action.—*Brashears v. Dickinson* (Ky.) 816.

In an action by a judgment creditor to set aside an alleged fraudulent conveyance, the burden is on defendants to show fraud practiced by plaintiff in obtaining his judgment.—

Johnson v. Stebbins-Thompson Realty Co. (Mo.) 933.

Evidence examined, and *held* insufficient to show that judgment was obtained by fraud.—**Johnson v. Stebbins-Thompson Realty Co. (Mo.)** 933.

Defendant was entitled to an injunction restraining enforcement of a judgment rendered by a justice after granting a new trial without notice.—**Smith v. Carroll (Tex. Civ. App.)** 863.

§ 7. Collateral attack.

A judgment decreeing a conveyance of land, rendered more than 30 years ago, having been acquiesced in by the parties, will not be declared void because of irregularities in the preliminary steps.—**Jones v. Patterson (Ky.)** 377; **Patterson v. Davis, Id.**; **Davis v. Patterson, Id.**

In a suit by a judgment creditor to set aside an alleged fraudulent conveyance, neither the debtor nor his vendee can attack the judgment on the ground that the note on which it was founded was obtained by fraud.—**Johnson v. Stebbins-Thompson Realty Co. (Mo.)** 933.

An action to set aside the fraudulent and unconstitutional transfer by a county commissioners' court of a judgment on a bail bond to the sureties thereon is not a collateral attack on the judgment of a court of competent jurisdiction.—**Lindsey v. State (Tex. Civ. App.)** 332.

Where facts vitiating a judgment are known at the time of a motion for a new trial, and not then urged, such facts cannot afterwards be set up collaterally to impeach the judgment.—**Sinmons v. Richards (Tex. Civ. App.)** 687.

§ 8. Construction and operation in general.

A decree settling an estate *held* a consent decree, and not a determination by the court.—**Rankin v. Schofield (Ark.)** 197.

§ 9. Merger and bar of causes of action and defenses.

A judgment against abutting owners for 90 per cent. of the warrant for improvements sued on was not a bar to a subsequent recovery against the city of the other 10 per cent.—**City of Louisville v. Selvage (Ky.)** 376.

A judgment in favor of the lessee railroad against the lessor, rendered about five years before the property was restored to the lessor, by which it was in effect determined that the lessee had not then failed to keep the property in repair, constitutes no defense to the action for failure to turn over the property in good repair.—**Louisville & N. R. Co. v. Schmidt (Ky.)** 629.

Where the subject-matter of a suit and the terms of a sale in issue differ from the subject-matter and terms of a sale involved in a subsequent suit, the decree in the former is not *res adjudicata*, though the parties are the same in both suits.—**Morton v. Morris (Tex. Civ. App.)** 94.

The recovery of judgment on notes given for the price of a building does not preclude the owner from claiming damages for defects then known to exist, where it was agreed that such matters should be subsequently adjusted.—**J. S. Mayfield Lumber Co. v. Carver (Tex. Civ. App.)** 216.

Judgment *held* not *res judicata*.—**Walsh v. Ford (Tex. Civ. App.)** 854.

§ 10. Conclusiveness of adjudication.

A judgment that an assignor for the benefit of creditors had no vendible interest in land which passed under the assignment does not estop his heirs from claiming the land subject to a trust imposed by the will under which it was held.—**Goatley v. Crowe (Ky.)** 1029.

A judgment in an action against the city by a taxpayer to set aside certain judgments and

tax sales *held* not an adjudication which would prevent the taxpayer from suing the city for the value of his property, acquired by it and sold to an innocent purchaser.—**City of Houston v. Walsh (Tex. Civ. App.)** 106.

§ 11. Lien.

A purchaser of land, executing a mortgage thereon to the vendor, as part of the same transaction, to secure the price, takes the land burdened with the lien, and the mortgage, though unregistered, is prior to an existing judgment lien against the purchaser, except as to bona fide purchasers.—**Masterson v. Burnett (Tex. Civ. App.)** 90.

As against a judgment creditor claiming prior lien, evidence *held* to show a deed and mortgage to be one transaction.—**Masterson v. Burnett (Tex. Civ. App.)** 90.

§ 12. Assignment.

In trespass to try title, a judgment under which plaintiff purchased *held* admissible in evidence over objection that a payment by a person from whom plaintiff purchased the judgment to the judgment creditor discharged and satisfied it.—**Tinsley v. Corbett (Tex. Civ. App.)** 910.

§ 13. Payment, satisfaction, merger, and discharge.

The satisfaction of a judgment as to one of the three joint defendants *held* not to release the others.—**Hadley v. Bryan (Ark.)** 921.

In trespass to try title, a judgment against several defendants, from one of whom plaintiff purchased and under which the land was sold, *held* admissible over objection that a stipulation in the transfer to plaintiff released the co-defendants.—**Tinsley v. Corbett (Tex. Civ. App.)** 910.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 7.

Of property of infant, see "Guardian and Ward," § 1.

On execution, see "Execution," § 3.

Where the accepted bidder at a decretal sale had been warned before the sale to be prepared to execute bond promptly, the commissioner did not err in refusing to give him "a day or two" to look around to see if he could execute bond.—**Carter v. Carter (Ky.)** 624.

Under Civ. Code Prac. § 694, on ordering a sale of real property for the payment of debt, the court was authorized to presume, in the absence of allegation or proof as to that matter, that a tract of 34½ acres was divisible, and to adjudge a sale of only so much of the tract as was necessary to pay the debt.—**Mays v. Carman (Ky.)** 1019.

JURISDICTION.

Amount in controversy, see "Appeal and Error," § 2.

Collateral attack on judgment rendered without jurisdiction, see "Judgment," § 7.

Effect of appearance, see "Appearance."

Jurisdiction of particular actions or proceedings.

See "Divorce," § 1.

Against heirs, see "Descent and Distribution," § 1.

Criminal prosecutions, see "Criminal Law," § 2.

Special jurisdictions.

See "Bankruptcy," § 1.
 Appellate jurisdiction, see "Appeal and Error," § 9.
 Justices' courts in civil cases, see "Justices of the Peace," § 2.
 Particular courts, see "Courts."

JURY.

See "Grand Jury."
 Custody and conduct, see "Criminal Law," § 22; "Trial," § 14.
 Instructions in civil actions, see "Trial," §§ 7-13.
 Instructions in criminal prosecutions, see "Criminal Law," § 19.
 Questions for jury in civil actions, see "Trial," § 6.
 Questions for jury in criminal prosecutions, see "Criminal Law," § 18.
 Taking case or question from jury at trial, see "Trial," § 6.
 Verdict in civil actions, see "Trial," § 15.
 Verdict in criminal prosecutions, see "Criminal Law," § 23.

§ 1. Right to trial by jury.

A motion for trial by jury on certain counts of the petition and certain counterclaims came too late after the case had been referred.—*Smith v. Baer* (Mo.) 166.

§ 2. Summoning, attendance, discharge, and compensation.

The method of summoning and impaneling juries provided for by statute is merely directory, and hence it is no objection to a panel that the court completes it by placing thereon citizens who were not summoned according to the statutes.—*State v. Jackson* (Mo.) 938.

Under Rev. St. 1899, art. 2, § 3801, the court has power by proper order to complete a panel of jurors, where the regular panel made up according to section 3795 was incomplete, by placing thereon a requisite number of citizens otherwise qualified.—*State v. Jackson* (Mo.) 938.

Under White's Ann. Code Cr. Proc. arts. 661, 662, relating to challenges to the array, a venire drawn by jury commissioners for a term of court will not be quashed because one of the commissioners was interested as a party in civil suits for trial before a jury at said term, though Rev. Civ. St. art. 3145, prescribes that no commissioner shall be interested in a suit requiring a jury.—*Whittle v. State* (Tex. Cr. App.) 771.

The exclusion of a juror, disqualified under Rev. St. art. 3141, and the selection of an unobjectionable juror, held not error though the parties may have exhausted their challenges.—*Mundine v. Pauls* (Tex. Civ. App.) 254.

§ 3. Competency of jurors, challenges, and objections.

The finding of the trial court as to whether jurors were disqualified, under Rev. St. 1899, § 3790, prescribing what persons shall not serve on juries, will not be disturbed unless manifestly erroneous.—*State v. Jackson* (Mo.) 938.

Where defendant failed to question a juror as to his ability to read or write, the discovery after the trial that he could not read or write or understand the English language is not sufficient ground for setting aside the verdict.—*San Antonio & A. P. Ry. Co. v. Gray* (Tex. Civ. App.) 229.

On a trial of the right of property between a mortgagee and the purchasers at an execution sale, the purchasers held entitled only to the challenges allowed to a single party.—*Watts v. Dubois* (Tex. Civ. App.) 698.

§ 4. Impaneling for trial and oath.
 Failure to swear jury before placing them in charge of officer held not error.—*State v. Armstrong* (Mo.) 961.

JUSTICES OF THE PEACE.**§ 1. Appointment, qualification, and tenure.**

Mandamus does not lie to compel a county judge to accept the bond of a justice, not tendered until after the first Monday in January succeeding his election.—*Barnett v. Hart* (Ky.) 726.

§ 2. Civil jurisdiction and authority.

An action of forcible entry and detainer in justice's court involves only the issue of prior possession; and hence a plea to the jurisdiction on the assumption that the case involves the issue of title should be overruled.—*Benfro v. Harris* (Tex. Civ. App.) 460.

A justice has no jurisdiction of an action for \$170, and to foreclose a mortgage lien on property of the value of more than \$200.—*Smith v. Carroll* (Tex. Civ. App.) 863.

§ 3. Procedure in civil cases.

Under Rev. St. 1895, arts. 1652, 1656, a judgment by a justice, rendered after new trial was granted without notice, held void.—*Smith v. Carroll* (Tex. Civ. App.) 863.

§ 4. Review of proceedings.

Affidavit for appeal from a justice of the peace held not insufficient, under Sand. & H. Dig. § 4438.—*Rust Land & Lumber Co. v. Isom* (Ark.) 434.

JUSTIFICATION.

Of homicide, see "Homicide," § 4.

KENTUCKY.

Lands, see "Public Lands," § 2.

KNOWLEDGE.

By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.
 Effect of ignorance of cause of action on limitation, see "Limitation of Actions," § 2.

LACHES.

In proceedings for probate, see "Wills," § 4.

LANDLORD AND TENANT.

Lease or sale, see "Sales," § 1.
 Railroad leases, see "Railroads," §§ 2, 4.

§ 1. Creation and existence of the relation.

Defendant was not entitled to prove that he had obtained possession of the land from the tenant of plaintiff's lessor.—*Terry v. Terry* (Ky.) 1024.

§ 2. Terms for years.

The fact that a landlord has consented that his tenant may sublet the premises does not render him liable for a breach by the tenant of his contract.—*Purdum v. Brussels* (Ky.) 22.

A lease reserving the right to the lessor to sell and terminate the lease on six months' notice, and providing the lessee shall have the option of buying, held not to give the lessee an unconditional option.—*DeVitt v. Kaufman* (Tex. Civ. App.) 224.

§ 3. Premises, and enjoyment and use thereof.

The question of a landlord's negligence in allowing a stairway to become out of repair, re-

sulting in injury to a tenant, *held* for the jury.—McGinley v. Alliance Trust Co. (Mo.) 153.

In an action by a tenant for injuries caused by a defective railing to a stairway, the question as to whether plaintiff was making proper use of the stairway when hurt *held* to be for the jury.—McGinley v. Alliance Trust Co. (Mo.) 153.

§ 4. Rent and advances.

Under Sand. & H. Dig. § 4795, landlord *held* entitled to credits as against his mortgagee for crop advances, whether the mortgage was security for an account of the tenant or not.—Neal v. Brandon (Ark.) 200.

Act March 21, 1883, authorizing employers' liens, etc., has no application to the relation of landlord and tenant.—Neal v. Brandon (Ark.) 200.

Act April 6, 1885, giving landlords a lien for advancements, applies to landlords strictly as such, and also to landlords as employers.—Neal v. Brandon (Ark.) 200.

A waiver by a landlord of the priority of his lien over a mortgage for crop advances given by his tenant *held* not to inure to the benefit of an assignee of the mortgage.—Neeley v. Phillips (Ark.) 349.

In an action against a tenant to foreclose landlord's lien, joined with an action against a junior mortgagee, an allegation that the mortgagee is asserting title to property subject to the lien is sufficient.—Cardwell v. Masterson (Tex. Civ. App.) 1121.

Under Rev. St. art. 1194, subd. 4, an action against a tenant for rent and foreclosure of lien, and against mortgagees for conversion of property subject to the lien, may be maintained in the county of the tenant's domicile.—Cardwell v. Masterson (Tex. Civ. App.) 1121.

§ 5. Renting on shares.

A contract between a landowner and another for the cultivation of land on shares *held* to create the relation of landlord and tenant.—Neal v. Brandon (Ark.) 200.

Where a crop of cotton is raised on land rented on condition that the landlord shall receive one-half the crop, he is entitled to one-half the cotton seed as well as to one-half the lint.—McBride v. Puckett (Tex. Civ. App.) 242.

Where a landlord levied a distress warrant on cotton raised on his land by his tenant for failure to pay the rent, and the tenant reprieved the cotton, such proceedings did not discharge it of the landlord's lien.—McBride v. Puckett (Tex. Civ. App.) 242.

LANDS.

See "Public Lands."

LAPSE.

Of devise or legacy, see "Wills," § 9.

LARCENY.

See "Receiving Stolen Goods"; "Robbery."

§ 1. Offenses and responsibility therefor.

Evidence in a prosecution for larceny *held* sufficient to show that defendant was a party to the crime.—State v. Koplan (Mo.) 967.

On a prosecution for larceny, evidence *held* sufficient to show that the owner consented to the theft.—McGee v. State (Tex. Cr. App.) 562.

A person induced by a detective to join in taking of property, knowing that detective has the consent of the owner thereto, or reasonably

believing that the consent has been given, *held* not guilty of larceny.—McGee v. State (Tex. Cr. App.) 562.

§ 2. Prosecution and punishment.

Instruction in prosecution for horse theft as to exercising ownership over an estray, and the effect thereof, *held* proper.—Bennett v. State (Ark.) 198, 914.

An instruction in a prosecution for larceny *held* erroneous, because authorizing a conviction if defendant bought the alleged stolen property from a third person without knowledge that such person did not own it.—Ward v. State (Ark.) 926.

An indictment for grand larceny which charges the taking of various articles is not bad in fixing the value thereof in one sum.—State v. Koplan (Mo.) 967.

On a prosecution for the theft of cattle belonging to an unknown owner, it is not necessary to prove that prior to the alleged theft the cattle were known as the property of an unknown owner.—Clements v. State (Tex. Cr. App.) 301.

In a prosecution for horse theft, there was no error in refusing to permit defendant to introduce an indictment filed, charging defendant with receiving the horse, knowing it to have been stolen.—Burns v. State (Tex. Cr. App.) 303.

On a prosecution for larceny, where defendant relied on the owner's consent, an instruction *held* erroneous for failing to instruct in reference to an implied consent.—McGee v. State (Tex. Cr. App.) 562.

Evidence *held* to sustain conviction of theft.—Garza v. State (Tex. Cr. App.) 1098.

Evidence that a calf was branded with the owner's brand after its recovery from defendant, charged to have stolen it, is inadmissible in a prosecution for the theft.—Wallace v. State (Tex. Cr. App.) 1102.

Evidence of a brand on a cow claimed to be the mother of a stolen calf is not admissible in a prosecution for the theft of the calf.—Wallace v. State (Tex. Cr. App.) 1102.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 23.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEGISLATIVE POWER.

See "Municipal Corporations," § 2.

LEGITIMACY.

See "Bastards," § 1.

LIBEL AND SLANDER.

§ 1. Words and acts actionable, and liability therefor.

A false publication that a person is implicated in a robbery and murder, and as "robber number three, who killed the farmer," *held* libelous per se.—Jones v. Murray (Mo.) 961.

A newspaper article, charging that a person is unlawfully received and held a prisoner in the county jail, *held* libelous per se.—Hoone v. Herald News Co. (Tex. Civ. App.) 313.

§ 2. Actions.

Under a plea in mitigation of a libel, *held* error not to permit a witness to contradict the reporter, who prepared the libelous article, as to the information on which the article was based.—*Jones v. Murray* (Mo.) 981.

A plea in mitigation of a libel that the officer furnishing defendant's reporter with the alleged facts submitted the information to the prosecuting attorney, who advised that the evidence warranted the arrest of plaintiff, *held* not supported by the evidence.—*Jones v. Murray* (Mo.) 981.

A plea in mitigation of a libel that the officer who furnished defendant's reporter with the alleged facts knew that plaintiff's reputation was bad *held* not supported by the evidence.—*Jones v. Murray* (Mo.) 981.

The court must instruct that evidence of defendant's good faith in publishing a libel is admissible only in mitigation of exemplary damages.—*Jones v. Murray* (Mo.) 981.

In an action by a sheriff for libel in publishing a charge that a prisoner was illegally received and held in the county jail, the jail being actually in charge of guards, one of whom received the prisoner, the burden is on plaintiff to prove that the libel was aimed at him.—*Boone v. Herald News Co.* (Tex. Civ. App.) 313.

LICENSES.

Conflict between state laws granting licenses and municipal ordinances, see "Municipal Corporations," § 2.

For sale of intoxicating liquors, see "Intoxicating Liquors," § 2.

Injuries to licensees, see "Railroads," § 5.

Mandamus to compel issuance of license, see "Mandamus," § 1.

To insurance companies, see "Insurance," § 1.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.

Liens acquired by particular remedies or proceedings.

See "Garnishment," § 3; "Judgment," § 11.

Particular classes of liens.

See "Mechanics' Liens"; "Railroads," § 3.

Landlord's lien for rent, see "Landlord and Tenant," § 4.

Mortgage, see "Chattel Mortgages," § 3; "Mortgages," § 2.

Of purchaser of land for purchase money on rescission of contract, see "Vendor and Purchaser," § 6.

Pledge, see "Pledges."

Vendor's lien on lands sold, see "Vendor and Purchaser," § 5.

In an action to enforce a lien on land, it was error to extend the lien over the interest of one who was not a defendant to the original petition, though plaintiff, by reply to such person's answer to a cross petition, asserted a lien on such interest; no rejoinder having been filed, and no issue made upon that question.—*Ft. Jefferson Imp. Co. v. Dupoyster* (Ky.) 1048.

A party having an equitable lien on certain property has also an equitable lien on the sum recovered by its legal owner from one wrongfully appropriating such property to his own use.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

The directors of a selling corporation, who will be individually benefited by the performance of an agreement by the purchaser of the corporate property, are, as individuals, entitled to damages for a breach of the agreement, and

such damages constitute an equitable lien analogous to a debt for the purchase price.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 485.

LIFE ESTATES.

See "Curtesy"; "Dower"; "Remainders." Created by deed, see "Deeds," § 2.

A person owning a life interest in land can bring a suit to try title and for partition thereof.—*Skaggs v. Deskin* (Tex. Civ. App.) 793.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Particular actions or proceedings.

For causing death, see "Death," § 2.

For taking appeal, see "Appeal and Error," § 8.

On bond of deputy sheriff collecting taxes, see "Taxation," § 5.

Probate proceedings, see "Wills," § 4.

To set aside municipal assessment, see "Municipal Corporations," § 5.

§ 1. Statutes of limitation.

Under Act March 25, 1889, an action to foreclose a mortgage *held* not barred, though the debt was barred; Act 1887 not applying to existing mortgages.—*Goodman v. Pareira* (Ark.) 147.

Contention that claim of beneficiary in trust deed was barred by three-year limitation *held* without merit.—*Gatens v. Neely* (Ark.) 438.

Ky. St. § 2515, providing that an action upon a contract not in writing signed by a party shall be commenced within five years, applies to an action by a grantor to enforce an undertaking of the grantee to pay a debt of the grantor contained in the deed signed by the grantor alone.—*Botkin v. Middlesborough Town & Land Co.* (Ky.) 747.

§ 2. Computation of period of limitation.

Where a railroad company acquires rights of another company, it became liable for its debts; but it is not liable for tort of vendor until judgment rendered against it.—*Louisville & N. R. Co. v. Biddell* (Ky.) 34.

The deed of a person of unsound mind being void, the 10-year limitation does not apply to an action to set aside such a deed.—*Spicer v. Holbrook* (Ky.) 180.

An action to enforce a vendor's lien *held* barred after the lapse of 15 years from the time the lien debt was created.—*Hemmingway v. Tong* (Ky.) 278.

An action against an abutting owner to enforce a lien for cost of a street improvement being brought within one year after the execution of the work, an amended petition to recover of the city 10 per cent. of the amount was not barred by limitations, though not filed until after five years.—*City of Louisville v. Selvaige* (Ky.) 376.

The filing of petition and issuing of summons against defendant stopped the running of the statute, though defendant was a nonresident; plaintiff city and its attorney being ignorant of that fact.—*Walston v. City of Louisville* (Ky.) 385.

If a contract of compromise was invalid, the payee was never bound, and might have sued for his debt at once, and therefore an action to recover the debt, brought more than 15 years thereafter, is barred by the statute of limitations.—*Price's Adm'x v. Price's Adm'x* (Ky.) 529.

Filing of petition and issuing of summons in an action by the assignee of an insolvent corporation against stockholders to recover a divi-

dead paid under mistake *held* sufficient to stop the running of the statute of limitations in favor of estate of decedent.—*Southern Contract Co.'s Assignee v. Newhouse (Ky.)* 730.

To an action by the assignee of an insolvent corporation against a stockholder to recover money prematurely distributed by the corporation as dividends, the bar of five years as provided by Ky. St. c. 80, art. 3, applies.—*Southern Contract Co.'s Assignee v. Newhouse (Ky.)* 730.

As an action against a devisee to subject estate devised must be brought on the original liability, it is within Ky. St. c. 80, art. 3; and the provision of Ky. St. § 2532, that the period of defendant's absence from the state shall not be computed as a part of the period of limitation, applies.—*Southern Contract Co.'s Assignee v. Newhouse (Ky.)* 730.

Under Ky. St. § 2532, where a debtor, against whom any cause of action mentioned in chapter 80, art. 3, has accrued, obstructs the bringing of an action by absenting himself from the state, the period of his absence is not to be computed as a part of the period of limitation.—*Southern Contract Co.'s Assignee v. Newhouse (Ky.)* 730.

In view of Ky. St. § 2528, where a debtor died before the expiration of the limitation of five years, and no administrator was appointed for one month, and no action could, under the statute, be brought for six months after the appointment, the period of limitation was extended seven months beyond the five years.—*Southern Contract Co.'s Assignee v. Newhouse (Ky.)* 730.

Ky. St. § 2530, limiting actions against heirs or devisees, conjointly with the personal representative, for the debt of the ancestor, to seven years from death, applies only where there has been a judicial settlement and distribution of the estate.—*Southern Contract Co.'s Assignee v. Newhouse (Ky.)* 730.

Under Rev. St. art. 4907, a petition, before amendment, *held* sufficient to arrest the running of the statute of limitations.—*Cox v. Patten (Tex. Civ. App.)* 64.

In a suit for reimbursement by a surety who did not pay the debt until after his principal had become a resident of another state, the absence of the principal from the state of Texas *held* not to suspend the statute of limitations.—*Habermann v. Heidrich (Tex. Civ. App.)* 106.

Where plaintiff was induced to perform a contract by promises fraudulently made by defendant, which he never intended to perform, limitations do not commence against services under such contract until the fraud is discovered.—*West v. Clark (Tex. Civ. App.)* 215.

Limitations as to a right to cancel a deed for fraud do not commence to run until discovery of the fraud.—*Hodges v. Hodges (Tex. Civ. App.)* 239.

Under Rev. St. art. 1177, where a petition was filed within the period of limitations, a delay, at defendant's request, of 52 days before serving the citation, *held* not so unreasonable as to admit the bar of the statute.—*Wigg v. Dooley (Tex. Civ. App.)* 306.

The statute of limitations does not run against a person claiming damages for injuries inflicted by an insolvent corporation until its officers indicate to the claimant an intention to repudiate the trust created by law.—*Scott v. Farmers' & Merchants' Nat. Bank (Tex. Civ. App.)* 485.

A sale by an insolvent street railway corporation of its property to one agreeing to operate the same for five years under a secret agreement that such operation should be for the benefit of the directors individually of the selling corporation is not a notice to a corporation

creditor of a repudiation of the trust imposed by law upon the corporate officers.—*Scott v. Farmers' & Merchants' Nat. Bank (Tex. Civ. App.)* 485.

Where surety on note does not pay it until maker becomes resident in another state, limitations will not be suspended by reason of the latter's absence from the state.—*Habermann v. Heidrich (Tex. Civ. App.)* 795.

Facts *held* to show that certain notes were not barred by the four-year period of limitations.—*Harrington v. Claffin (Tex. Civ. App.)* 898.

§ 3. Acknowledgment, new promise, and part payment.

Payments under a contract of compromise do not take the case out of the statute of limitations, not being made in part payment of the original debt, and not therefore to be regarded as an acknowledgment that it was due.—*Price's Adm'r v. Price's Adm'r (Ky.)* 529.

§ 4. Pleading, evidence, trial, and review.

It was proper to sustain a demurrer in an action for relief from a mistake in a deed, where the action was not brought until after 10 years from the execution of the deed.—*Greene's Adm'r v. Irvine (Ky.)* 278.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Institution of action to enforce a trust and to sell land to pay a debt *held* to create a lis pendens lien on the land which was specifically described in the petition.—*Friedman v. Janssen (Ky.)* 752.

Under Rev. St. 1889, § 7160, a partition judgment is conclusive on persons claiming under a mortgage executed by a party to the suit after the commencement of the suit, but before the rendition of judgment, and they will not be allowed to set up an adverse right in a subsequent suit.—*Becker v. Stroeher (Mo.)* 1083.

LIVE STOCK.

Carriage of, see "Carriers," § 3.
Injuries from operation of railroads, see "Railroads," § 8.

LOAN COMPANIES.

See "Building and Loan Associations."

LOANS.

By bank, see "Banks and Banking," § 1.

LOCAL LAWS.

See "Statutes," § 2.

LOCAL OPTION.

Traffic in intoxicating liquors, see "Intoxicating Liquors," § 1.

LOGS AND LOGGING.

Reservation of growing timber in deed construed.—*Buckwalter v. Hutcherson (Ky.)* 602.

LUMBER.

See "Logs and Logging."

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 3.
Production and use of electricity, see "Electricity."

MAINTENANCE.

See "Champerly and Maintenance."

MALICIOUS PROSECUTION.

See "False Imprisonment."

§ 1. Actions.

In an action for theft, defendants should have been permitted to prove by plaintiff on cross-examination that he had, during the summer before the taking of the tools, committed other depredations of like character.—O'Daniel v. Smith (Ky.) 284.

Defendants should have been permitted to prove by a certain witness that the tools were bought with money realized from farming operations while he was carrying on the farm for the wife and her mother.—O'Daniel v. Smith (Ky.) 284.

The defendant husband, who instituted the prosecution, should have been permitted to show certain other thefts, and to state the information he had received before instituting the prosecution.—O'Daniel v. Smith (Ky.) 284.

It is the duty of the judge to determine the issue and apply the law, where the facts are uncontradicted.—O'Daniel v. Smith (Ky.) 284.

MANDAMUS.

Jurisdiction of particular courts to issue mandamus, see "Courts," § 5.
To compel acceptance of justices' bond, see "Justices of the Peace," § 1.

§ 1. Subjects and purposes of relief.

Municipal and executive officers can be required by mandamus to perform only such duties as are imposed upon them by law.—German Security Bank v. Coulter (Ky.) 425; Louisville City Nat. Bank v. Coulter (Ky.) 427.

The state auditor may be required by mandamus to draw his warrant in favor of a bank for an excess of taxes paid by it into the treasury by reason of a mistake as to the rate of taxation, but not for an excess of taxes paid by reason of an erroneous assessment.—German Security Bank v. Coulter (Ky.) 425; Louisville City Nat. Bank v. Coulter (Ky.) 427.

As plaintiff has not yet applied for liquor license in a proper way, he is not entitled to a mandamus to compel the trustees to grant him a license, though he alleges that they have declared that they will not grant any license.—Riley v. Rowe (Ky.) 999.

Mandamus lies to compel a city treasurer to accept a certain sum tendered in payment of a license tax and to issue a receipt therefor, and to compel the city clerk upon the presentation to him of such receipt to issue a license.—Metropolitan Life Ins. Co. v. Darenkamp (Ky.) 1125.

A mandamus will not issue from the court of criminal appeals to compel the clerk of the court below to enter the sentence in a criminal case on the record.—Jones v. State (Tex. Cr. App.) 559.

An order under Rev. St. art. 1454, consolidating pending causes involving title to realty, considered, and mandamus held not to lie to vacate it.—Halliburton v. Martin (Tex. Civ. App.) 675.

§ 2. Jurisdiction, proceedings, and relief.

Persons occupying street under contract with city held necessary parties to mandamus proceedings to compel removal of obstructions.—Gibbs v. Ashford (Tex. Civ. App.) 858.

MANDATE.

See "Mandamus."

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 24.

MANSLAUGHTER.

See "Homicide," § 2.

MARRIAGE.

See "Bigamy"; "Divorce"; "Husband and Wife."

On a trial for forgery, held proper to permit evidence that defendant, subsequent to his alleged marriage to the woman whose name was forged, claimed to be illegal, introduced another woman as his wife.—Whittle v. State (Tex. Cr. App.) 771.

Where slaves cohabiting together continued to live together as man and wife after their emancipation, their marital status became legal, entitling the wife and her children to property acquired during the existence of such relation.—Waff v. Sessums (Tex. Civ. App.) 855.

MARRIED WOMEN.

See "Husband and Wife."

MARSHALING ASSETS AND SECURITIES.

Of estate assigned for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.

Objection that senior mortgagee of real and personal property should have been compelled to enforce mortgage against the real estate before being allowed to recover against person converting the personalty held untenable.—Parlin & Orendorff Co. v. Moore (Tex. Civ. App.) 798.

MASTER AND SERVANT.

See "Slaves"; "Work and Labor."

§ 1. Services and compensation.

A railroad company held liable for injury resulting from its refusal to admit an injured servant to a hospital under its control, maintained by enforced contributions of its employees.—Illinois Cent. R. Co. v. Gheen (Ky.) 639.

If plaintiff was entitled to admission to the hospital, he was entitled to the skilled surgical treatment and accommodations he would have received there, and also to board and transportation; and, if the company refused to furnish these things, it is liable for the cost thereof.—Illinois Cent. R. Co. v. Gheen (Ky.) 639.

Where plaintiff, instead of employing medical attention, contented himself to accept the services of the local surgeon of the company, the company is not liable for any aggravation of his injury by the failure of that surgeon to give him proper treatment.—Illinois Cent. R. Co. v. Gheen (Ky.) 639.

§ 2. Master's liability for injuries to servant—Nature and extent in general.

Where partners organized as a corporation, a servant of the firm who continued, after

the corporation was organized, to work as before, may look to the partners for damages for injuries thereafter received by him through the gross negligence of the foreman.—*Goodwin v. Smith (Ky.) 179.*

The law imposes no obligation upon the master to furnish a guard to protect the servant from a mob of strikers.—*Lewis' Adm'r v. Taylor Coal Co. (Ky.) 1044.*

Neither Const. § 241, nor Ky. St. § 6, giving a right of action for the death of a person resulting from an injury inflicted "by negligence or wrongful act," authorizes a recovery for the death of a servant resulting from the master's breach of contract to furnish a guard to protect him from an assault by others.—*Lewis' Adm'r v. Taylor Coal Co. (Ky.) 1044.*

§ 3. — Tools, machinery, appliances, and places for work.

The placing of brake beams on railroad cars so low that a man falling was caught thereby and crushed to death *held* not negligence.—*Texas Cent. R. Co. v. Waller (Tex. Civ. App.) 466.*

When cars with coupling appliances so defective or mismatched as to be dangerous to the trainmen are tendered to a railroad company for transportation over its road, the defect being discernible on inspection, it must remedy the defect or refuse to take the cars.—*Southern Pac. Co. v. Winton (Tex. Civ. App.) 477.*

A railroad company cannot shift its duty of inspection, and starting out only such cars as are properly equipped, onto its brakeman, by a rule forbidding them to put cars into a train which are not properly equipped.—*Southern Pac. Co. v. Winton (Tex. Civ. App.) 477.*

It is negligence for a railroad company to start a train over its road containing cars with coupling appliances so mismatched that those on one car may slip past those on the other, letting the cars together, so as to endanger the life of a brakeman while attending to the coupling.—*Southern Pac. Co. v. Winton (Tex. Civ. App.) 477.*

Receiver of electric light company *held* guilty of negligence in permitting rods supporting lamp to become rusted, so that they broke while a trimmer was caring for the lamp.—*Dupree v. Tamborilla (Tex. Civ. App.) 595.*

The fact that a railroad company did not know that a brakeman charged with tending a switch was in need of rest would not relieve it from liability for an accident caused by such brakeman going to sleep and leaving the switch open.—*St. Louis S. W. Ry. Co. v. Kelton (Tex. Civ. App.) 887.*

§ 4. — Methods of work, rules, and orders.

Servants of railroad company in charge of an engine in a yard owed to a car inspector the duty of giving signals of the approach of the engine, and of keeping a lookout.—*Louisville & N. R. Co. v. Lowe (Ky.) 736.*

Evidence considered, and *held* to justify a finding that defendant was negligent in causing the tender to an engine to be pushed back while plaintiff was cleaning the engine cab without giving him notice.—*Galveston, H. & S. A. Ry. Co. v. Quay (Tex. Civ. App.) 219.*

Evidence of the negligence of defendant's foreman, resulting in plaintiff's injury, *held* to support a verdict against the master.—*Missouri, K. & T. Ry. Co. of Texas v. Walden (Tex. Civ. App.) 584.*

Servants in charge of a railroad train *held* to be required to exercise ordinary care to make use of appliances of a train to stop it on seeing another servant on the track.—*St. Louis S. W. Ry. Co. v. Jacobson (Tex. Civ. App.) 1111.*

§ 5. — Warning and instructing servant.

Master was not liable for injury to servant, though it had failed to instruct him how to use a machine, and had assured him there was no danger, where plaintiff had represented that he understood how to operate the machine and the danger was obvious.—*McCormick Harvesting Mach. Co. v. Litter (Ky.) 761.*

Instruction that it was the duty of the master, who puts an inexperienced minor to work more dangerous than that for which he was engaged, to warn him of the danger, *held* proper.—*Waxahachie Cotton Oil Co. v. McLain (Tex. Civ. App.) 226.*

Evidence *held* sufficient to show negligence on the part of a foreman of a railroad company in failing to warn a workman of the danger.—*Texas & P. Ry. Co. v. Utley (Tex. Civ. App.) 311.*

Where a workman, at the request of his foreman, voluntarily assists in replacing a derailed car, the fact that he so went voluntarily does not release the company's foreman from the duty of giving warning as to any hazards.—*Texas & P. Ry. Co. v. Utley (Tex. Civ. App.) 311.*

§ 6. — Fellow servants.

Car inspector and men in charge of engine in railroad yard were not fellow servants, and the master was liable for an injury to the car inspector from the negligence of the men.—*Louisville & N. R. Co. v. Lowe (Ky.) 736.*

A foreman under whom plaintiff worked *held* a vice principal, and not a fellow servant.—*Waxahachie Cotton Oil Co. v. McLain (Tex. Civ. App.) 226.*

A brakeman *held* not the fellow servant of an engineer.—*St. Louis S. W. Ry. Co. v. Kelton (Tex. Civ. App.) 887.*

§ 7. — Risks assumed by servant.

Evidence *held* to show that an employé has assumed the risk.—*Daniels v. Covington & C. El. R. & Transfer & Bridge Co. (Ky.) 187.*

A bridge builder, engaged in repairing a bridge, assumed the risk of the danger necessarily incident to such work.—*Daniels v. Covington & C. El. R. & Transfer & Bridge Co. (Ky.) 187.*

Where plaintiff, a boy about 16 years old, employed as off-bearer from a planing machine, volunteered to oil the machine after he had been warned that it was dangerous, the master is not liable to him for an injury received.—*Floyd v. Kentucky Lumber Co. (Ky.) 501.*

Telephone lineman, charged by employment with duty of inspecting and repairing lines, *held* to thereby assume risk arising from defective cross-arm.—*Roberts v. Missouri & K. Tel. Co. (Mo.) 155.*

Evidence *held* insufficient to show plaintiff in suit for personal injuries to have assumed the risk.—*Connolly v. St. Joseph Press Printing Co. (Mo.) 248.*

Instruction relative to assumption of risk in an action by the representatives of a locomotive engineer against a railroad company for negligently causing decedent's death *held* misleading and not fully stating the law.—*Minnier v. Sedalia, W. & S. W. Ry. Co. (Mo.) 1072.*

Instruction relative to assumption of risk in an action by the representatives of a locomotive engineer against a railway company for negligently causing decedent's death *held* improperly modified.—*Minnier v. Sedalia, W. & S. W. Ry. Co. (Mo.) 1072.*

Evidence in an action by a servant for personal injuries *held* to sustain a judgment in

his favor.—*Waxahachie Cotton Oil Co. v. McLain* (Tex. Civ. App.) 226.

Instruction that, if the servant knows or ought to know how the business is conducted, he assumes the risk, *held* properly refused.—*Waxahachie Cotton Oil Co. v. McLain* (Tex. Civ. App.) 226.

A freight brakeman, ordered by a railroad company to brake on a passenger train having cars with mismatched couplers, *held* not to have assumed the risk of such defective appliances.—*Southern Pac. Co. v. Winton* (Tex. Civ. App.) 477.

A servant, in doing an act resulting in his injury, *held* only to have assumed the apparent or known dangers connected therewith, and not dangers resulting from the negligence of his foreman.—*Missouri, K. & T. Ry. Co. of Texas v. Walden* (Tex. Civ. App.) 584.

In action by railway employé for personal injuries, instruction *held* properly refused, because ignoring certain issue.—*Galveston, H. & S. A. Ry. Co. v. Hitzfelder* (Tex. Civ. App.) 707.

Evidence in an action by a servant for personal injury resulting from a defective appliance *held* to show an assumption of risk.—*Rio Grande & E. P. Ry. Co. v. Lynch* (Tex. Civ. App.) 712.

Evidence *held* not to show that decedent, the conductor in charge of a train, assumed the risk.—*International & G. N. Ry. Co. v. Vinson* (Tex. Civ. App.) 800.

A locomotive engineer's knowledge that his employer sometimes sent out brakemen who needed rest *held* insufficient to charge him with assumption of the risk of a brakeman going to sleep and leaving open a switch which it was his duty to close.—*St. Louis S. W. Ry. Co. v. Kelton* (Tex. Civ. App.) 887.

§ 8. — Contributory negligence of servant.

A servant has no right to look to the master for damages for negligence, if by the exercise of ordinary care he could have avoided injury.—*Daniels v. Covington & C. El. R. & Transfer & Bridge Co.* (Ky.) 187.

Evidence *held* to show a servant injured by his own negligence.—*Tradewater Coal Co. v. Head* (Ky.) 721.

In an action by a lineman against a telephone company for injuries received by reason of a cross-arm breaking, evidence *held* to show that plaintiff was guilty of contributory negligence as a matter of law.—*Roberts v. Missouri & K. Tel. Co.* (Mo.) 155.

Evidence *held* insufficient to show plaintiff guilty of contributory negligence.—*Connolly v. St. Joseph Press Printing Co.* (Mo.) 268.

A servant suddenly called to perform a service in an unusual manner *held* not chargeable with negligence in not having ascertained what dangers were incident thereto.—*Waxahachie Cotton Oil Co. v. McLain* (Tex. Civ. App.) 226.

Employer *held* not liable where plaintiff was injured by his own negligence or that of a fellow servant.—*Galveston, H. & S. A. Ry. Co. v. Butchek* (Tex. Civ. App.) 335.

Recoupling a train having defective couplers, which has been temporarily separated en route, is not a violation of a rule against placing cars with defective couplers in a train, or contributory negligence on the part of a brakeman killed thereby.—*Southern Pac. Co. v. Winton* (Tex. Civ. App.) 477.

Trimmer of electric light company, injured by falling, *held* not guilty of contributory negligence.—*Dupree v. Tamborilla* (Tex. Civ. App.) 595.

Trimmer of electric light company *held* not an "inspector" and accordingly entitled to recover for injuries due to defective rods on electric light poles.—*Dupree v. Tamborilla* (Tex. Civ. App.) 595.

Evidence *held* not to show as a matter of law that decedent, a conductor in charge of a train, was guilty of contributory negligence.—*International & G. N. Ry. Co. v. Vinson* (Tex. Civ. App.) 800.

§ 9. — Actions.

Jury *held* authorized to conclude there was negligence, where the master furnished an iron or steel fulcrum to raise a heavy engine, and the foreman, contrary to his own judgment, used a wooden one.—*Louisville & N. R. Co. v. Richardson* (Ky.) 631.

Proof which authorized the jury to conclude that a wooden fulcrum either split or slipped *held* sufficient to sustain an averment that it was "displaced," and therefore there was no variance.—*Louisville & N. R. Co. v. Richardson* (Ky.) 631.

Where plaintiff, while employed in defendant's machine shops, was injured by the displacement of a wooden fulcrum, the allegation in the petition that it was gross negligence to use a wooden fulcrum was sufficient.—*Louisville & N. R. Co. v. Richardson* (Ky.) 631.

An employé has a right to rely on the judgment of his master as to safety of appliance furnished.—*Louisville & N. R. Co. v. Richardson* (Ky.) 631.

Whether car inspector was guilty of contributory negligence and whether, notwithstanding his negligence, those in charge of engine, after they perceived his danger, or should have perceived it, might not have avoided injury to him, *held* for the jury.—*Louisville & N. R. Co. v. Lowe* (Ky.) 736.

In an action by a lineman against a telephone company for injuries received by reason of a cross-arm breaking, evidence *held* to show that plaintiff assumed the risk.—*Roberts v. Missouri & K. Tel. Co.* (Mo.) 155.

Evidence is admissible, in an action by a servant for injuries caused by defective appliance, as to the condition of the appliance three weeks before the accident.—*Pauck v. St. Louis Dressed Beef & Provision Co.* (Mo.) 1070.

Instruction in an action against a railway company for negligently causing an employé's death *held* erroneous because without foundation in the evidence.—*Minnier v. Sedalia, W. & S. W. Ry. Co.* (Mo.) 1072.

Evidence *held* not to show that the use of a standard-gauge car mounted on narrow-gauge trucks was negligent.—*Minnier v. Sedalia, W. & S. W. Ry. Co.* (Mo.) 1072.

Where an inexperienced boy of 10 years, employed in defendant's factory, was injured by an unprotected pulley, a charge that punitive damages might be awarded if defendant was found guilty of gross negligence, or acted in reckless disregard of the safety of the child, was not error.—*American Lead Pencil Co. v. Davis* (Tenn.) 1129.

Where plaintiff was injured by being caught in an unprotected pulley near where he was required to work in defendant's factory, it was not error to overrule a general objection to testimony as to the location and condition of the machines and pulley by one who followed plaintiff at the work, especially where the next witness testified that there had been no change.—*American Lead Pencil Co. v. Davis* (Tenn.) 1129.

Evidence of defendant's engineers in an action against a railroad by an engineer, injured in a collision, that they usually commence to slow up at a certain place, *held* not admissible

to show where plaintiff should have commenced to slow up.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

Evidence in an action by a railroad engineer for injuries in a collision *held* to sustain a judgment for plaintiff.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

A requested instruction in an action by a servant for injuries, requiring a verdict for defendant unless all of certain specified negligent acts should be established, *held* properly refused.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

An instruction, in an action by a servant for injuries, that he would not be debarred from recovery for the violation of a certain rule, if he acted as a reasonably prudent person would have done, *held* not erroneous under the evidence.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

Whether plaintiff was guilty of contributory negligence *held* for the jury.—*Galveston, H. & S. A. Ry. Co. v. Quay* (Tex. Civ. App.) 219.

In an action for injury to an employé *held*, that it was not error to refuse to charge that a failure of plaintiff to obey the rules of the company was negligence per se.—*San Antonio & A. P. Ry. Co. v. Connell* (Tex. Civ. App.) 246.

Certain requests to charge, not relating to the danger or negligence on which the cause of action was predicated, *held* properly refused.—*Texas & P. Ry. Co. v. Utley* (Tex. Civ. App.) 311.

Where a workman was injured by the lurching of a car, caused by the giving way of a jack screw which was in view of the foreman, who gave no warning, the question of the negligence of the foreman was for the jury.—*Texas & P. Ry. Co. v. Utley* (Tex. Civ. App.) 311.

In an action by an employé against a railroad company to recover for injuries sustained by falling into a pit in the roundhouse, evidence *held* not sufficient to justify a finding that the plank furnished to serve as a bridge across such pit was insufficient or defective.—*Galveston, H. & S. A. Ry. Co. v. Butchek* (Tex. Civ. App.) 335.

Instruction *held* to be outside the case made by the pleadings, and erroneous.—*W. G. Ragley Lumber Co. v. Goldsmith* (Tex. Civ. App.) 561.

In action by railway employé for personal injuries, complaint *held* to sufficiently show the nature of the injuries.—*Galveston, H. & S. A. Ry. Co. v. Hitzfelder* (Tex. Civ. App.) 707.

Requested instruction *held* properly refused, as preventing a recovery for the conductor's failure to signal to lower the train's speed, though his doing so would not have prevented the accident.—*International & G. N. Ry. Co. v. Vinson* (Tex. Civ. App.) 800.

In an action for injury received by locomotive engineer in a collision caused by a brakeman going to sleep and leaving a switch open, testimony of a witness that she saw the brakeman just before he went out, and that he looked bad and worried, and seemed unable to walk, was admissible to show his condition.—*St. Louis S. W. Ry. Co. v. Kelton* (Tex. Civ. App.) 887.

In an action for injuries received by an engineer in a collision caused by a brakeman going to sleep and leaving a switch open, evidence that the train dispatcher was requested to allow the latter to lay off and rest *held* admissible to charge the railroad company with knowledge of the brakeman's condition.—*St. Louis S. W. Ry. Co. v. Kelton* (Tex. Civ. App.) 887.

Evidence *held* to justify the instruction of a verdict for defendant in an action for the death of a switchman.—*Matthews v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 902.

An instruction requiring railroad engine men to use ordinary care to so use the apparatus and equipment as to avoid striking an employé rightfully on the track *held* not an instruction requiring the use of ordinary care to stop the train from the time the employé is first seen.—*St. Louis S. W. Ry. Co. v. Jacobson* (Tex. Civ. App.) 1111.

An instruction in an action against a railroad company for the death of a servant *held* not open to the objection that it authorized a recovery, even though the deceased could have saved himself by the use of ordinary care.—*St. Louis S. W. Ry. Co. v. Jacobson* (Tex. Civ. App.) 1111.

An instruction in an action against a railroad company for the death of a servant, authorizing a recovery if deceased was put in a position of peril and so frightened that he could not act with precaution and judgment, is warranted by an issue as to contributory negligence.—*St. Louis S. W. Ry. Co. v. Jacobson* (Tex. Civ. App.) 1111.

§ 10. Liabilities for injuries to third persons.

A jury cannot assess punitive damages for the tort of a servant, unless they find that the wrong was in the line of the servant's duty and was willful, wanton, or malicious.—*St. Louis, I. M. & S. Ry. Co. v. Wilson* (Ark.) 661.

Punitive damages may be awarded against the master, whether a natural person or a corporation, for the gross negligence of the servant in the line of his employment.—*Smith's Adm'x v. Middleton* (Ky.) 388.

Where it was sought to charge the master with the servant's negligence, evidence that the servant was a careful man was not admissible for defendant; no attempt having been made by plaintiff to prove that the servant was careless.—*Smith's Adm'x v. Middleton* (Ky.) 388.

The act of a drug clerk in selling morphine for calomel *held* evidence of gross negligence, entitling plaintiff to an instruction defining that degree of negligence, and authorizing punitive damages against the employer for a death caused thereby.—*Smith's Adm'x v. Middleton* (Ky.) 388.

A railroad company is liable for the negligence of employés operating its engines, though it has exercised due care in appointing them.—*St. Louis & S. W. R. Co. of Texas v. Miller* (Tex. Civ. App.) 139.

The proprietor of an eating house is not responsible for the shooting by its agent of a patron, where the agent was not acting in any matter relating to his duties.—*Lytle v. Crescent News & Hotel Co.* (Tex. Civ. App.) 240.

MASTERS IN CHANCERY.

See "Equity," § 1.

MATERIALITY.

Of evidence in criminal prosecutions, see "Criminal Law," § 9.

MEASURE OF DAMAGES.

See "Damages," § 2.

MECHANICS' LIENS.

§ 1. Nature, grounds, and subject-matter in general.

Ky. St. § 2463, giving to a material man a lien, *held* constitutional, though it requires the owner to know at his peril, before settling with the contractor, that he has paid for all material purchased.—Hodges v. Arvidson (Ky.) 601.

§ 2. Right to lien.

Under Ky. St. § 2467, where the owner owed the principal contractor when the subcontractor's notice for lien was served, but afterwards resumed possession of the property because of the contractor's delay, and used the amount he owed the contractor in finishing the work, the subcontractor had no lien.—Watts v. Metcalf (Ky.) 824.

MEDICINES.

See "Druggists."

MEETINGS.

School district meetings, see "Schools and School Districts." § 3.

MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 3.

MINORS.

See "Infants."

MISREPRESENTATION.

See "Fraud."

MISSOURI.

Jurisdiction of particular courts, see "Courts," § 5.

MISTAKE.

Ground for reformation of instrument, see "Reformation of Instruments," § 1.
In making payment, see "Payment," § 2.

MOBS.

Duty of master to protect servant from mob, see "Master and Servant," § 2.

MONEY PAID.

In gaming transaction, see "Gaming," § 1.
Recovery from principal of money paid to agent, see "Principal and Agent," § 3.

Purchaser of goods ordered shipped in car, not iced, *held* not entitled to reimbursement from seller on paying railroad company's charges for icing car.—Earl v. Westfall Commission Co. (Ark.) 148.

MONEY RECEIVED.

Recovery of payment in general, see "Payment," § 2.
Recovery of price paid for land, see "Vendor and Purchaser," § 6.
Recovery of tax paid, see "Taxation," § 4.

MONOPOLIES.

§ 1. Trusts and other combinations in restraint of trade.

Ky. St. § 3915, providing for the punishment of any person who shall combine with others

to raise the price of any article, *held* not in violation of Const. § 198, relating to unlawful combinations.—Commonwealth v. Bavarian Brewing Co. (Ky.) 1016.

A combination of brewers to raise the price of beer to the extent of the amount of the war tax thereon *held* a violation of Ky. St. § 3915.—Commonwealth v. Bavarian Brewing Co. (Ky.) 1016.

MONTH.

Meaning of term as applied to sentence for crime, see "Criminal Law," § 30.

MORTGAGES.

Duty of mortgagee to enforce claim against mortgaged property, see "Marshaling Assets and Securities."

In fraud of creditors, see "Fraudulent Conveyances," § 1.

Of personal property, see "Chattel Mortgages."

Of railroads, see "Railroads," § 3.

Parol or extrinsic evidence, see "Evidence," § 10.

Priority between judgment and mortgage lien, see "Judgment," § 11.

Priority between mortgage and landlord's lien, see "Landlord and Tenant," § 4.

Subrogation to rights of mortgagee, see "Subrogation."

§ 1. Requisites and validity.

Evidence in an action to foreclose a trust deed *held* insufficient to show that the grantor was insane, at the time of the execution thereof, to the extent of rendering him incompetent to transact business.—Seawel v. Dirst (Ark.) 1058.

Where the grantee in a deed agreed by separate writing to convey to another upon his payment of certain money, the deed constituted a mortgage, and the grantee held the legal title as trustee for such person.—Spicer v. Holbrook (Ky.) 180.

Evidence *held* insufficient to authorize an injunction restraining a sale of real estate under a trust deed.—Fry v. Piersol (Mo.) 171.

Where a son without consideration conveys land to his father, who, to secure a debt of the son, conveys to the creditor, who executes a contract to reconvey on payment of the debt, the transaction is a mortgage.—Schultze v. Schultze (Tex. Civ. App.) 56.

A deed, though absolute in form, may be shown by parol evidence to have been intended as a mortgage.—Lehman v. Chatham Machinery Co. (Tex. Civ. App.) 796.

The notary taking an acknowledgment may rebut the testimony of the grantor's wife that she did not understand the purport of the instrument.—Harrington v. Claflin (Tex. Civ. App.) 898.

§ 2. Construction and operation.

Where a deed recited that the grantee assumed a mortgage executed to him by the grantor, one to whom he subsequently executed a mortgage on the property was charged with notice that the mortgage was executed to secure certain coupon bonds, which were still outstanding.—Farmers' & Drivers' Bank v. German Ins. Bank (Ky.) 280.

Priorities between creditors as to the right to the security of a deed of trust claimed by each of them as collateral determined.—Southern Commercial Sav. Bank v. Slattry's Adm'r (Mo.) 1066.

A lien for attorney's fees reserved in a purchase money note secured by trust deed cannot be asserted against subsequent purchasers, where the deed did not refer to the provision in the note as to attorney fees, and such pur-

chasers did not otherwise have notice of the lien.—*Hall v. Read* (Tex. Civ. App.) 809.

§ 3. Assignment of mortgage or debt.

A recital in nonnegotiable coupon bonds executed to a title company that they were secured by a deed of trust *held* not to indicate a purpose on the obligor's part that the bonds should be sold to raise money for her use.—*Fidelity Trust & Safety Vault Co. v. Carr* (Ky.) 990; *Louisville Banking Co. v. Same, Id.*; *Murray v. Same, Id.*; *Carr v. Ross, Id.*

The fact that the agent of the assignee of bonds, prior to their purchase, made inquiry of one whom the obligor had employed as her agent in improving the mortgaged property as to her solvency, was not notice to her of the subsequent sale of the bonds; her agent having no authority to bind her as to that matter.—*Fidelity Trust & Safety Vault Co. v. Carr* (Ky.) 990; *Louisville Banking Co. v. Same, Id.*; *Murray v. Same, Id.*; *Carr v. Ross, Id.*

The mortgagor not being estopped to plead payment, those who claim under her are in an equally good position.—*Fidelity Trust & Safety Vault Co. v. Carr* (Ky.) 990; *Louisville Banking Co. v. Same, Id.*; *Murray v. Same, Id.*; *Carr v. Ross, Id.*

The mortgagor's employment of the title company to examine her title was not notice to her of the assignment by that company of the bonds which she subsequently executed to it.—*Fidelity Trust & Safety Vault Co. v. Carr* (Ky.) 990; *Louisville Banking Co. v. Same, Id.*; *Murray v. Same, Id.*; *Carr v. Ross, Id.*

Where the purchasers of property on which there was a mortgage paid the purchase money to a title company to which the mortgage bonds were payable, and that company retained a sufficient amount to extinguish the bonds, there was a payment of the bonds; the mortgagor having no notice that they had been assigned.—*Fidelity Trust & Safety Vault Co. v. Carr* (Ky.) 990; *Louisville Banking Co. v. Same, Id.*; *Murray v. Same, Id.*; *Carr v. Ross, Id.*

§ 4. Foreclosure by exercise of power of sale.

The court cannot determine, upon exceptions to a report of sale, that a deed purporting to convey the absolute title is but a mortgage; no pleading filed attacking the genuineness of the transactions.—*Hill v. Pettit* (Ky.) 190.

Exceptions to a commissioner's report of sale should have been sustained, where the report showed that the land was sold as an entirety, without showing that it was first offered in separate parcels.—*Hill v. Pettit* (Ky.) 190.

Acts 1889, p. 143, *held* not re-enacted by Rev. St. 1895, so as to require service on maker of trust deed of notice of a sale under the deed.—*Fischer v. Simon* (Tex. Sup.) 447.

Under Sayles' Ann. Civ. St. art. 2369, the statute as to judicial sales in force at the time when the article was enacted *held* to prescribe the method of giving notice of sale under a trust deed.—*Swain v. Mitchell* (Tex. Civ. App.) 61.

Under the provisions of a trust deed, a recital in the deed executed by the trustee thereunder as to the giving of notice *held* prima facie evidence that the law as to notice was complied with.—*Swain v. Mitchell* (Tex. Civ. App.) 61.

Under the provisions of a deed of trust to secure a note, a recital in the deed executed thereunder by the trustee that the request to sell was made by the holder of the note *held* prima facie true.—*Swain v. Mitchell* (Tex. Civ. App.) 61.

Where a trust deed to a guardian of certain minor heirs empowered him to sell, such pow-

er did not pass to his successor as guardian.—*Gillaspie v. Murray* (Tex. Civ. App.) 252.

Power to sell under a trust deed *held* not revoked by death of the grantor, but exercisable after the expiration of four years from his death.—*Gillaspie v. Murray* (Tex. Civ. App.) 252.

The notice of sales under deeds of trust required by Laws 1889, p. 143, as carried forward in Rev. St. art. 2369, is the same as was required in judicial sales at the time it was passed, and not as required by the law of judicial sales as amended and carried forward in article 2366.—*Marston v. Yaites* (Tex. Civ. App.) 867.

It is not necessary to give written notice to the debtor on a sale of real estate under a trust deed.—*Georgi v. Juergen* (Tex. Civ. App.) 873.

§ 5. Foreclosure by action.

Where there was a sale of farm land and also of town lots, and it was necessary to set aside the sale of the farm land because it was not offered in separate parcels, the sale of the town lots must also be set aside.—*Hill v. Pettit* (Ky.) 190.

MOTIONS.

Continuance in civil actions, see "Continuance." New trial in criminal prosecutions, see "Criminal Law," § 24.

Opening or setting aside default judgment, see "Judgment," § 2.

Presentation of objections for review, see "Appeal and Error," §§ 4-6.

Relating to pleadings, see "Pleading," § 6.

Striking out evidence, see "Criminal Law," §§ 15-23.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," §§ 1-4; "Towns."

Documentary evidence of city ordinances, see "Evidence," § 9.

Mandamus, see "Mandamus," § 1.

Municipal licenses to insurance companies, see "Insurance," § 1.

Regulation of railroads, see "Railroads," §§ 4-9.

Street railroads, see "Street Railroads."

Water supply, see "Waters and Water Courses," § 3.

§ 1. Governmental powers and functions in general.

The acts of a municipal body under power vested in it are conclusive on the courts, unless they are so oppressive as to indicate an attempted abuse of the power.—*Heman v. Schulte* (Mo.) 163.

§ 2. Legislative control of municipal acts, rights, and liabilities.

A municipal ordinance, prohibiting pool selling on horse races and punishing any saloon keeper permitting pool selling on his premises, is void, as in conflict with a state law licensing the selling of pools on horse races.—*Ex parte Ogden* (Tex. Cr. App.) 1100.

§ 3. Proceedings of council or other governing body.

Ordinances levying taxes are to be construed most strongly against the government and in favor of a citizen, and their provisions are not to be extended by implication beyond the clear import of the language used.—*Metropolitan Life Ins. Co. v. Darenkamp* (Ky.) 1125.

Every clause or word of an ordinance should be presumed to have been intended to have some force and effect.—*Metropolitan Life Ins. Co. v. Darenkamp* (Ky.) 1125.

§ 4. Officers, agents, and employes.

The office of city engineer of St. Joseph was not abolished by Laws 1901, p. 60, repealing Rev. St. 1899, § 5537, leaving sections 5541, 5603, 5604, and 5686 unchanged; and an appointment by the mayor under an ordinance adopted pursuant to section 5506, and Laws 1901, p. 60, after Laws 1901, p. 74, was pronounced unconstitutional, is valid.—*Sales v. Barber Asphalt Pav. Co. (Mo.) 979.*

Where the term of an appointive officer is fixed by law, and he is given no right to hold over until his successor is appointed, the fact that it has been the custom of his predecessor to so hold over and that inconvenience would result from the office being vacant is no defense to a proceeding by the state in the nature of quo warranto.—*State ex rel. Crow v. Lund (Mo.) 1062.*

Const. art. 14, § 5, relating to tenure of office, construed, and *held* to refer, in mentioning a certain class of provisions, to those contained in legislative enactments.—*State ex rel. Crow v. Lund (Mo.) 1062.*

Const. art. 14, § 5, relating to tenure of office, *held* to include municipal officers.—*State ex rel. Crow v. Lund (Mo.) 1062.*

Under Kansas City Charter, art. 4, § 14, and Const. art. 14, § 5, the right of the city comptroller to the office ceased at the expiration of two years from his appointment, even though his successor had not been appointed.—*State ex rel. Crow v. Lund (Mo.) 1062.*

Under Sp. Laws 1897, p. 54, constituting Houston city charter, mayor *held* not authorized to fill vacancy in position of health officer by appointment without concurrence of board of aldermen, though aldermen are not in session.—*Brumby v. Boyd (Tex. Civ. App.) 874.*

Fact that mayor and aldermen may not agree on the appointee for vacant position of health officer of Houston *held*, under Sp. Laws 1897, p. 54, not to authorize mayor to make individual appointment.—*Brumby v. Boyd (Tex. Civ. App.) 874.*

Board of aldermen *held*, under Sp. Laws 1897, p. 54, not to have power to fill vacancy in position of health officer of Houston without concurrence of mayor.—*Brumby v. Boyd (Tex. Civ. App.) 874.*

The motion by a board of aldermen without the mayor's concurrence, requesting a health inspector to discharge the duties and receive the compensation of health officer, is virtually an appointment to the position of health officer, and violates the constitution, prohibiting one person holding two offices.—*Brumby v. Boyd (Tex. Civ. App.) 874.*

§ 5. Public improvements.

A property owner joining in the petition of ten asking the organization of a park improvement district, or who is one of the majority petitioning for an assessment for such improvement, is estopped from questioning the organization of the district or the validity of the assessment.—*Matthews v. Kimball (Ark.) 651.*

The inclusion of real estate in an improvement district by city ordinance is *prima facie* evidence that the property will be benefited by the improvement for which the district is created, and an assessment thereof will not be set aside for want of benefit, in the absence of evidence to establish such fact.—*Matthews v. Kimball (Ark.) 651.*

A city or town authorized by Sand. & H. Dig. § 5321, to assess real property for municipal improvements, may include the whole area of the city in one improvement district.—*Matthews v. Kimball (Ark.) 651.*

Const. art. 19, § 27, does not limit the power of a city, in making special assessments for

park purposes, to the property which actually touches the park grounds.—*Matthews v. Kimball (Ark.) 651.*

Sand. & H. Dig. § 5321, authorizes a city to make a special assessment for park improvements.—*Matthews v. Kimball (Ark.) 651.*

An action seeking a new apportionment for the cost of a street improvement is barred after five years from the time the first apportionment was made.—*Gleason's Adm'r v. Peter & Bingham Stone Co. (Ky.) 16.*

Chancellor's finding that street assessment did not amount to spoliation *held* not to be disturbed under evidence.—*Henning v. Stengel (Ky.) 41; Fishback v. Mehler, Id.; Clark v. Bitzer, Id.*

It will be presumed, in the absence of proof that city officers did their duty under Ky. St. § 2829, relating to street assessments.—*Henning v. Stengel (Ky.) 41; Fishback v. Mehler, Id.; Clark v. Bitzer, Id.*

Where no sidewalk had ever been constructed, and there was not sufficient space belonging to the city to allow such construction, the curbing was a part of the street, and should be apportioned to the number of square feet owned by the lot owners in the fourth of a square contiguous to the improvement, and not according to the front feet.—*Marshall v. Barber Asphalt Paving Co. (Ky.) 182.*

A judgment against original defendants for amount of improvement warrant having been reversed on the ground that they were liable only for 90 per cent. thereof, the city was liable for interest on the remaining 10 per cent. only from the reapportionment, or from the filing of amended petition against the city to recover that amount.—*City of Louisville v. Selva (Ky.) 376.*

Under Ky. St. § 2885, in the original construction of a street, the cost of curbing is required to be apportioned to the front feet, though there was no sufficient space belonging to the city to permit a sidewalk.—*Marshall v. Barber Asphalt Paving Co. (Ky.) 734.*

In an action on a special tax bill issued for the construction of a sewer, it is no defense that defendant's lot could not be benefited by the sewer.—*Heman v. Schulte (Mo.) 163.*

Const. art. 2, § 20, prohibiting the taking of private property without compensation, *held* intended to regulate the right of eminent domain, and not to refer to special assessments for local improvements.—*Heman v. Schulte (Mo.) 163.*

§ 6. Police power and regulations.

A city ordinance requiring coal to be weighed on city scales, and the payment of 10 cents per load therefor, *held* not so unreasonable and oppressive as to be invalid.—*Wills v. City of Ft. Smith (Ark.) 922.*

A city ordinance requiring coal to be weighed on city scales, and the payment of 10 cents per load therefor, *held* not invalid under Sand. & H. Dig. § 5132, as passed for the purpose of raising revenue.—*Wills v. City of Ft. Smith (Ark.) 922.*

A city ordinance requiring coal to be weighed on city scales, and the payment of 10 cents per load therefor, applies only to wagon loads, and not to sales of small quantities, as a bucket or wheelbarrow of coal.—*Wills v. City of Ft. Smith (Ark.) 922.*

Pool selling on horse races being recognized as a legal occupation by Acts 25th Leg. (Sp. Sess.) p. 51, subd. 18, and by Beaumont City Charter, § 71, such city *held* to have no right to prohibit such pool selling.—*Ex parte Powell (Tex. Cr. App.) 298.*

§ 7. Torts.

The court properly instructed that, if plaintiff's injuries were caused by a hole in the street, which had existed long enough to enable the city to know of its existence, she was entitled to recover.—*City of Covington v. Huber* (Ky.) 619.

A petition for injuries sustained through a defective sidewalk *held* not to state a cause of action against the abutting property owner.—*Beck v. Ferd Heim Brewing Co. (Mo.)* 928.

In action against city for injuries sustained by stepping into a hole near a sidewalk, *held* not necessary that plaintiff should show title of the land in the city.—*Still v. City of Houston* (Tex. Civ. App.) 76.

Provision of a city charter limiting city's liability for injuries from defective street to cases where it had continued 10 days after notice *held* not a protection to the city under facts of the case.—*Still v. City of Houston* (Tex. Civ. App.) 76.

In action against a city for injuries from stepping into a hole beside a sidewalk, evidence *held* sufficient to authorize submission to jury of the question whether the city had assumed ownership and control of the property where the street was situated.—*Still v. City of Houston* (Tex. Civ. App.) 76.

§ 8. Fiscal management, public debt, securities, and taxation.

Section 134 of the charter of the city of Dallas *held* not to limit the power conferred by sections 118 and 185 to tax street railway franchises to the manner in which such franchises are taxed by the state, or to restrict such power in any way.—*City of Dallas v. Dallas Consol. Electric St. Ry. Co. (Tex. Sup.)* 835.

City ordinances imposing annual franchise tax upon a street railway company as a condition for the granting of its city franchises *held* not to take away the city's right to improve an ad valorem tax upon such franchises as authorized by charter.—*City of Dallas v. Dallas Consol. Electric St. Ry. Co. (Tex. Sup.)* 835.

MURDER.

See "Homicide," § 1.

MUTUAL BENEFIT SOCIETIES.

See "Beneficial Associations."

NAMES.

Of corporations, see "Corporations," § 2.
Variance as to names in criminal prosecution, see "Indictment and Information," § 5.

NATIONAL BANKS.

See "Banks and Banking," § 2.

NAVIGABLE WATERS.

See "Ferries"; "Waters and Water Courses."

NEGLIGENCE.

Assignability of cause of action for negligence, see "Assignments," § 1.
Causing death, see "Death," § 2.
Measure of damages, see "Damages," § 2.

By particular classes of parties.

See "Carriers," §§ 2, 4-7; "Municipal Corporations," § 7.
Administrators, see "Executors and Administrators," § 3.
Employers, see "Master and Servant," §§ 2-10.

Railroad companies, see "Railroads," §§ 4-8.
Telegraph or telephone companies, see "Telegraphs and Telephones," § 2.

Condition or use of particular species of property, works, or machinery.

See "Bridges," § 1; "Electricity"; "Railroads," §§ 1, 4-9; "Street Railroads," § 1.

Demised premises, see "Landlord and Tenant," § 5.

Contributory negligence.

Of passenger, see "Carriers," §§ 4-7.

Of person injured by operation of railroad, see "Railroads," § 5.

Of servant, see "Master and Servant," § 8.

§ 1. Acts or omissions constituting negligence.

Gross negligence was properly defined in an instruction as the failure to exercise slight care.—*Chesapeake & O. Ry. Co. v. Dodge* (Ky.) 606.

Definition of negligence as "the failing to exercise that degree of care which persons of ordinary prudence would thus use under the same or similar circumstances" was correct.—*Milligan v. Texas & N. O. R. Co. (Tex. Civ. App.)* 896.

§ 2. Proximate cause of injury.

The court properly instructed that, though plaintiff may have been pushed into hot water running in the gutter by a companion, that fact constituted no defense, as the companion's negligence, if any, could not be imputed to plaintiff as contributory negligence.—*Whitman McNamara Tobacco Co. v. Wurm* (Ky.) 609.

§ 3. Contributory negligence.

The rule that a person having charge of a dangerous instrumentality must avoid an injury to another, if possible, on the discovery of the danger to the latter, applies, even though the contributory negligence of the person injured continues up to the moment of the accident.—*St. Louis S. W. Ry. Co. v. Jacobson* (Tex. Civ. App.) 1111.

§ 4. Actions.

The question of defendant's negligence in discharging hot water into a gutter, whereby plaintiff, a boy of five years old, was scalded, was properly submitted to the jury.—*Whitman McNamara Tobacco Co. v. Wurm* (Ky.) 609.

Where, in an action against a railroad company for injury resulting from negligence, it is not clearly established that a fact essential to plaintiff's recovery has not been proven, or that one which is a complete defense is shown, the court should not direct a verdict for defendant.—*Southern Pac. Co. v. Winton* (Tex. Civ. App.) 477.

The rule as to the duty imposed on the person in charge of a dangerous instrumentality, on the discovery of the danger to a person guilty of contributory negligence, may be stated in an instruction as to contributory negligence.—*St. Louis S. W. Ry. Co. v. Jacobson* (Tex. Civ. App.) 1111.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 1.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 24.

Necessity of motion for purpose of review, see "Appeal and Error," § 6.

Opening or vacating judgment, see "Judgment," § 5.

§ 1. Grounds.

Refusal of application for a new trial on the ground of newly-discovered evidence *held* improper.—*Gulf, C. & S. F. Ry. Co. v. Burroughs* (Tex. Civ. App.) 83.

Where defendants discovered during trial that certain expected evidence could not be obtained, but failed to ask for a continuance, they could not, after verdict, assign the lack of such evidence as grounds for a new trial.—*Bridges v. Williams* (Tex. Civ. App.) 120.

Where it appears from the affidavits in support of a motion for new trial that the evidence claimed to be newly discovered, and for which the new trial is asked, either was or should have been known before the trial, and no diligence is shown to excuse its absence, the motion should be denied.—*McBride v. Puckett* (Tex. Civ. App.) 242.

Books which would only assist the letters of their keeper, read on the trial, *held* to be cumulative evidence, and therefore not ground for new trial.—*Bridges v. Williams* (Tex. Civ. App.) 484.

A showing as to the reason that an attorney failed to appear in an action in which judgment was rendered against his client *held* insufficient to authorize grant of a new trial.—*Cromer v. Sgitovich* (Tex. Civ. App.) 882.

NONRESIDENCE.

Effect on limitation, see "Limitation of Actions," § 2.

NONSUIT.

Before trial, see "Dismissal and Nonsuit."

NOTES.

Bank notes, see "Banks and Banking," § 1.
Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings.

See "Lis Pendens"; "Trial," § 1.
Condemnation proceedings, see "Eminent Domain," § 2.
Defects in bridge, see "Bridges," § 1.
Defects in streets, see "Municipal Corporations," § 7.
Mortgage, see "Mortgages," § 2.
Sale on foreclosure of mortgage, see "Mortgages," § 4.
Taking depositions, see "Depositions."

To particular classes of parties.

See "Corporations," § 5.
Attorneys, see "Attorney and Client," § 1.
Banks, see "Banks and Banking," § 1.
Guarantors, see "Guaranty," § 1.
Purchaser, see "Vendor and Purchaser," § 4.
Purchaser at execution sale, see "Execution," § 3.

NOVATION.

A third person, who assumes an account for purchase money of personal property due from the purchaser to the seller, is liable thereon in the same manner and to the same extent as the original purchaser.—*Schuwirth v. Thumma* (Tex. Civ. App.) 691.

NUISANCE.**§ 1. Private nuisances.**

The erection of a private stable near a church will not be enjoined as a nuisance.—*Albany Christian Church v. Wilborn* (Ky.) 285.

A person operating a cotton gin, which, in connection with other gins, constitutes a nuisance, is liable only for injuries caused solely by his mill.—*Neville v. Mitchell* (Tex. Civ. App.) 579.

Plaintiff, in an action to recover for medical expenses incurred for his wife and children in the treatment of sickness, should allege the sums expended for each, and that they were necessary and reasonable.—*Neville v. Mitchell* (Tex. Civ. App.) 579.

A husband, in an action for a nuisance causing the sickness of his wife, may recover for the loss of the society and the comfort of the wife.—*Neville v. Mitchell* (Tex. Civ. App.) 579.

Where there is evidence, in an action for sickness caused by a nuisance, that the sickness was only prolonged thereby, the instructions should state that under such facts the plaintiff is not entitled to damages for the entire sickness.—*Neville v. Mitchell* (Tex. Civ. App.) 579.

§ 2. Public nuisances.

Where a city condemned as a nuisance hitching posts erected by the county, and caused them to be removed, the city was entitled to an injunction restraining the county from replacing them.—*Mercer County v. City of Harrodsburg* (Ky.) 10.

A contract between the county and city authorizing the county to erect the posts does not estop the city from abating the nuisance, where population has increased since the contract was made.—*Mercer County v. City of Harrodsburg* (Ky.) 10.

As equity has exclusive jurisdiction to enjoin a nuisance, the defendant was not entitled to a transfer to the ordinary docket for a trial of the question of fact whether there was a nuisance.—*Mercer County v. City of Harrodsburg* (Ky.) 10.

OATH.

Of juror, see "Jury," § 4.
Of officer in charge of jury in criminal prosecution, see "Criminal Law," § 22.

OBJECTIONS.

To evidence, see "Trial," § 4.
To instructions, see "Trial," § 12.

OBSTRUCTIONS.

Of easements, see "Easements," § 2.
Of highways, see "Highways," § 3.

OFFICERS.

Mandamus, see "Mandamus," § 1.
Quo warranto, see "Quo Warranto."
Validity of contract assigning right to collect officer's fees, see "Contracts," § 1.
Vested right to office, see "Constitutional Law," § 1.

Particular classes of officers.

See "Attorney General"; "District and Prosecuting Attorneys"; "Judges"; "Justices of the Peace"; "Receivers"; "Sheriffs and Constables."

Bank officers, see "Banks and Banking," § 1.
Collectors of taxes, see "Taxation," § 5.
Corporate officers, see "Corporations," § 4.
County officers, see "Counties," § 1.
Jury commissioners, see "Jury," § 2.
Municipal officers, see "Municipal Corporations," § 4.
Prison officers, see "Prisons."
School officers, see "Schools and School Districts," § 3.
Town officers, see "Towns," § 2.

§ 1. Appointment, qualification, and tenure.

Where an appointment to office is absolutely void, the appointee, though attempting to discharge the duties, is not an officer de facto.—*Brumby v. Boyd* (Tex. Civ. App.) 874.

§ 2. Title to and possession of office.

A private citizen cannot enjoin an appointee from discharging the duties of health officer.—*Brumby v. Boyd* (Tex. Civ. App.) 874.

OPENING.

Judgment, see "Judgment," §§ 2, 5.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 11.

In criminal prosecutions, see "Criminal Law," § 12.

OPTIONS.

To purchase or sell demised premises, see "Landlord and Tenant," § 2.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 3, 6.

PARENT AND CHILD.

See "Bastards"; "Guardian and Ward"; "Infants."

Custody of children on divorce, see "Divorce," § 2.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 10.

PARTIES.

Admissions as evidence, see "Evidence," § 6.
Death ground for abatement, see "Abatement and Revival," § 1.

Persons concluded by judgment, see "Judgment," § 10.

In actions by or against particular classes of parties.

Administrators, see "Executors and Administrators," § 8.

Trustees, see "Trusts," § 5.

In particular actions or proceedings.

See "Ejectment," § 2; "Mandamus," § 2; "Partition," § 1.

For breach of covenant, see "Covenants," § 1.

For causing death, see "Death," § 2.

On appeal or writ of error, see "Appeal and Error," §§ 3, 7.

To collect taxes, see "Taxation," § 5.

To particular classes of conveyances, contracts, or transactions.

See "Usury," § 1.

§ 1. Plaintiffs.

An owner of property destroyed by fire and a fire insurance company, which has paid a loss thereon and taken a pro rata assignment of the claim for damages, may join as plaintiffs in an action against a railroad company for causing the fire.—*St. Louis & S. W. Ry. Co. of Texas v. Miller* (Tex. Civ. App.) 139.

§ 2. Defendants.

Where plaintiff in ejectment claimed under a deed alleged to have been executed to himself and to another, under which he claimed an undivided half interest, the other grantee, having refused to become a party plaintiff, was not a necessary or proper party defendant under Rev. St. 1890, § 544.—*McNear v. Williamson* (Mo.) 100.

§ 3. New parties and change of parties.

In an action for the price of goods damaged in transit through the alleged negligence of a railroad company, it was proper to bring the railroad company into the suit on defendant's complaint for judgment over against it.—*Gulf, W. T. & P. Ry. Co. v. Browne* (Tex. Civ. App.) 341.

In an action against a corporation as a maker of a note, a third party, alleging that he had sold the corporation to another person, covenanting to protect the purchaser from liability, held not a necessary or proper party.—*Wilson v. Tyler Coffin Co.* (Tex. Civ. App.) 865.

PARTITION.**§ 1. By acts of parties.**

Parol agreement between owner of 810-acre tract of land and purchaser that 110 acres should be taken off south end of the tract held a valid agreement for partition.—*Mass v. Bromberg* (Tex. Civ. App.) 468.

§ 2. Actions for partition.

A beneficiary or trustee in a deed of trust executed after the commencement of a partition suit by a party thereto is not a necessary party to the suit.—*Becker v. Stroehrer* (Mo.) 1088.

PARTNERSHIP.

Accounting between parties to gaming transaction, see "Gaming," § 1.

Set-off of firm debt against individual deposit of partner in bank, see "Banks and Banking," § 1.

§ 1. The relation.

Action against agent of and stockholder in prospective corporation to reach land contracted to be turned over to corporation to pay subscription, to satisfy debt created by agent, sustained on theory of partnership between prospective members.—*Friedman v. Janssen* (Ky.) 752.

§ 2. Mutual rights, duties, and liabilities of partners.

Where services performed by one partner for another were not in relation to the partnership business, the rule that one partner cannot recover for services in the absence of an agreement for compensation does not apply.—*Lell v. Hardesty* (Ky.) 643.

§ 3. Rights and liabilities as to third persons.

Partnership held not liable for individual undertaking of a member.—*Beatty v. Bulger* (Tex. Civ. App.) 893.

§ 4. Retirement and admission of partners.

Where, immediately after the dissolution, the continuing partners borrowed from a bank, it was not error to refuse to charge that, if the bank agreed to loan the money to the firm before the dissolution, then the debt would be that of the old firm.—*First Nat. Bank v. Watson* (Tex. Civ. App.) 232.

Where, after the dissolution, notes pledged to the retiring member were by the remaining partners transferred to a bank, if it knew of the dissolution, it could not presume that the full title of the claims was in the new firm.—

First Nat. Bank v. Watson (Tex. Civ. App.) 237.

§ 5. Dissolution, settlement, and accounting.

A surviving partner in a horse breeding business was entitled in a settlement to credit by money paid by him for the purpose of conditioning the horses for sale at the highest price in the most profitable market.—Central Trust & Safe Deposit Co. v. Respass (Ky.) 421.

PART PAYMENT.

Within statute of limitations, see "Limitation of Actions," § 3.

PASSENGERS.

See "Carriers," §§ 4-7.

PATENTS.

To lands, see "Public Lands," § 2.

PAYMENT.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Tender."

Part payment within statute of limitations, see "Limitation of Actions," § 3.

Recovery for money paid, see "Money Paid."

Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities.

See "Bonds," § 2; "Mortgages," § 3.

Price of land sold, see "Vendor and Purchaser," § 3.

Taxes, see "Taxation," § 4.

§ 1. Pleading, evidence, trial, and review.

Where the obligor in a note proved a credit, the burden was on plaintiff to show that a part of the amount was paid on some other account.—Hill v. Pettit (Ky.) 188.

§ 2. Recovery of payments.

A petition alleging that plaintiffs purchased from defendants certain lumber, represented as containing 704,000 feet and paid for on that basis, when in fact it contained only 574,000 feet, the prayer of the petition being for the excess paid under a mistake of fact, states a cause of action.—Edwards v. Fuson (Ky.) 715.

A petition held to aver a mistake in computing interest on a county school fund bond, against which plaintiff was entitled to relief.—Williams v. Carroll County (Mo.) 955.

In determining the sufficiency of a petition to recover an overpayment of interest by mistake of payee, it cannot be assumed that the overpayment arose from a mistake of law.—Williams v. Carroll County (Mo.) 955.

A petition, predicated plaintiff's right of recovery on a mistake in the calculation of interest by the payee, need not allege actual fraud.—Williams v. Carroll County (Mo.) 955.

PEACE.

Breach of public peace, see "Breach of the Peace."

PENALTIES.

Selling drugs without license, see "Druggists." Violations of fence laws, see "Fences." Violations of gaming laws, see "Gaming," § 2. Violations of usury laws, see "Usury," § 2.

§ 1. Actions and other proceedings.

Cr. Code Prac. § 11, providing that a public offense of which the only punishment is a

fine may be prosecuted by a penal action, was not repealed by Ky. St. § 1141.—Louisville & N. R. Co. v. Commonwealth (Ky.) 505.

Const. § 12, providing that, with certain exceptions, "no person for an indictable offense shall be proceeded against criminally by information," does not apply to misdemeanors punishable by fine, and therefore such offenses may be prosecuted by penal action.—Louisville & N. R. Co. v. Commonwealth (Ky.) 505.

The defendant in a penal action should not be required to file an answer, but should be admitted to plead merely not guilty, as the defendant, under the constitution, cannot be required to give evidence against himself.—Louisville & N. R. Co. v. Commonwealth (Ky.) 505.

Cr. Code Prac. § 238, applies to a prosecution by penal action, as well as by indictment; and it is error to require the jury to believe only "from the preponderance of the evidence" the facts necessary to constitute guilt.—Louisville & N. R. Co. v. Commonwealth (Ky.) 505.

PENDENCY OF ACTION.

Effect as to property involved, see "Lis Pendens."

PERJURY.

§ 1. Offenses and responsibility therefor.

Where one testified before a grand jury as to a gaming transaction, that complaint had been made before a justice on account of the same transaction did not prevent such testimony from being a basis for prosecution for perjury.—Wilks v. State (Tex. Cr. App.) 787.

PERSONAL INJURIES.

See "Assault and Battery," § 1; "Negligence."

Excessive damages, see "Damages," § 3.

Measure of damages, see "Damages," § 2.

To employé, see "Master and Servant," §§ 2-9.

To licensee, see "Railroads," § 5.

To passenger, see "Carriers," § 5.

To person on or near railroad tracks, see "Railroads," § 7.

To tenant, see "Landlord and Tenant," § 3.

To traveler on highway, see "Municipal Corporations," § 7.

To traveler on highway crossing railroad, see "Railroads," § 6.

To trespasser, see "Railroads," § 5.

PETITION.

In bankruptcy, see "Bankruptcy," § 1.

In pleading, see "Pleading," § 2.

PLEA.

In criminal prosecutions, see "Criminal Law," § 6.

PLEADING.

Admissions in pleadings as evidence, see "Evidence," § 6.

Applicability of instructions to pleadings, see "Trial," § 10.

Conformity of judgment to pleadings, see "Judgment," § 3.

Defects or irregularities in pleading as affecting action tolling limitations, see "Limitation of Actions," § 2.

Harmless error in pleading, see "Appeal and Error," § 21.

Allegations as to particular facts, acts, or transactions.

See "Adverse Possession," § 2; "Damages," § 4; "Estoppel," § 2.

Amount in controversy, see "Courts," § 4.
 Medical expenses made necessary by maintenance of nuisance, see "Nuisance," § 1.
 Statute of limitations, see "Limitation of Actions," § 4.

In actions by or against particular classes of parties.

See "Carriers," § 5; "Master and Servant," § 9; "Street Railroads," § 1.
 Corporate officers, see "Corporations," § 4.
 Guardians, see "Guardian and Ward," § 1.

In particular actions or proceedings.

See "Ejectment," § 3; "Fraud," § 2; "Removal of Causes," § 2; "Replevin," § 1; "Specific Performance," § 1; "Trespass," § 2; "Trespass to Try Title," § 2.
 For breach of contract, see "Contracts," § 4.
 For causing death, see "Death," § 2.
 For injunction, see "Injunction," § 1.
 For injuries caused by fence, see "Fences."
 For penalties, see "Penalties," § 1.
 Indictment or criminal information or complaint, see "Indictment and Information."
 On insurance policy, see "Insurance," § 5.
 Pleas in criminal prosecutions, see "Criminal Law," § 6.
 Probate proceedings, see "Wills," § 4.
 To collect taxes, see "Taxation," § 5.
 To enforce lien, see "Liens."
 To set aside fraudulent conveyances, see "Fraudulent Conveyances," § 8.
 To vacate judgment, see "Judgment," § 6.

§ 1. Form and allegations in general.

In an action to recover the price of an engine, the defenses of breach of warranty and settlement were not inconsistent, so as to require election.—*Robinson & Co. v. Hill* (Ky.) 623.

A pleading held not to be sufficient to raise the question whether a telephone line and box were fixtures, and passed under a deed.—*Mays v. Carman* (Ky.) 1019.

A pleading is to be construed most strongly against the pleader.—*Mays v. Carman* (Ky.) 1019.

An allegation that an improvement tax is an attempt to take private property and to deprive defendant of his property without due process of law, in violation of constitution, held a legal conclusion, and not a pleading of the facts.—*Heman v. Schulte* (Mo.) 163.

An allegation, in a bill to restrain the construction of a street railroad, that the construction of the road would practically destroy the street, held only to state a mere conclusion, and not facts authorizing the relief prayed for on such ground.—*Nagel v. Lindell Ry. Co.* (Mo.) 1090.

§ 2. Declaration, complaint, petition, or statement.

A joint petition by an owner of property destroyed by fire and by a fire insurance company which had paid a loss thereon against a railroad company for causing the fire states a single cause of action.—*St. Louis & S. W. Ry. Co. of Texas v. Miller* (Tex. Civ. App.) 139.

§ 3. Plea or answer, cross complaint, and affidavit of defense.

In an action for the price of goods damaged in transit, defendant's answer, bringing in the railroad company, held to show that defendant sought alternative relief against the company, if he was liable for the purchase price.—*Gulf, W. T. & P. Ry. Co. v. Browne* (Tex. Civ. App.) 341.

§ 4. Demurrer or exception.

Where a good cause of action is defectively stated, the defect cannot be reached by demurrer.—*Murrell v. Henry* (Ark.) 647.

A misjoinder of two causes of action does not furnish ground of demurrer, defendant's remedy being a motion to elect.—*Lewis' Adm'r v. Taylor Coal Co.* (Ky.) 1044.

Where a demurrer to a petition is sustained, and the plaintiff fails to amend, the court must enter a final judgment for defendant.—*United Benev. Soc. v. Shepherd* (Tex. Civ. App.) 577.

§ 5. Amended and supplemental pleadings and repleader.

Where original petition relied for recovery solely upon the ground that defendant forcibly ejected plaintiff from its train, and her testimony was to that effect, it was error, after the evidence was all in, to permit the filing of an amendment alleging that defendant had negligently permitted her to get off the train.—*Louisville & N. R. Co. v. Jordan* (Ky.) 27.

The court did not abuse its discretion in refusing to permit the filing of an amended petition, not offered until after one trial had been had.—*Board of Internal Improvement for Lincoln County v. Moore's Adm'r* (Ky.) 417.

§ 6. Motions.

When a part of a plea in mitigation of a libel contains matters properly admissible in mitigation, a motion to strike out the whole plea is properly denied.—*Jones v. Murray* (Mo.) 981.

§ 7. Issues, proof, and variance.

Where deed of a street railway contained a covenant against incumbrances, an assignee of the vendee, when sued for a breach of an agreement set forth in the deed, held not entitled to defend by showing that the covenant against incumbrances was broken.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 456.

§ 8. Defects and objections, waiver, and aid by verdict or judgment.

Where a petition is good as against a general demurrer, and subject only to special exception, advantage of the defects cannot be taken by objections to testimony tending to support its allegations, however general or indefinite they may be.—*McBride v. Puckett* (Tex. Civ. App.) 242.

PLEDGES.

Where bonds were pledged to a bank to secure a specific debt, the bank had no lien except for that debt.—*First Nat. Bank v. Germania Safety Vault & Trust Co.* (Ky.) 716.

One holding vendor's lien notes as collateral security, on a rescission by vendor and vendee, can enforce the note to the amount of the principal debt only.—*Brotherton v. Anderson* (Tex. Civ. App.) 682.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 6.

POLICY.

Of insurance, see "Insurance."

POSSESSION.

See "Adverse Possession."

POWERS.

Creation by will, see "Wills," § 5.
 Of attorney, see "Principal and Agent."
 Of sale in mortgage, see "Mortgages," § 4.

§ 1. Construction and execution.

Where a testator creates a life estate, with power of appointment, a deed executed by the donee of the power need not recite that it was

made in execution of the power, in order to have that effect.—*Thomas v. Wright* (Ky.) 993.

PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Divorce," § 1; "Ejectment"; "Mandamus," § 2; "Quo Warranto"; "Replevin"; "Trespass to Try Title," § 2.

Condemnation proceedings, see "Eminent Domain," § 2.

Particular proceedings in actions.

See "Abatement and Revival"; "Appearance"; "Continuance"; "Costs"; "Damages," § 4; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Removal of Causes"; "Trial"; "Venue."

Verdict, see "Trial," § 15.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers"; "Sequestration."

Procedure in criminal prosecutions.

See "Criminal Law"; "Intoxicating Liquors," § 3.

Procedure in exercise of special jurisdictions.

In equity, see "Equity."
In justices' courts, see "Justices of the Peace," § 3.

Procedure on review.

See "Appeal and Error"; "Exceptions, Bill of"; "Justices of the Peace," § 4; "New Trial."

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 21.

PRELIMINARY EXAMINATION.

On criminal charge, see "Criminal Law," §§ 7-18.

PRESCRIPTION.

Creation of easement by prescription, see "Easements," § 1.

Establishment of highways, see "Highways," § 1.

PRESENTMENT.

Of claims against estate of decedent, see "Executors and Administrators," § 5.

PRESUMPTIONS.

In criminal prosecutions, see "Criminal Law," §§ 7-13.

On appeal or error, see "Appeal and Error," § 18; "Criminal Law," § 29; "Homicide," § 3.

PRINCIPAL AND AGENT.

See "Brokers"; "Factors."

Admissions by agent, see "Evidence," § 6.

Agency of partner for firm, see "Partnership," § 3.

Corporate agents, see "Corporations," § 5.

§ 1. The relation.

The fact that the obligor in certain nonnegotiable bonds executed to a title company left in its hands the money due her on the bonds to be paid out by it upon her orders did not make the title company her agent.—*Fidelity Trust &*

Safety Vault Co. v. Carr (Ky.) 990; *Louisville Banking Co. v. Same*, Id.; *Murray v. Same*, Id.; *Carr v. Ross*, Id.

A person's direct testimony that he is the agent of another is not objectionable as proving the agency by the declaration of the agent.—*American Telegraph & Telephone Co. v. Kersh* (Tex. Civ. App.) 74.

§ 2. Mutual rights, duties, and liabilities.

An agent to sell land had no power to delegate his authority to his son.—*Floyd v. Mackey* (Ky.) 518.

Failure of agent to disclose to his principal that note secured by mortgage assumed by the principal was indorsed by the agent held not to establish fraud as matter of law.—*Beatty v. Bulger* (Tex. Civ. App.) 893.

Liability of indorser on note secured by mortgage held not discharged with property of the person who buys the land, assuming the mortgage, and afterwards pays the note.—*Beatty v. Bulger* (Tex. Civ. App.) 893.

§ 3. Rights and liabilities as to third persons.

The architect, being the owner's agent merely to see that his contract was performed, could not bind the owner by a contract to pay the subcontractor.—*Watts v. Metcalf* (Ky.) 824.

Where an attorney in fact exceeds his authority in making a sale of real estate, the vendee cannot recover of the vendor money paid to the agent in carrying out the sale; the vendor not having received such money.—*Morton v. Morris* (Tex. Civ. App.) 94.

A power of attorney to sell real estate held not to authorize the agent to sell the property and defer certain payments until the determination of a suit between the grantor and grantee.—*Morton v. Morris* (Tex. Civ. App.) 94.

A conveyance executed by an attorney in fact in excess of his power held void on its face.—*Morton v. Morris* (Tex. Civ. App.) 94.

An agent of a creditor, empowered to procure a transfer of accounts of debtor as security, may bind his principal by a contract to release the guarantors of the debtor.—*Martin v. Rotan Grocery Co.* (Tex. Civ. App.) 212.

PRINCIPAL AND SURETY.

See "Bonds"; "Guaranty."

Effect of default judgment against sureties after death of principal, see "Judgment," § 1.

Liabilities of sureties on bonds for performance of duties of office or trust, see "Assignments for Benefit of Creditors," § 3.

Liabilities of sureties on bonds for performance of duties of trust or office, see "Sheriffs and Constables," § 4.

Liabilities of sureties on bonds in legal proceedings, see "Attachment," § 2.

Married women as sureties, see "Husband and Wife," § 2.

§ 1. Creation and existence of relation.

Where a surety in a bond executed by M. for the faithful performance of his duties inquired of plaintiffs whether M. was keeping his accounts square, the failure of plaintiffs to disclose the fact that M. was in default operated to release the sureties.—*Frank Fehr Brewing Co. v. Mullican* (Ky.) 627.

A stipulation in a contract that plaintiff was to have the exclusive right to determine the amount of credit that should be extended to M., for whom defendant was surety, held not intended to modify a previous stipulation requiring payment at the end of every 30 days.—*Frank Fehr Brewing Co. v. Mullican* (Ky.) 627.

§ 1½. Nature and extent of liability of surety.

Where an additional guardian's bond is executed to release an original surety from liability for the guardian's future acts, the sureties in the two bonds are jointly liable for past and future acts of the principal, as if he had signed the original bond, except that the motioner is liable only for the guardian's past acts.—*Abshire v. Rowe* (Ky.) 394.

§ 2. Discharge of surety.

The alteration of a note by the addition of an obligor after the issuance of the paper releases the previous obligors.—*M. Rumley Co. v. Wilcher* (Ky.) 7; *Same v. Russell*, Id.

One who signs an existing note in consideration of the extension of the time is bound as upon a new contract, though previous obligors are released.—*M. Rumley Co. v. Wilcher* (Ky.) 7; *Same v. Russell*, Id.

§ 3. Rights and remedies of surety.

Where personal property mortgaged by the buyer to secure the price was resold by the buyer to the seller, the sureties in the notes were entitled to have the value of the mortgaged property at the time of resale credited upon the notes.—*M. Rumley Co. v. Wilcher* (Ky.) 7; *Same v. Russell*, Id.

PRIORITIES.

Of mortgages, see "Chattel Mortgages," § 8; "Mortgages," § 2.
Of vendors' liens, see "Vendor and Purchaser," § 5.

PRISONS.

The term of office of clerk of the penitentiary is four years, and the incumbent can be removed only for cause after notice of the charges against him and an opportunity to be heard.—*Evening Post Co. v. Caulfield* (Ky.) 502.

PRIVATE NUISANCE.

See "Nuisance," § 1.

PRIVATE ROADS.

Across railroads, see "Railroads," § 1.
Rights of way, see "Easements."

PRIVILEGE.

Of witness as to testimony, see "Witnesses," § 3.

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 2.

PROBATE.

Of will, see "Wills," § 4.

PROCESS.

Defects or irregularities in service of process as affecting action tolling limitations, see "Limitation of Actions," § 2.
Effect of appearance, see "Appearance."
Sufficiency to sustain default judgment, see "Judgment," § 2.

In particular actions or proceedings.

See "Divorce," § 1; "Trespass to Try Title," § 2.
Condemnation proceedings, see "Eminent Domain," § 2.

Particular forms of writs or other process.

See "Arrest"; "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Prohibition"; "Quo Warranto"; "Replevin"; "Sequestration."

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

§ 1. Nature and grounds.

The court of appeals can issue a writ of prohibition to restrain a trial court from enforcing an order adjudging a defendant to be in contempt, where the act complained of is not within the order alleged to enjoin it.—*Louisville & N. R. Co. v. Miller* (Ky.) 5.

Where, notwithstanding an order revoking letters of administration, which operated as a supersedeas, the probate court asserts the right to enforce its order, the supreme court may prevent it from doing so by a writ of prohibition.—*Cuendet v. Henderson* (Mo.) 1079.

PROMISSORY NOTES.

See "Bills and Notes."

PROPERTY.

See "Animals"; "Fixtures"; "Logs and Logging."

Adverse possession, see "Adverse Possession."
Constitutional guaranties of rights of property, see "Constitutional Law," § 1.

Dedication to public use, see "Dedication."

Intermixture, see "Confusion of Goods."

Taking for public use, see "Eminent Domain."

PROSECUTING ATTORNEYS.

See "District and Prosecuting Attorneys."

PROSTITUTION.

See "Disorderly House."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," §§ 7-13.

In criminal prosecutions, see "Criminal Law," § 18.

PROXIMATE CAUSE.

Of injury, see "Negligence," § 2.

PUBLIC DEBT.

See "Counties," § 3.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 5.

PUBLIC LANDS.

§ 1. Survey and disposal of lands of United States.

Under Act March 22, 1881, a petition to a tax collector by the inhabitants of a township for the sale of school lands authorizes a sale therefor by a subsequent tax collector.—*Brown v. Rushing* (Ark.) 442.

Act March 22, 1881, only requires that a petition for the sale of school land shall be signed by a majority of the electors of the township.—*Brown v. Rushing* (Ark.) 442.

A petition under Act March 22, 1881, is not insufficient to authorize a sale of school land.

in being directed to the sheriff, who is collector *ex officio*, as sheriff, and not as collector.—*Brown v. Rushing* (Ark.) 442.

An order of the county court confirming a sale of school lands under Act March 22, 1881, *held*, in an action against a bidder at a subsequent sale, to be sufficient to show the filing of the proper petition asking the sale of the lands.—*Brown v. Rushing* (Ark.) 442.

§ 2. Disposal of lands of the states.

In an action to recover land, in which the parties claimed under different patents, there being no conflict as to the boundaries, the court properly instructed the jury to find for defendant, claiming under the older patent.—*Allen v. Pulliam* (Ky.) 722.

A patent covering land all of which is embraced by an older patent is void.—*Allen v. Pulliam* (Ky.) 722.

A patent cannot be declared void in a collateral proceeding upon the ground that it embraces more land than it called for.—*Allen v. Pulliam* (Ky.) 722.

Patents embracing land not vacant were void.—*Kentucky Union Co. v. Cornett* (Ky.) 728.

Under the agreed statement of facts in trespass to try title to school lands, *held*, that the court must assume that the land was regularly on the market at the time of plaintiff's application to purchase the land.—*Hardman v. Crawford* (Tex. Sup.) 206.

Under *Sayles' Ann. Civ. St. art. 4218k*, where settler on school lands had not resided thereon for full three years, his vendee must actually settle on the land, and reside there the balance of three years, to acquire any rights therein.—*Hardman v. Crawford* (Tex. Sup.) 206.

Under Const. 1876, art. 7, § 6, the commissioners' court of a county cannot convey school lands to a surveyor in payment of his services in subdividing such lands for sale.—*Dallas County v. Club Land & Cattle Co.* (Tex. Sup.) 294.

Where county commissioners convey school lands for services in subdividing the whole tract, in a suit to recover from a subsequent grantee it is not incumbent on the county to pay the defendant the value of such services.—*Dallas County v. Club Land & Cattle Co.* (Tex. Sup.) 294.

Under Rev. St. 1895, arts. 4218f, 4218j, 4218k, a certificate of three years' occupancy, issued by the commissioners of the general land office to a prospective purchaser of public land, *held* subject to collateral attack.—*Logan v. Curry* (Tex. Civ. App.) 81.

Under Rev. St. 1895, art. 4218i, a person not a bona fide settler of agricultural land *held* not entitled to purchase adjacent pastoral land.—*Logan v. Curry* (Tex. Civ. App.) 81.

Where a settler on school land applies for an additional tract before acquiring title to his home tract, but acquires such title before the application is considered, the award *held* valid.—*Nowlin v. Hall* (Tex. Civ. App.) 116.

Where one who applied to purchase school lands before settlement afterwards settles on the land, does not make a new application, but relies on the application made, he waives, in a contest with another applicant, any superior right by reason of his settlement.—*Nowlin v. Hall* (Tex. Civ. App.) 116.

On a contest between applicants to purchase school lands, award *held* void and to leave the land subject to sale, without a forfeiture being declared, as prescribed by *Batts' Ann. Civ. St. art. 4218L*.—*Nowlin v. Hall* (Tex. Civ. App.) 116.

In trespass to try title between applicants to purchase school lands, *held* error to assume in the charge that plaintiff had not already purchased as much as four sections of school lands.—*Nowlin v. Hall* (Tex. Civ. App.) 116.

Under Rev. St. art. 4218f, one who marries the widow of a purchaser of school land and thereafter resides with her on such land does not thereby become eligible to purchase additional school land.—*Boyd v. Montgomery* (Tex. Civ. App.) 243.

Where the price of school lands has been fixed by the commissioner, an application for and award of the land to a proposed purchaser at a less price is void.—*Nard v. Baker* (Tex. Civ. App.) 306.

In an action of forcible entry and detainer of school land, it is not proper to go outside the records of the land office to show a state of facts which would impeach such records and show a forfeiture not declared by the office.—*Kenfro v. Harris* (Tex. Civ. App.) 460.

Under Act July 8, 1879, amended by Act April 6, 1881, § 6 et seq., the sale of public lands to an infant was void, so that a retention of the lands by the infant for 10 years and a subsequent sale could not amount to a ratification.—*Adams v. King* (Tex. Civ. App.) 484.

Where a prior application for the purchase of school lands is refused, and the lands sold to a subsequent purchaser, it will be inferred, in a suit involving title thereto, in the absence of evidence, that the prior applicant had not complied with all conditions, and that his application was rightfully refused.—*Forst v. Rothe* (Tex. Civ. App.) 575.

The plaintiff in an action of trespass to try title between applicants to purchase school lands *held* to have the burden of showing that he had not purchased the quantity of land authorized by statute prior to the purchase of the land in question.—*Nowlin v. Hall* (Tex. Civ. App.) 851.

The statute providing that a bona fide owner and resident of lands may purchase additional land does not authorize the purchase of land intended as a home place and additional lands at the same time.—*Nowlin v. Hall* (Tex. Civ. App.) 851.

The verified application of plaintiff to purchase school lands, reciting that he had purchased no other lands of the state, *held* not sufficient evidence to authorize the court to find such facts as a matter of law in trespass to try title.—*Nowlin v. Hall* (Tex. Civ. App.) 851.

An instruction directing the jury to disregard certain evidence in an action of trespass to try title to public lands, claimed as additional lands, *held* erroneous under the evidence and issues.—*Bell v. Williams* (Tex. Civ. App.) 1119.

Plaintiffs, in trespass to try title to public lands claimed by plaintiffs and defendant as additional lands, *held* to have the burden of showing that defendant was not an actual settler on her home tract when she made application for the additional lands, or of showing that she was acting in collusion with her son to fraudulently acquire the land for the latter.—*Bell v. Williams* (Tex. Civ. App.) 1119.

Where one contesting an award of school land made his application before April 19, 1901, when Acts 1901, p. 292, took effect, the question whether the owner to whom the land was awarded continued to reside on the land after the award is immaterial.—*Davis v. McCauley* (Tex. Civ. App.) 1124.

In a contest for school land, evidence considered, and *held* insufficient to show that the land had not been appraised at the price for which it was awarded to an applicant.—*Davis v. McCauley* (Tex. Civ. App.) 1124.

One contesting an award of school land, on the ground that it had not been appraised at the price offered by the first applicant, has the burden of showing that the land was not so appraised.—*Davis v. McCauley* (Tex. Civ. App.) 1124.

PUBLIC NUISANCE.

See "Nuisance," § 2.

PUBLIC POLICY.

Effect on validity of contract, see "Contracts," § 1.

PUBLIC SCHOOLS.

See "Schools and School Districts," §§ 1-4.

PUBLIC USE.

Dedication of property, see "Dedication."
Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 3.

PUNISHMENT.

See "Criminal Law," § 30; "Penalties."

PUNITIVE DAMAGES.

See "Damages," § 1.

QUANTUM MERUIT.

See "Work and Labor."

QUARANTINE.

See "Animals."

Effect of quarantine regulations on liabilities of carriers of stock, see "Carriers," § 3.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 6.
In criminal prosecutions, see "Criminal Law," § 18.

QUIETING TITLE.

§ 1. Proceedings and relief.

In an action by the grantee to quiet title to land claimed to be embraced in the deed, in which defendant denied that he claimed the land and admitted that he had conveyed it to plaintiff, a judgment quieting title vests in plaintiff all of defendant's title.—*Kentucky Union Co. v. Cornett* (Ky.) 728.

QUI TAM ACTIONS.

See "Penalties," § 1.

QUO WARRANTO.

§ 1. Nature and grounds.

Exhibition of writ in nature of quo warranto is in the proper discretion of the attorney general or circuit attorney.—*State ex inf. Folk v. Talty* (Mo.) 361.

§ 2. Jurisdiction, proceedings, and relief.

Where an information in quo warranto against a school trustee is presented by one

having no interest, the court may refuse to permit it to be filed, and should refuse to remove the respondent.—*Deaver v. State* (Tex. Civ. App.) 256.

RAILROADS.

See "Street Railroads."

Appealability of judgment against railroad commission, see "Appeal and Error," § 2.

As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."

Liability for allowing gaming on trains, see "Gaming," § 3.

§ 1. Construction, maintenance, and equipment.

An instruction authorizing punitive damages for the obstruction by a railroad company of a passway across its road, where the company had acted in good faith and was merely mistaken as to its right, was error.—*Louisville & N. R. Co. v. Carter* (Ky.) 617.

Instruction relative to acquirement of right to passway across a railroad by prescription held to properly submit issue.—*Louisville & N. R. Co. v. Carter* (Ky.) 617.

The erection of a gate across a passway is not an unreasonable obstruction.—*Louisville & N. R. Co. v. Carter* (Ky.) 617.

Plaintiff, in an action to recover for cattle drowned because of defendant's failure to leave openings in its right of way fence, held not negligent in using his pasture after knowledge of the construction of the fence.—*Gulf, C. & S. F. Ry. Co. v. Clay* (Tex. Civ. App.) 1115.

In an action for the drowning of plaintiff's stock by failure to leave openings in defendant's right of way fence, where the deed required defendant to construct all necessary road crossings, evidence that an open crossing was necessary was admissible.—*Gulf, C. & S. F. Ry. Co. v. Clay* (Tex. Civ. App.) 1115.

There has been no statutory modification of the common-law rule entitling the owner of land over which a railway is constructed to a way of necessity over the railroad.—*Gulf, C. & S. F. Ry. Co. v. Clay* (Tex. Civ. App.) 1115.

In an action to recover for animals drowned because of a railway company's failure to leave openings in the fence along its right of way, evidence held to support a finding for plaintiff.—*Gulf, C. & S. F. Ry. Co. v. Clay* (Tex. Civ. App.) 1115.

In an action for animals drowned because of failure of defendant to leave openings in its right of way fence, that the flood was unprecedented held not to affect the question of defendant's negligence.—*Gulf, C. & S. F. Ry. Co. v. Clay* (Tex. Civ. App.) 1115.

Testimony to the effect that "cattle" were in the habit of going across the right of way to higher ground held to include horses and mules.—*Gulf, C. & S. F. Ry. Co. v. Clay* (Tex. Civ. App.) 1115.

Evidence in an action for the drowning of plaintiff's cattle, caused by defendant's failure to leave openings in its right of way fence, held not to show contributory negligence.—*Gulf, C. & S. F. Ry. Co. v. Clay* (Tex. Civ. App.) 1115.

§ 2. Sales, leases, traffic contracts, and consolidation.

Where one railroad company leased its unfinished road, and executed also a mortgage thereon to secure bonds, which it delivered to the lessee for sale to raise money to complete the road, the lessee executing a mortgage on earnings to the trustee for bondholders, the three writings, which were executed simultaneously, are to be read together as one con-

tract.—*Louisville & N. R. Co. v. Schmidt* (Ky.) 629.

Though the undertaking to restore the premises to the lessor railroad in good repair at the termination of the lease was qualified by the addition of the words, "unless prevented by unavoidable casualty, legal proceedings, or operation of law," the lease is not susceptible of the construction that the lessee was not to turn over the property in good repair in case the lease was terminated by the sale under foreclosure.—*Louisville & N. R. Co. v. Schmidt* (Ky.) 629.

The fact that the lessor fell in debt to the lessee does not exclude the latter from liability to the bondholders; the covenant being for their benefit, and the trustee for them being a party to the contract.—*Louisville & N. R. Co. v. Schmidt* (Ky.) 629.

Act Jan. 22, 1858, authorizing "railroad companies in this commonwealth" to make certain contracts, *held* to apply only to domestic corporations.—*McCabe's Adm'r v. Maysville & B. S. R. Co.* (Ky.) 1054.

A provision of the charter of a railroad company *held* not to be sufficient to authorize the corporation to lease its road, as such charters are to be strictly construed.—*McCabe's Adm'r v. Maysville & B. S. R. Co.* (Ky.) 1054.

§ 3. Indebtedness, securities, liens, and mortgages.

A trustee for mortgage bondholders *held* to have the right to sue the lessee of the mortgaged road to recover damages for breach of its covenant, and to restore the leased premises to the lessor in good repair; the undertaking being for the benefit of the bondholders.—*Louisville & N. R. Co. v. Schmidt* (Ky.) 629.

A bond given to a railroad company by contractors erecting buildings for a railway *held* an indemnity bond to the railroad, and not to give a right of action to the laborers against the sureties on the bond.—*National Bank of Cleburne v. Gulf, C. & S. F. Ry. Co.* (Tex. Sup.) 208.

Rev. St. art. 3312, does not give mechanics and laborers erecting machine shops for a railroad on land adjoining its right of way a lien, but such lien must be asserted under article 3294.—*National Bank of Cleburne v. Gulf, C. & S. F. Ry. Co.* (Tex. Sup.) 203.

§ 4. Operation.

Ky. St. § 772a, requiring railroad companies operating a railroad line or any branch of a railroad to run at least one passenger train each way, does not require that one passenger train shall stop at each station.—*Commonwealth v. Louisville & N. R. Co.* (Ky.) 753.

A provision in the charter of a railroad corporation, empowering it to "make contracts for operating said road," empowered the corporation to lease its road, but not so as to relieve it from liability for the negligence of the lessee.—*McCabe's Adm'r v. Maysville & B. S. R. Co.* (Ky.) 1054.

Railroad company's failure to comply with an ordinance requiring it to maintain signal lights at all obstructions which it had placed in the streets near its track *held* negligence.—*Houston, B. & N. Ry. Co. v. Pollard* (Tex. Civ. App.) 851.

§ 5. — Injuries to licensees or trespassers in general.

In an action against a railroad company to recover damages for the death of a trespasser on a train, resulting from a collision, defendant *held* not prejudiced by instructions given.—*Louisville & N. R. Co. v. Kemery's Adm'r* (Ky.) 20.

Where a petition for death of a decedent avers that persons were carried on freight

trains with defendant's knowledge, *held* proper to refuse evidence that persons were in the habit of riding on freight trains, regardless of defendant's rules.—*Feedback v. Missouri Pac. Ry. Co.* (Mo.) 965.

Where deceased, when killed in a collision, was a trespasser on defendant's train, and the collision was the result of negligence of an engineer, defendant is not liable for his death.—*Feedback v. Missouri Pac. Ry. Co.* (Mo.) 965.

Where deceased was a trespasser on a freight train when killed, *held* proper to refuse evidence that passengers were habitually allowed to ride on freight trains with knowledge of defendant's employés.—*Feedback v. Missouri Pac. Ry. Co.* (Mo.) 965.

One who boarded a freight train at a watering station, and jumped or fell from it while in rapid motion, *held* to have voluntarily assumed the risk.—*Cunningham v. Ft. Worth & D. C. Ry. Co.* (Tex. Civ. App.) 467.

A railway company cannot, by permitting persons other than its own servants to move cars on a side track, or by consenting thereto, escape liability to a person injured through the negligence of such persons.—*Gulf, C. & S. F. Ry. Co. v. Bryant* (Tex. Civ. App.) 804.

A railway company is liable for injuries sustained by persons lawfully on its tracks by reason of negligence in their construction.—*Gulf, C. & S. F. Ry. Co. v. Bryant* (Tex. Civ. App.) 804.

Where, in an action for personal injuries sustained while loading a car standing on a side track of defendant, the evidence showed he was loading the right car, it was immaterial whether defendant's servants pointed out the car to be loaded.—*Gulf, C. & S. F. Ry. Co. v. Bryant* (Tex. Civ. App.) 804.

In an action for personal injuries sustained by jumping from a car through fear of being injured by moving cars striking the car, a requested instruction *held* erroneous, as ignoring the issue of imminent peril and the plaintiff's reasonable belief of such peril.—*Gulf, C. & S. F. Ry. Co. v. Bryant* (Tex. Civ. App.) 804.

Where one engaged in loading a car on a side track jumps from it and is injured, through fear that he would be struck by other cars coming down grade, *held*, the company was not relieved from liability by showing that there was no necessity for him to jump.—*Gulf, C. & S. F. Ry. Co. v. Bryant* (Tex. Civ. App.) 804.

In an action for personal injuries sustained while jumping from a car while loading it, an instruction *held* erroneous, as requiring the jury to find that certain acts enumerated, if found, were the proximate cause of the injury.—*Gulf, C. & S. F. Ry. Co. v. Bryant* (Tex. Civ. App.) 804.

In an action for personal injuries sustained by jumping from a car through fear of being injured by moving cars striking the car, an instruction *held* erroneous, as assuming as a matter of law that it was a person's duty to do a particular act.—*Gulf, C. & S. F. Ry. Co. v. Bryant* (Tex. Civ. App.) 804.

§ 6. — Accidents at crossings.

In an action for a death alleged to have resulted from the failure to give a signal of the approach of a train to a crossing, an instruction as to punitive damages *held* proper.—*Louisville & N. R. Co. v. Penrod's Adm'r* (Ky.) 1013, 1042.

It is negligence to make the customary noises incident to the movement of a train, where the servants in charge have reason to apprehend injury therefrom to the driver of a team near the track, whose perilous position they have discovered.—*Louisville & N. R. Co. v. Penrod's Adm'r* (Ky.) 1013, 1042.

Evidence in an action for personal injuries at a railway crossing *held* to support a verdict for the plaintiff.—*Gulf, C. & S. F. Ry. Co. v. Holland* (Tex. Civ. App.) 68.

A railroad company may be liable for frightening a horse by locomotive whistle for crossing, required by statute.—*Gulf, C. & S. F. Ry. Co. v. Milner* (Tex. Civ. App.) 574.

§ 7. — Injuries to persons on or near tracks.

Where a father, seeing his two year old child on a railroad track in front of a rapidly advancing train, runs on the track in an attempt to save it, he is not a trespasser on the track.—*San Antonio & A. P. Ry. Co. v. Gray* (Tex. Civ. App.) 229.

A petition alleging negligence in running a railroad train, whereby plaintiff was injured in attempting to save his child on the track, *held* good as against a general demurrer.—*San Antonio & A. P. Ry. Co. v. Gray* (Tex. Civ. App.) 229.

Where plaintiff was injured while attempting to save his child from being run over by a railroad train, a charge that the fact that those in charge of the train saw his peril in time to avoid the injury could be proven by circumstantial evidence was proper.—*San Antonio & A. P. Ry. Co. v. Gray* (Tex. Civ. App.) 229.

Where a party, injured because of the violation of an ordinance prohibiting the rapid running of trains, did not know of the ordinance, such fact did not affect the company's liability.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Civ. App.) 588.

Violation of an ordinance prohibiting the rapid running of trains within city limits *held* negligence per se, entitling a party injured thereby to recover.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Civ. App.) 588.

Neglect of municipal authorities to enforce an ordinance prohibiting the rapid running of trains *held* not to excuse a violation of the ordinance and exempt a railroad company from liability for injuries caused by such violation.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Civ. App.) 588.

Person walking upon a portion of a railroad track commonly used as a footway to the knowledge of the company *held* rightfully upon the track, so as to be entitled to benefit of ordinance regulating speed of trains.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Civ. App.) 588.

Though it was made a misdemeanor by ordinance to trespass on the premises of another without his consent, a person walking on part of a railroad track habitually used as a footway to the knowledge of the railroad company, not being a trespasser, was not guilty of a misdemeanor.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Civ. App.) 588.

Upon the issue of whether a person run over by a railway train was standing or walking on the track, or lying on it, when struck, evidence that a train, striking a man standing on the track, would throw him off, and would not run over him, unless he was lying down, was relevant and material.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Civ. App.) 588.

Evidence *held* inadmissible upon the issue of whether or not an ordinance prohibiting the running of trains at more than a certain rate of speed applied to a certain part of the city.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Civ. App.) 588.

A charge upon the question of the intoxication of deceased *held* erroneous, in an action against a railroad company for negligently causing death.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Civ. App.) 588.

Railway employes *held* not negligent in failing to discover child, trespassing under car, before moving it.—*Flores v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.) 709.

A railway company has a right to leave a string of cars half a mile long standing on a track used for switching and storing cars, and is not negligent in doing so.—*Flores v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.) 709.

In action against railroad company for personal injuries caused by frightening decedent's mule, evidence *held* not to show contributory negligence as matter of law.—*Texas & P. Ry. Co. v. Hamilton* (Tex. Civ. App.) 797.

In action against railroad company for personal injuries caused by frightening decedent's mule, evidence as to whether unnecessary noise was made *held* to support verdict against company.—*Texas & P. Ry. Co. v. Hamilton* (Tex. Civ. App.) 797.

In action against railroad company for personal injuries, charge respecting defendant's liability *held* as favorable to it as it could ask.—*Texas & P. Ry. Co. v. Hamilton* (Tex. Civ. App.) 797.

In action against railroad company for personal injuries, instruction on contributory negligence *held* sufficient, in absence of correct charge asked by defendant.—*Texas & P. Ry. Co. v. Hamilton* (Tex. Civ. App.) 797.

In action against railroad company for personal injuries, charge requiring verdict for defendant in case certain facts were found to be true *held* properly refused.—*Texas & P. Ry. Co. v. Hamilton* (Tex. Civ. App.) 797.

§ 8. — Injuries to animals on or near tracks.

In an action to recover damages for the negligent killing of horses struck by a train, defendant *held* entitled to a peremptory instruction; the presumption of negligence being overcome.—*Felton v. Anderson* (Ky.) 182.

The fact that, two or three days after mules were killed by a train, tracks of mules were seen which, if they were the tracks of the mules killed, and made just before the killing, tended to show that the mules could have been seen in time to prevent the injury, did not tend to prove negligence.—*Illinois Cent. R. Co. v. Gholson* (Ky.) 1018.

Where the uncontradicted testimony of the servants in charge of a train by which mules were struck and killed showed that the mules could not have been seen in time to prevent the injury, the presumption of negligence was overcome.—*Illinois Cent. R. Co. v. Gholson* (Ky.) 1018.

The question of negligence in the killing of live stock by a train *held* to be for the jury.—*Illinois Cent. R. Co. v. Gholson* (Ky.) 1022.

§ 9. — Fires.

Defendant having admitted that the fire was caused by sparks which escaped from its engine, and pleaded that the engine was furnished with a proper spark arrester, which was properly adjusted and in perfect condition, its plea was in effect a plea of confession and avoidance.—*Illinois Cent. R. Co. v. Barret* (Ky.) 9.

In an action to recover for the burning of crops by sparks from an engine, the burden *held* to be upon defendant to prove that the engine was provided with a proper spark arrester and that it was in perfect order.—*Illinois Cent. R. Co. v. Barret* (Ky.) 9.

In an action against railroad for firing property, instruction *held* properly refused as misleading jury as to burden of proof.—*St. Louis & S. W. Ry. Co. of Texas v. Miller* (Tex. Civ. App.) 139.

An owner of a lot is not negligent in building a house thereon and storing goods in it, though

it will be close to a railroad.—*St. Louis & S. W. Ry. Co. of Texas v. Miller* (Tex. Civ. App.) 139.

Failure of persons employed by plaintiff for a special purpose to extinguish a fire started by sparks from a locomotive held not to preclude recovery for resulting damages.—*San Antonio & A. P. Ry. Co. v. Adams* (Tex. Civ. App.) 578.

In an action for damages from fire by sparks from a locomotive, proof that the railroad company used the best spark arresters and that the fire did not originate on the right of way is insufficient to overcome a prima facie case by plaintiff.—*San Antonio & A. P. Ry. Co. v. Adams* (Tex. Civ. App.) 578.

Evidence held to support a finding that a fire near a railroad right of way was set by sparks from a locomotive.—*San Antonio & A. P. Ry. Co. v. Adams* (Tex. Civ. App.) 578.

RAPE.

§ 1. Prosecution and punishment.

Indictment for rape held to sufficiently aver that prosecutrix was a female.—*State v. Armstrong* (Mo.) 961.

In a prosecution for rape, evidence of the finding of a hair ornament of the prosecutrix at the place of the alleged assault was admissible.—*State v. Armstrong* (Mo.) 961.

In prosecution of a boy for rape, it was proper to permit witnesses to testify as to his age.—*State v. Armstrong* (Mo.) 961.

In prosecution for rape, evidence held sufficient to go to the jury.—*State v. Armstrong* (Mo.) 961.

In prosecution for rape, instruction that there was no direct evidence of penetration held properly refused under the evidence.—*State v. Armstrong* (Mo.) 961.

REAL ACTIONS.

See "Ejectment"; "Forcible Entry and Detainer," § 1; "Trespass to Try Title."

REAL-ESTATE AGENTS.

See "Brokers."

RECEIVERS.

Of national banks, see "Banks and Banking," § 2.

§ 1. Nature and grounds of receivership.

The plaintiffs in an action to vacate a judgment for the recovery of land held not entitled to the appointment of a receiver to take charge of the land.—*Brashears v. Dickinson* (Ky.) 1011.

§ 2. Appointment, qualification, and tenure.

Though a receivership for lands, where the interest of only one of several co-tenants was incumbered, is improper, yet where the other co-tenants were adjudged their part of the rents, and by consent order agreed to pay their part of the expenses of the receiver, they cannot complain.—*Ft. Jefferson Imp. Co. v. Dupoyster* (Ky.) 1048.

§ 3. Management and disposition of property.

A receiver of a national bank is bound by the acts and knowledge of his agent within the scope of the agency.—*Watts v. Dubois* (Tex. Civ. App.) 698.

RECEIVING STOLEN GOODS.

Evidence held to show ordinary theft of an animal, and not a driving of it from its accustomed range.—*Terry v. State* (Tex. Cr. App.) 451.

RECOGNIZANCES.

On appeal in criminal prosecutions, see "Criminal Law," § 27.

To secure attendance of witnesses, see "Witnesses," § 1.

RECORDS.

As evidence, see "Evidence," § 9.

As notice, see "Vendor and Purchaser," § 4.

Of judicial proceedings.

See "Divorce," § 1; "Judgment," § 4.

Abstract for purpose of review, see "Appeal and Error," §§ 11, 12.

Transcript on appeal or writ of error, see "Appeal and Error," §§ 11, 12; "Criminal Law," § 28.

Of particular instruments.

See "Chattel Mortgages," § 2.

REFERENCE.

See "Arbitration and Award."

To master or commissioner in equity, see "Equity," § 1.

REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

§ 1. Right of action and defenses.

Relief will not be granted against a mistake in a deed as to the consideration, unless the mistake is mutual; there being no fraud.—*Hill v. Pettit* (Ky.) 188.

It was proper to correct a deed by striking out a defeasance clause, which the evidence showed was inserted by mistake; all persons interested being before the court.—*Welch v. Lefler* (Ky.) 619.

A mistake in law as to the effect of a provision in a deed held not to authorize a reformation thereof.—*Morton v. Morris* (Tex. Civ. App.) 94.

The court in an action to cancel a deed held not empowered to substitute a valid condition in place of a condition working an avoidance of the instrument.—*Morton v. Morris* (Tex. Civ. App.) 94.

REHEARING.

See "New Trial."

On appeal or writ of error, see "Criminal Law," §§ 25-29.

RELEASE.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment."

By agent, see "Principal and Agent," § 3. Liabilities of sureties, see "Principal and Surety," § 1.

Of guaranty, see "Guaranty," § 2.

Of judgment, see "Judgment," § 13.

Of liabilities of sureties, see "Principal and Surety," § 2.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 4.

Of evidence in criminal prosecutions, see "Criminal Law," § 8.

RELIGIOUS SOCIETIES.

Exemption of church property from taxation, see "Taxation," § 1.

Where the majority had control by the terms of the organization, and there was no right of appeal from their decision, their action in expelling the minority from membership is binding on the courts.—*Bennett v. Morgan* (Ky.) 287.

The teaching of the doctrines of "absolute predestination" or of "limited predestination," in churches in the associations of the Primitive Baptist Church, is not a departure from the faith of that denomination.—*Bennett v. Morgan* (Ky.) 287.

Ky. St. §§ 320-322, providing for the appointment of trustees to hold the title to church property, and providing that in case of a schism "the trustees shall permit each party to use the church and appurtenances for divine worship a part of the time, proportioned to the members of each party," do not apply where the church property is still held by the trustees, or their heirs, to whom the title was first conveyed.—*Bennett v. Morgan* (Ky.) 287.

Independent of statute, a committee appointed by a church for that purpose may bring suit to enjoin trespasses upon the church property.—*Bennett v. Morgan* (Ky.) 287.

REMAINDERS.

See "Life Estates."

Created by deed, see "Deeds," § 2.

Bill by remainder-men praying possession of realty and that respondent's claim thereto be canceled *held* sustainable, so as to fix complainant's rights, though possession would not accrue until determination of particular estate.—*Wiley v. Bird* (Tenn.) 43.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 24.

REMITTITUR.

Of damages, see "Damages," § 4.

REMOVAL OF CAUSES.

Transfer of causes to other court for trial, see "Trial," § 2.

§ 1. Citizenship or alienage of parties.

It seems that a motion by a nonresident defendant railroad company to remove a cause to the United States circuit court was properly overruled; defendant's conductor and engineer, who are residents of the state, being joined as defendants.—*Jones' Adm'r v. Illinois Cent. R. Co.* (Ky.) 609.

A removal of a cause to a federal court cannot be had by a nonresident defendant, where a resident defendant is properly sued jointly with him.—*McCabe's Adm'r v. Maysville & B. S. R. Co.* (Ky.) 1054.

§ 2. Proceedings to procure and effect of removal.

A motion for the removal of a cause to the federal court must be overruled, unless the petition for removal shows the existence of a controversy wholly between citizens of different states and which can be fully determined as between them.—*McCabe's Adm'r v. Maysville & B. S. R. Co.* (Ky.) 1054.

REMOVAL OF CLOUD.

See "Quietling Title."

RENT.

See "Landlord and Tenant," § 4.

REPEAL.

Of statute, see "Statutes," § 4.

REPLEVIN.

To recover property intermingled with that of defendant, see "Confusion of Goods."

§ 1. Pleading and evidence.

Testimony of the person who sold the res in replevin to the defendant *held* not within the issues.—*Rust Land & Lumber Co. v. Isom* (Ark.) 434.

Evidence that real estate sold under a vendor's lien was of greater value than at the time the lien was reserved *held* inadmissible in an action by a purchaser under the vendor's lien foreclosure sale to recover machinery removed from property.—*Mundine v. Pauls* (Tex. Civ. App.) 264.

§ 2. Trial, judgment, enforcement of judgment, and review.

Instruction as to the ownership of land from which the res in replevin was obtained *held* without foundation in the evidence, and erroneous.—*Rust Land & Lumber Co. v. Isom* (Ark.) 434.

Failure to instruct, limiting the effect of a deed to lands contiguous to those from which the res in replevin was obtained, to showing innocent misapprehension of boundary, *held* error.—*Rust Land & Lumber Co. v. Isom* (Ark.) 434.

REQUESTS.

For instructions in civil actions, see "Trial," § 11.

For instructions in criminal prosecutions, see "Criminal Law," § 20.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

Of contract for sale of land, see "Vendor and Purchaser," § 2.

RES GESTÆ.

In civil actions, see "Evidence," § 4.

RES JUDICATA.

See "Judgment," § 10.

In action on note, see "Bills and Notes," § 1.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

RESTRICTIONS.

In wills, see "Wills," § 5.

RESULTING TRUSTS.

See "Trusts," § 1.

RETIRING PARTNERS.

See "Partnership," § 4.

RETROSPECTIVE LAWS.

Constitutional restrictions, see "Constitutional Law," § 2.

RETURN.

Of execution, see "Execution," § 4.
Of record of proceedings for purpose of review, see "Appeal and Error," §§ 11, 12.

REVENUE.

See "Taxation."

REVERSIONS.

Where a deed embraced two small parcels which the grantor had previously conveyed to toll road companies with a stipulation that they should revert when they should cease to be used for that purpose, the title thereto passed to the grantee, subject to their use by the toll road companies.—*Greene's Adm'r v. Irvine* (Ky.) 278.

REVIEW.

See "Appeal and Error"; "Criminal Law," §§ 25-29; "Justices of the Peace," § 4.

REVOCATION.

Of will, see "Wills," § 3.

RIGHT OF WAY.

See "Easements."

RISKS.

Assumed by employé, see "Master and Servant," § 7.

ROADS.

See "Highways."
Streets in cities, see "Municipal Corporations," § 7.

ROBBERY.

Allegation of an indictment for robbery held sufficient to charge the crime.—*Keeton v. State* (Ark.) 645.

Under an indictment for robbery, the court should instruct as to that offense, and not merely as to petit larceny; it appearing that defendant seized a purse in the hand of one who resisted, and overcame the resistance by force, though no blow was struck or injury inflicted.—*Commonwealth v. Davis* (Ky.) 27.

Evidence held to show such a taking by violence as authorized a conviction under an indictment for robbery.—*Jones v. Commonwealth* (Ky.) 633.

SALES.

See "Vendor and Purchaser."
By trustee, see "Trusts," § 3.
Of bill of exchange or promissory note, see "Bills and Notes," § 4.
Of intoxicating liquors, see "Intoxicating Liquors."
Of property of decedent under order of court, see "Executors and Administrators," § 7.
Of property of infant under order of court, see "Guardian and Ward," § 1.

Of public lands, see "Public Lands," § 1.
On execution, see "Execution," § 3.
On foreclosure of mortgage, see "Mortgages," §§ 4, 5.
On order or judgment of court, see "Judicial Sales."
Tax sales, see "Taxation," §§ 3, 6.
To enforce vendor's lien, see "Vendor and Purchaser," § 5.

§ 1. Requisites and validity of contract.

Where the last of several letters which passed as to the sale of coal was from defendant to plaintiff, containing a statement of defendant's understanding of plaintiff's proposition and an acceptance thereof, that letter, in the absence of any reply, bound plaintiff to the terms stated therein.—*Excelsior Coal Min. Co. v. Virginia Iron & Coal Co.* (Ky.) 373.

A contract for sale of the exclusive privileges of book-making and pool-selling upon a race track held not a lease, and hence the total amount agreed to be paid for such privileges could not be apportioned to the time during which the purchaser actually enjoyed the privileges sold.—*Ullman v. St. Louis Fair Ass'n* (Mo.) 949.

A plea that defendant was induced to contract to deliver pecans by fraudulent representations that the crop was good is insufficient, where it is not alleged that the failure of the crop rendered the execution of the contract more expensive.—*Hopkins v. Woldert Grocery Co.* (Tex. Civ. App.) 63.

§ 2. Construction of contract.

The contract being in writing and free from ambiguity, it was the duty of the court to construe it.—*Excelsior Coal Min. Co. v. Virginia Iron & Coal Co.* (Ky.) 373.

Where a contract for the sale of lambs provided that the lambs were to be "top" lambs, and should be graded by the buyer, but not "harder" than a former shipment, the question of whether the lambs were or not "top" lambs was not left solely to the buyer.—*Sanders v. Bond* (Ky.) 635.

§ 3. Performance of contract.

Though the bills which accompanied every shipment of coal gave notice that the coal was "run of the mine," and that the price was for each ton of 2,000 pounds, defendant corporation held not estopped to claim that the plaintiff undertook to furnish "screamed coal," and that the price agreed was for each ton of 2,240 pounds.—*Excelsior Coal Min. Co. v. Virginia Iron & Coal Co.* (Ky.) 373.

§ 4. Operation and effect.

Title to goods sold held to have passed to the purchaser on their delivery free on board cars at a certain point.—*Gulf, W. T. & P. Ry. Co. v. Browne* (Tex. Civ. App.) 341.

§ 5. Warranties.

Where plaintiff, having ordered goods, examined them on their arrival, and found them damaged, and accepted them at a reduced price, he was without recourse on the seller.—*Earl v. Westfall Commission Co.* (Ark.) 148.

Where property sold accords with the seller's guaranty at date of sale, he is entitled to recover the purchase price, notwithstanding it afterwards fails to accord therewith.—*Schuwirth v. Thumma* (Tex. Civ. App.) 691.

§ 6. Remedies of seller.

Measure of damages for breach of contract to purchase lumber stated.—*Nelson v. Hirschberg* (Ark.) 347.

In an action to recover purchase price, defendant, having admitted a contract to pay and pleaded a new contract, properly took the burden of proof.—*Middleton v. Kentucky Lumber Co.* (Ky.) 42.

Upon the buyer's rejection in open market of lambs which the evidence shows were "top" lambs, the difference between the price at which they were sold and the contract price is the measure of damages.—*Sanders v. Bond* (Ky.) 635.

Where, in an action to recover the value of goods and money delivered and charged to an employe of defendant, which plaintiff claims were in fact for defendant, and so charged merely for his convenience, a verdict which includes items which were clearly shown to be for such employe's own use should be set aside.—*Shaw v. Gilmer* (Tex. Civ. App.) 679.

§ 7. Remedies of buyer.

In action for purchase price of engine, testimony that agent, on making test, stated that it would not be a fair test, *held* admissible.—*Schuwirth v. Thumma* (Tex. Civ. App.) 691.

Where an engine sold defendant failed to develop the agreed capacity, but he did not offer to return it, the measure of damages was the difference between the contract price and the market value at the time of sale.—*Schuwirth v. Thumma* (Tex. Civ. App.) 691.

SATISFACTION.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment."
Of judgment, see "Judgment," § 13.

SCHOOL LANDS.

See "Public Lands," §§ 1, 2.

SCHOOLS AND SCHOOL DISTRICTS.

Leave of court to file quo warranto against school officer, see "Quo Warranto," § 2.

§ 1. Public schools.

Where a county treasurer has paid out the county school funds as apportioned by the county superintendent, and on his warrants, there is no liability on the treasurer's bond to a school district to which the superintendent erroneously failed to make an apportionment.—*Oge v. Froboese* (Tex. Civ. App.) 688.

§ 2. — Creation, alteration, existence, and dissolution of districts.

An order defining the boundary of a school district, describing one of the lines as beginning at "P.'s," excludes P.'s land.—*Hundley v. Singleton* (Ky.) 279.

In the absence of an averment that a majority of those voting at a school election did not vote against the tax, the vote is not rendered void by the failure of the county canvassing board to canvass the vote and certify the result, as that may yet be done.—*Hundley v. Singleton* (Ky.) 279.

Slight irregularities will not vitiate an election to take the sense of the voters of a school district as to the imposition of a local tax.—*Hundley v. Singleton* (Ky.) 279.

That an order of the county judge establishing a graded common school district, and ordering a vote to be taken on the question of a tax to establish such a school, embraced in the district property situated more than 2½ miles from the proposed school house, did not invalidate the vote taken.—*Hundley v. Singleton* (Ky.) 279.

Under Ky. St. § 4466, authorizing a petition containing a description of the boundary of a proposed graded common school district to be presented to the county judge, and providing that the district may be established "as agreed on by the county judge and the petitioners," it is not necessary to state in the order which

the county judge makes that such an agreement was made.—*Hundley v. Singleton* (Ky.) 279.

The action of a school board under Rev. St. 1889, § 8088, in dividing the district into wards and providing for the erection of a school building in one of them, does not deprive voters of the other ward of the right to vote and be taxed in the former.—*Burnham v. Rogers* (Mo.) 970.

The right of a town and school district to exist and act as such corporations cannot be collaterally impeached in a suit to enjoin collection of school taxes.—*Burnham v. Rogers* (Mo.) 970.

§ 3. — Government, officers, and district meetings.

Where a school trustee took the oath of office before the county superintendent, the failure of the record to show that fact does not deprive the trustee of his right to the office.—*Graham v. Jackson* (Ky.) 1009.

Neither a parol resignation by a school trustee, nor a written resignation to which his name was signed by another, was valid.—*Graham v. Jackson* (Ky.) 1009.

The fact that an election on a question submitted at a special school meeting was not conducted as required by Rev. St. 1889, § 8096, does not invalidate it.—*Burnham v. Rogers* (Mo.) 970.

A school district election under 2 Sayles' Ann. Civ. St. art. 3953a, *held* valid, though no officers were selected by the electors in place of those appointed to hold the election.—*Deaver v. State* (Tex. Civ. App.) 256.

Under 2 Sayles' Ann. Civ. St. art. 3953a, the fact that the officers conducting a school election were not sworn does not render the election void.—*Deaver v. State* (Tex. Civ. App.) 256.

Under 2 Sayles' Ann. Civ. St. art. 3953a, the returns of a school election are properly made to a county judge, who is ex-officio county superintendent.—*Deaver v. State* (Tex. Civ. App.) 256.

§ 4. — District debt, securities, and taxation.

Under Ky. St. § 4464, providing for the establishment of graded schools, and providing that no point of the boundary in a proposed graded common school district shall be more than 2½ miles from the site of the proposed school house, that part of a farm lying outside the 2½ mile limit is not subject to taxation for graded school purposes, though the dwelling house of the owner is within the limit.—*Jackson v. Brewer* (Ky.) 396.

Injunction to restrain collection of a school tax is not the remedy of a taxpayer for any improper conduct of a school board in the performance of their duties as prescribed by law or under Rev. St. 1889, § 8088.—*Burnham v. Rogers* (Mo.) 970.

A taxpayer who has not tendered or offered to pay the valid portion of a school tax cannot enjoin the collection of an increased assessment claimed to have not been levied as prescribed by law.—*Burnham v. Rogers* (Mo.) 970.

SEARCHES AND SEIZURES.

Under laws relating to intoxicating liquors, see "Intoxicating Liquors," § 6.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.
In criminal prosecutions, see "Criminal Law," §§ 7-13.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 2.

SEQUESTRATION.

The value of property for which plaintiff in sequestration is to have judgment under Rev. St. art. 4876, in case he prevail, *held* to mean the value at the time of trial.—*Luedde v. Hooper* (Tex. Sup.) 55.

SERVICES.

See "Master and Servant," § 1; "Work and Labor."

SERVITUDES.

See "Easements."

SET-OFF AND COUNTERCLAIM.

In action for damages for wrongful tax sale, see "Taxation," § 7.
Set-off of depositor's debt to bank against deposit, see "Banks and Banking," § 1.

SETTLEMENT.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment."
By executor or administrator, see "Executors and Administrators," § 9.

SHERIFFS AND CONSTABLES.

Compensation of sheriff for tax collections, see "Taxation," § 5.
Estoppel of sheriff by return to execution, see "Execution," § 4.

§ 1. Appointment, qualification, and tenure.

Where there was no showing that a deputy sheriff, who refused to take the oath of office, exercised the duties thereof or was reputed in the community to be a deputy sheriff, he was not an officer de facto.—*Brown v. State* (Tex. Cr. App.) 547.

§ 2. Compensation.

Where 66 tracts of land were joined in one proceeding to sell for special assessments, and 66 copies of the complaint were served on the owner, the sheriff was entitled to but one fee for such service.—*Sewer Dist. No. 1 of Ft. Smith v. School Dist. of Ft. Smith* (Ark.) 152.

Under Ky. St. § 4146, no person except the sheriff or the county attorney can file exceptions to a sheriff's report of settlement, and the remedy of any other person is a suit in equity to surcharge the settlement.—*Little v. Strow* (Ky.) 282.

§ 3. Powers, duties, and liabilities.

A sheriff, releasing attached property under a bond not in compliance with Sand. & H. Dig. §§ 406, 407, *held* liable therefor.—*Fitzhugh v. Hackley* (Ark.) 146.

Where the defendant in an execution had sufficient property to satisfy the execution when the writ was placed in the hands of the sheriff, and he failed to return the execution until after return day and until the defendant had died insolvent, he is liable on his bond.—*Commonwealth v. Begley* (Ky.) 754.

An officer, having in his hands an order for the sale of specific property, *held* not entitled to effect a forcible entry into the dwelling of the defendant for the purpose of seizing it.—*Hillman v. Edwards* (Tex. Civ. App.) 788.

An officer, in order to execute civil process, cannot climb through an open window of the defendant's dwelling, if that is an unusual place of entry.—*Hillman v. Edwards* (Tex. Civ. App.) 788.

An officer who, in executing civil process, has effected a lawful entry into a dwelling house and acquired a right to use force in making a levy, but who voluntarily leaves, is not entitled to re-enter by force.—*Hillman v. Edwards* (Tex. Civ. App.) 788.

§ 4. Liabilities on official bonds.

There being nothing in the order of the county court appointing a deputy sheriff, or in his bond, which limited his service to any particular district, the bond covers all collections made by him as deputy sheriff for his entire term.—*Bates v. Smith* (Ky.) 714.

SHIPPING.

See "Ferries."

SLAVES.

Marriage of slaves, see "Marriage."

Will *held* to be sufficient to confer freedom upon slaves upon the death of testator's widow.—*Miller v. Wilson's Adm'r* (Ky.) 755.

SLEEPING CARS.

See "Carriers," §§ 4-7.

SMALLPOX.

Liability for allowing delirious smallpox patient to go at large, see "Torts."

SPECIAL LAWS.

See "Statutes," § 2.

SPECIFIC LEGACIES.

See "Wills," § 7.

SPECIFIC PERFORMANCE.

Of contract between corporation and stockholder, see "Corporations," § 3.

§ 1. Proceedings and relief.

In an action for the specific performance of a contract by a married woman to make a will, where the petition does not allege that the contract was made so as to be binding on such married woman, a demurrer will be sustained.—*West v. Clark* (Tex. Civ. App.) 215.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 4.

Of case or facts for purpose of review, see "Appeal and Error," §§ 11, 12.

Of plaintiff's claim, see "Pleading," § 2.

STATES.

Attorney general, see "Attorney General."
Courts, see "Courts."

Legislative power over municipal corporation, see "Municipal Corporations," § 2.
Public lands, see "Public Lands," § 2.

STATUTES.

Validity of retrospective or ex post facto laws, see "Constitutional Law," § 2.

Provisions relating to particular subjects.

See "Banks and Banking," § 1; "Carriers," § 3; "Counties," § 5; "Courts," § 3; "Death," § 2; "District and Prosecuting Attorneys," "Ejectment," § 4; "Executors and Administrators," § 6; "Fences," "Gaming," §§ 1, 3; "Garnishment," § 4; "Intoxicating Liquors," "Judges," § 1; "Judgment," §§ 2, 3, 5; "Jury," § 2; "Justices of the Peace," § 3; "Limitation of Actions," § 1; "Master and Servant," § 2; "Mechanics' Liens," "Monopolies," § 1; "Municipal Corporations," §§ 4, 5; "Penalties," § 1; "Public Lands," §§ 1, 2; "Railroads," §§ 3-9; "Sunday," "Taxation," §§ 1, 5, 6; "Telegraphs and Telephones," § 1; "Towns," § 1.

Statute of frauds, see "Frauds, Statute of."

§ 1. Enactment, requisites, and validity in general.

Acts 1899, p. 11, § 1, providing for the search and seizure of intoxicating liquors in prohibited districts, and for their destruction after the owner has had a day in court, is constitutional as to the part authorizing the seizure and destruction.—*Ferguson v. Josey* (Ark.) 345.

§ 2. General and special or local laws.

The provision of the charter of cities of the first class requiring the payment of interest

on taxes past due held not void as special legislation.—*Walston v. City of Louisville* (Ky.) 385.

§ 3. Amendment, revision, and codification.

Sayles' Ann. Civ. St. art. 2369, relating to service of notice in sales under trust deeds, held not re-enacted by the adoption of the Revised Statutes, but continued in force.—*Swain v. Mitchell* (Tex. Civ. App.) 61.

Acts 1889, p. 143, relating to notice to be given on foreclosure of trust deed, held not re-enacted by the adoption of the Revised Statutes, and no service on the maker of a mortgage is necessary in foreclosing a trust deed.—*Fischer v. Simon* (Tex. Civ. App.) 882.

§ 4. Repeal, suspension, expiration, and revival.

Act March 4, 1867, relating to street assessments, was repealed, at least after six years from the adoption of the constitution, by Const. § 156, providing for the classification of cities and their government by general laws, as one county was excepted from the act.—*Henning v. Stengel* (Ky.) 41; *Fishback v. Mehler*, Id.; *Clark v. Bitzer*, Id.

§ 5. Construction and operation.

A penal statute ought to be strictly construed.—*Commonwealth v. Louisville & N. R. Co.* (Ky.) 753.

The word "now," in Laws 1899, p. 143, as carried forward in Rev. St. art. 2369, held, in view of Rev. St. "Final Title," art. 19, not to refer to article 2366.—*Marston v. Yaites* (Tex. Civ. App.) 867.

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Pending appeal or writ of error, see "Appeal and Error," § 10.

STOCKHOLDERS.

Of corporations, see "Corporations," § 3.

STOLEN GOODS.

See "Receiving Stolen Goods."

STREET RAILROADS.

Municipal taxation of street railroads, see "Municipal Corporations," § 8.
Taking property for public use, see "Eminent Domain," § 1.

§ 1. Regulation and operation.

As the general charge of negligence causing the injury was alleged, it was not necessary to repeat it in an amended petition charging the failure to give proper signals of the approach of the street car which struck plaintiff's intestate.—*Louisville Ry. Co. v. Will's Adm'r* (Ky.) 628.

While the motorman was not required to stop his car until, from the circumstances, he had reason to believe that plaintiff's intestate would be in danger unless it was stopped, an instruction asked by defendant on that subject was properly refused, as it was not in proper form.—*Louisville Ry. Co. v. Will's Adm'r* (Ky.) 628.

STREETS.

See "Highways"; "Municipal Corporations," § 7.

STRIKES.

Duty of master to protect servant from strikers, see "Master and Servant," § 2.

SUBLETTING.

See "Landlord and Tenant," § 2.

SUBROGATION.

Of purchaser at void tax sale to rights of state, see "Taxation," § 7.

Secretary of building association held entitled to be subrogated to the association's rights under the mortgage.—*Murrell v. Henry* (Ark.) 617.

Where a father mortgaged land owned jointly with his children for his own debt, and thereafter the children assumed the debt, they were entitled to be subrogated to the rights of the mortgagee.—*Ft. Jefferson Imp. Co. v. Dupoyser* (Ky.) 1048.

A purchaser of property under a trustee's sale is not subrogated to the rights of a prior mortgagee, thus cutting off the vendor's lien of his grantor under a contract for the sale of the property, where the jury finds that contract for such sale constituted the consideration of the trustee's sale.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 486.

SUICIDE.

As defense to action on insurance policy, see "Insurance," § 4.

SUIT.

See "Action."

SUNDAY.

Under Pen. Code, art. 198, imposing a fine on any person who shall be engaged in any species of gaming for money within the limits of any city on Sunday, the gaming with dice, thereafter prohibited by article 388, as soon as so prohibited, became subject to the penalty imposed by article 198.—*Borders v. State* (Tex. Cr. App.) 1102.

SUPERSEDEAS.

On appeal or writ of error, see "Appeal and Error," § 10.

SUPREME COURTS.

See "Courts," § 5.

SURETYSHIP.

See "Principal and Surety."

SURFACE WATERS.

See "Waters and Water Courses," § 1.

SURVIVAL.

Of cause of action, see "Abatement and Revival," § 1.

SURVIVORSHIP.

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TAXATION.

Mandamus to compel repayment of taxes, see "Mandamus," § 1.

Local or special taxes.

See "Highways," § 2; "Municipal Corporations," § 8; "Schools and School Districts," § 4.

Assessments for municipal improvements, see "Municipal Corporations," § 5.

§ 1. Liability of persons and property.

A church parsonage, which is not occupied by the minister, but is rented to another, is not exempt from taxation, though it be erected on the church lot, and though the rent be paid to the minister.—*Broadway Christian Church v. Commonwealth* (Ky.) 32; *Trustees of Broadway Christian Church v. Gross*, Id.

Act April 17, 1882, creating a court house district in Campbell county and exempting property in that district from taxation for certain county purposes, and the amendment of 1886 thereto, are inconsistent with the present constitution, forbidding exemptions from taxation and requiring uniformity of taxation, and were therefore repealed, either by that instrument at once upon its adoption, or by the general revenue law of November 11, 1892.—*Campbell County v. Newport & C. Bridge Co.* (Ky.) 526; *Same v. Louisville & N. R. Co.*, Id.; *Same v. Maysville & B. S. R. Co.*, Id.

A certain situs of personal property for purpose of taxation held established by the evidence.—*State ex rel. Dowell v. Renshaw* (Mo.) 953.

§ 2. Place of taxation.

A finding as to residence for purpose of personal tax held sustained by evidence.—*State ex rel. Dowell v. Renshaw* (Mo.) 953.

§ 3. Levy and assessment.

The presumption is that all land which should have been assessed as one tract was so assessed.—*Yeamans v. Lepp* (Mo.) 957.

Where several tracts of land are properly assessed separately, the sale of all in bulk for the total of all the taxes is invalid, being in contravention of Rev. St. 1889, § 7703, charging each tract with its own taxes.—*Yeamans v. Lepp* (Mo.) 957.

The term "tract" or "lot," in tax laws, defined.—*Yeamans v. Lepp* (Mo.) 957.

§ 4. Payment and refunding or recovery of tax paid.

Taxes voluntarily paid cannot be recovered, on the ground that they were not due, where payment, if they had been due, could not have been enforced, except by suit.—*German Security Bank v. Coulter* (Ky.) 425; *Louisville City Nat. Bank v. Same* (Ky.) 427.

§ 5. Collection and enforcement against persons or personal property.

Under Ky. St. § 4184, authorizing the sheriff to institute a garnishment proceeding for the collection of taxes if he "believes he cannot otherwise collect the tax," it will be presumed in support of such a proceeding that the sheriff did so believe, where the taxes were past due and the taxpayer was denying liability.—*Broadway Christian Church v. Commonwealth* (Ky.) 32; *Trustees of Broadway Christian Church v. Gross*, Id.

As all taxes levied by a county must be taken in the aggregate in estimating the commission due the sheriff, he is entitled to a commission of 10 per cent. on the first \$5,000 of the gross county taxes collected by him, including a tax levied by the county court to pay a subscription of a district in the county in aid of a railroad.—*Little v. Strow* (Ky.) 282.

Under Ky. St. § 4104, a collector of delinquent taxes appointed by the fiscal court, with power to receive and receipt for such taxes in the name of the county, was authorized to sue in the name of the commonwealth, for the use of the county, to recover delinquent taxes due from a railroad company or railroad bridge company.—*Campbell County v. Newport & C. Bridge Co.* (Ky.) 526; *Same v. Louisville & N. R. Co.*, Id.; *Same v. Maysville & B. S. R. Co.*, Id.

A statute authorizing an action to recover taxes "from any railroad company" applies to taxes due from a railroad bridge company.—*Campbell County v. Newport & C. Bridge Co.* (Ky.) 526; *Same v. Louisville & N. R. Co.*, Id.; *Same v. Maysville & B. S. R. Co.*, Id.

In an action by a city to recover taxes, the burden held to be upon plaintiff to show that the tax bills were made out and signed by the assessor.—*City of Louisville v. Kimbel* (Ky.) 608.

A sheriff's cause of action on a parol undertaking by his deputy to account for taxes collected was barred after the lapse of five years from the time the deputy left his service.—*Housman's Adm'r v. Long* (Ky.) 821.

A sheriff was bound to pay over to the county treasurer the unexpended amount of a road tax in his hands upon an order by the fiscal court requiring him to do so.—*Pulaski County v. Elrod* (Ky.) 1017.

Personal taxes may be sued on after the date Rev. St. 1889, § 7606, makes them delinquent.—*State ex rel. Dowell v. Renshaw* (Mo.) 953.

Allegation in petition to recover personal taxes that the collector called on defendant at his place of business in A. county and served him with an assessment blank is, after verdict, in absence of special demurrer, a good allegation of defendant's residence in the county.—*State ex rel. Dowell v. Renshaw* (Mo.) 953.

Objection that petition to recover personal tax did not allege defendant's residence held

waived; there being no demurrer, and motion in arrest of judgment for insufficiency of the petition being made on another ground.—*State ex rel. Dowell v. Renshaw* (Mo.) 953.

§ 6. Sale of land for nonpayment of tax.

Under Act 1881, p. 63, §§ 1, 2, and Sand. & H. Dig. §§ 1115, 1293, entry of warning order in proceedings to enforce overdue taxes in record of law proceedings held not to give circuit court jurisdiction to enter decree of sale, so that a sale was void.—*Pope v. Campbell* (Ark.) 916.

In an action by a city to recover taxes, the burden of proof was on plaintiff to show that the tax bills were properly authenticated; that fact being denied by the answer.—*Reccius v. City of Louisville* (Ky.) 410.

A sale of land for taxes without subdivision required by Rev. St. 1889, § 7683, may be set aside on a direct proceeding against the purchaser.—*Yeamans v. Lepp* (Mo.) 957.

§ 7. Tax titles.

A legal tender held not a necessary condition for maintenance of suit against purchaser at tax sale to set aside the deed.—*Yeamans v. Lepp* (Mo.) 957.

Where the property of a taxpayer is acquired by a city under invalid tax proceedings, and sold to a third person, the city, in an action for damages, cannot offset the rental value for the time the property owner remained in possession after the suit.—*City of Houston v. Walsh* (Tex. Civ. App.) 106.

Where the property of a taxpayer is acquired by a city under invalid proceedings and sold to a third person, the taxpayer is entitled to interest on the value of the property from the date of its sale by the city.—*City of Houston v. Walsh* (Tex. Civ. App.) 106.

Where a city acquires property for taxes under invalid proceedings, subsequently set aside after the property has been sold to an innocent purchaser, the taxpayer may recover the value of the property from the city.—*City of Houston v. Walsh* (Tex. Civ. App.) 106.

A judgment setting aside certain judgments foreclosing a tax lien, etc., is conclusive, and the question whether they are properly set aside cannot be considered in an action by the taxpayer for damages resulting from the sale of his property.—*City of Houston v. Walsh* (Tex. Civ. App.) 106.

The purchaser of real estate under a void tax sale, on the recovery of the land in trespass to try title brought by the owner thereof, who was not the person to whom the land was taxed, will not be subrogated to the rights of the state for taxes paid, or entitled to be reimbursed from the owner.—*Mumme v. McCloskey* (Tex. Civ. App.) 853.

Judgment foreclosing a supposed tax lien and deed to the purchaser and writ of possession held inadmissible in trespass to try title brought against the purchaser by the owner of the land, who was not the person against whom it was taxed.—*Mumme v. McCloskey* (Tex. Civ. App.) 853.

TAXATION OF COSTS.

See "Costs," § 4.

TELEGRAPHS AND TELEPHONES.

Telephone companies as employers, see "Master and Servant," §§ 7, 8.

§ 1. Establishment, construction, and maintenance.

Rev. St. art. 701, relating to power of telephone companies, held inapplicable to a branch line to connect a mill owned by a private per-

son to the main line of a telephone corporation.—*American Telegraph & Telephone Co. v. Kersh* (Tex. Civ. App.) 74.

§ 2. Regulation and operation.

Where a telegraph company under its rules did not deliver messages received after 7 p. m. until the next morning, it owed no duty, where a message was received exactly at 7 p. m., to deliver it that night.—*Davis v. Western Union Tel. Co.* (Ky.) 17.

A telegraph company has the right to establish reasonable hours during which its office shall be kept open.—*Davis v. Western Union Tel. Co.* (Ky.) 17.

In an action against a telephone company for personal injuries, where there was no evidence that defendant had leased the telephone line causing the injury to a third person, *held* proper to refuse an instruction on the theory of such leasing.—*American Telegraph & Telephone Co. v. Kersh* (Tex. Civ. App.) 74.

In an action against a telephone company by a railway employé for personal injuries by being struck by a telephone wire suspended across the railway track, evidence *held* to warrant a finding that defendant was the owner of the telephone line.—*American Telegraph & Telephone Co. v. Kersh* (Tex. Civ. App.) 74.

Negligence in not having plaintiff's telegram delivered to the proprietor of the hotel at which he boarded, who was his agent to receive messages, *held* to be that of such agent, and not of the telegraph company.—*Western Union Tel. Co. v. Redinger* (Tex. Civ. App.) 485.

A telegraph operator in New Orleans *held* not presumed in law to know the Sunday hours of the company at a town in Texas.—*Western Union Tel. Co. v. McConnico* (Tex. Civ. App.) 592.

Evidence as to rules of telegraph company with respect to closing its office on certain hours on Sunday reviewed.—*Western Union Tel. Co. v. McConnico* (Tex. Civ. App.) 592.

In determining whether a telegraph company was negligent in delivering a message received during closed hours on Sunday, the time consumed after the office was opened in copying, numbering, enveloping, and addressing the message was properly computed.—*Western Union Tel. Co. v. McConnico* (Tex. Civ. App.) 592.

Telegraph company *held* not liable for delay in delivering message on Sunday.—*Western Union Tel. Co. v. McConnico* (Tex. Civ. App.) 592.

TENANCY IN COMMON.

§ 1. Mutual rights, duties, and liabilities of co-tenants.

Possession of land of a decedent by one of her heirs *held* not adversary as against the other heirs.—*Newcomb v. Cox* (Tex. Civ. App.) 338.

Occupancy of realty by a son (inheriting his mother's community interest), payment of taxes, and making improvements *held* not sufficient to show an ouster of his co-tenant.—*Madison v. Matthews* (Tex. Civ. App.) 803.

TENDER.

A vendor is not liable for damages for his refusal to release his lien on a tender by the purchaser, where the accounts between them were so complicated that even the court, with the aid of a commissioner, had difficulty in adjusting them.—*Hill v. Pettit* (Ky.) 188.

TERMS.

Of leases, see "Landlord and Tenant," § 2.

TESTAMENT.

See "Wills."

TESTAMENTARY CAPACITY.

See "Wills," § 2.

TESTAMENTARY POWERS.

Construction and execution, see "Powers," § 1.
Creation, see "Wills," § 5.
Restrictions on power to devise or bequeath, see "Wills," § 1.

TEXAS.

Courts, see "Courts," § 5.
Lands, see "Public Lands," § 2.

THEFT.

See "Larceny."

TIMBER.

See "Logs and Logging."

TIME.

For filing bill of exceptions, see "Criminal Law," § 28; "Exceptions, Bill of," § 2.
For filing transcript on appeal, see "Appeal and Error," §§ 11, 12.
For opening or vacating judgment, see "Judgment," § 5.
For performance of contract, see "Contracts," § 2.
For taking appeal or suing out writ of error, see "Appeal and Error," § 8.

A sentence imposing 30 days' imprisonment is a compliance with the minimum imprisonment authorized by a statute, providing for imprisonment of not less than "one month" or more than two years.—*McKinney v. State* (Tex. Cr. App.) 769.

TITLE.

Necessary to maintain ejectment, see "Ejectment," § 1.
Necessary to maintain suit for dower, see "Dower," § 1.
Necessary to maintain trover, see "Trover and Conversion," § 1.
Removal of cloud, see "Quieting Title."
Tax titles, see "Taxation," § 7.

TORTS.

Measure of damages, see "Damages," § 2.

By particular classes of parties.

See "Corporations," § 7; "Municipal Corporations," § 7.
Agents, see "Principal and Agent," § 3.
Employés, see "Master and Servant," § 10.

Particular remedies for torts.

See "Trespass," § 2; "Trover and Conversion," § 1.

Particular torts.

See "Assault and Battery," § 1; "False Imprisonment," § 1; "Forcible Entry and Detainer," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass"; "Trover and Conversion."
Causing death, see "Death," § 2.
Operating unlicensed ferry to injury of licensed one, see "Ferries," § 1.

Person afflicted with contagious disease *held* to be under the control of person having him in charge while delirious, so that the latter was liable for damages arising from failure to exercise due care in preventing him from going at large.—Missouri, K. & T. Ry. Co. of Texas v. Wood (Tex. Sup.) 449.

Railroad company *held* not relieved from liability for damages resulting from the spread of contagion by a smallpox patient, with whose custody it was charged, by reason of the fact that the city in which the patient became ill would not be liable for failing to maintain an effectual quarantine.—Missouri, K. & T. Ry. Co. of Texas v. Wood (Tex. Sup.) 449.

Railroad company, taking charge of an employee afflicted with smallpox, *held* to owe to each individual member of the community the duty to prevent the spread of the disease, and hence liable to a person injured by the failure to perform such duty.—Missouri, K. & T. Ry. Co. of Texas v. Wood (Tex. Sup.) 449.

An answer by one of two joint tort feors that he committed the tort as agent for the other is insufficient.—Diamond v. Smith (Tex. Civ. App.) 141.

TOWNS.

See "Schools and School Districts," §§ 1-4.

§ 1. Creation, alteration, existence, and political functions.

Where every lot in a town save three had been built upon at the time an ordinance annexing territory was passed, and much of the annexed territory was used by citizens as pasture lots, the court was justified in concluding that the proposed territory was necessary for the growth of the town.—Yancy v. Town of Fairview (Ky.) 636.

Ky. St. § 3713, restricting the boundary of towns when created, does not apply to a sixth-class town organized by special charter and then in existence, the boundary of which may be extended any reasonable distance.—Yancy v. Town of Fairview (Ky.) 636.

§ 2. Government and officers.

The acts of persons acting and recognized as town trustees are valid; they being de facto officers.—Yancy v. Town of Fairview (Ky.) 636.

Where a town lies in two counties, the county judge of either may appoint trustees; the jurisdiction continuing in the one first exercising the authority.—Yancy v. Town of Fairview (Ky.) 636.

TRADE-MARKS AND TRADE-NAMES.

Trade-name as name for corporation, see "Corporations," § 2.

TRAFFIC CONTRACTS.

Between railroads, see "Railroads," § 2.

TRANSCRIPTS.

Of record for purpose of review, see "Appeal and Error," §§ 11, 12; "Criminal Law," § 28.

TRANSITORY ACTIONS.

See "Venue," § 1.

TREES.

See "Logs and Logging."

TRESPASS.

Ejection of trespasser, see "Carriers," § 7.
Injuries to trespassers, see "Railroads," § 5.
To the person, see "Assault and Battery," § 1; "False Imprisonment."

§ 1. Acts constituting trespass and liability therefor.

The act of defendant corporation in entering upon the premises of plaintiff's husband to remove a clock, which it had sold him, *held* not a trespass; the condition upon which it was to have the right to enter having happened.—O. F. Adams Co. v. Sanders (Ky.) 815.

The defendant, in an action for wrongfully pasturing cattle on plaintiff's lands, *held* under the evidence to be a mere trespasser, and liable for damages.—Forst v. Rothe (Tex. Civ. App.) 575.

§ 2. Actions.

One who has entered upon land in the constructive possession of others by reason of their paper title cannot resist a recovery by showing an outstanding title in another.—Jones v. Patterson (Ky.) 377; Patterson v. Davis, Id.; Davis v. Patterson, Id.

A petition in a damage suit for destroying plaintiff's sewer *held* to state a good cause of action.—Diamond v. Smith (Tex. Civ. App.) 141.

Evidence *held* sufficient to support the verdict of a jury upon an issue of exemplary damages.—Diamond v. Smith (Tex. Civ. App.) 141.

The validity of an award of school lands will not be considered, in an action by the person to whom the land is granted for damages against a mere trespasser, who exhibits no title to the land.—Forst v. Rothe (Tex. Civ. App.) 575.

TRESPASS TO TRY TITLE.

See "Ejectment."

Between applicants to purchase public lands, see "Public Lands," § 2.

§ 1. Right of action and defenses.

A claimant to land under an alleged executed parol agreement for sale or gift thereof *held* to have failed to establish her title.—Newcomb v. Cox (Tex. Civ. App.) 338.

Valuable improvements, made on land, after death of the owner, in reliance on a promise made by the owner that at her death the land was to belong to the party making the improvement, *held* insufficient to perfect title in claimant.—Newcomb v. Cox (Tex. Civ. App.) 338.

§ 2. Proceedings.

In trespass to try title, where the petition described the land as situated on "Corinth" street, and the citation as on "Coruth" street, the variance did not render the citation void.—Swain v. Mitchell (Tex. Civ. App.) 61.

In trespass to try title, evidence of an equitable title outstanding against plaintiffs' remote grantor *held* properly ignored in instructions; it not appearing that the plaintiffs or their immediate grantors had any knowledge thereof.—Burlison v. Alvis (Tex. Civ. App.) 235.

Evidence, in trespass to try title, of an equitable title with which the defendants failed to connect themselves, *held* properly ignored in instructions.—Burlison v. Alvis (Tex. Civ. App.) 235.

Where a county, sued in trespass to try title, justifies its entry and claim by virtue of a condemnation proceeding, proof of service of notice therein is admissible without spe-

cial pleadings.—*Bowie County v. Powell* (Tex. Civ. App.) 237.

The plaintiff in trespass to try title *held* to have the burden of proving that his location included lands claimed by defendant.—*Clawson v. Williams* (Tex. Civ. App.) 702.

Evidence in trespass to try title considered, and *held* to show that plaintiff's location did not include lands claimed by defendant under another location, and that the locations were not conflicting.—*Clawson v. Williams* (Tex. Civ. App.) 702.

In trespass to try title, a judgment under which plaintiff purchaser *held* not subject to be excluded as evidence on the ground that it was not shown that the land therein ordered sold was not sold in accordance with the judgment.—*Tinsley v. Corbett* (Tex. Civ. App.) 910.

§ 3. Damages, use and occupation, improvements, and taxes.

In trespass to try title, disallowance of plaintiff's claim for rents pursuant to Rev. St. art. 5278, *held* proper.—*Morris v. Wells* (Tex. Civ. App.) 248.

Limitations *held* not to have run against claim for improvements on land by one holding under void parol gift until after the gift had been disavowed by the donor.—*Morris v. Wells* (Tex. Civ. App.) 248.

Defendant in trespass to try title *held* entitled to a personal judgment against plaintiff for the value of improvements.—*Morris v. Wells* (Tex. Civ. App.) 248.

TRIAL.

See "New Trial"; "Witnesses."

Harmless error at trial, see "Appeal and Error," § 21.

Proceedings incident to trials.

See "Continuance."

Conformity of judgment to verdict or findings, see "Judgment," § 3.

Entry of judgment after trial of issues, see "Judgment," § 3.

Right to trial by jury, see "Jury," § 1.

Summoning and impanelling jury, see "Jury," § 2.

Trial of particular civil actions or proceedings.

See "Assault and Battery," § 1: "Forcible Entry and Detainer," § 1; "Fraud," § 2; "Libel and Slander," § 2; "Negligence," § 4; "Replevin," § 2.

Against carrier, see "Carriers," § 2.

Against municipal corporations, see "Municipal Corporations," § 7.

Against railroads, see "Railroads," §§ 1, 7-9.

Against street railroads, see "Street Railroads," § 1.

Against telephone company, see "Telegraphs and Telephones," § 2.

Disputed claims against estate of decedent, see "Executors and Administrators," § 5.

For broker's commissions, see "Brokers," § 3.

For causing death, see "Death," § 2.

For damages caused by nuisance, see "Nuisance," § 1.

For damages caused by overflow of surface waters, see "Waters and Water Courses," § 1.

For enforcement of vendor's lien, see "Vendor and Purchaser," § 5.

For injuries caused by electricity, see "Electricity."

For injuries to servant, see "Master and Servant," § 9.

For injuries to stock in transportation, see "Carriers," § 3.

For malicious prosecution, see "Malicious Prosecution," § 1.

For personal injuries to passengers, see "Carriers," § 5.

For personal injuries to tenant, see "Landlord and Tenant," § 3.

Involving right to homestead, see "Homestead," § 5.

On agreement within statute of frauds, see "Frauds, Statute of," § 5.

On check given as accord and satisfaction, see "Accord and Satisfaction."

On guaranty, see "Guaranty," § 3.

Suits to try tax titles, see "Taxation," § 7.

To try title to public lands, see "Public Lands," § 2.

Trespass to try title to real property, see "Trespass to Try Title."

Trial of right to property levied on, see "Attachment," § 1.

Trial of criminal prosecutions.

See "Assault and Battery," § 2; "Criminal Law," §§ 14-23; "Forgery"; "Homicide," § 7; "Larceny," § 2; "Rape," § 1.

For keeping disorderly house, see "Disorderly House."

For violation of liquor laws, see "Intoxicating Liquors," § 5.

§ 1. Notice of trial and preliminary proceedings.

In an action by vendors to recover the price and to enforce a lien, the trial *held* not premature by reason of the fact that persons against whom defendants set up a cross petition to quiet his title had not been served with process.—*Edwards v. Grimes* (Ky.) 515.

One who was injured by reason of a defective street had the right to sue the city alone, without joining abutting property owners, who were also negligent.—*City of Covington v. Huber* (Ky.) 619.

It was not error to require a trial of the issue between the original parties to an action before the formation of an issue on a cross petition filed by defendant.—*City of Covington v. Huber* (Ky.) 619.

§ 2. Dockets, lists, and calendars.

Refusal to transfer to a chancery court a cause wherein defendant seeks to remove cloud cast on his title by certain fraudulent conveyances *held* erroneous.—*Castle v. Hillman* (Ark.) 648.

Clerk of court *held* to have had no authority to consolidate certain garnishment proceedings.—*Fidelity & Deposit Co. of Maryland v. Seymour* (Tex. Civ. App.) 686.

Though certain garnishment proceedings were consolidated, judgment against one of the garnishees *held* proper.—*Fidelity & Deposit Co. of Maryland v. Seymour* (Tex. Civ. App.) 686.

§ 3. Course and conduct of trial in general.

Though defendant based his right to the goods in question upon the ground that the transaction by virtue of which plaintiff claimed them was fraudulent, the burden of proof was upon plaintiff, and he was entitled to the concluding argument to the jury.—*Rudy v. Katz* (Ky.) 18.

The court did not abuse its discretion in permitting the jury to be taken to the court house yard to see a horse and phaeton offered by plaintiff as evidence.—*Board of Internal Improvement for Lincoln County v. Moore's Adm'r* (Ky.) 417.

Fact that in action for personal injuries plaintiff had epileptic fit in presence of jury *held* not ground for reversing verdict in his favor.—*Galveston, H. & S. A. Ry. Co. v. Hitzfelder* (Tex. Civ. App.) 707.

§ 4. Reception of evidence.

Where tax deeds are introduced to support a plea of limitation, it is not necessary to ob-

ject to their introduction to limit their effect to the purpose for which they were introduced.—*Gillaspie v. Murray* (Tex. Civ. App.) 252.

Where there was no evidence that the sale of school land to plaintiff was forfeited, an assignment of error in rejecting evidence of a sale to defendant after sale to plaintiff had been "legally forfeited and canceled," cannot be sustained.—*Renfro v. Harris* (Tex. Civ. App.) 460.

§ 5. Arguments and conduct of counsel.

Misconduct of counsel for appellee in argument to the jury is ground for reversal.—*Spalding v. Grundy* (Ky.) 599.

The remarks of defendant's counsel at the trial for libel that plaintiff committed the murder charged in the alleged libelous article should have been rebuked by the court.—*Jones v. Murray* (Mo.) 981.

Permitting the reading of opinions to the court in the presence of the jury, and afterwards commenting on the same, *held* an abuse of discretion.—*Houston & T. C. R. Co. v. Gee* (Tex. Civ. App.) 78.

§ 6. Taking case or question from jury.

There being a conflict of testimony, it was error to grant a peremptory instruction.—*Middleton v. Kentucky Lumber Co.* (Ky.) 42.

In an action against a telephone company for personal injuries caused by improper repair of its line, where the evidence conclusively showed that the person repairing the line was employed by an authorized agent, *held* not error to refuse an instruction making defendant's liability depend upon authorized direction of repairer.—*American Telegraph & Telephone Co. v. Kersh* (Tex. Civ. App.) 74.

In an action for personal injuries, where reasonable minds can draw no other conclusion than that there was an absence of negligence, a verdict for defendant is properly directed.—*Flores v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.) 709.

§ 7. Instructions to jury—Province of court and jury in general.

Though the constitution provides that, in an action for libel, the jury shall be the judges of the law and the facts, the court must properly advise the jury as to the law.—*Jones v. Murray* (Mo.) 981.

In an action against a telephone company for injuries caused by its failure to properly repair a branch connected with its main line, where it denied ownership of the branch, *held* not error to refer in instruction to the line to which the branch was connected as defendant's "main line."—*American Telegraph & Telephone Co. v. Kersh* (Tex. Civ. App.) 74.

A requested instruction in an action by a servant against the master for injuries *held* properly refused as being on the weight of the evidence.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

Where it is a question whether certain machinery removed from a mill is a fixture, an instruction assuming that the machinery was a part of the realty is properly refused.—*Mundine v. Pauls* (Tex. Civ. App.) 254.

Where the uncontroverted evidence showed that defendant had revoked plaintiff's authority to sell lands, it was not error for the court to assume such fact in the charge.—*McLane v. Maurer* (Tex. Civ. App.) 693.

In an action by a passenger for personal injuries sustained while alighting from street car, an instruction assuming the purpose for which the car slowed down *held* erroneous.—*Rapid Transit Ry. Co. v. Lusk* (Tex. Civ. App.) 799.

§ 8. — Necessity and subject-matter.

The jury should have been confined by the instructions to the consideration of such acts of negligence as were specifically alleged in the petition.—*South Covington & C. St. Ry. Co. v. Stroh* (Ky.) 177.

The failure of the court to confine the jury by its instructions to the acts of negligence alleged *held* not prejudicial, as the evidence was thus confined.—*Louisville Ry. Co. v. Will's Adm'r* (Ky.) 628.

The issues made by the pleadings and the evidence should be defined in the instructions, and the jury should not be referred to the petition to determine the issues.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

Where a requested charge is not correct, but calls the attention of the court to an issue raised by the evidence, the court should give the proper instruction as to such issue.—*Neville v. Mitchell* (Tex. Civ. App.) 579.

The court, in charging the jury, *held* not required to make a brief presentation of the issues raised by the pleadings as a preface to the law embodied in the charge.—*Galveston, H. & S. A. Ry. Co. v. Hitzfelder* (Tex. Civ. App.) 707.

§ 9. — Form, requisites, and sufficiency.

Where the issues are defined in the instructions, stating defendant's case in an action by a servant for injuries, it is harmless error to refer the jury to the petition to determine the negligent acts of plaintiff in issue.—*Texas & N. O. R. Co. v. Mortensen* (Tex. Civ. App.) 99.

Special instructions in an action for personal injuries *held* not in conflict with the main charge.—*Waxahachie Cotton Oil Co. v. McLain* (Tex. Civ. App.) 226.

In an action to recover purchase money of land and foreclose a vendor's lien, *held* error to reiterate and give undue prominence in the charge to certain propositions of law.—*Cross v. Kennedy* (Tex. Civ. App.) 318.

§ 10. — Applicability to pleadings and evidence.

It was error to base an instruction upon the averments of plaintiff's original petition, which he had abandoned by an amended petition.—*Purdum v. Brussels* (Ky.) 22.

Where an instrument in issue is in the form of a bill of sale, and there is no evidence to show that it is a mortgage, the court should instruct that it is a bill of sale.—*Mundine v. Pauls* (Tex. Civ. App.) 254.

In an action to foreclose a lien, it is not error to refuse a special charge on fraud, requested by defendants, and to also refuse to submit a special issue thereon, where the evidence did not sustain the defendant's allegations thereof.—*Harrington v. Clafin* (Tex. Civ. App.) 898.

§ 11. — Requests or prayers.

As defendant did not ask an instruction presenting the question of fraud in procuring the policy, that question is not presented.—*New York Life Ins. Co. v. Brown's Adm'r* (Ky.) 613.

Where no instruction was asked as to the right of plaintiff to nominal damages, although his land was not in fact injured, he cannot complain that no such instruction was given.—*Hommel v. Lewis* (Ky.) 1041.

Failure to instruct, in the absence of a request therefor, *held* not error.—*American Telegraph & Telephone Co. v. Kersh* (Tex. Civ. App.) 74.

Where requested instructions are fully covered in the main charge, a refusal thereof is not erroneous.—*Texas & N. O. R. Co. v. Mor-*

tensen (Tex. Civ. App.) 99; Texas & P. Ry. Co. v. Crockett (Tex. Civ. App.) 114; Missouri, K. & T. Ry. Co. of Texas v. Walden (Tex. Civ. App.) 584; Johnson v. Galveston, H. & N. Ry. Co. (Tex. Civ. App.) 906.

Assignments of error for failure of the court to charge on certain phases of a case cannot be sustained, where there was no request to so charge.—Abilene Cotton Oil Co. v. Briscoe (Tex. Civ. App.) 315.

Where defects in the charge are such as can be taken advantage of only by requested charges, and none are asked which can properly be given, the defects are waived.—Greenwood v. Houston Ice & Brewing Co. (Tex. Civ. App.) 585.

Failure to charge on a certain issue was not error, where the charge requested thereon was included in a charge erroneous in other respects.—Western Union Tel. Co. v. McConico (Tex. Civ. App.) 592.

In an action for the purchase price of an engine, where the question whether it would develop the agreed capacity was submitted in the main charge, a special charge on the same issue was properly refused.—Schuwirth v. Thumma (Tex. Civ. App.) 691.

Where, in an action for breach of a contract authorizing plaintiffs to sell defendant's lands, the law governing the facts was properly given in the charge of the court, a refusal to give the special charge requested was proper.—McLane v. Maurer (Tex. Civ. App.) 693.

It is error for the court to change a requested charge, by inserting matter without the consent of the party asking it, and give it as a charge of that party.—St. Louis S. W. Ry. Co. of Texas v. Ball (Tex. Civ. App.) 879.

Facts in an action against a railway company for personal injuries held to show that the court's use of the word "negligence" in its instructions, without indicating that the word required a high degree of care of the company, was not fatal error; no instruction to cure the error having been requested.—Milligan v. Texas & N. O. R. Co. (Tex. Civ. App.) 896.

§ 12. — Objections and exceptions.

Objection to depositions upon the ground that they were taken without notice was waived, where no exceptions were filed before the cause was submitted.—Beatty v. Thompson's Adm'r (Ky.) 384.

§ 13. — Construction and operation.

In an action for assault, an instruction authorizing compensatory and punitive damages held not prejudicial, because it failed to tell the jury that it could award punitive damages only if the assault was made willfully and maliciously, where stated elsewhere in charge.—Hollins v. Gorham (Ky.) 823.

In an action against a railroad company for the death of a child killed on its track, a charge as to the duty of defendant held reversible error.—International & G. N. R. Co. v. Lehman (Tex. Civ. App.) 214.

In an action on a note and to foreclose a vendor's lien, error in refusing to charge that there was no lien if it was so agreed when the note was given held not cured by a charge to find for defendant if the lien was waived when the deed was executed or afterwards; the note having been given before the deed.—Cross v. Kennedy (Tex. Civ. App.) 318.

§ 14. Custody, conduct, and deliberations of jury.

Conviviality and conversation between juror and brother of one of the parties to the action held sufficient cause for setting aside a verdict.—Gulf, C. & S. F. Ry. Co. v. Matthews (Tex. Civ. App.) 588.

§ 15. Verdict.

Verdict held irresponsive.—Beatty v. Bulger (Tex. Civ. App.) 893.

§ 16. Waiver and correction of irregularities and errors.

If a party objects to the conclusions filed by the court in reference to his motion for conclusions of law and fact, he must point out in a motion for additional conclusions the facts on which he desires a finding.—Wetz v. Wetz (Tex. Civ. App.) 869.

TROVER AND CONVERSION.

§ 1. Actions.

Where plaintiff alleged that he had sold defendant only a half interest in goods, while defendant claimed the entire stock, evidence of price plaintiff asked for the entire stock before the sale to the defendant held admissible.—Puckett v. Irick (Tex. Civ. App.) 62.

Where plaintiff in conversion alleged a sale to defendant of a half interest in a stock of goods, while defendant claimed the entire stock, evidence of the value of plaintiff's services was inadmissible under the issues.—Puckett v. Irick (Tex. Civ. App.) 62.

The rule that one must either have or be entitled to possession of personal property in order to maintain an action for conversion thereof does not apply to one whose property is entirely destroyed or whose rights are permanently injured.—Cox v. Patten (Tex. Civ. App.) 64.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 1.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Creation by will, see "Wills," § 5.

Effect of trust on limitation, see "Limitation of Actions," § 2.

Trust deeds, see "Mortgages."

Trust property not subject to execution, see "Execution," § 1.

§ 1. Creation, existence, and validity.

A son and his grantee held to have a resulting trust in property purchased with the money of the son and title taken in the father's name, and not an express trust, void under the statute of frauds.—Grayson v. Bowlin (Ark.) 658.

Where a written agreement of compromise of a bastardy proceeding shows that the money was paid to the mother, and there is nothing to create a trust for the child, one who now has the money cannot withhold it from the mother on the ground that he received it from the father in trust for the child.—Beyer v. Schehr (Ky.) 24.

An instrument declaring a trust, but containing no operative words of conveyance, or words showing an intention of the grantor to pass the legal title, is insufficient to create a legal estate in the grantee.—Becker v. Strocher (Mo.) 1083.

Where the consideration of a deed conveying a street railway was furnished by a third person, who later purchased it at a trustee's sale, the third person is the absolute owner thereof.—Scott v. Farmers' & Merchants' Nat. Bank (Tex. Civ. App.) 485.

§ 2. Construction and operation.

The word "heirs" in a deed construed, in connection with other provisions, and held to embrace, not only children of life tenant, but all

descendants, so as to prevent taking by contingent remainder-man.—*Rothenburger v. Peugnet* (Ky.) 717.

§ 3. Management and disposal of trust property.

A trustee with title, and with power to change the investment, has the right to sell and convey the title to the trust property.—*First Nat. Bank v. Lee* (Ky.) 413.

Where a testator devised property to his wife, with power to sell and reinvest, and upon her death to descend to her daughter in trust, and at the daughter's death to go to her surviving children, the daughter's trustee had the same power to change the investment which the widow had.—*First Nat. Bank v. Lee* (Ky.) 413.

Under Civ. Code Prac. § 498, where lands are held in trust for the life of one, with remainder over to a class of persons not ascertained or to be ascertained until the death of the life tenant, the circuit court may empower the trustee to sell, provided it is shown that the sale will be beneficial to all concerned.—*Burge v. Fidelity Trust & Safety Vault Co.* (Ky.) 763.

A judgment for the sale of a city lot of a decedent, which gives the street on which the lot is located, the beginning corner, and the frontage and depth, sufficiently describes the property.—*Whayne v. Davis* (Ky.) 827.

Where a creditor has failed, though the debtor has been dead two years, to present his claim, he must, by reason of his laches, be required to look to the proceeds of sale of realty, and not to the property.—*Whayne v. Davis* (Ky.) 827.

The fact that the holder of debt barred by limitations was before the court only by constructive service in an action for a sale of the land furnishes the purchaser no ground of exception to the report of sale.—*Whayne v. Davis* (Ky.) 827.

The court should, before confirming the sale of decedent's realty, have determined the validity of tax sales or have taken some steps to protect the purchasers.—*Whayne v. Davis* (Ky.) 827.

Exceptions to the report of sale of decedent's realty on the ground that there were tax liens on the property were properly overruled, as the taxes may be paid out of the proceeds of sale.—*Whayne v. Davis* (Ky.) 827.

Under Ky. St. § 4846, the purchaser of land sold for reinvestment under the provisions of a will need not look to the application of the purchase money, unless expressly so required by the devise.—*Johnson v. Dumeyer* (Ky.) 1025.

§ 4. Accounting and compensation of trustee.

The chancellor held authorized under the evidence to conclude that a commission stipulated for was to be the entire compensation of the trustee during the entire continuance of the trust.—*Louisville Trust Co. v. Warren* (Ky.) 644.

§ 5. Establishment and enforcement of trust.

A claim of the existence of a resulting trust, made by defendant in an action by the holders of the legal title to recover the property, held not stale.—*Grayson v. Bowlin* (Ark.) 658.

Persons who had no interest in land held not necessary parties to an action for its sale to pay debts.—*Whayne v. Davis* (Ky.) 827.

UNDERTAKINGS.

See "Bonds."

UNDUE INFLUENCE.

Procuring making of will, see "Wills," § 3.

UNITED STATES.

Courts, see "Removal of Causes."
Public lands, see "Public Lands," § 1.

UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

USAGES.

See "Customs and Usages."

USE AND OCCUPATION.

Recovery for in action of trespass to try title, see "Trespass to Try Title," § 3.

USURY.

In contracts of loan associations, see "Building and Loan Associations."

§ 1. Usurious contracts and transactions.

A contract which was in substance an undertaking to pay an annuity of \$250 a year in quarterly installments, in consideration of the release of a debt of \$4,000, held not usurious.—*Price's Adm'r v. Price's Adm'r* (Ky.) 529.

Where, on the entry of final credits on the several notes sued on, only legal interest was collected, the defense of usury was not sustained; the charge of usury being expressly denied, and no evidence introduced in support of it.—*Ludlow v. Ludlow & C. Coal Co.* (Ky.) 615.

Where, in garnishment, plaintiff proceeded under Rev. St. 1899, § 388, a contention that he could not take advantage of section 3710, in order to show that the property in the hands of the garnishee was held under a usurious pledge, held without merit.—*Marx v. Hart* (Mo.) 260.

Where a loan of money is made at a usurious interest, all payments of interest will be credited on the principal of the debt.—*American Mut. Bldg. & Sav. Ass'n v. Daugherty* (Tex. Civ. App.) 131.

Where a building contract bearing legal interest is shown to be but part of a transaction for procuring a usurious loan from a building association, the association, as assignee of such contract, cannot enforce it without respect to the usury in the loan.—*American Mut. Bldg. & Sav. Ass'n v. Daugherty* (Tex. Civ. App.) 131.

§ 2. Penalties and forfeitures.

Under Rev. St. art. 3106, where the first payments on a loan are not themselves usurious, but the contract as an entirety is usurious, the taint of usury will run through all the interest paid, and a double recovery for the whole will be allowed.—*American Mut. Bldg. & Sav. Ass'n v. Daugherty* (Tex. Civ. App.) 131.

VACATION.

Of judgment, see "Judgment," §§ 2, 5.

VALUE.

Limits of jurisdiction, see "Appeal and Error," § 2.

VARIANCE.

Between pleading and proof in civil action, see "Pleading," § 7.
Between pleading and proof in criminal prosecutions, see "Indictment and Information," § 5.

VENDOR AND PURCHASER.

See "Exchange of Property"; "Sales."
Priority between purchase money mortgage and judgment lien, see "Judgment," § 11.
Purchasers at sale on execution, see "Execution," § 3.
Purchasers at tax sale, see "Taxation," § 7.
Purchasers of property fraudulently conveyed, see "Fraudulent Conveyances," § 2.
Requirements of statute of frauds, see "Frauds, Statute of," § 2.

§ 1. Requisites and validity of contract.

A writing agreeing to permit the redemption of land *held* to be a title bond.—Wise v. Traylor (Ky.) 1005.

§ 2. Modification or rescission of contract.

Evidence *held* to show that an agreement for the rescission of a contract for the sale of land was not consummated.—Brotherton v. Anderson (Tex. Civ. App.) 682.

One acquiring title to vendor's lien notes for value and without notice *held* entitled to foreclose for amount of the notes, notwithstanding rescission by vendor and vendee.—Brotherton v. Anderson (Tex. Civ. App.) 682.

Vendor *held* not estopped to rescind sale of land.—Walsh v. Ford (Tex. Civ. App.) 854.

§ 3. Performance of contract.

Where there is a deficiency in land sold, the purchaser would ordinarily be entitled to compensation for the deficiency according to the average value of the whole tract; but, where he has received improvements as contemplated, that fact will be considered in fixing the value of the deficiency.—Patton v. Schneider (Ky.) 1003.

A vendor who conveyed a tract of land with general warranty as containing 33½ acres, "more or less," when the survey as made by a competent surveyor under his direction showed the boundary to contain only 20¼ acres, must make good the difference.—Patton v. Schneider (Ky.) 1003.

The purchaser of land by executory contract cannot resist payment of the price upon the ground that, after he purchased the land, it was sold under execution against the vendor, and he took deed from sheriff.—Fuson v. Lambdin (Ky.) 1004.

§ 4. Rights and liabilities of parties.

Under Ky. St. § 495, where a deed conveys land lying in two counties, it may be recorded in that county in which the greater part of the land lies, so as to operate as constructive notice of the grantee's title to the entire land.—Shively v. Gilpin (Ky.) 763.

The fact that, at the foot of a deed executed by a mortgagor conveying the mortgaged property to persons to whom she had sold it, there was an unsigned release by the mortgagee of all its interest in the property, gave the purchasers, at most, only notice that the mortgagee had a claim.—Fidelity, Trust & Safety Vault Co. v. Carr (Ky.) 990; Louisville Banking Co. v. Same, Id.; Murray v. Same, Id.; Carr v. Ross, Id.

Where the holder of a title bond sold his equity, executing to the purchaser a new title bond, and thereafter attempted to sell his equity to another, delivering to him the original

bond, the equity of the first purchaser, being the older, must prevail.—Casteel v. Baugh's Adm'r (Ky.) 996.

A recorded deed of land embraced in a trust deed, by a beneficiary in the trust deed, will not impart constructive notice of the interest of the grantee to a subsequent purchaser of the legal title, as the deed is not in the chain of title.—Becker v. Stroehrer (Mo.) 1033.

A vendor remaining in possession after the execution of a deed, and who accepts the price with interest from the date of the deed, is liable to the vendee for the crops raised, but not for the rental of the property.—Siemers v. Hunt (Tex. Civ. App.) 116.

§ 5. Remedies of vendor.

A mortgagee has no ground to complain of a sale by a commissioner to satisfy a prior vendor's lien, where he was present at the sale and made no bid in excess of the prior lien.—Watson v. Childers (Ky.) 13.

An agreement between vendor and purchaser, transferring a lien from one tract of land to another, was void as to one who held a mortgage on the tract to which the lien was transferred.—Watson v. Childers (Ky.) 13.

A bona fide indorsee before maturity of a note apparently secured by a vendor's lien *held* entitled to such lien, though in fact it did not exist as between the immediate parties to the original transaction.—Graves v. Kinney (Tex. Sup.) 293.

A person to whom vendor's lien notes are transferred, but who does not receive a conveyance of the title of the vendor, does not occupy the position of the original vendor, but only acquires a lien on the land.—Mundine v. Pauls (Tex. Civ. App.) 254.

The purchaser of real estate at a sale foreclosing vendor's lien, having knowledge of facts which would put a reasonably prudent man on inquiry as to the ownership of machinery on the premises, *held* chargeable with knowledge of the facts.—Mundine v. Pauls (Tex. Civ. App.) 254.

In an action to recover part of the purchase price of land and foreclose a vendor's lien, it is error to refuse to charge that such lien exists unless there was agreement to waive or it was understood that a lien was waived.—Cross v. Kennedy (Tex. Civ. App.) 318.

Under the evidence in an action to foreclose a vendor's lien *held* error to charge, without modification, that the fact that a lien was not retained in the deed or note was not sufficient to justify a finding that the lien was waived.—Cross v. Kennedy (Tex. Civ. App.) 318.

Where note is given in payment for land, the vendor has a lien on the same by implication, in the absence of a reservation of the lien in the note.—Brandenburg v. Norwood (Tex. Civ. App.) 537.

A transfer of a note given in payment of the purchase price of land carries with it the vendor's lien.—Brandenburg v. Norwood (Tex. Civ. App.) 537.

Acceptance by vendor of reconveyance after judgment foreclosing vendor's lien, as authorized by the decree, *held* not to have constituted waiver of vendor's right of action against vendee for removal of improvements subsequent to the decree.—Smith v. Frio County (Tex. Civ. App.) 711.

Where a decree foreclosing vendor's lien authorized reconveyance, and before reconveyance vendor sold improvements to one who removed them, acceptance of reconveyance *held* a waiver of a right of action against the purchaser.—Smith v. Frio County (Tex. Civ. App.) 711.

A vendor of land, whose deed retains a vendor's lien, may, on his vendee's default, bring

trespass to try title, and recover the land without returning the part of the price paid.—*Walsh v. Ford* (Tex. Civ. App.) 854.

§ 6. Remedies of purchaser.

In an action for the unpaid purchase money of land, in which defendant corporation sought and was granted a rescission, defendant is not entitled to a lien for purchase money paid upon such parts of the land as have been sold under judgments in the action to satisfy pre-existing liens.—*Ft. Jefferson Imp. Co. v. Dupoyster* (Ky.) 1048.

Where one of several tenants in common sold specific parcels of the land to different persons, and afterwards sold the entire land to another, his co-tenants cannot ratify the sales of the specific parcels, so as to deprive the purchaser of the whole tract of his lien upon the vendor's interest for purchase money paid.—*Ft. Jefferson Imp. Co. v. Dupoyster* (Ky.) 1048.

VENUE.

Of particular actions or proceedings.

Against corporations, see "Corporations," § 5.
Criminal prosecutions, see "Criminal Law," § 3.
On bond of assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 3.
To surcharge guardian's settlement, see "Guardian and Ward," § 2.

§ 1. Nature or subject of action.

Under Sayles' Civ. St. art. 1194, an action to set aside a fraudulent transfer of a judgment may be brought in the county where such transfer was obtained, though the defendants reside in another county.—*Lindsey v. State* (Tex. Civ. App.) 832.

VERDICT.

Directing verdict in civil actions, see "Trial," § 6.
In civil actions, see "Trial," § 15.
In criminal prosecutions, see "Criminal Law," §§ 22, 23.
In garnishment proceedings, see "Garnishment," § 4.
Necessity of conformity of judgment, see "Judgment," § 3.
Review on appeal or writ of error, see "Appeal and Error," § 20.

VERIFICATION.

Of claim against decedent's estate, see "Executors and Administrators," § 5.

VESTED RIGHTS.

Protection, see "Constitutional Law," § 1.

VICE PRINCIPALS.

See "Master and Servant," § 6.

VIEW.

By jury, see "Trial," § 8.

VINDICTIVE DAMAGES.

See "Damages," § 1.

WAGERS.

See "Gaming," § 1.

WAGES.

See "Master and Servant," § 1.

WAIVER.

See "Estoppel."

Of objections to particular acts or proceedings.

See "Appearance"; "Trial," § 16.
Selection of juror, see "Jury," § 3.
Taxation of costs, see "Costs," § 4.

Of rights or remedies.

Exemption of homestead, see "Homestead," § 4.
Landlord's lien for advances, see "Landlord and Tenant," § 4.

WARDS.

See "Guardian and Ward."

WARRANTY.

On sale of goods, see "Sales," §§ 5-7.

WATERS AND WATER COURSES.

See "Drains."

§ 1. Surface waters.

Evidence that plaintiff's land was low and had overflowed before defendant company closed a culvert through its embankment and constructed a drain along its right of way *held* admissible as tending to show a complete defense for overflow from such closing.—*Gulf, C. & S. F. Ry. Co. v. Wishart* (Tex. Civ. App.) 860.

Instruction in action for overflow of land from closing of culvert *held* erroneous in denying recovery, if it was at all subject to overflow before said closing.—*Gulf, C. & S. F. Ry. Co. v. Wishart* (Tex. Civ. App.) 860.

§ 2. Conveyances and contracts.

A partition deed construed, and *held* to reserve to the owners of the respective tracts the right to maintain the irrigating ditches and tanks for watering stock, and use the water, as was done before the partition.—*Stratton v. West* (Tex. Civ. App.) 244.

§ 3. Public water supply.

A city property owner may sue a water company for the destruction of his property by fire by reason of defendant's failure to maintain a water supply pursuant to its contract with the city.—*Graves County Water Co. v. Ligon* (Ky.) 725.

WAYS.

Private rights of way, see "Easements."
Public ways, see "Highways"; "Municipal Corporations," § 7.

WEAPONS.

One who removed the cylinder rod of a pistol, and, believing that the pistol was thus rendered incapable of shooting, carried it about with him trying to sell it, was not guilty of unlawfully carrying a pistol, although it appeared that the pistol could be made to shoot by placing the cylinder with the hands.—*White v. State* (Tex. Cr. App.) 773.

WIDOWS.

Dower, see "Dower."
Election between testamentary provisions and other rights, see "Wills," § 8.

WILLS.

Admissions by legatees, see "Evidence," § 6.
Conferring freedom on slaves, see "Slaves."
Construction and execution of powers, see "Powers," § 1.

Construction and execution of trusts, see "Trusts."

Specific performance of contract to make will, see "Specific Performance," § 1.

§ 1. Nature and extent of testamentary power.

The proceeds of a life insurance policy payable to the executor, administrator, or assigns of the insured, becoming a part of his estate on his death, may be disposed of by his will, under Rev. St. art. 5334.—*Fletcher v. Williams* (Tex. Civ. App.) 860.

§ 2. Testamentary capacity.

Evidence of transactions occurring after the execution of the will held inadmissible in a contest over the validity thereof.—*Wood v. Carpenter* (Mo.) 172.

Evidence of want of mental capacity held insufficient to sustain a judgment setting aside a will.—*Wood v. Carpenter* (Mo.) 172.

§ 3. Requisites and validity.

A will cannot be set aside because the testator made an error in a calculation resulting in the statement in the will that the bequest made to a certain child, considered in connection with certain advancements, renders the share of such child equivalent to that of the other children.—*Wood v. Carpenter* (Mo.) 172.

Evidence of undue influence held insufficient to sustain a judgment setting aside a will.—*Wood v. Carpenter* (Mo.) 172.

A will held revoked by decedent's indorsement on it and declarations.—*Billington v. Jones* (Tenn.) 1127.

§ 4. Probate, establishment, and annulment.

A will may be probated at any time within 10 years after testator's death.—*Reid's Adm'r v. Bengé* (Ky.) 997.

Where the petition in a will contest case does not allege that the will was signed by testator's wife, and not by him, evidence to show such fact is inadmissible.—*Wood v. Carpenter* (Mo.) 172.

§ 5. Construction.

Where a testator directed that the "interest and profits" of a fund be paid to his daughter "annually," the principal at her death to go to her surviving children, property in which the fund was invested having sold for much more than the amount of the fund originally invested, the daughter was not entitled to the increase in value as "profits," but to the income thereof.—*First Nat. Bank v. Lee* (Ky.) 413.

Where a testator devised all of his estate to his eight children, naming as one of them "M. S. [dead]," and then added the words, "except M. S.'s five children, which I gave one dollar each," the children of M. S. took only one dollar each.—*Sigler v. Tapp* (Ky.) 608.

Under will devising estate to slaves at death of testator's widow, estate held to go to the surviving slaves of testator and the descendants of his female slaves per capita.—*Miller v. Wilson's Adm'r* (Ky.) 755.

Under Rev. St. c. 46, art. 2, § 3, legacies to slaves held not to be defeated by their failure to serve testator's widow, even had the will expressly required them to do so.—*Miller v. Wilson's Adm'r* (Ky.) 755.

The widow, having failed to renounce the provisions of the will, and having lost by her remarriage that part of the estate devised to her, cannot, after the time for renunciation has expired, claim any part of the estate.—*Chenault v. Scott* (Ky.) 759.

Will construed, and widow held to take a de-feasible fee in that part of testator's estate other than that which he inherited from his

mother, and upon her remarriage her interest ceased.—*Chenault v. Scott* (Ky.) 759.

Will forbidding sale of land devised for a term of 20 years held to authorize a sale for reinvestment at any time.—*Johnson v. Dumeyer* (Ky.) 1025.

Extrinsic evidence held not admissible to show the circumstances surrounding testator when the will was made, to show testator's intent to limit a provision for the children of a certain person to children born prior to the making of the will.—*Gray's Adm'r v. Pash* (Ky.) 1026.

Will construed and held that testator's son took the estate in fee, subject to the trust imposed, but could not sell the land while the trust remained unexecuted.—*Goatley v. Crowe* (Ky.) 1029.

Where testatrix in her will defined the boundaries of city lots devised to the inch, the use of the words "more or less" did not cover a distance of 8 or 10 feet.—*Krechter v. Grofe* (Mo.) 358.

Where a will, in devising two contiguous lots of land, describes the dimensions, the lines so described cannot be varied or controlled by previous occupancy to a different line.—*Krechter v. Grofe* (Mo.) 358.

Parol evidence of the circumstances of the testator held admissible to show the intent of the testator, where ambiguously expressed in his will.—*Lenz v. Sens* (Tex. Civ. App.) 110.

Will held to attempt to dispose of entire community estate owned by testator and his wife, and not merely of his half thereof.—*Skaggs v. Deskin* (Tex. Civ. App.) 793.

§ 6. Rights and liabilities of devisees and legatees—Nature of title and rights in general.

Where a will directed that testator's slaves be set free upon the death of his widow, and that certain legacies be then paid to them, the fact that the slaves were emancipated by operation of law prior to the death of the widow does not deprive them of their right to the legacies.—*Miller v. Wilson's Adm'r* (Ky.) 755.

The interest of devisees vested at the instant of testator's death, though the will was not probated for seven years thereafter.—*Reid's Adm'r v. Bengé* (Ky.) 997.

Where a will was not probated for seven years after testator's death, and the only heir had taken possession of the land devised and executed a mortgage thereon, the devisees are not estopped to claim the land as against the mortgagee.—*Reid's Adm'r v. Bengé* (Ky.) 997.

The failure of the testator to disclose to some person where his will could be found, so that it might have been probated sooner, cannot operate as an estoppel upon the devisees.—*Reid's Adm'r v. Bengé* (Ky.) 997.

Where testator devised his entire estate to his children, to be equally divided, a proviso "that none of it shall be sold until my youngest child shall be of lawful age," does not prohibit any devisee from selling his undivided interest.—*Roederer v. Hess* (Ky.) 1012.

One may be made the legatee of the proceeds of a life insurance policy taken out by the testator on his own life, though having no insurable interest in the life of the testator.—*Fletcher v. Williams* (Tex. Civ. App.) 860.

The fact that the possession of a will was intrusted to the legatee of the proceeds of an insurance policy on the testator's life would not invalidate the bequest.—*Fletcher v. Williams* (Tex. Civ. App.) 860.

Under Rev. St. art. 1869, an heir or devisee cannot maintain an action to recover property belonging to the estate, unless it is alleged and proved that there are no debts or necessity for

administration, etc.—*Laas v. Seidel* (Tex. Civ. App.) 871.

In suit by legatee to recover property belonging to the estate, allegation that estate is solvent is insufficient to show that there is no necessity for administration, so as to authorize the suit.—*Laas v. Seidel* (Tex. Civ. App.) 871.

A devise of \$300 out of a \$500 note, if entitled to sue on the note, should make the devisee of the balance a party defendant, so that the judgment may be complete protection to the maker against further litigation thereon.—*Laas v. Seidel* (Tex. Civ. App.) 871.

Suit by legatee of \$300 out of a \$500 note *held* to be on the note, and not on a promise to pay legatee, made by its maker to the devisee of the balance.—*Laas v. Seidel* (Tex. Civ. App.) 871.

§ 7. — Specific, demonstrative, and general devises and bequests.

The fact that legacies given to slaves may have been given to enable them to remove from the state, in order that they might be free, and that at the death of testator's widow, when the testamentary emancipation took place, the legacies were no longer necessary for that purpose, *held* not to cause them to fail; there being nothing in the will to manifest any such purpose.—*Miller v. Wilson's Adm'r* (Ky.) 755.

§ 8. — Election.

A widow, having renounced under her husband's will, is not liable for any part of the costs incurred in litigating its construction and probate.—*Morton's Ex'r's v. Morton's Ex'r* (Ky.) 641.

A widow, who renounced under her husband's will, was not chargeable with any part paid by the executors as taxes on personal estate, in the absence of anything to show that the only item of personalty of any magnitude in which she had any interest for the years represented by the taxes was embraced in the assessment.—*Morton's Ex'r's v. Morton's Ex'r* (Ky.) 641.

Wife, accepting bequest, *held* estopped to assert community rights in other property disposed of by her husband's will.—*Skaggs v. Deskin* (Tex. Civ. App.) 793.

§ 9. — Void, lapsed, and forfeited devises and bequests, and property and interests undisposed of.

A lapsed legacy goes to the residuary legatees, unless the will shows that testator intended the residuary gift to have only a limited effect.—*Lenz v. Sens* (Tex. Civ. App.) 110.

Will construed, and residuary estate *held* not to include a lapsed legacy of large amount bequeathed to testatrix's niece.—*Lenz v. Sens* (Tex. Civ. App.) 110.

§ 10. — Rights and remedies of creditors of devisees and legatees.

Property delivered by an executor to the beneficiary of the will as agent of such executor *held* not liable for the debts of such beneficiary.—*Cox v. Patten* (Tex. Civ. App.) 64.

WITNESSES.

See "Depositions"; "Evidence."

Continuance to take testimony of absent witness, see "Continuance."

Experts, see "Evidence," § 11.

Opinions, see "Evidence," § 11.

Perjury, see "Perjury."

Testimony of accomplices, see "Criminal Law," §§ 7-13.

§ 1. Attendance, production of documents, and compensation.

Under White's Ann. Code Cr. Proc. art. 524a, construed with articles 536, 537, and Laws

1897, p. 59, §§ 6, 7, *held*, that in all cases, both felonies and misdemeanors, where an attachment is issued for a witness on an affidavit that he is about to move out of the county, and it appears to the court that he cannot give security for his attendance, the court must discharge him on his personal recognizance.—*Ex parte Sheppard* (Tex. Cr. App.) 304.

The wife of a party to a suit is not entitled to pay for attendance as a witness.—*Texas M. Ry. Co. v. Parker* (Tex. Civ. App.) 583.

§ 2. Competency.

Under Sand. & H. Dig. § 2916, subd. 4, a note handed by a husband confined in jail to his wife while visiting him there, is inadmissible in evidence on a subsequent trial for crime.—*Ward v. State* (Ark.) 928.

Where a prisoner confined in jail handed a communication to a third person to his wife while visiting him, such communication was admissible in evidence, though taken from the wife against her will.—*Ward v. State* (Ark.) 928.

In an action on a policy of insurance, the widow of insured was not competent to testify as to conversations with, or acts done by, or transactions with, decedent.—*Manhattan Life Ins. Co. v. Beard* (Ky.) 35.

It seems that the mere fact that an action by her husband as administrator is against a "wrongdoer" is sufficient to render the wife competent as a witness aside from any other reason.—*Board of Internal Improvement for Lincoln County v. Moore's Adm'r* (Ky.) 417.

The wife may testify for plaintiff in an action by the husband as administrator to recover damages for the death of their infant child, though she and the husband are the joint beneficiaries of the recovery.—*Board of Internal Improvement for Lincoln County v. Moore's Adm'r* (Ky.) 417.

A grand juror *held* not competent to testify in suit for libel as to testimony of a witness before the grand jury.—*Fritchett v. Frisby* (Ky.) 503.

Plaintiff was a competent witness as to his mental condition at the time he entered into a compromise.—*Louisville & N. R. Co. v. Carter* (Ky.) 508.

A surviving partner was not a competent witness for himself as to the purpose for which a note was executed by the deceased partner in the firm name.—*Warren Deposit Bank v. Younglove* (Ky.) 749.

Where an heir asserts a claim against the ancestor's estate, he is not a competent witness for himself as to any transaction or conversation with the ancestor, unless the other heirs were present and have testified.—*Carpenter v. Carpenter* (Ky.) 814.

The cashier and stockholder of a bank *held* not disqualified, by Rev. St. 1899, § 4652, from testifying as a witness to a transaction with a borrower, since deceased, and its discount committee, in negotiating a loan.—*Southern Commercial Sav. Bank v. Slaterry's Adm'r* (Mo.) 1066.

Objection that a witness was incompetent because her husband was particeps criminis cannot be sustained, where the husband was not indicted.—*Burns v. State* (Tex. Cr. App.) 303.

Under the statute, a girl eight years old *held* properly allowed to testify.—*Click v. State* (Tex. Cr. App.) 1104.

Evidence by a party to a suit relating to a transaction with a decedent *held* inadmissible, under Rev. St. art. 2302.—*Gillaspie v. Murray* (Tex. Civ. App.) 252.

§ 3. Examination.

Rev. St. 1899, § 2206, *held* violative of Const. art. 2, § 23, providing that no one shall be compelled to testify against himself in a criminal case.—*Ex parte Carter* (Mo.) 540.

In a prosecution for horse theft, it was not error to permit prosecuting attorney to ask defendant the following question: "If you had stolen that mare, would you have gone on the stand and testified that you stole her?"—*Burns v. State* (Tex. Cr. App.) 303.

In an action for personal injuries, questions as to the extent of plaintiff's injuries and his suffering therefrom, asked a witness, *held* not leading.—*St. Louis S. W. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 879.

§ 4. Credibility, impeachment, contradiction, and corroboration.

Under Sand. & H. Dig. § 2959, evidence that plaintiff in an action on a fire policy had been indicted for the burning of a house is not admissible.—*Stanley v. Aetna Ins. Co.* (Ark.) 432.

Under Sand. & H. Dig. § 2959, evidence that plaintiff in an action on a fire policy had previously owned an insured house, which was burned, was inadmissible for the purpose of impeachment.—*Stanley v. Aetna Ins. Co.* (Ark.) 432.

Defendants should have been permitted by cross-examination to test the accuracy of a statement made by a witness for plaintiff.—*O'Daniel v. Smith* (Ky.) 284.

Where a witness for defendant testified that he had not made certain statements relating to a collateral matter, it was error to permit the prosecution to prove that he had made such statements.—*Commonwealth v. Bright* (Ky.) 604.

Refusal to require witness for the prosecution in a murder case to state, upon cross-examination, with whom she lived, *held* error.—*Trabue v. Commonwealth* (Ky.) 718.

In a prosecution for theft of a buggy and harness, testimony by a witness for the state, who claimed that he acted as a detective in the transaction, that a third person reported to him that he had bought a buggy and harness from defendant and had sold it to another party, etc., *held* not admissible.—*Mercer v. State* (Tex. Cr. App.) 555.

Question, asked witness for defendant, whether she had so testified to an alibi for defendant in other cases, *held* not admissible to destroy her credibility.—*Mercer v. State* (Tex. Cr. App.) 555.

A witness cannot be impeached for truth by showing her reputation for chastity is bad, except by asking her, on cross-examination, if she is a common prostitute.—*Hall v. State* (Tex. Cr. App.) 783.

Evidence of the possession of a pistol by a witness for the defense, in a prosecution for assault with intent to murder, *held* inadmissible to show that the witness was acting with defendant.—*Collins v. State* (Tex. Cr. App.) 840.

The impeachment of a witness for the defense in a prosecution for assault with intent to murder, by evidence of threats to kill a third person, *held* erroneous.—*Collins v. State* (Tex. Cr. App.) 840.

der, by evidence of threats to kill a third person, *held* erroneous.—*Collins v. State* (Tex. Cr. App.) 840.

In prosecution for rape, redirect testimony that all the women in the neighborhood were afraid of defendant *held* inadmissible, notwithstanding certain cross-examination.—*Hefner v. State* (Tex. Cr. App.) 841.

Under the statute requiring warning before any statement made by one under arrest can be introduced in evidence, such a statement cannot be shown to dispute defendant's answer to a question on cross-examination, though he answered without objection.—*Johnson v. State* (Tex. Cr. App.) 845.

In a prosecution for assault with intent to murder, the state was properly permitted to show by the prosecutrix, who was hostile toward it, the state of feeling existing between her and accused.—*Baines v. State* (Tex. Cr. App.) 847.

The state may prove that defendant had been charged with theft, as affecting his credibility.—*Click v. State* (Tex. Cr. App.) 1104.

Where, in a proceeding in garnishment to reach a certain bank deposit, the judgment debtor has testified that he had assigned all his interest in the money to the intervenor at a certain time, testimony that after such time the debtor said the money was his is admissible to impeach such testimony.—*Norton v. Maddox* (Tex. Civ. App.) 319.

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